CITATION:	*Scrutton v The Queen* [2019] NTCCA 9
PARTIES:	SCRUTTON, Stanley Robert v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 11 of 2018 (21458585)
DELIVERED:	18 April 2019
JUDGMENT OF:	Grant CJ, Southwood and Barr JJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – MATTERS CONNECTED WITH CONDUCT OF DEFENCE – APPEAL AND NEW TRIAL

Application for an extension of time and leave to appeal – whether forensic evidence concerning bloodstains false, misleading, inconsistent and/or flawed – whether forensic evidence concerning bloodstains inconsistent with prosecution case and guilt – whether trial judge's direction to jury concerning bloodstains inconsistent with the evidence – whether trial judge wrongly admitted relationship evidence – no satisfactory explanation for delay – no exceptional circumstances or special reasons for delay – no manifest miscarriage of justice – no viable ground of appeal – application to extend time dismissed – application for leave to appeal dismissed.

Criminal Code 1983 (NT) s 406, s 407, s 410, s 417, s 420, s 423, s 426, s 429
Supreme Court Rules 1987 (NT) r 86.01, r 86.10, r 86.11, r 86.13, r 86.14, r 86.22, r 86.23

Conway v R (2000) 172 ALR 185, *Crabbe v The Queen* (1990) 101 FLR 133, *Edwards v R* [2009] NSWCCA 199, *Etchell v R* [2010] NSWCCA 262, *FDP v R* [2008] NSWCCA 317, *Green v The Queen* (1989) 95 FLR 301, *HML v The Queen* (2008) 235 CLR 334, *R v Cornwell* (2003) 57 NSWLR 82, *R v Gregory* [2002] NSWCCA 199, *R v Lock* (1997) 91 A Crim R 356, *R v Quach* (2002) 137 A Crim R 345, *Stamp v The Queen* [2012] NTCCA 15, *The Queen v King* [2009] VSCA 190, referred to.

REPRESENTATION:

Counsel:

Applicant:	Self-Represented
Respondent:	SA Robson

Solicitors:

Applicant:	Self-Represented
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	25

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

Scrutton v The Queen [2019] NTCCA 9
No. CA 11 of 2018 (21458585)

BETWEEN:

STANLEY ROBERT SCRUTTON
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD and BARR JJ

REASONS FOR JUDGMENT

(Delivered 18 April 2019)

THE COURT:

[1] On 17 June 2016, the applicant in this matter was found guilty of murder following a trial by jury. On 16 May 2018, almost two years outside the 28 days provided for in s 417(1) of the *Criminal Code 1983* (NT), the applicant filed an application for leave to appeal and an application for an extension of time within which to bring that application for leave.

The statutory provisions

[2] Part X, Division 2 of the *Criminal Code* governs applications for the grant of an extension of time within which to bring an application for leave to

appeal, and applications for leave to appeal. The subordinate procedural provisions are found in Order 86 of the *Supreme Court Rules 1987* (NT). The reference to the "Court" in ss 408 to 426 and 429 of the *Criminal Code* is a reference to the Court of Criminal Appeal constituted by not less than three Judges.[1]

[3] Section 410 of the *Criminal Code* grants a person who is found guilty on indictment in the Supreme Court a right of appeal. Section 410(b) provides that a person may appeal to the Court:

> … with leave of the Court, or upon a certificate of the Judge of the court of trial that it is a fit case for appeal, against the finding of guilt or any special finding on any ground of appeal that involves a question of fact alone or question of mixed law and fact, or any other ground that appears to the Court to be a sufficient ground of appeal;

[4] The procedure for obtaining leave to appeal is set out in ss 417, 420, 423 and 426 of the *Criminal Code*. Subsection 417(1) of the *Criminal Code* provides that any person found guilty desiring to obtain the leave of "the Court" to appeal from any finding of guilt shall give notice of application of leave to appeal in the prescribed manner within 28 days after the date of such finding of guilt. Subsection 417(2) states that the time within which notice of an application for leave to appeal may be given may be extended at any time by "the Court".

[5] Subsections 420(1) and (2) of the *Criminal Code* state:

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1 Subsection 406(1) of the *Criminal Code* states that "Court means the Court of Criminal Appeal". Subsection 407 of the *Criminal Code* creates the Court of Criminal Appeal. Section 407(1) states the Supreme Court shall be the Court of Criminal Appeal and the Court shall be duly constituted if it consists of not less than 3 Judges and of an uneven number of Judges.

