Court of Criminal Appeal
Supreme Court

New South Wales

Case Name:	Evans v R
Medium Neutral Citation:	[2023] NSWCCA 11
Hearing Date(s):	19 September 2022
Date of Orders:	10 February 2023
Decision Date:	10 February 2023
Before:	Bell CJ at [1] Price J at [9] Lonergan J at [161]
Decision:	(1) Extend the time for leave to appeal (2) Grant leave to appeal (3) Dismiss the appeal.
Catchwords:	CRIMINAL LAW - murder – issue at trial was presence of the accused – no directions sought for alternative verdict of manslaughter – tactical decision of trial counsel – two home invasions – coincidence evidence – consumption of ice – intoxication – whether evidence available to support verdict of manslaughter by unlawful and dangerous act – impermissible speculation or conjecture
Legislation Cited:	Crimes Act 1900 (NSW) ss 18, 27, 86, 112, 421, 428A, 428B, 428C Drug Misuse and Trafficking Act 1985 (NSW) Sch 1 Supreme Court (Criminal Appeal) Rules 2021 (NSW) r 4.15
Cases Cited:	Burns v The Queen (2012) 246 CLR 334; 86 ALJR 1097; 2017 A Crim R 501; [2012] HCA 35 Carbone v R [2020] NSWCCA 318 Douglass v R [2020] NSWCCA 284 James v The Queen (2014) 253 CLR 475; 88 ALJR

427; 306 ALR 1; 236 A Crim R 402; [2014] HCA 6
Jones v Great Western Railway Co (1930) 144 LT 194
Lane v R (2013) 241 A Crim R 321; [2013] NSWCCA 317
Luxton v Vines (1952) 85 CLR 352; [1952] ALR 308; [1952] HCA 19
Pemble v The Queen (1971) 124 CLR 107; 45 ALJR 333; [1971] ALR 762; [1971] HCA 20
R v Basanovic (2018) 100 NSWLR 840; [2018] NSWCCA 246
R v Holzer [1968] VR 481
R v Johnson (No 4) [2017] NSWSC 609
R v Kanaan (2005) 157 A Crim R 238; 64 NSWLR 527; [2005] NSWCCA 385
Seltsam Pty Ltd v McGuiness (2002) 49 NSWLR 262; [2000] NSWCA 29
The Queen v Baden-Clay (2016) 258 CLR 308; 90 ALJR 1013; 334 ALR 234; 256 A Crim R 132; [2016] HCA 35
The Queen v Lavender (2005) 222 CLR 67; 218 ALR 521; 155 A Crim R 458; [2005] HCA 37
Wilson v The Queen (1992) 174 CLR 313; 66 ALJR 517; [1992] HCA 31
Xie v R [2022] NSWCCA 185

Category:	Principal judgment
Parties:	Ryan Evans (Applicant) Rex (Respondent)
Representation:	Counsel: T Woods (Applicant) E Balodis (Respondent) Solicitors: Just Defence Lawyers (Applicant) Office of the Director of Public Prosecutions (NSW) (Respondent)
File Number(s):	2014/309094
Publication Restriction:	Non-publication order in relation to the witnesses “Kurt Sinclair” and “Sam Franklin"
Decision under appeal:	

Court or Tribunal:	Supreme Court of NSW
Jurisdiction:	Criminal
Citation:	[2017] NSWSC 1523
Date of Decision:	10 November 2017
Before:	R A Hulme J
File Number(s):	2014/309094

HEADNOTE

[This headnote is not to be read as part of the judgment]

Ryan Evans (the applicant) was found guilty by a jury of the murder of Keith Cini. Mr Cini had suffered blunt head injuries from which he had died when his home at Badgerys Creek was invaded by the applicant and Kurt Sinclair on 30 May 2014 ('the Badgerys Creek home invasion').

The applicant was also found guilty of four offences which were committed during an invasion of a home at Medway on 28 April 2014 ('the Medway home invasion') by the applicant, Kurt Sinclair and Sam Franklin. One of the occupants of the home, Mr Brett Delamont, suffered serious head injuries, including a moderate to severe traumatic brain injury with long-term cognitive impairment.

Both home invasions were accompanied by a high level of violence. The Crown relied on coincidence evidence during the trial as there were strong similarities between the two home invasions and the circumstances in which they occurred.

The trial judge raised the question of intent in relation to the murder charge with the applicant's trial counsel who informed the judge there was no issue that the person who inflicted the blunt head injuries upon Mr Cini did so with an intention to either kill or do grievous bodily harm.

The applicant's trial counsel did not ask the judge to leave an alternative verdict of manslaughter to the jury. The possibility of the applicant being

intoxicated by the consumption of the prohibited drug methylamphetamine ('ice') at the time of the murder was not raised. The applicant's case at trial was that he was not present at either home invasion.

The Crown case at trial was:

(1) The applicant deliberately caused the blunt head injury to Mr Cini, intending to kill him or cause him really serious bodily harm; or

(2) The applicant was a party to an agreement with Sinclair to break into the Cini home in order to steal property and it was part of that agreement that at least really serious bodily harm would be caused to an occupant; or

(3) The applicant was party to an agreement to break into the Cini home in order to steal property and he foresaw the possibility that (at least) really serious bodily harm would be caused to an occupant in the course of carrying out that plan.

The applicant's appeal was confined to his conviction of murder. He sought leave to appeal out of time on the ground that the trial judge erred by failing to leave manslaughter to the jury.

The main issues on appeal

(a) The applicant accepted that his trial counsel had made a forensic decision not to raise manslaughter with the trial judge but contended this did not relieve the trial judge of the duty of determining whether it was necessary to leave manslaughter as an alternative verdict.

(b) The applicant contended that there was evidence from which a jury could conclude that he was intoxicated as a result of smoking ice immediately prior to the Badgerys Creek home invasion, which could be taken into account in determining whether he had the specific intent to commit the crime of murder. Murder was an offence of specific intent for the purpose of Part 11A of the *Crimes Act* relating to intoxication: s 428B of the *Crimes Act*.

In these circumstances, the applicant contended that the trial judge was duty-bound to direct as to manslaughter.

The Court of Criminal Appeal unanimously found that the trial judge was not obliged to direct the jury on the alternative verdict of manslaughter and dismissed the appeal.

1. Whatever may have been the tactical decisions of counsel, the trial judge was obliged to direct the jury on the alternative verdict if there was evidence on which the jury, acting reasonably, could find manslaughter by unlawful and dangerous act and not murder: [6] (Bell CJ); [112] (Price J).

Pemble v The Queen (1971) 124 CLR 107; 45 ALJR 333; [1971] ALR 762; [1971] HCA 20; *R v Kanaan* (2005) 157 A Crim R 238; 64 NSWLR 527; [2005] NSWCCA 385; *Lane v R* (2013) 241 A Crim R 321; [2013] NSWCCA 317, referred to.

James v The Queen (2014) 253 CLR 475; 88 ALJR 427; 306 ALR 1; 236 A Crim R 402; [2014] HCA 6, considered.

2. Contrary to the applicant's contention, a jury, acting reasonably, could not have found that the applicant was intoxicated by ice, nor the extent of intoxication at the time of the murder. The jury would have been constrained to speculate on these matters had manslaughter been left to the jury: [6] (Bell CJ); [155-156] (Price J); [161] (Lonergan J).

Xie v R [2022] NSWCCA 185, referred to.

3. Even if there was evidence of intoxication, s 428C(2) of the *Crimes Act* would have precluded reliance on that evidence because the applicant "had resolved before becoming intoxicated to do the relevant conduct" with which he was charged: [7] (Bell CJ); [158] (Price J); [161] (Lonergan J).

4. Putting aside the issue of intoxication, there was no merit in the applicant's complaint that manslaughter should have been left to the jury: [113]-[120] (Price J).

Douglass v R [2020] NSWCCA 284; *Carbone v R* [2020] NSWCCA 318, referred to and distinguished.

JUDGMENT

1 **BELL CJ:** This appeal was ultimately confined to a challenge to the applicant's conviction on Count 1 for the murder of Keith Cini contrary to s 18(1)(a) of the *Crimes Act 1900* (NSW).

2 I have had the advantage of reading the reasons of Price J who has set out in considerable detail the facts relating to both of the home invasions at Medway and Badgerys Creek which formed the basis of the various counts upon which the applicant was found guilty. These short reasons assume familiarity with his Honour's account of the background facts and summary of the evidence.

3 The two home invasions occurred within approximately a month of the other. The evidence summarised by Price J at [39]–[43] below shows that the planning for the Badgerys Creek invasion commenced shortly after the events at Medway. Those events included the offence comprised by Count 4 upon which the applicant was convicted, namely breaking and entering a dwelling-house and committing larceny in circumstances of special aggravation (namely, being in company and intentionally inflicting grievous bodily harm) contrary to s 112(3) of the *Crimes Act*.

4 The applicant's argument, ably advanced by Mr Woods, depended upon establishing that there was a basis for the jury to conclude that the applicant was intoxicated as a result of smoking ice immediately prior to the Badgerys Creek home invasion, and that this could be taken into account in determining whether the applicant had the requisite intent to cause the specific result necessary for an offence of specific intent, murder being such an offence for the purposes of Part 11 of the *Crimes Act*. As such, it was submitted that manslaughter should have been left to the jury.

