IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA409/2021
[2023] NZCA 209

BETWEEN	JAY CHRISTOPHER LINGMAN Appellant
AND	THE KING Respondent

Hearing:	22 March 2023
Court:	Clifford, Dunningham and Cull JJ
Counsel:	T M Cooper KC and C G Farquhar for Appellant Z R Johnston and B So for Respondent
Judgment:	2 June 2023 at 3.00 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Cull J)

[1] Mr Lingman was convicted of murder by a jury in the Auckland High Court before Harland J. He pleaded guilty to charges of possession for supply of a Class A drug (cocaine), a Class B drug (MDMA) and a Class C drug (diphenidine and phenethylamine). He was sentenced by Harland J to life imprisonment with a minimum period of imprisonment of 15 years and two months.[1] He now appeals his conviction for murder only.

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1 *R v Lingman* [2021] NZHC 1394.

Background

[2] Mr Lingman and the victim were both involved in dealing illegal drugs. On 24 February 2019, the victim arrived at the front door of Mr Lingman's rural property. Mr Lingman fired six shots from his Ruger .22 semi-automatic firearm, three of which entered the victim's skull and caused his death.

[3] Mr Lingman took steps to conceal the victim's body and belongings. Shortly after the shooting, Mr Lingman parked the victim's vehicle behind another vehicle on his property and discarded the victim's phone. The next day, he purchased a large chest freezer and severed the victim's legs with a chainsaw to fit the victim's body into the freezer. The freezer was left in plain view near the front door of his house, until it was put in a shed at Mr Lingman's address. Two days later, he purchased a shipping container and subsequently purchased some quad bike ramps to hide the victim's car that was still on his property. Some days later, he obtained water from a neighbour and a water delivery service to water blast the property and remove any incriminating evidence.

[4] The victim was reported missing by his flatmate on 27 February 2019. The police were able to access the victim's phone location data, which led them to Mr Lingman's address. On arriving at his address, the police noticed a strong smell of bleach and signs of unusual water blasting at the front door. The police noticed blood on the top of a chest freezer near the handle, at the rear of the property. On opening the freezer, the police found the victim's body. They also located the victim's car, drugs, and a number of guns and a chainsaw with the victim's blood on it. When spoken to by police, Mr Lingman said, "I was fearing for my life. … This arsehole was coming to kill me and my son."

[5] Mr Lingman was then charged with murder and the three drug-related charges of possession for supply. Mr Lingman was tried for murder before Harland J in the Auckland High Court, having pleaded guilty to the drug supply charges at the outset of the trial.

[6] The primary issue at trial was whether Mr Lingman killed the victim with murderous intent or acted in self-defence. The defence case was that Mr Lingman was

acting in self-defence when he discharged his firearm at the victim. Mr Lingman maintained he was a drug dealer, and the victim was his cocaine supplier. The victim came onto his property unannounced. He was angry after realising that drugs he had stored in a secure facility on Mr Lingman's property had gone missing.

[7] Mr Lingman claims that the victim took the shotgun, which Mr Lingman had left lying outside the shed and confronted Mr Lingman about the missing drugs before raising the shotgun at him. Mr Lingman said that with his eyes closed, he fired shots from a semi-automatic rifle, which he had taken from inside the house, while he was moving to get closer to his car to leave.

[8] The jury found Mr Lingman guilty of murder.

The appeal against conviction

[9] Counsel for Mr Lingman submit that the errors in the Judge's directions to the jury on self-defence and prejudice and sympathy, together with the unfairly prejudicial admission of the post-mortem photograph, led to a miscarriage of justice. They submit that the conviction is unsafe and should be quashed.

[10] The three grounds of appeal alleged are as follows:

(a) the Judge erred in her directions to the jury on self-defence;

(b) the Judge gave inadequate prejudice and sympathy directions on Mr Lingman's post-death conduct; and

(c) the post-mortem photographs lacked probative value, were highly prejudicial, and should have been ruled inadmissible.

[11] We now examine each of those grounds in turn.