(1) Neither an appellant seeking leave to appeal or to extend the time in which notice of appeal or notice of application for leave to appeal may be given, nor a respondent to the application for leave or extension, is entitled to be present, *except with the leave of the Court*, at the hearing of the application or any proceedings preliminary or incidental to the application.

(2) An appellant who is in custody shall not be entitled to be present at the hearing of his appeal, application for leave to appeal or any proceedings preliminary or incidental thereto *except by leave of the Court*.

(Emphasis added)

[6] Subsection 423(2) of the *Criminal Code* states:

> Both an appellant seeking leave to appeal or to extend the time in which notice of appeal or notice of application for leave to appeal may be given and a respondent to the application for leave or extension *are to present their arguments*, including an argument in relation to proceedings preliminary or incidental to the application, *in writing, unless the Court directs otherwise*.
>
> (Emphasis added)

[7] That requirement is picked up in r 86.23 of the *Supreme Court Rules*, which provides a regime for the form and service of written arguments.

[8] Subsection 426(4) of the *Criminal Code* states:

> Where an appellant is in custody, the Registrar shall give reasonable notice to him in writing:
>
> (a) that if he wishes to appear in person at the Court he must seek leave of the Court;
>
> (b) that he may make such application for leave to appear in writing and may present his argument in support of such application in writing;
>
> (c) that he may present his argument with respect to his appeal, application for leave to appeal or any proceedings preliminary or incidental thereto in writing;
>
> (d) of the date of the sittings of the court during which it is expected his appeal or application for leave to appeal will be heard; and

(e) of the result of any proceedings preliminary or incidental to his appeal application for leave to appeal given when he was not present.

[9] It is apparent from those provisions that an application to extend the time in which notice of an application for leave to appeal may be given, and an application for leave to appeal, are to be dealt with on the papers without the parties being present. However, there is provision for an applicant to apply for leave to be present.

[10] Order 86 of the *Supreme Court Rules* is consistent with those provisions. In r 86.01 it is provided that Court of Criminal Appeal means the Court of Criminal Appeal constituted in accordance with s 407 of the *Criminal Code*. Rules 86.10 and 86.11 specify the forms to be used and affidavits to be made when someone who has been found guilty wishes to make an application for leave to appeal or an extension of time in which to give notice of the application for leave to appeal. Rule 86.13 provides for a response by the Director of Public Prosecutions. Rule 86.14 then states:

(1) An application made in accordance with rule 86.10 or 86.11 is to be determined by the Court of Criminal Appeal after:

(a) 21 days after the Director of Public Prosecutions is served under rule 86.12 with the application and accompanying affidavit; or

(b) 7 days after the Director of Public Prosecutions files an affidavit in response in accordance with rule 86.13(11),

whichever occurs first.

(2) The Court of Criminal Appeal is to determine the application on the written arguments and in the absence of the parties and may, if it thinks it is necessary to do so, hear oral submissions.

(3) A party is not entitled to make oral submissions in relation to an application to be determined under this rule.

(4) The Court of Criminal Appeal is not required to give reasons for its decision in relation to an application determined under this rule.

[11] It is apparent from the above rules, and Part X, Division 2 of the *Criminal Code*, that the Court of Criminal Appeal as constituted under s 407 of the *Criminal Code* (that is, by no less than three Judges) is to determine both applications on the papers and in the absence of the parties, unless the Court otherwise orders. Further, in accordance with r 86.14(4) the Court is not required to give reasons for its decision. Of course, the fact that the Court is not required to give reasons does not mean that in an appropriate case reasons should not be given.

[12] Subsection 429(1) of the *Criminal Code* enables an application to extend the time in which notice of an application for leave to appeal may be given, and an application for leave to appeal, to be determined by a single Judge in the same manner as the Court of Criminal Appeal and subject to the same provisions. This provision has obviously been inserted into the *Criminal Code* for the purposes of achieving economy and efficiency in relation to such applications. Subsection 429(2) provides that if a single Judge refuses an application, the applicant shall be entitled to have the application determined by the Court; that is, by the Court of Criminal Appeal constituted by not less than three Judges.

