SUPREME COURT OF QUEENSLAND

CITATION:	*R v Zingle* [2017] QCA 91
PARTIES:	**R** **v** **ZINGLE, Harry Travis** (appellant)
FILE NO/S:	CA No 151 of 2015 SC No 4 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 16 June 2015
DELIVERED ON:	16 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2017
JUDGES:	Fraser and Philippides JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where on 16 June 2015 the appellant was found not guilty of one count of rape but guilty of one count of murder – where the learned trial judge admitted evidence relating to the appellant and deceased's prior domestic relationship – where the appellant contends that admission of such evidence was in error – whether the admission of evidence relating to the prior domestic relationship caused a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was heavily intoxicated at the time of the offence – where the appellant contends that it was not open for the jury on the whole of the evidence to be satisfied beyond reasonable doubt that the requisite intention was held – where the appellant further contends that his lack of understanding of the seriousness of the injuries inflicted on the deceased at the time of and immediately after the offence was inconsistent with an intent to kill or do grievous bodily harm – whether the jury

	could be satisfied beyond reasonable doubt that the appellant held the requisite intent
	Evidence Act 1977 (Qld), s 132B
	R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited *R v SCH* [2015] QCA 38, cited *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, cited
COUNSEL:	S R Lewis with K E McMahon for the appellant (pro bono) G P Cash QC, with A J Robinson, for the respondent
SOLICITORS:	No appearance for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **PHILIPPIDES JA:** I have had the considerable benefit of reading the reasons of Boddice J. I agree with those reasons and the order proposed.

[3] **BODDICE J:** On 16 June 2015, a jury found the appellant guilty of murdering Cheryl Esther Greenwool on 21 December 2013. The jury found the appellant not guilty of the rape of Cheryl Esther Greenwool. The appellant was convicted and sentenced to life imprisonment.

[4] The appellant appeals his conviction. The appellant relies on three grounds of appeal. First, that the verdict of the jury was unreasonable, unsafe and unsatisfactory having regard to the evidence. Second, that there was a miscarriage of justice in the appellant's trial because the learned trial judge erred in admitting evidence of prior domestic violence. Third, there was a miscarriage of justice in the appellant's trial because of the failure of the appellant's counsel to object to evidence of prior domestic violence.

Background

[5] The appellant was born on 30 November 1971. He is indigenous. The deceased was born on 23 March 1971. She was the de facto partner of the appellant. They lived together in a duplex at 331A Karrenganang Street, Kowanyama. The street is known locally as Jennifer Street. It contained living areas and two bedrooms. The back bedroom was used as the main bedroom.

[6] The duplex had its own separate front and back yards. Paul Wallace lived next door. Across the road lived Gerard Malachi and Sheena Parry. Adjacent to Malachi's backyard lived Henry Gibbo and Michelle Jimmy.

[7] The deceased was found dead on the floor of her bedroom in the early hours of 21 December 2013. She had sustained significant injuries to her head. The cause of death was bleeding on the brain. The appellant admitted punching the deceased some hours prior to the deceased's death. He also said he struck her on the leg with a piece of timber. The appellant said that when he left the deceased the previous evening she was bleeding but conscious.

[8] At issue in the appellant's trial was whether the appellant caused the deceased's death and, further, if he did so, whether he intended to kill or cause the deceased grievous bodily harm. An issue in relation to the existence of the relevant intent was the quantity of alcohol consumed by the appellant over an extended period prior to the deceased's death.

Evidence

Events of 20 December 2013

[9] Nullem Aiden commenced drinking with the appellant and others at his house from early in the morning of 20 December 2013. The appellant arrived at around six o'clock in the morning. The appellant was drinking Fourex Gold beers throughout the morning. The deceased came to the house for a time at about midday. She did not stay long. The appellant was drinking and dancing whilst the deceased was at the house. He was "almost getting drunk".[1] Everybody left in the afternoon when there was no more beer. Aiden was too drunk himself to remember what time everyone left his house.

[10] Chantel Sandra Major, a friend of the deceased, saw the appellant at Fayden's house at about 7 am on the morning of 20 December 2013. She saw him again at 1.00 pm. She could not remember if she saw the appellant drinking at either time. Major also saw the deceased at Fayden's house that day. It was about 2 pm. The deceased was talking to the appellant out the back of Fayden's house. The deceased asked the appellant why he did not come home. Major did not hear the appellant reply.

[11] Major started drinking herself at 7.00 am that day. She drank cask wine throughout that day. By 1 or 2 pm she was drunk. She continued drinking into the evening. At some time after 10.00 or 11.00 pm on the evening of 20 December 2013, Major went to the deceased's house. She knocked on the door but nobody answered. Major saw the appellant smoking with some others out the back of the house. The appellant told her the deceased was asleep. Major then went with the appellant and others to Malachi's house next door. She drank beer at Malachi's house. When Major left Malachi's house at 1.00 or 2.00 am on 21 December 2013 the appellant was still at Malachi's house.

[12] Ishmail Birchley attended the residence of the appellant and deceased at around 12.30 pm on 20 December 2013. The deceased was "pretty drunk" when he arrived at the house. The deceased, who had trouble walking, was wearing a long brown flowery dress. Birchley remained at the house for approximately 20 minutes. He had two to three cups of wine. He left after 20 minutes. His wife came to collect him. He did not see the appellant or deceased again that night.

[13] Delilah Paul, a friend of the deceased, went to the residence of the appellant and the deceased at about 4.00 pm on 20 December 2013. The appellant and deceased were sitting on the couch. There were other people there. She described that there was bit of a party going on. The appellant and others were drinking wine from a cask. Paul said she was drunk as was the deceased. At one point, Paul went to her sister's house across the road looking for cigarettes. She was away for 10 to 15 minutes. When she returned everybody was leaving and going to Malachi's house. Paul saw the appellant push one person out the front door. The door was then locked and the house was all dark.

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1 AB 313/45.

[14] Paul left and went back to her house. Paul went to Malachi's house at around one o'clock on the morning of 21 December 2013. She saw the appellant at Malachi's house. He was wearing a red shirt and black shorts and was drinking. She did not see the appellant leave Malachi's house. Paul agreed that at one stage during the evening she had asked the deceased to sit down beside her on the lounge. The deceased was getting pretty drunk.