5 Even assuming that the applicant was intoxicated at the time of Mr Cini's death, as Mr Woods submitted the court should infer notwithstanding the lack of evidence as to the amount of ice actually smoked by the applicant immediately prior to the Badgerys Creek home invasion, there was no evidence as to the extent of any intoxication or the effect of that uncertain degree of intoxication upon the applicant in terms of the applicant's intention to cause harm to Mr Cini.

6 The jury would have been constrained to speculate on these matters, had manslaughter been left to them by the trial judge, as Mr Woods submitted it should have been. This would, however, have been an impermissible mode of reasoning for the jury to adopt. In other words, there was no evidence upon

which the jury, acting reasonably, could have found manslaughter. For these reasons, I agree with the reasons of Price J.

7 I am also inclined to agree with his Honour's conclusion at [158] that, even if there were evidence of intoxication which bore upon the question of the presence or absence of the applicant's intent for the purposes of the charge of murder, s 428C(2) of the *Crimes Act* would have precluded reliance on that evidence because the applicant "had resolved before becoming intoxicated to do the relevant conduct" with which he was charged. This conclusion is based upon the combination of the applicant's knowledge of what had occurred at Medway, planning over a number of weeks of the Badgerys Creek home invasion almost immediately thereafter and the modus operandi of that invasion which anticipated an encounter with occupants of the house, with the applicant and his associates bringing with them duct tape for restraining, balaclavas for concealment, gloves and a pick handle with which grievous bodily harm could be inflicted (as it had been at Medway) in the event that the applicant and his associates were disturbed in the course of the planned robbery.

8 For all of these reasons, I agree with the orders proposed by Price J.

9 **PRICE J:** The applicant was convicted of six counts following a trial before a jury in the Supreme Court of NSW. There were seven counts on the indictment, to which the applicant pleaded not guilty. The jury found him guilty of six of those counts and not guilty of one count on 30 May 2017.

10 The counts on the indictment concerned two home invasions. The first was committed at Medway on 28 April 2014 ('the Medway home invasion') and the second at Badgerys Creek on 30 May 2014 ('the Badgerys Creek home invasion').

11 The jury found the applicant guilty of the following counts, which arose from the Medway home invasion:

(1) Count 4: Break and enter dwelling-house and commit larceny, in circumstances of special aggravation, namely in company with [Franklin] and [Sinclair] and intentionally inflict grievous bodily harm to Brett Delamont contrary to s 112(3) of the *Crimes Act*.

(2) Count 5: Detain, without consent, Alana Bush with the intention of obtaining a financial advantage, while in the company of [Franklin] and [Sinclair] contrary to s 86(2)(a) of the *Crimes Act.*

(3) Count 6: Detain, without consent, Kirby Delamont with the intention of obtaining a financial advantage, while in the company of [Franklin] and [Sinclair] contrary to s 86(2)(a) of the *Crimes Act.*

(4) Count 7: Detain, without consent, Jack Lisle with the intention of obtaining a financial advantage, while in the company of [Franklin] and [Sinclair] and at the time of detaining actual bodily harm was occasioned to Mr Lisle contrary to s 86(3) of the *Crimes Act*.

12 The applicant does not appeal any of these convictions.

13 The jury found the applicant guilty of the following counts which arose from the Badgerys Creek home invasion:

(1) Count 1: The murder of Keith Cini contrary to s 18(1)(a) of the *Crimes Act.*

(2) Count 3: Break and enter dwelling-house and commit larceny, in circumstances of special aggravation, namely in the company of [Kurt Sinclair] and intentionally wound Luciana Boldi contrary to s 112(3) of the *Crimes Act.*

14 The jury found the applicant not guilty of Count 2, being wounding with intent to murder Luciana Boldi contrary to s 27 of the *Crimes Act*.

The ground of appeal

15 The applicant seeks leave to appeal his conviction of murder on the ground that the trial judge erred by failing to leave manslaughter to the jury. The applicant, at the commencement of the hearing of the appeal, abandoned the argument that, if error was established, this Court would set aside not only the verdict on Count 1, but also the verdicts on Counts 3 and 4. Hence, the applicant's complaint is confined to his conviction of murder.

The application for an extension of time

16 The applicant requires an extension of time. The last notice of intention to appeal expired on 15 November 2019. In an affidavit of Eloise Howard, solicitor, affirmed on 1 September 2022, Ms Howard explains that the applicant had been previously advised there was no merit in the appeal but subsequently obtained further advice that there were reasonable prospects of success in pursuing an appeal on the ground relating to manslaughter.

17 The Crown submitted that the sole ground of appeal should not be upheld and leave to appeal should not be extended.

18 The issue on this appeal is whether the trial judge, in failing to direct the jury of the availability of a verdict of manslaughter by unlawful and dangerous act, occasioned a miscarriage of justice.

19 The applicant was sentenced to an aggregate term of imprisonment of 48 years with a non-parole period of 36 years. There is no application for leave to appeal against sentence.

Discussions during the trial

20 During discussions concerning directions that might be given to the jury, the trial judge raised the question of intent in the murder charge with the applicant's trial counsel.

> "His Honour: [Applicant's counsel], can you tell me, just in relation to the mental elements of the various charges as to, for example, will there be any issue that the person who inflicted the blunt head injury upon Mr Cini did so with an intention to either kill or do grievous bodily harm?
>
> [Applicant's counsel]: No."[1]

21 In discussions that followed, the applicant's trial counsel did not ask the trial judge to leave an alternative verdict of manslaughter to the jury. The possibility of the applicant being intoxicated by the consumption of the prohibited drug methylamphetamine ('ice') at the time of the murder was not raised and no reference was made to an alternative verdict of manslaughter by unlawful and dangerous act. The applicant's case at trial was that he was not present at either home invasion.

22 Consistent with the issues in the trial and discussions with counsel, the trial judge directed the jury in relation to the count of murder on the essential matters that the Crown was required to prove beyond reasonable doubt (other than Mr Cini died as a result of a 'blunt head injury' that was deliberately caused by an intruder in his home) as follows:

> "The second essential matter is that the intruder who caused such injury intended to kill Mr Cini or to cause him grievous, that is really serious, bodily harm.

[1] Tcpt, 19 May 2017, p 663(37).

The third matter is one of these three possibilities that are listed:

> 'Ryan Evans deliberately caused the blunt head injury to Mr Cini, intending to kill him or cause him really serious bodily harm; or
>
> Ryan Evans was a party to an agreement with [Kurt Sinclair] to break into the Cini home in order to steal property and it was part of that agreement that at least really serious bodily harm would be caused to an occupant.'

It does not necessarily have to be Mr Cini, but part of the agreement was that at least really serious bodily harm would be caused to an occupant.

> 'Or Ryan Evans was a party to an agreement with [Kurt Sinclair] to break into the Cini home in order to steal property and he foresaw the possibility that (at least) really serious bodily harm would be intentionally caused to an occupant in the course of carrying out that plan.'

Now it seems to me that there is no real dispute that Mr Cini was murdered and that is that all of the elements are made out, with the important exception, that the accused was present. So, if you are satisfied beyond reasonable doubt that he was present, you may have little difficulty with the other essential matters in relation to this count.

The critical thing, of course, is that the Crown proves beyond reasonable doubt that he was present and involved in what occurred at Badgerys Creek in one of the three ways that is mentioned in relation to the third essential matter." [2] (Emphasis added.)

The Crown Case

23 The following brief summaries of the Crown cases for the Medway home invasion and the Badgerys Creek home invasion do not include the evidence in the trial concerning the consumption of ice. A summary of the evidence in the trial concerning the use of ice is set out at [122]-[148] below.

24 There was a significant amount of evidence in the Crown case which was relevant to establishing the applicant's presence at both home invasions. As the applicant now does not dispute his presence and involvement in the offending, it is unnecessary to summarise much of that evidence.

The Medway home invasion

25 At about 1:00am on Monday 28 April 2014, the applicant, Kurt Sinclair (a pseudonym), and Sam Franklin (a pseudonym) entered a rural property at Medway (near Berrima). They were equipped with torches, duct tape and rope. They had gloves, sunglasses, hooded jumpers and material to cover their faces.

[2] Tcpt, 25 May 2017, p 22(4).

26 The men entered via an unlocked laundry door. Both Sinclair and Franklin, who admitted their involvement in the Medway offences and had been sentenced, gave evidence at the trial inculpating the applicant.

27 Franklin gave evidence that he was in custody serving a sentence reflecting the role he played for the offences committed at Medway. He said he committed those offences with the applicant and Sinclair. He agreed that he had been convicted of the offence of specially aggravated break, enter and commit serious indictable offence and another count of aggravated detaining a person in company with the intent to obtain a financial advantage. In addition, taken into account on that sentence were two further offences of detaining Ms Kirby Delamont and Mr Jack Lisle.