Ground one — the self-defence directions

[12] The appellant's principal criticism of the Judge's self-defence directions is that the jury was directed that they needed to assess what the appellant "honestly believed"

the circumstances to be at the time of the killing. Thus, Ms Farquhar submits, the jury was asked to accept either Mr Lingman's evidence as being truthful, or the Crown theory that he was lying, before proceeding to consider the elements of self-defence under s 48 of the Crimes Act 1961. The inclusion of the word "honestly" in relation to the circumstances as the appellant believed them to be is not part of the statute, was unnecessary and confused the jury with respect to both the standard and burden of proof, because it led to an over-emphasis on whether the appellant's evidence was wholly truthful.

[13] Section 48(1) of the Crimes Act provides:

> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[14] Self-defence comprises subjective and objective elements in three steps. The first, the subjective inquiry is what did the defendant *believe* the circumstances to be. This provides the threshold test.[2] The second step is whether the defendant was acting in self-defence, again considered from his or her point of view. The last step is whether the force used was reasonable in those circumstances; the objective element.[3] The Crown then has the burden of disproving self-defence.

[15] At the outset of the Judge's summing-up to the jury, the Judge reinforced that it was a fundamental issue for the jury to decide whether Mr Lingman was acting in self-defence. She emphasised "the Crown must make you sure he wasn't". Standard burden and standard of proof directions were given, including a direction that if the jury did not believe Mr Lingman, they were not to leap to a conclusion of guilt. At the outset of the self-defence direction, the Judge said this:

> [85] I am going to give you an overview of self-defence. You have already heard a little bit about this, but to flesh it out somewhat; Mr Lingman does not have to stand by while he or anyone else is under attack or the threat of an attack. On the contrary, he is entitled to use reasonable force to defend himself or another person from attack or the threat of it. As I said to you before, a person who uses reasonable force in self-defence has a complete defence to

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2 *R v Sarich* CA407/04, 16 May 2005 at [33] and [37]; *R v Auckram* [2007] NZCA 570.

3 This follows the approach endorsed by Tipping J in *Shortland v Police* HC Invercargill AP74/95, 23 April 1996 at 2 which was approved in *R v Li* CA140/00, 28 June 2000. See Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CA48.01].

> any criminal charge brought against them. Importantly however, it is for the Crown to satisfy you beyond [a] reasonable doubt that the defence of self-defence does not apply. Mr Lingman does not have to prove he was acting in self-defence. The Crown must prove he was not.
>
> [86] There are pre-conditions to the use of this defence and these are captured in Questions 2, 3 and 4, with the focus being on the point in time of which Mr Lingman fired the rifle.

[16] In directing the jury that the first step was for them to decide what Mr Lingman honestly believed the circumstances to be at the time, the Judge emphasised that the jury was to stand in his shoes, consider it through his eyes, decide what he knew or believed, and what he honestly believed was happening at the time:

> [87] The first step is for you to decide what Mr Lingman honestly believed the circumstances to be at the time. And you will see that is set out in Question 2, by asking "What were the circumstances that Mr Lingman honestly believe[d] them to be when he shot [the victim]?" The circumstances include Mr Lingman's beliefs as to the nature and seriousness of any threat, and his beliefs as to its imminence and the courses of action available to avoid or combat it. That is what you have got to decide first.
>
> [88] What was going through his mind? Stand in his shoes. Consider it through his eyes. Decide what he knew or believed. What did he honestly believe was happening at the time?

[17] In addressing the second step, the Judge said this:

> [108] …whether, in the circumstances as Mr Lingman believed existed, the Crown has made you sure that he was not acting to defend himself when he fired the rifle. Putting it another way, is it reasonably possible Mr Lingman was acting to defend himself when he fired the rifle? …

[18] In the Judge's question trail provided to the jury, the questions on self-defence were framed as follows:

> …
>
> 2. What were the circumstances as Mr Lingman honestly believed them to be when he shot [the victim]? The circumstances include Mr Lingman's beliefs as to the nature and seriousness of any threat and his beliefs as to its imminence and the courses of action available to avoid or combat it.
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> Once you have determined this, go to question three.
>
> 3. Given what Mr Lingman believed was happening at the time, are you sure that when he shot [the victim], Mr Lingman was not acting to defend himself from [the victim]?

If NO, go to question four.

If YES, go to Issue 3 (questions five and six).

4. Given what Mr Lingman believed was happening at the time, are you sure that when he shot [the victim], Mr Lingman used more force than was reasonable?

If NO, find Mr Lingman not guilty. Do not continue.

If YES, go to Issue 3 (questions five and six).