[15] Paul said while the party was going on at the house of the appellant and the deceased on the evening of 20 December 2013 an incident happened when Roddy Daniel started having a fight with his girlfriend, Edith Holness. Daniel chased Holness around the house. Holness was running away from him. At one stage Holness ducked behind Paul who was sitting on the lounge chair. Daniel tried to hit Holness but struck Paul on the head. Daniel hit her with his hands. It hurt but did not make Paul bleed.

[16] Stanley David saw the appellant and the deceased at their residence at about 3.00 pm on 20 December 2013. The appellant was quite happy and in a good mood. The deceased was so drunk she could hardly walk. He left at 5.00 pm. The appellant was angry and telling everybody to go. The appellant came through a door and slammed it. David asked the appellant what was going on but he would not tell them. David went with the others to Malachi's house. They continued drinking there. David did not recall Roddy Daniel having a fight with Holness or throwing a Jim Beam bottle. David had had a lot of cups of Jim Beam that day.

[17] Peter Wallace lived in the duplex next door to the appellant and the deceased. He saw people in the appellant's back yard at about 9.30 am on 20 December 2013. They were having a party. He heard the deceased and the appellant's voices from time to time during that day. They were loud and sounded as if they were drunk. At 6.30 pm, he heard the appellant tell everybody to leave the house. It was said in an angry way.

[18] He then heard movement noises, like a person cleaning or tidying up. He also heard the appellant talking to the deceased. At one point, Wallace thought he heard the appellant ask the deceased who she was seeing. The appellant sounded angry. He heard the deceased reply by expressing how she loved the appellant. Her voice was calm but concerned.

[19] Wallace went to bed at 8.30 pm on 20 December 2013. He woke up at 11.30 pm to have a cup of tea. At that time there were no lights at the appellant's house next door. Wallace accepted he did not tell police when he had earlier provided his statement that he had earlier heard the appellant ask the deceased about who she was seeing. He accepted he may have been mistaken in his recollection of that conversation.

[20] Edith Holness went with Roddy Daniel to the residence of the appellant and the deceased at around 4 pm on 20 December 2013. Prior to going there, Holness had been drinking Jim Beam and rum. She was "not real drunk".[2] A number of people were present. The deceased was "real drunk".[3] At one point, the appellant told all the families to go home. The appellant did not sound angry and there had not been any argument. She left with her partner, Roddy Daniel. She estimated that was 6.00 or 7.00 at night.

[21] Holness agreed she had previously told police that the deceased was unsteady on her feet that afternoon. She also agreed that at one point that evening she had a fight with

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2 AB 240/15.
3 AB 240/50.

Daniel who chased her around the house. She did not remember Daniel throwing a Jim Beam bottle out towards the front door of the house.

[22] Gerard Malachi went to the deceased's house at around 4.30 pm on 20 December 2013. The deceased was home with some other women. Malachi started drinking Fourex Gold. He had about 10 cans before the appellant arrived home at about 6.00 pm. There was a party that night. People were dancing and drinking. At one point, the appellant told them all to go as there was too much noise. The appellant was calm. There was no argument. The appellant sounded a bit groggy, "a bit under the influence of alcohol".[4] People left and went to Malachi's house.

[23] Some time later Malachi went back to the house of the appellant and the deceased to get a cigarette lighter. Whilst he was speaking to the appellant the deceased came into the lounge room. She was wearing a big long skirt which extended from the knee somewhere up to her mid-chest region. The appellant told her to go back into the room and not show bad respect. The deceased went to her room and closed the door. The deceased was "stumbling".[5]

[24] Malachi said the appellant came over to his house. The appellant was dancing but not drinking at that time. The appellant told Malachi the deceased was asleep and would come later when she sobered up. Malachi did not recall seeing Roddy Daniel throw a Jim Beam bottle that evening. He did not remember Daniel and Holness having a fight. He did remember Gavin Dick kicking the screen door of the appellant's house. It caused Dick's foot to bleed. Malachi said when he left the appellant and the deceased were the only ones at their house and they were calm.

[25] Sheena Parry, Malachi's partner, went to the residence of the appellant and the deceased at around 2.30 pm on 20 December 2013. The deceased was wearing a skirt and a top. They drank wine. It seemed the deceased had already been drinking "a bit".[6] Other people came over. The appellant also arrived home later in the afternoon. The deceased was drinking and dancing and listening to music. Parry left before it got dark. The appellant was angry and asked everybody to leave. She did not see Roddy Daniel get into a fight with Holness or Gavin Dick kicking the front door. An incident happened between her and Malachi. Parry got injured in that incident. Parry agreed the appellant was drunk when he arrived home that afternoon.

[26] Gibson Frank saw the appellant at Malachi's place at 2.00 am on 21 December 2013. He was pretty sure the appellant was drinking wine. The appellant had a few dances. He did not see the appellant leave. Frank was there for about an hour and drank three or four cups of wine. The appellant was in a happy mood.

Events of 21 December 2013

[27] Nola Gregory was at the house of her friends, Henry and Michelle Jimmy on the evening of 20 December 2013. That house overlooked the backyard of Malachi's house. Gregory had been drinking cask wine earlier that day but was "not really" drunk.[7] At one point, Gregory saw a group of people in Malachi's backyard. They were dancing and having fun. She saw the appellant in that group. He was wearing a red shirt and

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4 AB 252/30.
5 AB 258/15.
6 AB 331/45.
7 AB 246/1.

black shorts. Later that evening Gregory saw police pull up at Malachi's house. They were concerned about the noise of the music which was turned down and everyone went away.

[28] Gregory went to the deceased's house with Michelle Jimmy, in the early hours of 21 December 2013 to obtain some cigarettes from the deceased. She found the house in darkness. Jimmy knocked on the front door but obtained no reply. Gregory went into the kitchen and turned on the light. Jimmy knocked on the closed bedroom door. Jimmy called out and then opened the bedroom door and turned on the bedroom light. Gregory followed Jimmy into the bedroom.

[29] Gregory saw the deceased laying on the bed. Her right leg was on the bed and her left leg was on the side of the bed. Her dress was a bit below her hip. There was blood on the head and side of the bed. Gregory raised the alarm.

[30] A community police officer, Frank Raymond, who was the deceased's uncle, attended the deceased's residence at two or three o'clock that morning. He had been working that evening with Lana Burns, doing patrols around the community. When Raymond arrived the house was unlocked and there were people standing on the footpath. There was a light on in the back bedroom. Raymond saw the deceased lying sideways on the end of the bed. Her left arm was hanging down. The deceased had blood on the top of her head and on her chest and dress. Her dress was pulled up near her waist.