[13] On 24 June 2018, a single Judge of this Court refused both the application for an extension of time within which to appeal and the application for leave to appeal pursuant to r 86.14 of the *Supreme Court Rules* on the basis of the written arguments and without hearing oral submissions. The applicant has now exercised his entitlement to have the applications determined by the Court pursuant to s 429(2) of the *Criminal Code*. There is nothing in the text of s 429(2), or any other part of Part X, Division 2, to suggest that once the applications are referred to the Court the applications are to be determined by the Court otherwise than as set out above; that is, on the papers and in the absence of the parties. All that is contemplated by s 429(2) of the *Criminal Code* is a rehearing by the Court of Criminal Appeal on the papers and in the absence of the parties.[2]

[14] Rule 86.22 of the *Supreme Court Rules* provides that where an applicant has asked for the matter to be dealt with by the Court constituted by three Judges, the Registrar "shall take such action as is necessary to place the application before the Court of Criminal Appeal as soon as possible"; the Court of Criminal Appeal may refuse leave to the applicant to be present at a determination of the application; the Registrar is to notify the applicant in the event that the application is refused; and the Judge who referred the

2 See also s 9A of the *Supreme Court Act 1979* (NT), which abolishes the distinction between court and chambers, and provides that the business of the Court, whether conducted in court or otherwise, shall be taken to be conducted in court.

application may sit as a member of the Court of Criminal Appeal which determines the referral.

[15] On 14 December 2018, the Registrar, on direction from the Court, advised the parties to the applications as follows:

> 1. The applications are to be referred to the Court of Criminal Appeal as constituted under s 407 of the *Criminal Code*.
> 2. The applications are to be determined on the papers and in the absence of the parties.
> 3. Any further written submissions the parties wish to make should be filed and served by 4 p.m. on 31 January 2019.
> 4. The parties have a right to apply for leave to make oral submissions and any such application will also be determined on the papers and in the absence of the parties.

[16] By letter dated 28 December 2018, the applicant requested leave to make oral submissions. The basis for that application was said to be "because I have a true record of the evidence".

The grounds of application

[17] The applicant is self-represented. The bases for the applications were initially set out in a handwritten document dated 10 April 2018. The grounds for appeal were identified in the document to be:

(a) that the forensic and expert evidence concerning the bloodstains on the boots and jeans worn by the applicant, was false, misleading, inconsistent and/or flawed;

(b) that the forensic and expert evidence concerning the bloodstains was inconsistent with the prosecution case and guilt on the part of the applicant;

(c) that the trial judge's direction to the jury concerning the bloodstains was inconsistent with the evidence; and

(d) that the trial judge wrongly admitted tendency evidence (or relationship evidence) of assaults previously committed by the applicant upon the deceased.

[18] Those claims are repeated in varying forms in a number of handwritten documents sent by the applicant to the Court registry and received on 16 April, 18 April, 27 July and 2 August 2018 respectively.

[19] The applications were formalised in an application for an extension of time within which to appeal and an application for leave to appeal, together with affidavits in support of those applications, which were filed on 16 May 2018.

[20] The affidavit in support of the application for an extension of time is dated 30 April 2018 but not executed by the applicant. Subject to that qualification, it states:

> I was sentenced at the Alice Springs Supreme Court on the 17/6/16 and I could not appeal within 28 days because I could not find a lawyer that would help me and I will be representing myself for this purpose and I would also like to appeal under Section 417(2) of the Criminal Code for an extension of time for leave to appeal

[21] The affidavit in support of the application for leave to appeal is also dated 30 April 2018 and is executed by the applicant. It states:

> there was a miscarriage of justice of the evidence that was adduced by the prosecution of relationship evidence under Section 97 and the evidence is of kicking and stomping is false and misleading and this evidence must not be admitted by discretionary and mandatory exclusions and the general discretion to exclude of evidence division 4 Part 3.11 Section 135 of the evidence (national uniform legislation) act and I was wrongly convicted by this evidence and I will be appealing under Section 430 of the appeal from the decision of the Court Part X division 2 and I also have the transcript of the trial and the committal and the Court File to prove this.

[22] The Crown responded pursuant to r 86.13 of the *Supreme Court Rules* by way of affidavit sworn on 1 June 2018. That affidavit provided relevantly:

(a) The applicant's affidavit in support of the application for an extension of time within which to seek leave to appeal did not comply with r 86.11 for failure to explain the reasons for the delay.

(b) The applicant's affidavit in support of the application for leave to appeal did not comply with r 86.10 for failure to identify the nature of the appeal, the questions involved and the reasons why leave should be granted.

(c) The applicant's assertion of a miscarriage of justice due to the admission at trial of "relationship evidence" under s 97 of the *Evidence (National Uniform Legislation) Act 2011* (NT) was misconceived. Evidence was adduced by the Crown of 10 assaults committed by the applicant upon the deceased between 2005 and 2013 in respect of which the applicant had entered pleas of guilty before the Local Court.