28 Franklin was sentenced to an aggregate term of 14 years of imprisonment with a non-parole period of 8 years and 5 months commencing on 2 March 2017 and expiring on 1 August 2025. For past and future assistance by way of giving evidence, he received a 20% discount on the sentence that would otherwise have been imposed.

29 Sinclair also admitted his involvement in the Badgerys Creek home invasion. He told the jury that he was in custody for two offences at Badgerys Creek, being his involvement in the murder of Keith Cini, and in the specially aggravated break and enter in company and wounding of Ms Boldi. He was also in custody for four offences at Medway; specially aggravated break and enter in company and inflicting grievous bodily harm on Mr Brett Delamont, and his involvement in the three offences of aggravated detention of Ms Alana Bush, Ms Delamont and Mr Lisle.

30 For his preparedness to give evidence in relation to the Medway offences, Sinclair received a discount on the sentences that would otherwise have been imposed of 10% and for the Badgerys Creek offences, he received the same discount. The aggregate sentence imposed was 38 years' imprisonment with a non-parole period of 28 years and 6 months, to date from his arrest on 21 October 2014.

31 It was the Crown case that the applicant and Franklin went to the bedroom of Mr Delamont and Ms Bush. The applicant was armed with what Franklin

described as a wooden pick handle, with which he struck Mr Delamont to the head, wounding him and rendering him unconscious. Both the applicant and Franklin bound the hands of Mr Delamont and Ms Bush.

32 When Ms Bush screamed, the applicant told her to be quiet or he would strike Mr Delamont again. As he said this, he struck Mr Delamont to the upper torso with the pick handle. He then demanded cash and asked, "Where is your gun?" Cash, a .22 magnum rifle and other items were stolen from the premises.

33 Mr Lisle, who had been asleep in another bedroom, was woken by Ms Bush's screams. He woke Ms Delamont. Two men entered the bedroom, who on the Crown case were the applicant and Sinclair. One of the men was armed with a "pole". Mr Lisle laid over Ms Delamont, under the bed clothes but the armed male struck the bed a number of times with the weapon and hit Mr Lisle to the upper torso. Demands were made for phones, which were taken.

34 Mr Lisle and Ms Delamont's feet were bound with duct tape and pillow cases were placed over their heads.

35 Franklin bound Ms Bush's ankles with duct tape and Sinclair taped Mr Delamont's ankles, also tying his hands with rope. Pillow cases were placed over the heads of both victims.

36 The three men then left.

37 Mr Delamont sustained a wound to the back of the head that required suturing, bruising to the left temporal region, a fractured skull, and bruising to the brain. He sustained a moderate to severe traumatic brain injury with long-term, if not permanent, psychological and cognitive impairment. Mr Lisle sustained a red welt mark on his torso.

The Badgerys Creek home invasion

38 Mr Keith Cini lived with his partner Ms Luciana Boldi on a farm in Badgerys Creek. Mr Cini operated a business from this farm of purchasing and selling pigs. Mr Cini kept significant amounts of cash on the property in a safe.

39 Sinclair gave evidence of discussing with the applicant the plan to rob Mr Cini's house. Sinclair said that the day before the Badgerys Creek offences, he was at a friend Jason's house at Camden. Later that afternoon, he was dropped off

at the applicant's house at Elderslie, where they discussed the plan to rob Mr Cini's house. It had first been discussed approximately three weeks earlier at Shaun and Patrick Kenney's house, which was where the idea was formed. They were friends of the applicant. Sinclair and the applicant had been discussing their financial problems which were caused by using more drugs than they were selling.

40 Sinclair said that Shaun and Patrick mentioned that large sums of money were often kept at Mr Cini's house. They mentioned that if the place was to be robbed either on Thursday night or the early hours of Friday morning, there was a possibility of collecting in excess of $10,000. Mr Cini was said to keep the money in a bookcase in his office.

41 Sinclair said that it was originally discussed as a home invasion between the applicant and himself. The applicant mentioned that he had been in the house before as he had previously worked for Mr Cini. The applicant discussed where the rooms were, where the money was kept, how they could access the house, and things of that nature. Initially, the applicant said they could go through "the front door as the back door was usually jammed with a chair or something". It was later discussed that Mr Cini went to work very early. It was thought that the easier and less risky option would be to wait until Mr Cini went to work. These conversations took place three weeks before the Badgerys Creek offences.

42 Sinclair said that about a week before 29 May 2014, the robbery was brought up again while he and the applicant drove past Mr Cini's house at 1:30-2:00am with the intention to rob the house. Sinclair said that the robbery did not happen as they were too early and there was a television on.

43 After discussions between the applicant and Sinclair (see [133]-[136] below) on 29 May 2014, they decided to rob Mr Cini's house that night.

44 Mr Cini and Ms Boldi slept in separate bedrooms. Before they retired on the evening of 29 May 2014, all the external doors to the house were securely locked. Sometime after 3:00am on Friday 30 May 2014, the applicant and Sinclair entered the house by smashing a front window. Sinclair cut his finger, causing it to bleed. Before they entered the property, they had pulled the balaclavas they were wearing down to cover their faces. They had with them a

pick handle, duct tape and gloves. It was Sinclair's evidence that the applicant had the pick handle which he used to smash the window.

45 Once inside the property, the intruders came into contact with Mr Cini in his bedroom. Mr Cini's blood was later found in the bedroom, the kitchen and the hallway. It was the Crown case that Mr Cini was required to move around the house by the intruders to assist them to find the money.

46 At some point, Mr Cini was outside Ms Boldi's bedroom door. Ms Boldi was woken by Mr Cini calling out "Luce". After getting out of bed, turning on the light and opening the bedroom door, she saw Mr Cini in the hallway near one or two figures dressed in dark clothing. It was the Crown case that the applicant approached Ms Boldi, who unsuccessfully tried to close the bedroom door.

47 The applicant struck Ms Boldi to the head with the pick handle. He continued hitting her and she put her arms up to protect her face. She fell to the floor after two or three blows. She was hit further on her arms and hands. She asked the applicant to stop but he kept hitting her. Ms Boldi stopped moving, pretending to be dead, and the applicant then stopped. At that time, she heard the other intruder say "*that's enough Brian*". It was the Crown case that Sinclair was saying "*that's enough Ryan*".

48 Sinclair gave evidence that he had lost vision of the applicant as the applicant climbed through the window, dragging the pick handle across the bottom of the frame. He gave evidence that he approached Mr Cini's bedroom and saw Mr Cini laying unconscious, bleeding from the head.

49 He described partially seeing the applicant in Ms Boldi's room swinging the pick handle. He described hearing Ms Boldi screaming. When the applicant finished hitting her, Sinclair said that he did not see Ms Boldi move when he opened the bedroom door.

50 Sinclair said that he went to Mr Cini's room, where the applicant was. Sinclair said Mr Cini started to move, stretching his arms forward but was not able to sit up. He described taping Mr Cini's feet with duct tape. After following the applicant to the study door and into the kitchen, they returned to the hallway where he saw Mr Cini sitting up, attempting to get the duct tape off his feet.

Sinclair said that it was at this point that the applicant struck Mr Cini five or six times towards the head with "extreme force".

51 Sinclair said that after probably the first four times the applicant hit Mr Cini, he grabbed the applicant under the right arm and said "*That's enough Ryan… this is fucked mate. I'm going. Come with me."* The applicant said "*Fine, fuck off. I'll meet you in the car. I'll be a couple of seconds behind you*."

52 Sinclair said that he left the house through the window and got in the car.

53 The Crown case was that Mr Cini was violently assaulted by the applicant in the hallway where his body was found with no signs of life.

54 Ms Boldi gave evidence of the house going quiet for a while and then she heard some smashing on the walls. She then heard someone say, "*Here it is*." At that point, someone came back into her room and kicked her leg. She could hear that man tipping her bed upside down, going through her drawers and then she heard a window smash. She kept still for five or ten minutes after that, and when she got up she saw Mr Cini on the floor in the hallway. She rang triple-0.

55 When police arrived about ten minutes later, they found Mr Cini lying on his side in the hallway. His ankles were taped and duct tape was on his wrists. Paramedics who arrived observed that Mr Cini had sustained significant head injuries.

56 Mr Cini died as a result of a "blunt head injury". He suffered numerous injuries involving the head, the torso, and the extremities. The severe blunt head injuries included a full thickness tear of the left parietal skull, with an underlying severe depressed skull fracture. Dr Istvan Szentmariay, a forensic pathologist, opined that these blunt head injuries could be consistent with a blow or blows from, for instance, a pick handle.

57 Ms Boldi was taken to Liverpool hospital. She had suffered multiple scalp lacerations, multiple head and finger lacerations and fractures, a swollen and bruised right cheek, multiple bruises to her shoulders and forearms, bruising and multiple lacerations to her right shin, and a right distal ulnar shaft fracture.

58 Her injuries were consistent with multiple episodes of blunt trauma to the face, head, neck, shoulders, trunk, and to her upper and lower limbs.