[31] Lana Burns said they arrived at the deceased's residence at about 2 am, in response to an approach from some girls. Burns and Raymond had attended Malachi's house earlier that evening at about 10 or 11 o'clock. There was a party on and she told Malachi to keep the noise down. Malachi was drunk but happy go lucky.

[32] Burns went into the bedroom of the deceased's house and saw the deceased on the bed. The deceased looked asleep but had injuries. Burns found no movement and no response. The deceased's dress was caught up underneath her bottom. The deceased was not wearing underpants. Burns pulled the deceased's dress down. Burns saw a half circle of blood on the floor. There was minimal blood on the pillow. Burns did not move the deceased's body.

[33] Senior Constable Lisa Thomas attended the deceased's residence at around 2 am on 21 December 2013 after being contacted by Raymond and Burns. Thomas said it had been a busy night. She had earlier been called to Jennifer Street in response to reports of fighting in the street with shovels. Later, she was called to the health clinic as Sheena Parry had presented with an open, gaping head wound at the front of her skull. As a result of that complaint, Thomas attended Malachi's residence. She observed the appellant in the front yard but did not speak to him. Thomas spoke to Malachi. He was agitated and upset. Thomas took Malachi back to the police station.

[34] When Thomas entered the deceased's bedroom she saw the deceased lying on the double bed. The deceased's head was near the actual bedhead. Her body was partially hanging off the bed, although her feet were still on the bed. The deceased's body was twisted to the right. The deceased was wearing either a printed long shirt or a short dress. The deceased was not wearing underpants. A pair of underpants was located at the bottom of the bed. The deceased's blue coloured bra was unclipped and hanging out the top. Thomas rang the ambulance service.

[35] Robert Sands, a friend of the appellant and of the deceased, was contacted by the appellant at about 3.30 am on 21 December 2013. Sands said he and his partner, Donna Brumby,

had attempted to make contact with Greenwood on the previous evening. They had tried to contact the appellant on his mobile phone initially. When they were unsuccessful they went for a drive past the house of the appellant and the deceased a couple of times. Sands estimated it was between 9.30 and 10 o'clock at night. The house was blacked out with all the lights off. Sands and Brumby returned home. Sands estimated it was between 10.30 and 11 o'clock when they arrived home.

[36] Sands said that at about 3.30 or 3.40 am the appellant knocked on their bedroom window. The appellant was yelling out for Sands to come outside. Sands said the appellant appeared to be affected by alcohol. He was not legless or staggering and he was not slurring his words. However, he clearly had been drinking and was drunk.

[37] Sands said the appellant said to him "you've got to hit me". Sands asked why and the appellant replied to the effect that he "belted his missus up".[8] The appellant said the deceased was laying on her bed cold. The appellant said that he and the deceased had had a fight and he had belted her up. The appellant said the deceased fell down and hit her head in the bedroom. The appellant had picked her up and put her on the bed before going across the road to Malachi's house to continue to have a party.

[38] Sands said the appellant suggested that Sands take him to the police station. Sands agreed. At that stage both Sands and the appellant were both very emotional and upset. The appellant was crying. Sands, Brumby and the appellant then went to the police station. Sands said it was about 3.35 am. Sands rang triple 0 and spoke to police communications. Approximately 15 to 20 minutes later Sergeant Colin Thomas arrived at the police station.

[39] Sands said before Sergeant Thomas arrived the appellant said "I might as well go and hang myself".[9] Sands and Brumby tried to be strong and told him not to do that and to wait for the police. Sands was actually holding the appellant back at that stage. At that point, the appellant said to Brumby "you had better belt me up too".[10] Sands said the appellant was wearing a red T-shirt with a black print when he arrived at their house.

[40] Brumby gave evidence that she tried to get in touch with the deceased on the night of 20 December 2013. At 9.42 pm she rang the mobile phone unsuccessfully. Sands and Brumby then drove to the deceased's house. They drove around the street a couple of times but then went back home. The house was dark. It was around 10 o'clock. Brumby said she next remembered hearing a knock on the bedroom window and a voice calling for Sands to come outside. Brumby recognised the voice as that of the appellant. Sands walked outside. Brumby could hear the sounds of the conversation but could not hear what was being said by either Sands or the appellant.

[41] When Brumby went outside to the dining room table, Sands and the appellant were standing inside the house. Brumby heard the appellant say he "belt Cheryl".[11] The appellant asked to be taken to the police station. Sands, Brumby and the appellant then drove to the police station. After a while, Sergeant Thomas arrived at the police station. Brumby said the appellant was wearing a red T-shirt when he arrived at their home. She estimated it was about 3.30 am when they were woken up. Brumby later said in evidence that Sands told her whilst they were at the dining room table that the

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8 AB 219/5.
9 AB 222/1.
10 AB 222/10.
11 AB 224/35.

appellant had said he had belted Cheryl. Brumby agreed the appellant was crying whilst at their house. Brumby agreed she also was pretty upset because she realised the deceased was dead.

[42] Colin Thomas, a police officer, spoke to the appellant at the front counter of the police station just after 2 am on 21 December 2013. He could smell alcohol on the appellant's breath. He described the appellant as affected by alcohol. His speech was slurred and he did not make any sense. A breath test performed on the appellant 4.16 am produced a reading of 0.206 per cent. At 2.25 pm the appellant was again breath tested with a reading of 0.066 per cent. Colin Thomas did not observe anything unusual about the appellant's gait when he first walked into the police station. He said it was only a short walk.

Police interviews

[43] The appellant was first interviewed by police at 3.23 pm. A second interview took place at 5.26 pm. In his first interview, the appellant estimated he consumed 15 cans of Fourex Gold beer on 20 December 2013. He also consumed some spirits. The appellant estimated he and his drinking companions drank a couple of bottles of Jim Beam. The appellant told police he fell asleep on the afternoon of 20 December 2013. A friend, Jack Gibbo, picked him up in his ute and took him home.

[44] The appellant said when he arrived home, the deceased was drunk and playing music. The appellant's cousin, Gerard Malachi, and his partner, Sheena Perry, were present. They were all drinking cask wine. The appellant estimated he had about 10 cups of wine filled right to the brim. He also drank some Fourex Gold cans. Others were present at the house drinking Jim Beam or rum. Those others included Roddy Daniel Jnr, Latham Gilbow and Delilah Paul. At one point, the appellant asked them all to leave because he was jealous of the deceased dancing with somebody else. The appellant said Roddy Daniel Jnr and his partner had a fight. The appellant estimated they kept drinking until around 11.00 pm or midnight.