[19] The statutory definition of self-defence under s 48 of the Crimes Act does not include the word "honest" but in *R v Thomas*[4] and in subsequent decisions, self-defence has been held to be available to a defendant who holds an honest, albeit mistaken, belief in the circumstances.[5] Consequently, the word "honestly" has been imported into model directions and question trails to clarify that the defendant's belief does not need to be reasonable.

[20] In *Stepanicic v R*, the Court of Appeal approved the following question trail where the defendant was of the belief that police were using excessive or unlawful force and claimed he acted in self-defence:[6]

…

3.3 What were the circumstances as Mr Stepanicic believed them to be?

3.4 In those circumstances, are you sure Mr Stepanicic honestly believed Constable Carter was using excessive force against him?

3.5 And further, in those circumstances, are you sure Mr Stepanicic was *not* defending himself?

(This question is framed in this way because the Crown must exclude Mr Stepanicic's defence that he was acting in self-defence.)

3.6 Are you sure the force Mr Stepanicic used was *not* reasonable in the circumstances as he believed them to be?

(This question is framed in this way for the same reason.)

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4 *R v Thomas* [1991] 3 NZLR 141 (CA) at 144, applied in *Mackley v Police* (1994) 11 CRNZ 497 (HC) at 503–504, *R v Sarich,* above n 2, and *Kazazi (aka Van Gosliga) v Police* HC Wellington CRI-2011-435-2, 4 August 2011.

5 *Stepanicic v R* [2015] NZCA 35 at [11].

6 At [10].

[21] As can be seen from *Stepanicic*, questions 3.3 and 3.4 mirrors question two of Harland J's question trail in Mr Lingman's trial.

[22] There have been two lines of authority in this Court on the wording of the self-defence direction. One approach adopted model directions requiring the jury to assess the circumstances as the defendant believed them to be, taking the view of the evidence most favourable to the defendant.[7] The other approach required the jury to assess the circumstances as a defendant *honestly* believed them to be.[8]

[23] In *Mackley v Police*,[9] Tipping J discussed the word "honest" in the expression "honest belief" as it applies to the self-defence direction. He said:[10]

> … It is a moot point whether the word "honest" in the expression "honest belief" actually adds anything. The question is whether the belief asserted was in fact held at the relevant time. There is a danger that the word "honest" is inadvertently construed as meaning "justified". It is not necessary for the belief to have been a justified belief. *All that is necessary is that the belief must have actually been held.*
>
> The difficulty, of course, is that a lot of people may actually believe things without reasonable grounds for their belief. The decisions of the Court of Appeal in *Thomas* and *Waaka* must lead to the conclusion that however unreasonable may have been the defendant's belief that the police officer was not acting in the course of his duty, if that belief was actually held at the material time and that is the reason why the obstruction took place, no offence has been committed.
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> (Emphasis added).

[24] The Crown invites an interpretation of "honest belief" as encouraging the jury to look for a belief that was actually held, not whether the belief was reasonable to hold in the circumstances. The word "honestly," the Crown says, reinforces the subjective nature of the jury's inquiry.

[25] We adopt the reasoning in *Mackley* and consider "honestly" does not add anything other than emphasising that the belief was actually held, as Tipping J

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7 *R v Kerr* [1976] 1 NZLR 335 (CA) at 340; *Theobold v R* [2018] NZCA 409 where "honestly" was not included in the model directions.

8 "Honestly" was included in the model directions approved in *R v Hackell* (CA) 131/02, 10 October 2002; *R v Bridger* [2003] 1 NZLR 636; *R v Howard* [2003] 20 CRNZ 319 (CA); *Stepanicic v R*, above n 5and *Theobald v R,* above n 7,at [56].

9 *Mackley v Police*, above n 4..

10 At 503.

articulated. We consider the use of the word "honestly" in the direction and the question trail is synonymous with "actually." In a different context, the Supreme Court in *Hayes*[11] reinforces this interpretation of "honest belief" by saying:[12]

> … there is no suggestion that the belief has to be reasonable or based on reasonable grounds. It is the existence of the belief which matters, not its reasonableness. Of course the word "honest", in the phrase "honest belief", was designed to signify that the belief must actually be held. Despite the tautology, its usage in that sense is unobjectionable. It is preferable, however, to follow the drafting of the definitions of dishonestly and claim of right by not qualifying the word belief at all. The potential difficulty with the word "honest" in the phrase "honest belief" is its capacity to be understood as signifying an ability for the accused person to frame their own moral code (the so called "Robin Hood" defence).