59 In his evidence, Sinclair recounted a conversation he had with the applicant in the car after they left the house. Sinclair had removed his balaclava and driven around until he saw the applicant standing on the opposite side of the road to the house. Sinclair saw the pick handle leaning against a tree. He reminded the applicant to grab it because the applicant had forgotten it was there. After the applicant got in the car and Sinclair had made a U-turn, Sinclair recalled the applicant saying "*Pretty sure he's fucking dead anyway*." Sinclair said, "*Don't say that… you don't know that,*" to which the applicant replied "*Pretty sure I do. Pretty sure he died when I caved his fucking skull in*."

60 Jacinta Delander gave evidence of having a conversation with the applicant at about 2am one morning around June 2014. When she asked the applicant "What's wrong? What's going on?" He told her:

> "'I have done something really bad, I've f'd up, I'm a murderer. I'm a father, what's wrong with me?' and I said, 'What do you mean?' He then said he was talking to his friend Shaun about needing money to get on. Shaun then told him about somebody that he used to work for that owns a trucking company and has lots of money on his property and safes and drugs."

He then said they had deposited $10,000 into a bank account on Friday. The money was from selling pigs. The applicant told her he had spoken to Mr Sinclair about it:

> "and they had decided it would be a good idea. The three of them went to the property. They said they walked up the back past sheds. [Sinclair] went into the house first, then they – Ryan went in after. [Sinclair] went through the house and was looking for the drugs and the money. Ryan said he tied up two people, the woman and the man."

He then said that they were carrying on. He hit the woman and pushed her down into the ground. He said the man was carrying on and he hit him with the pick handle in the head:

"The woman was still carrying on and he said he had to shut her up. He towelled her up and hit her again and then he went back and then continued to hit the man over and over again. He said it was like he couldn't control himself and… he just kept going until he didn't look like a person anymore and he was covered in blood."[3]

[3] Tcpt, 18 May 2017, p 554(30).

The applicant's case

61 The applicant did not give evidence, but some exhibits were tendered and Helen Roebuck, a forensic scientist, gave evidence concerning DNA material on the knot of a rope and the handle of a dark-coloured shopping bag.

62 The applicant's case at trial was that he was not involved in the home invasions; that Franklin and Sinclair had lied by falsely claiming that he was involved in each of the home invasions in order to gain a benefit for themselves. They had falsely nominated him as the other offender instead of correctly incriminating the true offender.

How the Crown case on murder was left to the jury

63 As will be seen from the trial judge's summing up quoted at [22] above, the Crown case was;

(1) The applicant deliberately caused the blunt head injury to Mr Cini, intending to kill him or cause him really serious bodily harm; or

(2) The applicant was a party to an agreement with Sinclair to break into the Cini home in order to steal property and it was part of that agreement that at least really serious bodily harm would be caused to an occupant; or

(3) The applicant was a party to an agreement with Sinclair to break into the Cini home in order to steal property and he foresaw the possibility that (at least) really serious bodily harm would be caused to an occupant in the course of carrying out that plan.

64 The applicant makes no complaint about the trial judge's directions on murder. The sole issue is whether the alternative verdict of manslaughter should have been left to the jury.

The relevance of the Medway home invasion

65 Although the applicant's appeal is confined to his conviction of murder, evidence of some of the events at Medway and at Badgerys Creek were admitted as tendency and coincidence evidence.

66 In the trial judge's summing up, his Honour's directions concerning coincidence included the following:

> "The Crown says that there is such a strong similarity between the two home invasions and the circumstances in which they occurred that you would be satisfied that the persons who did one must have done the other. This is putting aside [Sam Franklin] who, on the Crown case, was only involved at

> Medway, not at Badgerys Creek. The Crown says that it is highly improbable that the two home invasions were committed by different people and that it is just coincidence that they just happen to be so similar; in other words, the similarity of the two home invasions cannot be regarded as mere chance or coincidence. The Crown says that the improbability of the two events occurring by chance or coincidentally would lead you to a conclusion that the same persons committed both home invasions and that, at least insofar as the accused is concerned, *he had the same state of mind*.
>
> In this way, the Crown says, that if you are satisfied the accused committed the offences alleged at one location, you would be assisted by that conclusion in assessing whether he committed the offences at the other location with the same state of mind. The Crown points at the same similarities between the two home invasions that I referred to when dealing with the tendency issue. I have gone through them twice already; I won't go through them again, the six points that I raised with you.
>
> In deciding just how similar you consider the two home invasions are, you should look at the cumulative effect of the similarities, rather than looking at them individually. The Crown says it is the combination of these features that would lead you to the conclusion that the two events were so distinctive they must have been committed by the same people: [Kurt Sinclair] and, particularly, Ryan Evans. Further, the Crown says that it would lead you to the same conclusion that, at least insofar as the accused is concerned, *he had the same state of mind*."[4] (Emphasis added.)

The applicant's submissions

67 The applicant accepted that his trial counsel had made a forensic decision not to raise manslaughter with the trial judge who had specifically asked him what his position would be. However, the applicant contended this did not relieve the trial judge of the duty of determining whether it was necessary to leave manslaughter as an alternative verdict, citing *Pemble v The Queen* (1971) 124 CLR 107; [1971] HCA 20 (*'Pemble'*).

68 Manslaughter was open to the jury in the present case, the applicant submitted, because the jury might have considered the elements of murder established save for intent. That is, the intent to kill or inflict grievous bodily harm. The argument was that on the evidence it was open for the jury to have entertained a reasonable doubt in relation to the alleged intent to inflict grievous bodily harm.

69 The applicant addressed the alternative bases put to the jury by the Crown on the charge of murder:

[4] Tcpt, 25 May 2017, p 34.

1) If the applicant was the person who deliberately caused the blunt head injury to Mr Cini

70 The motive for the Badgerys Creek home invasion was financial, in that the offenders' objective was to steal cash so that they could buy drugs. The applicant submitted that although the offenders may have envisaged that violence of some kind might be used, it could hardly be said that the intentional infliction of really serious bodily harm was essential to achieving this objective.

71 Further, the evidence was that Sinclair and the applicant were almost always using (and therefore affected by) ice. They both had "raging addictions", which drove them to commit the home invasions. The applicant referred to the Crown's closing address that "[t]he reason that these somewhat…, desperate and brutal crimes were committed was to get money to buy ice."[5]

72 The Court was referred to evidence from Franklin and Sinclair as to the applicant's use of ice and to Sinclair's evidence of the effect of ice on himself.

73 The applicant argued there was no reason not to accept the jury might reasonably have doubted that when the applicant hit Mr Cini, he subjectively intended to inflict "really serious bodily injury". It would have been open to the jury in the circumstances to entertain that he might not have turned his mind or given any thought to the result of his actions.

2) If the applicant was not the person inflicting the violence

74 The applicant pointed out that if he was not the person directly inflicting the violence on Mr Cini, then his liability for Mr Cini's death was based on complicity, i.e., basic or extended joint criminal enterprise. If he did not harm Mr Cini, it was Sinclair who did.

75 The applicant submitted that it was well open to the jury to doubt that there was an agreement between the intruders that grievous bodily harm would be caused to an occupant of the house. A further argument was that it was well open to the jury to consider that the agreement between Sinclair and the applicant in relation to the events at Badgerys Creek fell short of such an agreement. This was said to be contemplated by the Crown's reliance upon

[5] Tcpt, 22 May 2017, p 713(8).

extended joint criminal enterprise which was the third suggested basis of liability for murder.

76 The applicant pointed out that if he was a party to an agreement with Sinclair to break into Mr Cini's home to steal property, then he could only be guilty of murder if he foresaw the possibility that (at least) grievous bodily harm would be intentionally inflicted upon an occupant in the carrying out of that plan. The applicant submitted that it was open to the jury not to be satisfied beyond reasonable doubt in relation to the issue of subjective foresight. The applicant may well have foreseen that violence might be used, but it was well open to the jury to entertain that his foresight fell short of the intentional infliction of grievous bodily harm.

77 The jury might have entertained that the only possibility subjectively foreseen by the applicant was that of battery (or the infliction of "serious injury" as distinct from "really serious injury") or some other unlawful and dangerous act, hence a verdict of manslaughter.

78 The applicant relied on *Douglass v R* [2020] NSWCCA 284 ('*Douglass*') and *Carbone v R* [2020] NSWCCA 318 ('*Carbone*'), in which new trials were ordered because the trial judge directed the jury on extended joint criminal enterprise but failed to give directions on manslaughter. This Court's attention was particularly directed to the remarks of Rothman J in *Douglass* at [178]-[179]:

> "Where there is an allegation that an accused has participated in an extended joint criminal enterprise, the contemplation of the accused, as to what may have occurred, is crucial. If the agreement of the applicant, in these proceedings, were that there would be a criminal enterprise, namely to rob or to break, enter and steal from the deceased, as part of which the applicant contemplated the possibility of the infliction of injury, the question arises as to whether, on the evidence before the jury in these proceedings, the possibility that that contemplation involved the infliction of an appreciable risk of serious injury, but not an appreciable risk of really serious injury, means that the issue of manslaughter was one that should have been left to the jury.
>
> Regardless of the manner in which the applicant ran its case in answer to the charges below, unless the evidence amounts to one of the exceptional situations to which the High Court referred in *Baden-Clay*, the availability of a manslaughter verdict should be left to the jury and should have been left to the jury in these proceedings. In so doing, the Court would be determining that it was open for the jury to find the applicant guilty of manslaughter, through having engaged in a criminal enterprise whilst contemplating that there would,

> as a result of that criminal enterprise, be a possibility that an unlawful and dangerous act would occur which would carry with it an appreciable risk of serious injury." (Footnotes omitted.)