[45] The appellant said that after everybody had left he and the deceased had a fight. The appellant described punching the deceased in the head twice. He also slapped the deceased once. Initially, the appellant said he did not use anything to hit the deceased, other than his hands. Later, the appellant said he hit the deceased on the leg with a piece of board. He obtained the board from out the back of the house. He hit the deceased when she walked in near the door. The appellant did not hit her with anything else. He did not use anything other than a piece of timber and his fist to hit the deceased.

[46] The appellant said the first time he punched the deceased was when she was in the kitchen. He used his left hand and a closed fist. After that he slapped the deceased. The appellant said the deceased got a fright and said they should go to bed. That was around midnight or 1.00 am. The deceased and the appellant then had sex. The deceased took all her clothes off and he took all his clothes off.

[47] The appellant said after they had sex, Gerard Malachi came back to the house. He was talking to Malachi when the deceased walked out of their bedroom. He told the deceased to go back into the room. The appellant said at one point the deceased tumbled over in the kitchen. He thought she probably bumped her head on the table.

[48] The appellant said after Malachi left again he took the deceased into the room and punched her with his left hand to the jaw. The deceased fell to the floor. He grabbed

her and woke her up. He asked her if she was okay. She said yes. He then put her to bed. The appellant said the deceased was bleeding when he lay on the bed. The blood was coming from her head. They laid down on the bed together talking for a while.

[49] The appellant said he then had sex for a second time with the deceased. The appellant said he put his clothes back on after that second occasion but the deceased just had her top on. She was not wearing a skirt or underpants. He then said he was going back to Malachi's place. When he returned to the house the second time he found the deceased cold and on the bed.

[50] The appellant estimated he left and went to Malachi's house across the road at around 1.00 or 2.00 am. When he left the deceased on the bed she said "I'll wait for you to come back". He said the deceased was awake when he left but said she was going to bed. The appellant said when he returned home at about 3.00 am he found the deceased dead. The appellant then went to Robby and Donna's house and told them he thought the deceased had died. He told Robby he had done something stupid. He thought his woman was dead. He asked Robby to take him to the police station.

[51] The appellant estimated that the whole argument with the deceased lasted about 20 minutes. He described the deceased as having a cut on her head. He believed she sustained this cut when she fell over and bumped her head on the ground. The cut was in the middle of the head. There was a little bit of blood.

[52] During the interview, the appellant was asked about a large amount of blood in the house. The appellant said the deceased had tripped over and stumbled backwards. He did not know how blood splatter got onto the walls. He described shaking the deceased when they were laying on the bed in the bedroom. He said that must have been when the blood spilt there. The appellant later said that he had moved the deceased onto the bed after he came back from Malachi's place. He lifted her onto the bed and they had sex.

[53] The appellant said he changed his shirt from a white shirt to a red shirt when he first went across to Malachi's house. He had been wearing the white shirt all day. He was wearing the white shirt when he put the deceased onto the bed. He then pulled his shirt off and changed it to a red shirt. He estimated he was gone to Malachi's place on the first occasion for 10 to 20 minutes. He denied mopping up blood with the deceased's skirt. He used an actual mop to clean up a bit of the room. The appellant said that when he came home the first time from Malachi's place and lifted the deceased from the floor he saw a pool of blood on the floor.

[54] In a further short interview later that afternoon, the appellant said he may have hit the deceased on the side of her head with the piece of timber. He was not sure because he was drunk. It happened in the house near the bedroom door which was open. The appellant had grabbed the timber from the back yard. He may have hit the deceased in the head with it but he definitely hit her on the leg. He put the timber back in the yard. The appellant said this had happened when they were arguing the first time in the kitchen. He had left the house, obtained the piece of wood and came back in and hit the deceased.

Police investigation

[55] Amanda Milligan, a scientific police officer, arrived at the deceased's residence at approximately 10.50 am on of 21 December 2013. She located a blood stained broken bourbon bottle in the front yard. There was also broken glass and a fragment of a Jim

Beam bourbon bottle in the backyard. A piece of timber was located in the backyard. It had blood stains and hair on it. On the rear porch was located a mop. It was slightly moist and had what appeared to be blood on the tassels.

[56] The piece of timber was taken to Cairns for examination. It was found to be 1.21 metres long, 8.7 centimetres wide and 3.5 centimetres thick. At one end there was a dent and an area of blood staining approximately 20 x 40 millimetres in size. In that area there were several black or dark coloured hairs adhered to the timber. Some were wedged in the timber. The hairs were both short, consistent with leg hair, and longer, consistent with head hair. A substance that may have been skin was located amongst the hair. On the other side of the piece of timber, but the same end, there was a bit of timber missing. There was a visible blood stain down the side of the timber.

[57] Milligan undertook an examination of the house for bloodstains. There were blood stains in the vicinity of the front door and some blood drips from blood falling to the ground to the right of the door. Blood was found on the front door handle consistent with somebody who had blood on their hand opening the door.

[58] Blood was found on the floor of the lounge area and on the lounge chair. The lounge suit appeared disturbed with the central cushion on the ground and the cover ruffled. There was a saturation stain on the couch. It was most likely that an individual was bleeding on or near the couch at the time that stain was deposited onto the couch.

[59] Blood stains were found on the kitchen benchtop and adjacent floor and on the internal side of a door beside the benchtop. A patterned skirt with blood stains was located in the dining area. There was a contact blood stain on the wall beside the dining room table. Blood was located on the dining room floor with evidence it had been partially wiped away or partially cleaned up. There was a contact blood stain on the edge of the back door leading to the backyard. It had a ridged detail like the lines of a fingertip suggestive of a person actually touching it. It was possible somebody with blood on their hand had opened the door.[12]

[60] Milligan located a pair of jeans and a brown and white polo shirt on the floor of the bathroom. An examination of the jeans revealed what appeared to be a blood stain on the waist. No blood stains were detected on the polo shirt. A blood stained hand had come into contact with the bathroom wall. There was a blood stain on the vertical edge of the bath tub and also on its lip. Those blood stains were diluted.

[61] Milligan found numerous blood stains on the floor, walls, furnishings and objects of the deceased's bedroom. There was a contact swipe blood stain on the lounge room side of the bedroom door. There was a contact blood stain on the external door handle. Blood stains were located on a fan, light switch and the door's architrave inside the bedroom. The blood stain on the architrave was 1.7 metres above the floor. There were projected blood stains on the right side of the doorway, on the southern wall and on the door itself. The projected blood stains were either cast off or impact pattern blood stains.