[26] The jury's determination of what the circumstances were as the defendant believed them to be, standing in his shoes, has to be assessed along with all of the surrounding circumstances. That requires the jury to accept or reject the defendant's account. The jury must be satisfied that the Crown has proved that self-defence does not apply in the circumstances. That does give rise to an element of a credibility assessment as to whether the defendant's belief, from a subjective standpoint, can be accepted or rejected. But we disagree that the inclusion of the word "honestly" overemphasised the credibility aspect of the inquiry. If anything, it has the capacity for the defendant to "frame their own moral code" as the Supreme Court suggests.

[27] We reject the appellant's submission therefore, that the inclusion of the words "honest belief" can cause confusion for a jury because they may need to decide whether the defendant is honest or dishonest. We consider the use of "honestly" in this case was unobjectionable, although we respectfully agree with the Supreme Court's articulation that it is preferable to follow the statutory wording in this context also.

[28] The Judge's direction on the standard and onus of proof was conventional. We do not consider the Judge was in error.

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11 *Hayes v R* [2008] NZSC 3, [2008] 2 NZLR 321. The Supreme Court was considering the meaning of "dishonestly" in the context of dishonestly using a document under ss 229A [repealed] and 228 of the Crimes Act 1961.

12 At [34] (footnotes omitted).

Further grounds

[29] While the inclusion of the word "honestly" was the focus of the appellant's submissions before us, in written submissions, the appellant makes four further criticisms about the Judges' self-defence directions, summing up and question trail. These relate to:

(a) Directions on the onus and standard of proof;

(b) Directions on inferences;

(c) Balance in the summing up; and

(d) Directions on pre-emptive strike.

[30] We do not consider those directions involved any material errors. We can explain our reasons succinctly.

Onus and standard of proof

[31] The first of these criticisms were that the Judge, in directing the jury on self-defence, failed to clearly guide the jury on the standard of proof, and where the onus of proof lay.

[32] Regarding the onus of proof, the appellant submitted that the Judge's final direction in [121] of the summing up on self-defence completely reversed the onus of proof. The direction in issue stated:

> [121] So, if you find that self-defence has not been proved or you are not satisfied that the self-defence has been made out, answering those questions, you would then go on to look at Issue Three, which is to do with Mr Lingman's intent and Issue Three deals with intent for murder.

[33] We agree that this direction was a mistake but in the context of the summing up as a whole has not led to error. In *addition* to the general directions on onus and standard of proof, the Judge included the following:

> [9] … The Crown must make you sure he wasn't [acting in self-defence]…
>
> [10] If, however, the Crown has satisfied you that Mr Lingman was not acting in self defence…
>
> [43] [Reference to Mr Lingman giving evidence] …the fact that he did does not change the fact that the Crown has to prove the charge, which includes disproving self-defence, beyond reasonable doubt.
>
> [44] …Mr Lingman does not become responsible for proving his innocence…
>
> [69] [Referring to Question Trail] …the Crown must prove all elements of the charge, and disprove all elements of self-defence, beyond reasonable doubt…
>
> [85] …it is for the Crown to satisfy you beyond reasonable doubt that the defence of self-defence does not apply. Mr Lingman does not have to prove he was acting in self-defence. The Crown must prove he was not.
>
> [118] …it is for the Crown to make you sure that the force used by Mr Lingman was not reasonable….
>
> [119] If the Crown has not made you sure Mr Lingman's shooting of [the victim] was justified as being in self-defence; then you must find him not guilty of murder, and not guilty of manslaughter.

[34] It follows that the misdirection at [121] of the summing up was an outlier. In its opening, the Crown said, "it is the Crown that has brought this charge and the Crown has to prove it." The question trail was headed with a banner that reiterated the onus and standard of proof: "The Crown must prove all elements of the charge and disprove all elements of self-defence, beyond reasonable doubt". Overall, we consider that the one misstatement in the direction did not materially mislead the jury as to where the onus lay.