Although the Crown initially proposed to rely upon aspects of the applicant's conduct in committing the assaults to also show that he had a tendency to kick or stomp on the deceased when assaulting her, the Crown subsequently did not pursue the use of the evidence for that purpose. However, after pre-trial argument the trial judge ruled that the evidence of the assault was admissible as relationship evidence. The trial judge's directions in relation to the use of that evidence properly precluded its use for any tendency purpose.

[23] The applicant made an affidavit on 8 June 2018, purportedly in reply to the respondent's affidavit. That affidavit was received in the Court registry on 20 June 2018. That affidavit:

(a) makes reference to an offer made prior to trial by the applicant's then solicitors to plead guilty to a charge of manslaughter in lieu of the charge of murder, on the basis that there was no reasonable prospect of proving that the applicant intended to cause either death or serious harm;

(b) repeats the assertion that the evidence of the previous assaults was wrongly admitted; and

(c) repeats the complaint about the reliability and cogency of the evidence concerning the bloodstains.

[24] On 27 June 2018, the Registrar advised the applicant that a single Judge had refused the applications. By notice dated 5 July 2018, the applicant

requested that his applications be considered and determined by the Court of Criminal Appeal. That notice largely repeated the complaints made in the documents previously filed by the applicant, together with a further complaint that the legal practitioner who represented him during the course of the trial "wouldn't put up any defence for me and I asked him to but he didn't want to". That additional complaint is made with reference to the expert evidence concerning the bloodstains.

[25] On 19 October 2018, the applicant filed a further handwritten document dated 17 October 2018. That document repeated the complaint about "the prosecution admitting relationship evidence under Section 97 or 98", and contended the evidence should have been excluded in the exercise of the discretion under s 135 of the *Evidence (National Uniform Legislation) Act*. That document also repeated the allegation that the evidence concerning the bloodstains was "misleading and confusing", and that the applicant's lawyer "didn't put up any defence". That document also attached a copy of the defence offer to the Crown to plead guilty to manslaughter dated 4 January 2016, a copy of a notice of intention to adduce tendency evidence dated 18 May 2016 (which was ultimately not pursued by the Crown), a copy of the aide-memoire provided to the jury during the course of the trial judge's summing up, a copy of the transcript of the sentencing proceedings dated 17 June 2016; and a copy of the statutory declaration made by the forensic scientist in relation to the Bloodstain Pattern Analysis dated 13 March 2015.

[26] On 27 February 2019, the applicant filed a further document making submissions about the rules governing coincidence evidence, the burden of proof, and the forensic evidence concerning the bloodstains.

[27] On 30 March 2019, the applicant filed a further document making reference to the provisions of the *Criminal Code* about fitness to stand trial, and making an application for bail.

Principles governing the extension of time

[28] The principles applicable to the determination of an application to extend time are well-established. They were summarised by Rice J in *Green v The Queen* as follows:

> (1) An extension of time within which to appeal from conviction will not be granted as a matter of course. In every case the Court will require substantial reasons to be shown why an extension should be made.
>
> (2) Where an appeal is lodged after the lapse of a considerable period of time, exceptional circumstances have to be established before the Court will be justified in granting an extension of time.
>
> (3) After a lengthy delay, the Court will require exceptional circumstances before granting an extension unless there has been a manifest miscarriage of justice or unless the Court is satisfied that there are such merits in the proposed appeal that it would probably succeed.
>
> (4) The greater the delay which has occurred before the application is made, the more difficult becomes the task of the applicant.
>
> (5) The Court itself, in the administration of justice, has its own interest in seeing that time limits are observed and that an application for the extension of time is properly justified.[3]

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3 *Green v The Queen* (1989) 95 FLR 301 at 312 (Asche CJ and Kearney J agreeing). That summary was subsequently adopted by the Court of Criminal Appeal in *Stamp v The Queen* [2012] NTCCA 15 at [12].

[29] The Court will ordinarily require some satisfactory explanation as to why an appeal or application for leave to appeal was not brought within the time allowed, especially if the delay is considerable.[4] In *Edwards v R*, Johnson J stated:

> The principle of finality of litigation is relevant on an application such as this. Although it may be, as here, that the Crown cannot point to any actual prejudice because of the delay in bringing the application, there is a public interest in avoidance of delay, and the finality of litigation, in the area of sentencing as with litigation generally. In many cases, the prospect of sentence being reopened long after the event may impact adversely upon victims of crime.[5]

[30] In *R v Gregory*, Hodgson J said:

> ... an important factor in a decision as to whether an extension of time should be granted is whether the interests of justice require it; but the interests of justice must take into account not just the interests of the applicant, but also those of the Crown (and the community represented by the Crown), and of the administration of law generally. There are many factors relevant to those matters, including the powerful considerations supporting the finality of judicial decisions.[6]

[31] The greater the delay the more exceptional the reasons must be for it.[7] It has been held that delays of six months or more require "very exceptional circumstances" or "special and substantial reasons".[8] Against that background, the applicant has provided no reason for the delay beyond the

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4 *Edwards v R* [2009] NSWCCA 199 at [8] per Johnson J (Allsop P and Kirby J agreeing); *The Queen v King* [2009] VSCA 190 at [6] per Ashley JA (Neave JA and King AJA agreeing); *Etchell v R* [2010] NSWCCA 262 at [18] per Campbell JA.