79 This Court was also referred to the analysis and conclusion of Button J in *Carbone* at [94]-[119].

80 In oral submissions, Mr Woods, counsel for the applicant, made it clear that intoxication by drugs was relied upon by the applicant as possibly raising a doubt about his intent to either kill or to inflict grievous bodily harm.

81 As to the Crown's reliance on tendency and coincidence evidence, Mr Woods submitted that what occurred at Medway could not be determinative of the issue of foresight in regard to the Badgerys Creek charges. Mr Woods contended that whether it was the applicant or Sinclair who struck Mr Cini, a reasonable jury might have taken the view that he had been struck by someone heavily intoxicated by ice, not appreciating the full consequences of his actions and hence, a verdict of manslaughter was reasonably open on the evidence.

82 In discussing the alternative verdict of manslaughter, Mr Woods submitted that the approach taken by Gageler J in *James v R* (2014) 253 CLR 475 ('*James*') at [68] should be adopted.

The Crown's submissions

1) The applicant was the actual perpetrator of Mr Cini's murder

83 The Crown pointed out that the applicant's trial counsel did not dispute that the evidence allowed a conclusion that whoever struck Mr Cini did so with an intention to kill or do grievous bodily harm. The Crown referred to the exchange between the trial judge and the applicant's counsel quoted at [20] above. The Crown submitted that the concession was correctly made.

84 The Crown argued that the applicant's reliance upon intoxication was misplaced as there was no evidence of the applicant's intoxication and no suggestion that intoxication should be taken into account by the jury when considering intent.

2) Sinclair as to the assailant of Mr Cini

85 The Crown contended that on the premise that Sinclair assaulted Mr Cini, the applicant, having agreed to breaking and entering the premises, which were occupied, in order to steal money, in circumstances where a weapon was brought, must have at least foreseen the possibility that Sinclair would strike an occupant with intent to cause grievous bodily harm. That was particularly so, the Crown argued, where tape was brought in order to subdue an occupant as this revealed that confrontation with an occupant was expected.

86 As the Badgerys Creek home invasion followed the Medway home invasion, the Crown submitted that the applicant's foresight must be judged by what occurred at Medway, as the coincidence notice invited. An important factor, the Crown said, is that the coincidence argument allowed for a conclusion to be reached on the applicant's state of mind at Badgerys Creek. The home invasion at Medway was planned, and with respect to Mr Brett Delamont, brutal and almost immediately violent.

87 Mr E Balodis, who appeared for the Crown, pointed out that the applicant accepted there was very strong evidence to link the applicant with both home invasions. Mr Balodis submitted that even putting aside the evidence of Sinclair and Franklin, it would come as no surprise to the intruders in the Badgerys Creek home invasion that intentional violence was inflicted. The Crown further referred to the manner of entry to the house, the wearing of masks, the tape, and the weapon which, in totality, excluded the viability of an alternative verdict.

88 On the applicant's intoxication argument, Mr Balodis submitted, the high point of the applicant's case was evidence of drug usage but not intoxication. He submitted the extent of the drug taken, the quality of the drug, and the effect of the drug was unknown. The applicant's argument was purely speculation.

89 Mr Balodis submitted that this Court should not follow Gageler J's formulation as to when manslaughter should be left to the jury. He submitted that this Court should err on the side of caution and follow *Pemble* and *Lane v R* (2013) 241 A Crim R 321; [2013] NSWCCA 317 ('*Lane*') at [40].

90 Further submissions were made by the parties concerning the application of rule 4.15 of the *Supreme Court (Criminal Appeal) Rules 2021* (NSW). In view of the conclusions that I have reached in dealing with the applicant's submission that the alternative verdict of manslaughter should have been left to the jury, it is unnecessary to deal with the arguments concerning rule 4.15.

91 Before venturing further, it is convenient to deal with matters of legal principle.

Murder and Manslaughter

92 Section 18 of the *Crimes Act 1900* (NSW) is as follows:

> **18 Murder and manslaughter defined**
>
> (1)
>
> (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
>
> (b) Every other punishable homicide shall be taken to be manslaughter.
>
> (2)
>
> (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
>
> (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

93 Murder, aside from other circumstances that render a killing murder (the other circumstances are the commission of a crime punishable by imprisonment for life or for 25 years, known as "constructive murder" or "felony murder") is a crime of specific intent. Constructive murder or felony murder have no application to the present case.

94 In the present case, the relevant intent was to kill or to inflict grievous bodily harm (really serious bodily harm). Where the requisite state of mind is not proved, the evidence may establish the lesser offence of manslaughter, for which there is no statutory definition.

95 There are two categories of manslaughter – voluntary manslaughter and involuntary manslaughter. Manslaughter by unlawful and dangerous act is a

category of involuntary manslaughter. It is the applicant's contention that manslaughter by unlawful and dangerous act ought to have been left to the jury.

96 In *Lane*, the Court (Bathurst CJ, Simpson and Adamson JJ) referred to the essential elements of this category of manslaughter:

> "*Manslaughter by unlawful and dangerous act*
>
> [54] In *Wilson*, Mason CJ, Toohey, Guadron and McHugh JJ described this category of manslaughter as "an uncertain area of the law, reflecting a divergence between Australian and English authorities as to the degree of danger which must exist". *Wilson* settled the law of manslaughter by unlawful and dangerous act for Australia.
>
> [55] An unlawful act is one which is contrary to the criminal law: *Wilson*, per Brennan, Deane and Dawson JJ (at p 335). A dangerous act is one carrying with it an appreciable risk of serious injury: *Wilson*, per Mason CJ, Toohey, Gaudron and McHugh JJ (at p 333), adopting (with one qualification - the deletion of the description "really" before "serious injury") the test specified in *R v Holzer* [1968] VR 481. It is no part of this offence that the accused intended to cause death or grievous bodily harm; if that were the case, the offence would be murder. It is necessary, however, that the Crown prove that the accused intended to commit the act that caused death. It is also necessary that the Crown prove that a reasonable person in the position of the accused, performing the act which the accused performed, would have realised that he or she was exposing another or others to that appreciable risk. In that respect, the test of dangerousness is objective.
>
> [56] In *Lavender* at [40], Gleeson CJ, McHugh, Gummow and Hayne JJ said, in a joint judgment:
>
> > "40 ... The decision in *Wilson v The Queen* establishes that this is a form of manslaughter [that is, manslaughter by unlawful and dangerous act] which exists because of the importance which the law attaches to human life. It turns upon an objective test. The only relevant intent of the accused is an intent to do the act that was unlawful and dangerous and that inadvertently caused death. A description of an act as dangerous requires consideration of whether a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury ..."
>
> See also *Burns* at [75].
>
> [57] In order to sustain a conviction of this category of manslaughter, it is necessary that the Crown prove:
>
> (i) that the act causing death was a breach of the criminal law;
>
> (ii) that the act causing death was one that carried with it an appreciable risk of serious injury to another or others;
>
> (iii) that the act causing death was one that a reasonable person in the position of the accused would have realized carried such a risk; and
>
> (iv) that the accused person intended to commit the act that caused death."

Intoxication

97 Murder is an offence of specific intent for the purpose of Part 11A of the *Crimes Act* relating to intoxication: s 428B of the *Crimes Act*.

98 Section 428C of the *Crimes Act* is as follows:

> **Intoxication in relation to offences of specific intent**
>
> (1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.
>
> (2) However, such evidence cannot be taken into account if the person—
>
> (a) had resolved before becoming intoxicated to do the relevant conduct, or
>
> (b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

99 "Intoxication" is defined in s 428A of the *Crimes Act* to mean:

> "Intoxication because of the influence of alcohol, a drug or other substance."

100 The definition of drug relevantly includes "a drug within the meaning of the *Drug Misuse and Trafficking Act 1985*". Methylamphetamine (ice) is a drug within this meaning.

101 The word "intoxication" is not otherwise defined in the *Crimes Act*. In *R v Johnson (No 4)* [2017] NSWSC 609, Button J was of the opinion at [8] that "intoxicated" is "an ordinary English word, in common parlance, with its ordinary English meaning in court".

The alternative verdict of manslaughter

102 Barwick CJ said in the oft-quoted passage in *Pemble* at [117]-[118]:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part."