[35] The appellant relied on *Afamasaga v R*[13] and *Murray v R*[14] to argue that the Judge ought to have invited the jury to take the most favourable view of the circumstances as the defendant believed them to be as long as they were *reasonably possible*. We consider that to say that Mr Lingman's version of events ought to be

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[13] *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640. The Court of Appeal at [45] did not criticise the question trail which included:

> (2) What were the circumstances as Mr Afamasaga believed them to be at the time he shot Mr Turner?
> *In deciding this issue, you should take the view that is as favourable to Mr Afamasaga as you believe is reasonably possible.*

[14] *Murray v R* [2017] NZCA 467 at [78].

accepted if reasonably possible, is simply another way of viewing the Crown's burden to disprove self-defence beyond reasonable doubt. Given our conclusion above, that this standard was made clear to the jury and for reasons that follow, we do not consider that the omission to include "reasonable possibility" was fatal.

[36] The Crown in closing, when discussing whether the jury was "sure that when [Mr Lingman] shot [the victim], he was not acting in self-defence", counsel added "[i]f you're not sure about that, in other words if you consider it's reasonably possible that he was defending himself, you will need to consider the third question." Crown counsel again stated it later in its closing "…you only need to consider this third question if you are left in some doubt about that, if it is reasonably possible, he was acting defensively."

[37] The Judge in summing up said:

> [46] However, if what Mr Lingman said when he gave evidence leaves you unsure, if you think what he said is reasonably possible, the proper verdict is still not guilty because you will have been left with a reasonable doubt. If what Mr Lingman said seems a reasonable possibility, the Crown will not have proved the charge and you will be finding Mr Lingman not guilty.…
>
> [108] …whether, in the circumstances as Mr Lingman believed existed, the Crown has made you sure that he was not acting to defend himself when he fired the rifle. Putting it another way, is it reasonably possible Mr Lingman was acting to defend himself when he fired the rifle?

[38] We consider this repeated reference to the reasonable possibility of Mr Lingman's account is sufficient to accompany the statements of the Crown's burden to disprove the defence beyond reasonable doubt. We do not consider its omission from the question trail to have had the effect of displacing this onus or standard.

Directions on inferences

[39] The appellant submits that the Judge's direction that inferences from, "other reliably established facts" to decide the circumstances as the appellant believed them to be ignored and therefore disregarded Mr Lingman's own evidence regarding his state of mind. The passage of the Judge's summing up in issue states:

> [53] For example, you will have to decide what the circumstances Mr Lingman believed them to be at the time he shot [the victim]. A defendant's state of mind is a question of fact which the Crown is required to prove like any other relevant fact. *The only difference is that unlike most facts, direct evidence cannot be called to prove what a defendant was thinking at a particular time.* That is because you cannot see what is going on inside the somebody's head. So, in that case, you would draw an inference from other reliably established facts to draw a conclusion.
>
> (Emphasis added).

[40] We agree with the Crown's concession that this direction overlooks Mr Lingman's direct evidence of his state of mind. However, we do not consider it has the effect of implying that the jury should ignore his evidence. Just prior, at [45] the Judge discussed that Mr Lingman gave his account of what happened. The Judge said: "…if you accept his evidence, the proper verdict would be not guilty because he would be entitled to the defence of self-defence".

[41] When viewed in context, we consider the oversight in the Judge's direction on inferences does not amount to a material error.

Balance in the summing up

[42] The appellant submits that the Judge's summing up of the respective theories of the case was unbalanced, as the Judge set out the reasons why the Crown contended Mr Lingman was lying without reference to the counter submissions from the defence. The appellant says the Judge asked the jury to choose between the competing accounts.

[43] Having carefully considered the Judge's summing up, we do not accept that it was unbalanced in favour of the Crown. We agree with the Crown's submission that the Judge fairly explained the defence case regarding self-defence, followed by the Crown's case. The Judge noted that both counsel presented "skilful and powerful closing addresses". The Judge then outlined three examples of inferences the Crown invited the jury to make, together with the defence counter-responses to those inferences.

[44] While we accept that at no point did the Judge invite the jury to choose between two competing theories, it was obvious that the jury had to choose between the two sets of competing inferences. We find there was no error.

Directions on pre-emptive strike

[45] The appellant submits that the Judge failed to give specific directions on how a pre-emptive strike can still amount to self-defence in law.