5 *Edwards v R* [2009] NSWCCA 199 at [13].

6 *R v Gregory* [2002] NSWCCA 199 at [41] (Levine and Simpson JJ agreeing).

7 *Green v The Queen* (1989) 95 FLR 301 at 303 per Asche CJ.

8 See the examples cited by Asche CJ in *Green v The Queen* (1989) 95 FLR 301 at 303. See also *Crabbe v The Queen* (1990) 101 FLR 133 (NTCCA) at 136-137.

fact that he "could not find a lawyer", much less a satisfactory explanation or exceptional circumstances or special reasons. That being the case, in order to warrant the grant of an extension of time the Court must be satisfied that there has been a manifest miscarriage of justice or that there are such merits in the proposed appeal that it would probably succeed.[9]

Consideration of the proposed grounds of appeal

[32] In broad terms, the Crown case was as follows. Early in the evening of 19 December 2014 the applicant and the deceased were drinking with others at Charles Creek Camp and both became heavily intoxicated. They began arguing over jealousy issues. At some time in the early evening the deceased left the group, saying that she was going to find another man. She returned to the group some time later and continued drinking. The applicant left the group some time after that. At around 11 o'clock that night the deceased asked a friend to look after her child and went off to find the applicant. The applicant had already left the group by that stage. The applicant and the deceased came together at some point after that in circumstances to which there were no witnesses. They made their way to a tin shed at the rear of House 19 in which the applicant was staying at the time.

[33] At about 6 a.m. the following morning the applicant walked into the police station at Alice Springs and told an officer there that he had a fight with his

9 *Green v The Queen* (1989) 95 FLR 301 at 312.5.

wife the previous evening. He did not disclose the nature of the fight or the deceased's condition, and then left the police station. At that time the deceased was lying dead on the mattress in the shed. The deceased was found by the applicant's sister at about 8 a.m. that morning. Police and the ambulance service were called. The deceased was pronounced dead and a crime scene was established. Blood was located on the ground next to the mattress, the walls and the door of the shed, and a blue striped shirt behind the mattress. The applicant was arrested later that day.

[34] In a record of interview conducted on 21 December 2014, the applicant told police that he had slapped the deceased a number of times while they were walking back to the shed and she had fallen over. After they returned to the shed the arguing continued and once again he slapped her a number of times before falling down and hurting his knee. He then blacked out. The Crown alleged that the applicant's account was a deliberate and significant understatement of the physical violence he had inflicted on the deceased that night. The examination by the forensic pathologist disclosed that the deceased had suffered more than 40 impacts to her head and body causing various injuries including a brain haemorrhage, fractured ribs, bruised lungs, a bruised bowel, abrasions, lacerations and blood loss consistent with blunt force trauma.

[35] The jeans and boots the applicant was wearing at the time of his arrest were seized for testing. The deceased's blood was identified on the jeans, the boots and the blue striped shirt which had been found in the shed. The

forensic scientist's analysis contained the following conclusions. The bloodstains on the blue striped shirt were spatter stains consistent with blood drops flying through the air and landing on the shirt while it was being worn. There were both propelled and transfer bloodstains on the jeans. The propelled stains were also consistent with the jeans being worn at the time blood droplets flying through the air were deposited on them. The transfer stains were consistent with the jeans coming into contact with or rubbing against another surface on which there was blood. There were a number of impact blood spatters on the boots consistent with the boots directly striking liquid blood and indicative of the fact that they were being worn at the time the staining was deposited on them. The Crown contended that the applicant predominantly used the boots he was wearing to deliver the blows to the deceased's face and body which caused her death. Further, at the time the applicant bashed the deceased he intended to cause either her death or serious harm.