103 In *R v Kanaan* [2005] NSWCCA 385; 64 NSWLR 527 (*'Kanaan'*), the Court (Hunt AJA, Buddin and Hoeben JJ), after extensively reviewing the decisions of the High Court on the consequences of the failure of a trial judge to direct a

jury in relation to the alternative verdict of manslaughter in a murder trial, concluded at [75] that the High Court's position was:

> "…(1) Manslaughter cannot be left for the determination of the jury as an alternative verdict in a murder trial unless there is evidence to support such a verdict (or unless the case on manslaughter is "viable").
>
> (2) However, if in a murder trial the jury nevertheless returns a verdict of manslaughter where there is no evidence to support it, the judge may request them to reconsider the matter but, if they persist in that verdict, the judge must accept it.
>
> (3) If there is evidence to support an alternative verdict of manslaughter, the judge must leave that issue to the jury — notwithstanding that it has not been raised by any party, and even if a party objects (or all parties object) to the issue being left to the jury.
>
> (4) (a) If there is evidence to support an alternative verdict of manslaughter, and if the judge has not left that issue (for whatever reason), there has been an error of law.
>
> (b) Subject to the provisions of the *Criminal Appeal Rules*, r 4 (see pars [99]–[100] *infra*), the appellant is entitled to a new trial unless the Crown establishes that no substantial miscarriage of justice has actually occurred.
>
> (c) In determining whether there has been such a substantial miscarriage, it is not permissible to reason that the jury's verdict of guilty of murder at the first trial excludes any consideration of the alternative verdict of manslaughter at the new trial."

104 In *Lane*, the Court confirmed at [42] the four propositions in *Kanaan*.

105 The test to determine whether there is evidence to support the alternative verdict of manslaughter has been expressed in terms of capability and viability.

106 In *Lane*, the Court said at [39]:

> "…it is now well established that, where a person is on trial for murder, *and where the evidence in the trial is capable of supporting a verdict of guilty of the lesser offence of manslaughter*, it is the duty of the trial judge to direct the jury of its entitlement to acquit the accused of murder and return a verdict of guilty of manslaughter. That is so even if the accused person does not seek such a direction, and even where the accused person actively opposes the direction."

107 In *R v Basanovic* [2018] NSWCCA 246; 100 NSWLR 840, Simpson AJA (Bellew and Wilson JJ agreeing) said at [80]-[82]:

> "The question has most frequently arisen in relation to charges of murder, where an alternative verdict of manslaughter might be available whether by reason of a defence such as self-defence or provocation, or because the evidence is susceptible of a verdict of manslaughter by criminal negligence or unlawful and dangerous act.

As stated in various of the decisions, the test is whether there is evidence that could support the defence or alternative verdict; that is, whether a case for an alternative verdict based on the evidence is viable.

Most recently, in *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6 the High Court has re-affirmed the principle, although in circumstances that did not involve a charge of murder, but alternative charges (under Victorian law) of intentionally or recklessly causing serious injury. After being convicted of the more serious count, James complained that further alternatives, of intentionally or recklessly causing injury (as distinct from serious injury) ought to have been left to the jury. The High Court rejected that proposition, in conclusions that have no bearing on the present case. But French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ commented on matters that are presently relevant. Their Honours said:

> '[31] Discharge of the trial judge's role in ensuring fairness to the accused requires that the jury receives instruction on any defence or partial defence, provided there is material raising it, regardless of the tactical decisions of counsel. Among other things, this recognises the forensic difficulty of relying on inconsistent defences. The tactical decision not to rely on a defence or partial defence, whether objectively sound or otherwise, does not relieve the trial judge of the obligation to instruct the jury on a view of the facts a defence or partial defence arises.
>
> [32] Of course, forensic considerations may equally be against defence counsel inviting the jury to consider the accused's guilt of a lesser offence. The submission may be inconsistent with the tenor of the defence case. Nonetheless fairness to the accused may require that the jury be directed of the availability of the alternative verdict. In such a case the failure to do so would be a miscarriage of justice.'" (Emphasis added.)

108 As Simpson AJA observed, *James* was not a murder trial but was concerned with a trial judge's duty to leave to the jury an alternative verdict of a lesser charge. The passages quoted above include what was said by the majority in *James* at [31]-[32].

109 In the present appeal, Mr Woods submitted that the correct approach to the question of whether manslaughter should be left is to be found in what was said in *James* by Gageler J at [68]:

> "Where the offence charged is murder – the circumstance covered by 421(1) of the *Crimes Act* – it has long been settled that the trial judge is duty-bound to direct as to manslaughter "if there [is] a basis in the evidence on which the jury, not being satisfied of all the elements of murder, could find manslaughter" and to do so irrespective of "the tactics or manoeuvring of the accused or of those representing [the accused]". *The question is always whether there is evidence on which the jury, acting reasonably, could find manslaughter and not murder*, the trial judge not being duty-bound to direct as to manslaughter if "on no view of the evidence which might reasonably be adopted, would the crime amount to manslaughter and not murder". If the evidence is sufficient to

> enliven the duty, failure to perform the duty is an error of law." (Footnotes omitted, emphasis added.)

110 Gageler J's formulation of the question as being "whether there is evidence on which the jury, acting reasonably, could find manslaughter" is no different in my opinion to the test of capability or viability of the evidence to support an alternative verdict.

111 In the present trial, the trial judge raised with the applicant's counsel the question of intention to kill or inflict grievous bodily harm. The applicant's case was that he was not present at either home invasion. Neither the Crown nor the applicant's counsel asked the trial judge to leave the alternative verdict of manslaughter to the jury.

112 Whatever may have been the tactical decisions of counsel, the trial judge was obliged to direct the jury on the alternative verdict if there was evidence on which the jury, acting reasonably, could find manslaughter by unlawful and dangerous act and not murder.

Consideration

113 Putting aside for one moment the issue of intoxication, there is no merit in the applicant's complaint that manslaughter should have been left to the jury. The factual circumstances of the offences in *Douglass* and *Carbone* did not involve the probative force of the coincidence evidence in the present case, and the analysis in those decisions provides little assistance.

114 In accordance with the trial judge's coincidence direction at [66] above, the jury was entitled to take into account the strong similarities between the two home invasions in concluding that the applicant had committed both offences and had the same state of mind.

115 The Medway home invasion was accompanied by a high level of violence. The applicant, Sinclair and Franklin had entered the rural property equipped with torches, duct tape, rope, sunglasses, hooded jumpers and material to cover their faces. A wooden pick handle was used to strike Mr Delamont to the head, wounding him and rendering him unconscious. Mr Delamont sustained a moderate to severe brain injury. It was Franklin's evidence that it was the applicant who struck Mr Delamont.

116 Mr Delamont and Ms Bush's hands and ankles were bound with duct tape, as were Mr Lisle and Ms Delamont's feet.

117 The Badgerys Creek home invasion was also accompanied by a high level of violence. The applicant and Sinclair entered the property wearing balaclavas to cover their faces and had with them a pick handle, duct tape and gloves. Mr Cini and Ms Boldi were violently assaulted. It was Sinclair's evidence that it was the applicant who struck Mr Cini and Ms Boldi many times with the pick handle.

118 Mr Cini died as a result of a "blunt head injury". He suffered numerous injuries involving the head, the torso and the extremities. Ms Boldi's severe injuries were consistent with multiple episodes of blunt trauma to the face, head, neck, shoulders, trunk, and to her upper and lower limbs. The assault on Mr Delamont in the Medway home invasion was merciless, as were the assaults on Mr Cini and Ms Boldi.

119 Addressing the alternative bases of murder put to the jury, in my opinion;

(1) If the applicant was the person who deliberately caused the blunt head injury to Mr Cini, there could be no other conclusion than he did so with an intention to kill or to cause him really serious bodily harm; or

(2) If the violence was not inflicted by the applicant, there was no reasonable possibility that the applicant did not foresee that at least really serious bodily harm would be caused to an occupant in the course of the home invasion, which he and Sinclair had agreed to commit in order to steal Mr Cini's money.

120 There was no evidence on which the jury, acting reasonably, could find manslaughter by unlawful and dangerous act and not murder.

121 However, central to the applicant's submissions is that there was evidence in the trial from which the jury could reasonably conclude that at the time of the Badgerys Creek home invasion the applicant was intoxicated by the consumption of ice. The applicant submitted that if the applicant was the person who deliberately caused the blunt head injury to Mr Cini, it was a matter for the jury to decide whether the applicant had formed the intent to kill or to inflict really serious bodily harm. It was submitted that if the applicant was not the person inflicting the violence, it was a reasonable possibility that it was not part of the agreement with Sinclair that at least really serious bodily harm

would be caused to an occupant, or it was a reasonable possibility that the applicant did not foresee the possibility that (at least) really serious bodily harm would be caused to an occupant.