[62] Milligan said a cabinet in the bedroom had a yellow curtain over the top of it which had numerous projected and contact blood stains, predominantly on the front. Her examination indicated a blood letting event had occurred beneath or at the level of the cabinet, most likely beneath the level of the cabinet.

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12 AB 163-10/25.

[63] Milligan said there were numerous blood stains between the doorway to the bedroom and the bed. There was a pool of blood consistent with a blood stained person being in that location for an undetermined period of time. There were fine swipe marks consistent with hair moving along the pool of blood. There was also a swipe mark indicating a person or object had travelling through the blood in an east west direction after the blood pooled. The blood pool and the wipe mark were consistent with somebody bleeding from the head being in that position for a period of time and then moving or being moved to another position.

[64] Mulligan said there were numerous blood stains on the bed. These included saturation and contact blood stains. The saturation blood stain was consistent with the deceased bleeding from her head and having her head in the position she was found in for some time. There were projected blood stains on the bedframe and mattress consistent with either cast-off or impact mechanisms.

[65] There was also a blood stain on the floor of the bedroom that could be explained by either a wipe or swipe. Other blood stains were located on the floor. There was a concentration of hair on the floor near some of the blood stains which might indicate a person's head had been in that location for a period of time. It might also be irrelevant. There was an exercise book on the floor in a position which indicated it was put there after the blood had been deposited.

[66] Milligan said there were blood drips in numerous locations caused by blood falling by gravity alone. There was an unclassified large volume blood stain on the eastern wall of the bedroom. There were projected blood stains near the floor and on the floor itself with a right downwards directionality. There was projected blood staining underneath the window on the eastern wall. It had a directionality indicating it occurred perpendicular to the wall and some had a directionality towards the northern wall.

[67] Milligan opined that if all of the stains on the southern wall of the bedroom occurred as the result of a single blood letting event, it was likely that event occurred in the approximately vicinity of the light switch or the right architrave of the door and at a height above the door handle or light switch. The marks on the southern and eastern walls, however, could not be explained by a single blood letting event. They were caused by at least two blood letting events plus another event given a general proposition that the first blow created the source of the blood but did not create a blood stain.

[68] The blood stain on the eastern wall contained within it many projected blood stains. Most appeared diluted in appearance. There were also patterns that contained whole blood or blood that was only diluted to a small extent. Milligan opined that the dilute blood stains on the walls were dilute before impact. It was possible if a person was very wet and had injuries on their head and there were multiple impact blows it could cause such a pattern. If the blood stains had been caused by mopping up blood with a wet mop and flicking the blood onto the wall, Milligan would have expected to see some larger blood stains although she accepted that may not necessarily be so.

[69] Milligan said the deceased had apparent injuries in the centre of the forehead and a large visible injury to the right side of her forehead. There was an apparent lump on the back of her head. A large amount of matted clotted blood was found on the top of her head and in her hair. There were blood stains on both feet, left shin, right thigh and on her abdomen between her naval and her breasts. However, all the observable injuries were on the head or face of the deceased.

[70] Milligan said the deceased was wearing a blood stained upper garment. The deceased was not wearing any underpants. She had on a blue bra. The straps were pulled down to her upper arm area. A presumptive test for seminal fluid on the crotch of the deceased's underpants was positive but slow to react which may be explicable by vaginal secretions. Four areas of the bed sheet tested positive to seminal fluid. It was not possible to age those samples.

[71] Milligan undertook an examination of the appellant on the following evening. No blood was located on his skin. He had a small aged injury on one of his hands. The appellant's t-shirt had blood stains on the back of it. There was also a blood stain on the left hip and waist band of the appellant's shorts.

Scientific evidence

[72] Milligan took multiple blood samples during her investigation. They were examined for DNA profiles by Penelope Taylor, a forensic scientist. The DNA profiles produced by those samples suggested the blood stains on the couch and the mop tassels were contributed to by the deceased's DNA, as were the projected blood stains on the timber foot of the bed, the pool of blood on the floor of the bedroom and the multiple blood stains on the eastern wall of the bedroom. The DNA under the deceased's fingernails was likely to have been contributed to by the appellant. The appellant's spermatozoa was found on the bedsheets. The low vaginal and rectal swabs from the deceased were positive for the presence of seminal fluid.

[73] The DNA profiles on both ends of the piece of timber were more likely to have occurred if both the deceased and the appellant contributed DNA. Similarly, the projected blood stain on the wall beside the fan switch in the bedroom was likely to have occurred if the appellant, the deceased and Lana Burns contributed DNA. The blood stains on the floor beside the cabinet and the cupboard in the bedroom were likely to have occurred if the appellant and the deceased contributed DNA.

[74] Some of the blood stains in the bedroom were likely to have occurred if the appellant contributed DNA, although a swab of blood on the floor in the dining room was more likely to have occurred if Nola Gregory and Henry Gibbo contributed DNA. The swab of blood from the internal panel of the rear door is likely to have occurred if both the deceased and the appellant contributed DNA as was the swab on the front right waist band of the jeans found on the floor of the bathroom and on the back of the appellant's shirt.

[75] Lesley Griffiths, a forensic medical officer, opined that on the basis no alcohol had been consumed by the appellant after 9 pm on 20 December 2013 and the appellant's blood alcohol concentration was 0.206 per cent at about 4 am on 21 December 2013, the appellant's blood alcohol range at 7 pm on 20 December 2013 would have been 0.31 per cent to 0.536 per cent, at 8 pm, 0.301 per cent to 0.508 per cent and at 9 pm, 0.291 per cent to 0.48 per cent. If more alcohol was consumed after 9 pm the ranges of those times would have been lower. If the appellant was a heavy drinker it is likely the ranges were closer to the higher end.

[76] Griffiths opined that regarding a normal person, a reading of 0.15 per cent results in loss of critical judgment and critical self-appraisal. At 0.25 per cent, there is an exaggeration of feelings of loss, anger and rage and an effect on motor co-ordination such as a staggering gait and slurred speech. At 0.3 per cent, there is a loss of motor

function and the beginning of inertia and apathy. A coma may also start to begin. Griffiths said a person's blood alcohol content continues to rise after their last drink. A person, after drinking a low strength beverage like beer, might peak at two hours after that drink. Based on usual elimination rates, the appellant's reading at 2.15 pm on 21 December 2013 would be 0.14 per cent. The elimination rate is, however, affected by a number of variables, including good metabolism, body habitus, and gender.