[36] We turn then to the applicant's contention that the forensic and expert evidence concerning the bloodstains on the boots and jeans worn by the applicant was false, misleading, flawed and/or inconsistent with the prosecution case; and that the trial judge's directions to the jury concerning the bloodstains was inconsistent with the evidence. The trial judge dealt with the bloodstains on a number of occasions during the course of his summing up for the jury. In the first reference, his Honour said:

In this context, it might be appropriate for me to mention the boots. Now, as I said earlier, not every individual fact or detail has to be proved by the Crown beyond reasonable doubt. At the end of the day, there are those essential facts that are set out in the aide-memoire that the Crown must prove. That is the burden on the Crown, not to prove every single detail in the case. So, let us look at the boots just for an example. In order to prove guilt, the Crown does not have to prove that the boots were used to kick the deceased. What the Crown must prove is that the accused applied physical violence to the deceased and that that physical violence caused death.

Now, the Crown seeks to persuade you that the boots were worn and they seek to persuade you they were - there was kicking and stomping, and they seek to persuade you that this is also relevant to intent by saying, 'What else did he intend if he was prepared to kick and stomp?' as they put it. Now, ladies and gentlemen, what they seek to do is to use a combination of facts to prove that the boots were in fact on the [accused's] feet and that he kicked the deceased.

Now, while a comparison between the heel and the boot and the patterned bruising raises the possibility that the heel caused the injury to the abdomen or the neck, by itself, it cannot prove that. I gave you that warning that you cannot make that comparison. We know the experts cannot make it. It does not rule it in or rule it out, so it remains a possibility, but in itself it does not prove it was used.

What the Crown asks you to do is to look into other things. There was blood on the boots. There was blood spatter on the boots, which means that the boots were in close - either involved in an impact on the deceased when the blood came off the deceased, or they were close to it at the time, so there is splatter on the boots as well as blood.

There was blood spatter on the jeans at the very bottom of the legs, where you might expect blood spatter if, wearing the boots, the accused had kicked the deceased. And you know of course that there would have been copious bleeding. That was the evidence of Dr Sinton. You know that there was a degree of force used, a strong degree of force. You know that there would have been a significant amount of blood.

So, ladies and gentlemen, using the boots as an example, in isolation, there is a similarity in a sense, just a very broad similarity, but it does not prove by itself that the boot was used. But when you put all those facts together in combination, are you satisfied when you look at the totality of the evidence that the boots were used in the kicking process and that the bruise to the stomach and or the neck were caused by the heel of the boot?

Even if you do not reach that point, you would still - even if you cannot say beyond reasonable doubt what caused the particular bruise to the stomach, nevertheless it would still be open to you from the

> combination to find that the accused kicked the deceased while wearing the boots, from combination of the other evidence. Whether you find that is a matter for you, but I use this as an example of how circumstantial evidence involves putting all the individual facts together, all the proven facts, and then deciding what inferences you are prepared to draw from the proven facts.

[37] Further on in the summing up, his Honour said:

> Now, Mr Goldflam also said there was no blood on the toe or the sole of the boot. Well, that is a fact there was no blood located. Mr Robson pointed out that those boots had travelled some distance in terms of whether anything might adhere to the sole of the boot.
>
> The [accused] had walked to his sister's place and then to the police and then presumably to the hospital so he had covered a fair distance and then, of course, to the roundabout down by the Gap. So if there had been any blood on the sole according to the Crown or the heel it could well have disappeared in that process.
>
> Now, ladies and gentlemen, the Crown do not have to prove that as a matter of fact beyond reasonable doubt. You simply do not know. That is where it is left. The Crown does not have to prove the negative in that sense. The negative, that is – well, I should not say the negative. The Crown does not have to prove that there was blood on the toe or that there was blood on the sole or the heel.
>
> What you have is a fact that the Crown does not have to prove during the walking process. What you have as a fact is that there was no blood found visible on the sole. What you have is the Crown advancing a potential explanation and what you do have is blood elsewhere on the boot. That is spattered blood you might be satisfied from the deceased.

[38] Those directions were entirely consistent with the evidence and the judge's proper role in summing up. The material submitted by the applicant does not identify any basis on which to conclude that the expert forensic evidence concerning the bloodstains on the boots and jeans worn by the applicant was false, misleading, flawed and/or inconsistent with the prosecution case. The most that can be said about the evidence is that there was no blood found on the bottom or toe of the applicant's boots. That was a matter raised by

defence counsel in the course of his address to the jury in the following terms:

> That's a bit abstract, so I'll give you some concrete examples. What the Crown said to you yesterday, firstly, Mr Robson submitted to you that Mr Scrutton walked off in blood that may have been on the bottom of his boots. I suppose that is a reasonable possibility, that Mr Scrutton left the shed with blood on the soles of his boots and it all got rubbed off by him walking down to the Gap area and back into town again. Of course, the bloodstain expert wasn't invited to give an opinion about this, so you don't have the benefit of any expert opinion. But yes, you can bring your common sense and collective experience to bear on this question, and yes, it's a possibility, but it's not a proven fact, not a proven fact beyond reasonable doubt. So, you can't plug that in as a link in your chain of reasoning towards proof of guilt because it's a weak link.