Evidence concerning ice

122 The applicant did not give evidence in the trial. The following summary is taken from the evidence of various witnesses:

Sam Franklin

123 Franklin said that for participating in the Medway home invasion, he received payment of about $300 worth of ice. Franklin noted that he, the applicant, and Sinclair went together to Smithfield where they met a man on the side of the road. He thought that Sinclair paid for the ice.[6]

124 Franklin noted that all three of them needed money and that they were also ice addicts. He had used ice and had seen the applicant using ice in the in the months leading up to the Medway offences. He said, "*that was about the only thing we had in common*".[7] Franklin estimated he was using about $200 worth of ice per day, and that the applicant and Sinclair were probably using about the same. He saw the applicant spend money on ice at various locations.[8]

125 Franklin said he was addicted to ice. He could not recall if there was any discussion about the need for money prior to the Medway in order to buy more ice.[9]

126 Franklin also recalled giving police an interview on 20 October 2014 about conversations he had with the applicant after the murder of Mr Cini. Franklin said:

> *"Details are pretty hazy because, like I said to you before, I was high on ice at the time so certain things stand out, some things don't."*[10]

Kurt Sinclair

127 Sinclair knew the applicant and Franklin and described them as friends. Sinclair had not known Franklin for very long, maybe four to five months at

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[6] Tcpt, 12 May 2017, p 279(19).
[7] Tcpt, 12 May 2017, p 280(23).
[8] Tcpt, 12 May 2017, p 281(3).
[9] Tcpt, 12 May 2017, p 281(13).
[10] Tcpt, 12 May 2017, p 285(37).

most. Sinclair had first met the applicant when he (Sinclair) was 20 years old but did not have much to do with him until four or five months before that incident at Medway. He met up with the applicant again through mutual friends. At that time Sinclair had a drug problem, predominantly ice. Sinclair was using ice every day. He used it in the applicant's presence and had seen the applicant use it.[11]

128 Sinclair started seeing the applicant once a week and then daily, when he ended up living with him at the applicant's father's house at Elderslie. In the two months leading up to the Medway offences on 28 April 2014, Sinclair was using ice every day and every time that the applicant was in his presence, they were using ice together. Towards the last month before the offence, the applicant was with him every day. Sinclair said he was probably using about $500 (approximately 2 grams) worth of ice per day. To support that, Sinclair supplied and sold ice himself. Sinclair thought that when the applicant was with him, that the applicant was using *"a similar sort of amount. Maybe not quite as much, but – say slightly less, probably*".[12] The applicant was not working at that time. Sinclair did not see how the applicant supported his habit.[13]

129 Sinclair stayed in a bedroom in the applicant's house. They would smoke ice at a friend's place down the road, who had a shed out the back. Sometimes Franklin would join them, but not as regularly as he and the applicant because he was working doing deliveries around the State in his semi-trailer.[14]

130 A few days before the Medway offences, Sinclair and the applicant were with Franklin in his truck at Taree. They had gone with Franklin in his truck and were staying with him at Taree in a garage he had converted into a room. Sinclair said that the three of them used ice that he (Sinclair) had brought with him from Sydney. Sinclair thought that they were there for a couple of days before they left to return to Sydney. Sinclair said that during that time he planned a home invasion of the home of Mr Delamont and Ms Bush at

[11] Tcpt, 16 May 2017, p 355(5).
[12] Tcpt, 16 May 2017, p 355(43).
[13] Tcpt, 16 May 2017, p 356(8).
[14] Tcpt, 16 May 2017, p 356(32).

Medway. Franklin was short of money, as were the applicant and himself because they were using more drugs than they were selling.[15]

131 Sinclair said that they had travelled from Franklin's place at Taree on 27 April 2014 to the applicant's home at Elderslie. They arrived at Elderslie at night-time. Sinclair said that he and the applicant used ice after they got to Elderslie.[16]

132 Sinclair said that after the Medway home invasion, they went three ways on half an ounce of ice for $3200, which was purchased from one of Franklin's associates and lasted maybe three or four days.[17]

133 In relation to the plan to rob Mr Cini's house, Sinclair said that they had been discussing their financial problems. On 29 May 2014, Sinclair discussed with the applicant the plan to rob Mr Cini's house that night. They were both smoking ice. Sinclair said he would have started smoking straightaway. Their discussions included the car that would be used. Sinclair then discussed trying to get to Kim Booker's house at Rossmore to get access to a car to use to rob Mr Cini's house.[18]

134 They took a cab from the applicant's house to Ms Booker's house. Sinclair said that when he got into the cab, he had a bag containing balaclavas and tight-fitting rubber gloves for himself and the applicant. The trip from Elderslie to Ms Booker's house took about 15 minutes.

135 After they paid for the cab, Sinclair went into Ms Booker's house where they had a chat and were smoking ice. Over this time, the applicant left him perhaps twice to go to the service station and sell some of Sinclair's ice.

136 Sometime after the applicant returned from the service station, a decision was made to go to Mr Cini's house on Elizabeth Drive at Badgerys Creek. They used a bone-coloured Mazda that was at Ms Booker's house. The applicant drove. Sinclair and the applicant had the balaclavas and gloves. It took

[15] Tcpt, 16 May 2017, p 357(4).
[16] Tcpt, 16 May 2017, p 362(4).
[17] Tcpt, 16 May 2017, p 377(13).
[18] Tcpt, 16 May 2017, p 379(7).

approximately 10 minutes to get to Mr Cini's house. Sinclair's further evidence included the following:

> "We drove past on Elizabeth Drive, noticed there was a light on in the house. We then drove down I think it is Lawson Road, maybe, and we pulled over facing away from Elizabeth Drive.
>
> …
>
> Q: And what did you do there when you pulled over on Lawson Drive?
>
> A: We sat there watching the house for about approximately 15 minutes. At that time we were smoking ice.
>
> Q: So how long did you sit there for in Lawson Drive?
>
> A: Approximately 15 minutes.
>
> Q:Did you discuss anything, what you were going to do or what?
>
> A: About - at that time we were smoking ice, we'd already discussed sort of what the plan was.
>
> Q: What was the plan going to be though?
>
> A:The plan was to wait there and to see whether anybody was home and, if nobody was, to rob the house. That was the original plan."
>
> …
>
> Q: So you smoked for 15 minutes, then what?
>
> A: Then we thought we'd get out of the car and go get a closer look.
>
> Q: So you had a closer look and then what did you-
>
> A: Pulled the balaclava down, put our phones into the door of the car. I had got out first, jumped over the fence and sort of squatted down in the paddock as the drive was pretty busy. Didn't want to be noticed.
>
> Q: So was this the front of the house you have jumped over?
>
> A: No, this was in the paddock at the side of the house. Ryan then followed. He then jumped out of the- got out of the car. When he got out of the car he had the – a pick handle.
>
> Q: Could you describe that?
>
> A: It was light in colour, timber, approximately a metre long." [19]

137 In relation to the Badgerys Creek home invasion, Sinclair said that he was "*incredibly affected*" by ice, and "*at that point in my life I was always under the influence of ice. When I was awake, I was under the influence of ice*."[20] Sinclair

[19] Tcpt, 16 May 2017, p 389(11).
[20] Tcpt, 16 May 2017, p 404(43).

said that his use of ice "*most definitely*" affected his own memory of smaller details at that time.[21]

138 Sinclair agreed that he was in the drug sales business and that the applicant would sell drugs belonging to Sinclair.[22]

139 In cross-examination, Sinclair's evidence included the following:

> "Q: And was it the case that sometimes before, shortly before going to Medway, you might smoke ice, you say, with [Franklin] and [the applicant] in [Franklin's] truck?
>
> A: Yes.
>
> Q: And when I mention "[Franklin's] truck", it is in fact a prime move with something like a small cabin in the back of it?
>
> A: Yes.
>
> Q: Now you may be able to assist me here. In terms of the mechanics or practicality of smoking of this drug, what is it smoked from?
>
> A: A glass pipe.
>
> Q: And is it the case that some crystals are put into the glass bowl?
>
> A: Yes.
>
> Q: And are they put in from the top or--
>
> A: From the top.
>
> Q: From the top?
>
> A: (No verbal reply.)
>
> Q: And what happens after that to get it going?
>
> A: You then get a lighter or some sort of flame and apply it to the glass bowl and it begins to smoke and you can smoke it.
>
> Q: And when you say "it begins to smoke", is it the case that the bowl becomes smoky, the glass bowl?
>
> A: It becomes hot and the ice inside it produces smoke.
>
> Q: And then is it that smoke which is inhaled after some hear of - whether from a lighter or whatever other instrument is applied to the glass bowl?
>
> A: Yes.
>
> Q: And when you were, as you say, smoking ice with [Franklin] and [the applicant] before the Medway offences, were you sharing a pipe?
>
> A: Yes.
>
> Q: And can I understand from that that you might have a puff and then you'd pass it on to [the applicant] and so forth?

[21] Tcpt, 16 May 2017, p 405(19).
[22] Tcpt, 17 May 2017, p 447(33).

A: Yes, correct.

Q: Now in so doing, is it the case that - perhaps it is plain enough, but the person using the pipe would hang onto it in some way so as to ingest the smoke?

A: Hang on to the pipe, sorry?

Q: Hang on to the pipe so as to smoke the drug?

A: Yeah.

Q: Now the smoke which you've talked about as gathering or forming in the bowl, that would then be inhaled?

A: Yes.

Q: And I suppose you'd try and inhale it as fully as possible to achieve the effect?

A: Yes, correct.

Q: And would smoke then be blown out or exhaled from the mouth like a cigarette?

A: Yes, something like that.

Q: And would the exhaling of the smoke perhaps be even more dense, that is to say the smoke which is exhaled, would it be more dense by comparison than the person exhaling cigarette smoke?