Autopsy

[77] An autopsy was performed on the deceased by Paul Botterill, pathologist. He found an eight centimetre curved tear of the scalp over the right temple region just above and to the front of the right ear. There was a separation of the tissues under the skin's surface away from the outer part of the skull but no underlying fracture. This injury was most likely caused by something with a straight but not a sharp edge. It would be unusual if it was caused by a punch.

[78] Botterill also found three tears of the skin over the central part of the forehead. The largest was a bit over two centimetres long. The tears went through the skin to the underlying tissue but there was no associated underlying skull fracture. It was most likely all three tears occurred at the same time but it was possible they were caused by more than one contract. The likely contact was not with something that had a sharp edge on it. A fist could cause such an injury. It could also be caused by falling onto the floor, furniture or like object.

[79] Botterill found a superficial tear about one centimetre long to the top back of the skull. It tore through the skin surface but did not tear through the full thickness of tissue between the skin's surface and the underlying skull. There was no associated skull fracture. This injury could be caused by any sort of blunt force trauma but not something with a sharp edge. Botterill also found swelling over the bridge of the nose and swelling and bruising within both eye sockets. This was reflective of the bruising at the time of death.

[80] Botterill also found swelling of the upper and lower lip, grazing to the right arm and some scaly areas on the foot, probably caused by footwear. There was also internal bruising to the deceased's tongue, left side of the lower jaw beneath the left ear, right cheek bone, under the skin of the fingers of the left hand, to the back of that hand, to both elbows and between the wrist and elbow. All bar the bruising to the tongue, was likely to be the result of blunt force contact within about a day of death. The bruising could have been caused by a blow or just the application of pressure.

[81] Botterill opined the cause of death was a 60 millimetre subdural haematoma on the left side of the brain. A contact from anywhere on the head could cause that injury. It was the final event in a blunt force head injury. It could have been caused by any of the injuries to the head as each had a statistical risk of causing the subdural haematoma. However, it was most likely caused by the curved laceration to the right temple because that injury was the most severe. It was not possible to say what was the time between the bleed to the brain and death.

[82] Botterill said a person can sustain an injury that causes a bleed but not lose consciousness. They could be slightly dazed at the time and appear to behave in a reasonably normal way. They might appear drunk. It is only when the bleed gets to the critical point that death takes place. Botterill said a microscopic examination of the haematoma indicated an unusual calcification suggesting there may have been some previous bleed weeks, months or years earlier. That calcification did not, however, indicate anything that contributed to the deceased's death.

[83] Botterill took some samples from the deceased. Blood from the femoral artery revealed a blood alcohol content of 0.17 per cent. There was also an active metabolite of cannabis, indicating exposure to cannabis within a few hours of death. The clot to the brain had a 0.11 per cent blood alcohol content. The differences in blood alcohol contents were explained by the blood clot in the brain staying at the same level as at the time the injury is occasioned, whereas the blood alcohol content in the rest of the body is reflective of any continued absorption from the stomach. The differences confirm there was a period of time between injury and death.

[84] Botterill said fluid from the deceased's eyeball had a blood alcohol content of 0.21 per cent. Her urine revealed a blood alcohol content of 0.24 per cent. Those readings were higher because of the absence of red blood cells in those samples. In the case of the urine, the presence of bacteria would also explain the higher reading.

[85] Botterill opined that the injuries to the deceased's face and scalp could be aged to within a day of her death. At least five contacts would be necessary to cause those injuries. They could be caused by a complex surface but that would be unusual. In that event, it would be less than five contacts. The injuries to the deceased's temple and scalp could have been caused by the piece of timber. The injuries to the forehead and the back of the scalp were more likely to have been caused by the flatter surface of that piece of timber than the round edge. The injury to the temple was more likely to have been along the long axis but any of the straight edges could have caused that injury.

[86] Botterill agreed that if severe force had been applied to the deceased's head, there would be a greater likelihood of a skull fracture. Further, the more severe the force the more likely it is that interstitial haemorrhaging would be seen at autopsy. There was no interstitial haemorrhaging found on the deceased's autopsy.

Prior domestic violence

[87] Raymond gave evidence that in November 2013 he went to the deceased's home after receiving a call from the community clinic. He found her sitting on the ground near the front fence. She had an injury to the back of her head. Raymond saw blood but not a wound or cut. The deceased told him the appellant had hit her with a bar.

[88] Raymond initially agreed in cross-examination that the deceased may have said that the appellant hit her with a stick. However, he later said the words used by the deceased were "a bar". Raymond accepted the deceased was under the influence of alcohol. She was slurring her words. Raymond did not write down any notes. He agreed the first time he was asked about it was months later.

[89] Burns also gave evidence of the incident in November 2013. She said that the deceased was at the front of her house. The deceased was intoxicated and sitting down on the footpath. She appeared to have a wound to her head. They took her to the clinic. The deceased told her the appellant hit her over the head with a bar. She also did not make notes in her notebook that day.

[90] Burns accepted she had given a statement in January 2014 in which she had said the deceased did not say anything to her about what had happened that day. She agreed she did not remember what the deceased had said to her that day. She was relying on what Raymond had told her the deceased had said that day.

[91] Joseph Patchett, a police officer, gave evidence that on 27 November 2013 he saw the deceased sitting on the side of Jennifer Street next door to her home. He did not speak with her. She was with Raymond and Burns. Patchett did not see any sign of injury on her. The deceased was taken to the clinic by the community police officers.

[92] Susan Paul gave evidence that two weeks prior to the deceased's death she observed a fight between the appellant and the deceased in the front yard in Jennifer Street. She saw the appellant punch the deceased and knock her to the ground. She did not see the deceased punch or kick the appellant. Paul picked up the deceased and took her to her mother's house next door. The appellant followed them. He was yelling at the deceased and was still yelling when they went into her mother's house. She could not recall where the appellant went. She thought it was back to his place next door.

[93] Janita Paul, Susan Paul's mother, gave evidence of an occasion before Christmas when she saw the appellant chasing the deceased around the dining room of her house. The appellant was asking the deceased about his alcohol. He was shouting at the deceased. He grabbed the deceased's hair and punched the deceased down onto the concrete once. He busted the deceased's head at the back. The deceased was paralytic drunk.[13] She could hardly walk and could not talk very well.

[94] Edmund Eric, the deceased's 87 year old uncle, gave evidence that he once saw the appellant and the deceased out the front of their house in the street. The appellant was holding a pick head. He tried to pull it off him but the appellant was too strong. The appellant hit the deceased. The deceased sustained an injury to the head. Eric saw blood pouring out of her head. The deceased was crying with pain.