[39] Defence counsel came back to the matter in his closing address in the following terms:

> And finally, there's Mr Robson's submission to you about the supposed match between the pattern of the bruise on Kwementyaye's abdomen and the pattern of the heel of Mr Scrutton's right boot. His Honour has warned you about the dangers of you jumping to that conclusion. Indeed, he's told you that an expert did look at the injury and came to the conclusion that the boots are neither included nor excluded as a possible cause of that injury. The conclusion the Crown urged you to reach is not proven. So, ladies and gentlemen, do not be distracted from the job. Find facts against the accused only if they've been proven, not just raised as possibilities but proven on the evidence beyond reasonable doubt.

[40] Later in the address, defence counsel said:

> The second area is the evidence of Dr Lee, who we heard at the beginning of this week. Some of the DNA mixed up with Kwementyaye's blood in the shed belonged to a person who did not leave a detectable male component, and that person was certainly not Kwementyaye and it certainly wasn't Mr Scrutton either. We don't know who it was. And there's no blood on the toe or the bottom of his boots, and furthermore there's no expert evidence that the patterned

> bruises matched his boots, as I've already said. Does any of that raise a lingering doubt? It's a matter for you.

[41] No more could have been made of the matter. On his own admission, the applicant had gone to and stayed in the shed with the deceased on the night in question. Over that time the deceased suffered massive blunt force trauma which caused her death. The applicant's hands showed no sign of injury consistent with the repeated delivery of blows using his hands. The applicant was wearing the boots and jeans at the time of his arrest. The boots and jeans had the deceased's blood on them. The bloodstain patterns were indicative of the fact that the boots and jeans were being worn at the time the blood was deposited on them. There was nothing in the evidence to suggest any other conclusion. The real issue in the trial was not whether the applicant killed the deceased, but whether he had murderous intent when doing so. Given the injuries suffered by the deceased and the force and kind of the blows required to cause such injuries, there was a very strong inference that, at the very least, the applicant intended to cause her serious harm.

[42] We turn then to the applicant's contention that there was a miscarriage of justice due to the admission at trial of "relationship evidence" under s 97 of the *Evidence (National Uniform Legislation) Act*. As the respondent correctly identified in its affidavit material, although the Crown initially proposed to rely upon aspects of the applicant's conduct in committing the assaults to also show that he had a tendency to kick or stomp on the

deceased when assaulting her, the Crown subsequently did not pursue the use of the evidence for that purpose. Rather, the trial judge ruled that the evidence of the assault was admissible as relationship evidence. As already described, the relationship evidence was that the applicant had previously committed 10 assaults on the deceased between 2005 and 2013 and had pleaded guilty to those assaults before the Local Court.

[43] A distinction may be drawn between evidence which is admitted under the tendency rule on the one hand, and relationship evidence on the other hand. The operation of s 95 of the *Evidence (National Uniform Legislation) Act* is that evidence cannot be used to prove that the accused had a relevant tendency unless that evidence is admissible under the tendency rule in s 97. Subject to that qualification, the evidence in question may also be admitted for a non-tendency purpose. The admissibility of evidence for that purpose is governed by the general test of relevance in s 55 of the *Evidence (National Uniform Legislation) Act*, and the discretions and obligations contained in Part 3.11 of the *Evidence (National Uniform Legislation) Act* (particularly ss 135 and 137).[10]

[44] One example of a non-tendency purpose commonly arising is relationship evidence that is not relied on for a tendency inference. In *HML v The Queen* various members of the High Court[11] observed that evidence of other

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10 *R v Quach* (2002) 137 A Crim R 345 ; *Conway v R* (2000) 172 ALR 185; *FDP v R* [2008] NSWCCA 317; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356.

11 *HML v The Queen* (2008) 235 CLR 334. See, for example, at [6]-[7] per Gleeson CJ.

conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including:

(a) as essential background against which evidence necessarily falls to be evaluated, to show the continuing nature of particular conduct and to assist in explaining the circumstances of the offence charged;

(b) to overcome a false impression that an event was an isolated one, or that the offence happened "out of the blue", where previous acts form part of the relevant background to the offence;

(c) to ensure that the jury is not required to decide issues in a vacuum, including in deciding matters such as the intention of an accused at the relevant time.