A: No, I would say cigarette smoke would be more dense.

Q: Sorry?

A: I would say cigarette smoke would be more dense.

Q: So it would be exhaled?

A: Yes.

Q: And the pipe would be, you say, passed around from one to the other whilst smoking the drug?

A: Yes.

Q: And before you say you went to Medway, were you sitting in [Franklin's] truck when this was happening and having a chat or what was the situation?

A: Yes, we were smoking, yes.

Q: Sorry, sir?

A: Yes, we had been smoking the ice mixture up.

Q: And passing the glass pipe around?

A: Yes.

Q: And it must have got pretty smoky, did it, in the little cabin?

A: Not particularly, no. Like I said, it's not the densest of smoke. It is not like if you were smoking cigarettes, it would become more dense.

Q: But you could see the smoke?

A: Yes, of course, yeah."[23]

140 Sinclair denied he had made up that the applicant was present at Medway and Badgerys Creek. [24] It had been put to him that the applicant was the obvious person because he was working for Sinclair. In re-examination Sinclair said that the applicant was not working for him. They both had connections with people that would often purchase drugs. It was a joint venture, but they each had their own phone, and once all the drugs were paid for, whatever profit was left over would go between them and then they would buy what they needed.[25]

Brittany Bradshaw

141 On 29 May 2014 at 11:24am the applicant sent Ms Bradshaw a text, "*Oi, what doin, you still want a car?*" which she said was a reference to the applicant helping her. At 11:58pm there was a text from the applicant to her, "*It's not my car but yeah its $300*" and the following messages were about meeting up after that. She initially said that she was not sure what the meeting was in relation to, but then said she thought the purpose of the meeting was to sell the applicant ice.[26]

142 In terms of her meeting up with the applicant, she agreed that it was possible that she was not selling drugs to the applicant, but rather that the applicant was selling drugs to her.[27]

Jacinta Delander

143 Ms Delander agreed that in 2014 she was using ice. She agreed she was addicted at that time, but had recovered from that addiction. In 2014 she was smoking ice every day. She said,

> "*[It] would vary a lot. It would have been probably around half a gram, buy it every couple of days and that sort of thing.*" [28]

144 She agreed that in some circumstances the drug had significant effects on memory and the understanding of things happening in the sequence of time and place. She also agreed that if one was using the drug daily, it would have a

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[23] Tcpt, 16 May 2017, p 415(47)
[24] Tcpt, 17 May 2017, p 468(17).
[25] Tcpt, 17 May 2017, p 468(28).
[26] Tcpt, 17 May 2017, p 480(10).
[27] Tcpt, 17 May 2017, p 481(41).
[28] Tcpt, 18 May 2017, p 577(28).

more pronounced effect on one's mental state and things of that nature.[29] When she was using the drug in 2014, she was spending time with other people who were also using ice. It was almost a way of life to get together and smoke with other people. Those people smoked quite a lot and sometimes they would be talking "*gibberish*", ramble and talk a lot but "*it's not utter gibberish*". She accepted that in that context people can misunderstand things, overemphasise some things and completely ignore other things in the ordinary flow of communication.[30]

145 Ms Delander said that the applicant, Sinclair, and Franklin were often heavily affected by ice, which affected the way in which they spoke and talked about things.[31] Ms Delander denied sometimes hearing things that were not said or hearing voices or seeing things that she now knew were not there. She accepted that one of the features of ice was that it keeps one awake "for ages".[32]

146 On the night that she had the discussion with the applicant quoted at [60] above, she had not been awake for a very long time. She could stay awake for 20 hours, get tired and go to sleep. At times she found that she could stay awake for three or four days.[33]

147 As to the suggestion that she was mistaken about what the applicant had told her because the drug had a powerful effect on her, Ms Delander replied, "*No, I'm not mistaken*".[34]

148 In re-examination she said that her drug use did not affect her memory in any way in relation to her evidence about what the applicant had told her.[35]

Further consideration

149 There was evidence before the jury that the applicant used and sold ice. Franklin told the jury that the applicant was an ice addict. Franklin estimated

[29] Tcpt, 18 May 2017, p 577(35).
[30] Tcpt, 18 May 2017, p 578(13).
[31] Tcpt, 18 May 2017, p 579(21).
[32] Tcpt, 18 May 2017, p 579(35).
[33] Tcpt, 18 May 2017, p 580(3).
[34] Tcpt, 18 May 2017, p 583(15).
[35] Tcpt, 18 May 2017, p 583(38).

that he was using about $200 worth of ice per day, and the applicant's use was probably about the same.

150 Sinclair's evidence included his daily use of ice and when the applicant was present with him, their use of the drug together. Sinclair estimated that he was using about $500 (approximately two grams) worth of ice per day. He thought that when the applicant was with him, the applicant was probably using slightly less.

151 Sinclair referred to the use of ice affecting his memory, as did Franklin. Ms Delander said that in some circumstances the drug had significant effects on her memory and the understanding of things happening in sequence of time and place. She said that the applicant, Sinclair, and Franklin were often heavily affected by ice, which affected the way in which they spoke and talked about things.

152 Of particular relevance is Sinclair's evidence at [136] above, that he and the applicant had been watching Mr Cini's house for approximately 15 minutes during which time they were smoking ice. Earlier that day, they had both smoked ice at the applicant's house and ice was smoked when they were at Ms Booker's house.

153 However, Sinclair did not give evidence of the quantity of ice he saw the applicant smoke whilst they were in the car or earlier that day, nor did he give evidence of observing any impact that the ice had on his co-offender. Sinclair's testimony of what happened after they got out of the car strongly supported the Crown case that the planned invasion of Mr Cini's home was carried out with deliberation and intention.

154 Ms Boldi's account of the actions of the co-offenders in the home does not support the contention that the applicant was intoxicated. Rather, her evidence makes plain that the co-offenders acted deliberately and with the intention to kill or to cause really serious bodily harm when Mr Cini was violently assaulted.

155 No expert evidence was adduced by the defence. Where intoxication by consumption of a prohibited drug is an issue in a trial, it is generally the case

that a forensic toxicologist is called to give evidence of the effect upon the accused person of the prohibited drug that has been consumed.

156 In the present case, whether the applicant was affected by ice at the time of the murder and the degree to which he was affected is a matter of speculation or conjecture. It would not be open to the jury to assume that the applicant used about $200 worth of ice or slightly less than $500 worth of ice on the day prior to the murder. Furthermore, it would not be open to the jury to assume that the use of ice affected the applicant's memory or understanding. There is simply no evidence of the amount of the drug the applicant consumed or how the applicant may have been affected at the time of the murder. A jury, acting reasonably, could not find that the applicant was intoxicated by ice, nor the extent of intoxication. There are no primary facts from which it is reasonable to draw the inference that the applicant was intoxicated.[36] As Bell CJ recently observed in *Xie v R* [2022] NSWCCA 185 at [54]:

> "…to have so found would have involved improper speculation or conjecture rather than logical inference. Chief Justice Spigelman in *Seltsam Pty Ltd v McGuiness* at [85] held that '[a] conjecture may be plausible but is of no legal value, for its essence is that it is a mere guess' as opposed to 'a reasonable deduction [that] may have validity as legal proof'. [37]

157 It follows that there was no evidence on which the jury, acting reasonably, could find manslaughter by unlawful and dangerous act and not murder.

158 Another difficulty for the applicant is that the evidence points to the Badgerys Creek home invasion being planned before 30 May 2014. The applicant and Sinclair had discussed the robbery three weeks before the offending and the decision was made to rob Mr Cini's house before they obtained the car at Ms Booker's house. When they drove to Lawson Road, they had balaclavas, duct tape, gloves, and a pick handle. The applicant foresaw the possibility that (at least) really serious bodily harm would be caused to an occupant of the home in the course of carrying out the plan. The evidence of smoking ice at the applicant's home, in Ms Booker's house, and in Lawson Road whilst watching Mr Cini's house could not be taken into account in determining the issue of

[36] Luxton v Vines (1952) 85 CLR 352 at 358.
[37] (2002) 49 NSWLR 262; [2000] NSWCA 29 citing Jones v Great Western Railway Co (1930) 144 LT 194 at 202 (Lord Macmillan).

specific intent. Section 428C (2) of the *Crimes Act* provides that evidence of intoxication cannot be taken into account if the person:

> "(a) had resolved before becoming intoxicated to do the relevant conduct, …"

159 The trial judge was not obliged to direct the jury on the alternative verdict of manslaughter by unlawful and dangerous act.

Orders

160 I propose the following orders:

(1) Extend the time for leave to appeal

(2) Grant leave to appeal

(3) Dismiss the appeal.

161 **LONERGAN J:** I have had the advantage of reading the judgments of Bell CJ and Price J. I agree for the reasons set out in the judgments of Bell CJ and Price J that there was no error in the trial judge refraining from leaving manslaughter to the jury in respect of the murder of Keith Cini. I agree with the orders proposed by Price J.

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Amendments

10 February 2023 - Paragraph number correction

10 February 2023 - Paragraph numbering correction