Trial Judge's direction

[95] The evidence of a prior domestic relationship was the subject of specific direction by the trial judge. After specifically directing the jury that it was a matter for the jury whether it was satisfied as to the reliability of that evidence and whether it concluded, on the basis of that evidence, that the appellant had previously been violent towards the deceased, the trial judge directed the jury:

> "Our law provides that relevant history of the domestic relationship and the person against whom the alleged offence was committed is admissible in evidence in a proceeding like this. Obviously, if there has been past violence in a relationship, that evidence forms part of the history of the domestic relationship.
>
> In this case, the relevance of the historical evidence of the domestic relationship is merely that it provides context or background for your consideration. Put slightly differently, it throws some light on the nature of the relationship between this de facto couple, so that you are not left to consider the events of the fatal night in a vacuum. It may make the events of the fatal night more intelligible or explicable, for, without that context, such events may appear improbable or to have occurred out of the blue.
>
> Importantly, you ought not have any regard, at all, to the historical evidence of the domestic relationship unless you consider it is reliable.

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13 AB 310/45.

> If you do, then the use of the evidence is limited to the contextual purpose just explained. I direct you that the purpose for which the historical evidence of the domestic relationship is before you is solely to provide an informed context for your consideration of the events of the fatal night. That is the sole purpose for which you may have regard to the evidence. You must not use that evidence for any other purpose.
>
> I specifically warn you against misusing the evidence as evidence of some sort of pattern of violence or of a propensity of the accused for violence towards the deceased such that you reason he has a tendency to or is the kind of person who would or is more likely to inflict serious violence upon the deceased. Such reasoning is flawed, for the evidence falls well short of a pattern and, in any event, it cannot assist to determine the critical issues on which this case happens to turn. It is fundamentally unfair to allow the smear of past events to substitute the need for proof of the actual events attracting the charges. Do not let it happen.
>
> To emphasise my warning in another way, consider this. The accused admits he did do violence to Greenwool on the fatal night. What is in issue, at least to some extent, I suppose, is whether the violence he did to her that night included the impact which caused the fatal injury, in contrast, for example, to her receiving the fatal injury in the innocent context of a drunken fall. Further, even if you conclude the accused did cause the fatal injury, the remaining big issue – and frankly, the main issue in the trial – is whether, in his drunken state, he held the intention to kill or do grievous bodily harm. Now, those two critical issues turn solely upon events that night and not upon past events. That underscores my warning against your misuse of the evidence.
>
> To reiterate, then, I warn you you must not use the historical evidence of the domestic relationship by applying propensity or tendency reasoning and I direct you may only use the evidence for the sole purpose of providing some context about this couple's domestic relationship."[14]

Appellant's submissions

[96] The appellant submits the verdict of the jury was unreasonable because it was not open, on the whole of the evidence, for the jury to be satisfied beyond reasonable doubt that the appellant had the requisite intention. The appellant was heavily intoxicated at the time he assaulted the deceased. There was no basis for the jury to be satisfied in those circumstances that he was capable of forming the requisite intent.

[97] Further, the appellant consistently gave an account that the deceased was alive after he assaulted her and her death was a total surprise to him. Such a belief is inconsistent with any realisation of the seriousness of any injuries inflicted by him and inconsistent with an intent to kill or do grievous bodily harm at the time of inflicting those injuries.

[98] The appellant submits the deceased sustained injuries consistent with at least five contacts, any one of which could have been the fatal blow. The Crown could not prove whether the fatal blow was caused by a punch rather than a hit to the head from a piece

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14 AB 416-418.

of timber. The Crown therefore could not prove the fatal blow was inflicted with the requisite intent. The fatal injury may have been caused by an insignificant level of force, inconsistent with the requisite intent. The evidence of motive was also weak.

[99] The appellant submits that in those circumstances, it was not reasonably open to the jury to reject a hypothesis consistent with the appellant's innocence, namely, that whilst he intended to assault the deceased he did not intend to cause her grievous bodily harm or kill her or that he was so intoxicated that he could not form the necessary intent. Those hypotheses could not be excluded as death could have been due to an indirect cause, the timing and circumstances of which were unclear.

[100] The appellant further submits that the directions to the jury in relation to the use of evidence of prior domestic violence were inadequate. The evidence of prior domestic violence was not relevant to any issue in the appellant's trial. It was not sufficient for the trial judge to tell the jury how they could not use that evidence. The evidence having been placed before the jury it was incumbent upon the trial judge to remove that evidence from the jury's consideration. It would have been difficult for the jury to disregard the prejudicial effect of that evidence even if they had been properly directed by the trial judge.

[101] Finally, the appellant submits there was no forensic, explicable reason why defence counsel did not object to the admission of the evidence of prior domestic violence. It was highly prejudicial and irrelevant in circumstances where issues as to proof of intention were finely balanced on the admissible evidence. Its admission has led to a miscarriage of justice.

Respondent's submissions

[102] The respondent submits the verdict was not unreasonable. The evidence did not permit any reliable conclusion about the appellant's blood alcohol content at the time he assaulted the deceased. There was evidence the appellant at the relevant time was coherent in speech and co-ordinated in movement. The appellant was sufficiently aware of his actions to report to others that he had "beat up his woman" and that she was "on the bed cold".

[103] The appellant was also aware of the seriousness of his conduct when he discovered the deceased. At interview, he gave an account of events of the preceding day in a coherent way without apparent memory loss. He acknowledged relevant emotions. In the circumstances, it was open to the jury, upon a consideration of the evidence as a whole, to conclude the appellant assaulted the deceased with the intention to at least cause her grievous bodily harm.

[104] The respondent further submits the evidence of prior domestic violence between the appellant and the deceased was relevant and properly admitted at trial. The evidence rationally affected the probability of the existence of a fact or facts in issue. That evidence assisted the jury in assessing the probability of events occurring in the way urged upon them by the appellant, in the context of a circumstantial case. If accepted, the evidence made it more probable the assault on the deceased did not occur in the manner described by the appellant to the police.

[105] The respondent submits the directions given by the trial judge ensured there was no risk the jury would use the evidence to reason impermissibly. The trial judge correctly directed the jury as to the use to be made of such evidence, namely, to provide context

or background to the relationship. The jury was expressly directed they were not to use the evidence to infer an intention to kill or do grievous bodily harm and that they could not apply propensity type reasoning in using the evidence. It was not incumbent upon the trial judge to specifically identify every potential use of the evidence.