[45] The trial judge dealt with the relationship evidence in his summing up in the following terms:

> Now I move from the general observation about circumstantial evidence to the evidence of the relationship. This is part of the circumstantial evidence upon which the Crown relies. It is another example of evidence that cannot in itself prove that the accused either killed the deceased or that he had the necessary intention.
>
> This evidence of the relationship is basically from two sources: (1) the accused's own statements to the police - statement; I think it is in the interview - and more particularly in the document P3 which sets out facts of prior violence by the accused against the deceased. It is part of the circumstantial case upon which the Crown relies to prove that it was the accused who delivered the beating, but I need to give you directions as to how this evidence may be used and also as to how it may not be used. I appreciate that I gave you preliminary and incomplete directions about this evidence earlier in the trial, but it is necessary that I now give you final directions.

As I said to you earlier in this case, and quite frankly in any case in which the Crown submits to a jury that they should find that a husband attacked his wife with an intention to kill her or cause serious harm to her, and particularly where the husband and wife have been in a relationship for many years, the first and inevitable question a jury will ask is whether they were in a close, loving relationship or not. It is perfectly obvious and natural. The first thing the jury will want to know is how the accused felt about his wife.

So, ladies and gentlemen, in order to put the events in the proper context and to avoid the appearance of an incident like this coming out of the blue, so to speak, or to put it another way, so that you are not considering this evidence in a vacuum divorced from the reality of life, you are entitled to hear evidence as to the true nature of the relationship as it existed at the time the deceased was killed. You are entitled to know that this relationship involved over a lengthy period violence on the part of the accused toward his wife. It is in this context that you are asked by the Crown to find that the accused delivered the beating.

Now, importantly, ladies and gentlemen, while you may use this evidence to provide a context and setting for the events of the evening, that Friday evening, you must not use this evidence as a basis for reasoning that the accused had beaten his wife previously and, therefore, he is likely to have done it on this occasion. Similarly, you cannot reason that the accused is the type of person who is likely to have delivered the beating to the deceased. You cannot use this evidence to say that the accused had a tendency to physically assault the deceased. Nor can this evidence be used as a basis for reasoning that because the accused was violent toward his wife previously, therefore, he is more likely to have intended to cause death or serious harm or that he is the type of person likely to possess such an intention.

Those types of reasoning would be quite unfair and inappropriate. Let me give you an example removed from the circumstances of this case. Let us suppose a person is charged with breaking and entering and stealing. If a jury was told that the person had previously committed a large number of offences of breaking and entering and stealing, it would be very easy for the jury to slip into the reasoning that because this person is a thief and has done it before, therefore, is the type of person likely to have done it this time. But that would be unfair, because whether the person committed the particular offence must be decided about on the evidence about the particular offence, and not through an impermissible line of reasoning: 'Oh well, he's the type of person that does this sort of thing; therefore, it's obvious he did it this time.' Now, that would be quite unfair; that last part.

So, ladies and gentlemen, you must not reason in that way. What this evidence does do and the way you may use it is as context of the nature

> of the relationship in the setting of the relationship in the circumstances, where the Crown invites you to make these inferences that the accused beat his wife.

[46] The evidence provided an explanation about the nature of the relationship between the applicant and the deceased. It was of potential assistance to the jury in determining whether it was a harmonious and caring relationship or a relationship marred by anger and violence by the applicant towards the deceased. Those matters were capable of informing the jury's determination whether the applicant killed the deceased and, if so, his state of mind and intention at the time. The probative value of that evidence as relationship evidence was neither outweighed by the danger of unfair prejudice to the accused, nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused. The trial judge's directions in relation to the jury's use of the relationship evidence were orthodox and correct in law.

[47] Finally, the applicant's contention that his counsel did not mount a defence on his behalf during the course of the trial is simply not borne out on a reading of the cross-examination of the Crown witnesses or defence counsel's closing address.

Conclusion

[48] As the proposed grounds of appeal which the applicant seeks to pursue involve questions of mixed law and fact, leave to appeal would be required under s 410 of the *Criminal Code*. It follows from what we have said that

no viable ground of appeal is made out on the materials. For that reason, there is no basis on which to allow the application to extend time within which to make application for leave to appeal against the applicant's conviction on 17 June 2016. Had an extension of time not been required, we would have dismissed the application for leave in any event.

[49] We make the following orders:

1. The applicant's application to be present and make oral submissions at the determination of the application is refused.
2. The application for an extension of time within which to make application for leave to appeal is dismissed.
3. The application for leave to appeal is dismissed.

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