[106] Finally, the respondent submits that as the evidence was relevant and admissible there was no proper basis upon which defence counsel at trial could object to the evidence. Accordingly, there has been no miscarriage of justice.

Discussion

Unreasonable verdict

[107] In determining whether the jury's verdict of guilty of murder was unreasonable, the Court must undertake an independent review of the evidence. The question for determination is whether it was open, upon the whole of the evidence, for the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of murder. The relevant principles were summarised in *R v SCH*:[15]

> "In such a case, the question which an appellate court must ask itself is whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the defendant was guilty. In most cases, a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. In such a case of doubt, it is only where a jury's advantage in seeing and hearing the evidence can explain the difference in conclusion as to guilt that the appellate court may conclude that no miscarriage of justice occurred. However, if the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence." (Citations omitted)

[108] Here, the issue for determination is whether, having regard to the evidence of the appellant's intoxication and the medical evidence as to cause of death it was open for the jury to be satisfied, on the whole of the evidence, that the appellant caused the deceased's death intending to kill the deceased or at least do her grievous bodily harm.

[109] A consideration of the evidence as a whole, amply supports such a conclusion. The medical evidence as to the injuries sustained by the deceased and the scientific evidence as to the likely cause of those injuries was inconsistent with the deceased's account to police as to the nature of the force inflicted by him upon the deceased and the circumstances in which that occurred at the residence. The fact that the medical evidence could not identify precisely which wound caused the fatal bleed did not prevent the jury from accepting the medical opinion that the most likely injury to have caused the fatal bleed was the blow to the temple, which was inflicted by the piece of timber. Such a conclusion was supported by the nature of the wound to the temple and the presence of the deceased's blood and hairs imbedded in the piece of timber.

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15 [2015] QCA 38 at [7].

[110] Further, whilst the appellant had been drinking since early on the morning of 20 December 2013 and had within his body a high concentration of alcohol at or around the time he assaulted the deceased, that fact did not prevent the jury from being satisfied beyond reasonable doubt that notwithstanding that level of intoxication the appellant was able to form and have, at the time of the assault, the requisite intention. In coming to that conclusion the jury was entitled to have regard to the eye witness accounts of the appellant's conduct before he asked everyone to leave the residence and after he attended Malachi's residence.

[111] That evidence supported a conclusion that the appellant was not so affected by alcohol as to affect his speech, co-ordination or mental acuity. His conduct in dancing and in giving an account to Malachi as to the deceased's whereabouts were entirely consistent with an ability to form the requisite intention. The evidence of continuing consumption of alcohol by the appellant thereafter explained the increased effects of intoxication observed by Sands and Sergeant Thomas later on the morning of 21 December 2013.

[112] The jury was entitled to conclude, on the whole of the evidence, that the only reasonable, rational inference was that the deceased was killed by the appellant deliberately striking her on the head with the piece of timber, intending to at least cause her grievous bodily harm. That conclusion excluded, as a reasonable hypothesis, that the appellant intended to assault the deceased but not to cause her at least grievous bodily harm. It also excluded, as a reasonable hypothesis, that the appellant was so intoxicated he could not form the necessary intent.

[113] This conclusion gives proper regard to the advantage enjoyed by the jury in having seen and heard the witnesses. The primacy of a verdict was reiterated in *R v Baden-Clay*[16]:

> "[65] It is fundamental to our system of criminal justice in relation to allegations of serious crime tried by jury that the jury is 'the constitutional tribunal for deciding issues of fact'. Given the central place of the jury in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.
>
> [66] With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court 'must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[114] The verdict of the jury was not unreasonable.

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16 (2016) 90 ALJR 1013 at 1023 [65]-[66].

Evidence of domestic violence

[115] Relevant evidence of a history of domestic violence in a relationship between a defendant and the victim is admissible in a proceeding.[17] However, that evidence is only admissible if it is relevant to the probability of the existence of a fact in issue in that proceeding. As was observed in *Roach v The Queen*[18]:

> "The first requirement which must be fulfilled, for evidence to be admissible, is that it be relevant. The question as to relevance is whether the evidence, if accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue. It may also do so indirectly. As Gleeson CJ observed in *HML v The Queen*, evidence may be relevant if it assists in the evaluation of other evidence."

[116] Here, the evidence was relevant and therefore admissible. It did more than provide propensity type evidence. It rationally affected the assessment by the jury of the circumstances in which the deceased suffered the fatal injury and the probability that the fatal injury was caused by the appellant rather than when the deceased fell in a drunken state.

[117] Where evidence of a prior domestic relationship is relevant to a fact in issue, the purpose for which the evidence is led is properly to be the subject of identification at trial. Otherwise, there is a risk that evidence may merely show a particular propensity. In *Roach*, the High Court said:

> "The importance of directions in cases where evidence may show propensity should not be underestimated. It is necessary in such a case that a trial judge give a clear and comprehensible warning about the misuse of the evidence for that purpose and explain the purpose for which it is tendered. A trial judge should identify the inferences which may be open from it or the questions which may have occurred to the jury without the evidence. Those inferences and those questions should be identified by the prosecution at an early point in the trial. And it should be explained to the jury that the evidence is to allow the complainant to tell her, or his, story but that they will need to consider whether it is true."

[118] Contrary to the appellant's submissions, the jury was not merely directed as to how not to use that evidence. The directions directed the jury as to the only use they may make of the evidence of prior domestic violence. That use was to provide informed context in which to consider the evidence as to the events of the night of the deceased's death. Those events were a fact in issue; had the appellant caused the fatal injury or was the deceased's death caused by a fall. The trial judge expressly directed the jury that violence could not be used as evidence of a pattern of violence or of a propensity. There is no reason to doubt the jury failed to follow those specific directions.

[119] The trial judge did not err in admitting the evidence of the prior domestic violence. There was also no error in the directions given to the jury as to the permissible use of that evidence in their deliberations.

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17 Section 132B, *Evidence Act* (Qld).
18 (2011) 242 CLR 610 at 616 [12].

[120] That conclusion also disposes of the third ground of appeal. As the evidence was admissible, defence counsel's failure to object to that evidence did not result in a miscarriage of justice. There is no reasonable prospect the appellant, by reason of the failure to object to the admission of that evidence, was deprived of a fair chance of an acquittal on the charge of murder.

Orders

[121] I would order the appeal be dismissed.