[46] The Crown submits that the Judge made it clear that Mr Lingman was not required to stand by while he was under attack. Further detailed directions on the use of "pre-emptive strike" risked overcomplication.

[47] The question on this appeal is whether a pre-emptive strike direction was appropriate and necessary in the present case. No authority was provided by the appellant to suggest there is a positive obligation for the Judge to provide a detailed direction regarding pre-emptive strike. However, the authorities have addressed the requirements of a pre-emptive strike. A threat has to be "imminent or immediate [with] no alternative available" for a pre-emptive strike to amount to self-defence.[15]

[48] The Judge's directions on the nature of the attack was as follows:

> [85] …Mr Lingman does not have to stand by while he or anyone else is under attack or the threat of an attack. On the contrary, he is entitled to use reasonable force to defend himself or another person from attack or the threat of it.
>
> [87] …The circumstances include Mr Lingman's beliefs as to the nature and seriousness of any threat, and his beliefs as to its imminence and the courses of action available to avoid or combat it.
>
> [115] To decide if the force is reasonable, you need to consider the perceived imminence and seriousness of the attack or threatened attack. You are looking at whether the defensive action taken was reasonably proportionate to the perceived danger. You can also consider whether Mr Lingman had other reasonable options open to him and whether he would have been aware of these options, whether he had the time to take up those options. So, you have to look at the imminence of the threat and the danger it posed as Mr Lingman understood the circumstances to be at the time.

[49] We are satisfied that the Judge gave adequate directions regarding the considerations relevant to pre-emptive strike; how imminent the apparent peril was, the nature and seriousness of the apparent threat, and the alternative courses of action available.

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[15] See generally *R v Wang* [1990] 2 NZLR 529 (CA) at 536 and *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [54].

[50] We consider these directions amounted, in practical terms, to asking the jury to consider whether self-defence was established based on pre-emptive strike. We accordingly do not accept the appellant's contention that the Judge ought to have directed about pre-emptive strike in more detail.

Conclusion on ground one

[51] We consider the Judge's directions, summing up, and question trail on self-defence was adequate. The appellant was unable to point to any error that led to a miscarriage or created a real possibility that the trial was unfair. Ground one is not upheld.

Ground two — the prejudice and sympathy directions

[52] The appellant contends that the Judge's general prejudice and sympathy directions were insufficient to deal with the jury's likely emotional reaction to Mr Lingman's post-death conduct. Specifically, the Judge did not tailor the prejudice direction in regard to Mr Lingman's actions in concealing the body in the freezer by amputating his legs with a chainsaw.

Analysis

[53] The Judge directed on post offence conduct as follows:

> [129] The Crown says, in relation to intention, that a person who fires a rifle at someone can be taken to intend to kill them. And the Crown highlights at this point what Mr Lingman did after he shot [the victim], and you are asked to infer that these things are consistent with someone who has intended to kill.
>
> [130] The defence case again relies on you accepting what Mr Lingman said, which is he only intended to disarm [the victim], not to kill him. You are asked to accept that the post-shooting events were both clumsy and ineffective in terms of disposing of evidence, which is more consistent with an attempt to preserve the position until the child's position could be secured when his mother returned from overseas.
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> [131] You are asked to accept that although, given the outward appearance of coping, this was not in fact how Mr Lingman was; he was taking diazepam and self-medicating — trying to forget.
>
> [132] You are not permitted to jump to a conclusion that Mr Lingman is guilty based solely on his conduct after [the victim] was shot. The most relevant consideration is what you think Mr Lingman intended at the time he

> pulled the trigger, however, you are entitled to take into account Mr Lingman's conduct after [the victim] was shot to determine whether Mr Lingman had the necessary murderous intent and whether he genuinely perceived there to be a threat.

[54] The evidence of Mr Lingman's post offence conduct was plainly admissible and is not in dispute. As the Crown submitted, the directions met the requirements of the case law. The Supreme Court of Canada made the following observations in *R v White,*[16] which have been approved by this Court:[17]

> … [T]here is a risk that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt. However, the best way for a trial judge to address that danger is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations. Beyond such a cautionary instruction, the members of jury should be left to draw whatever inferences they choose from the evidence at the end of the day.

[55] At [132] of the Judge's summing up (above) the jury was warned against jumping to a conclusion of guilt based solely on the post-offence conduct, and at [130]–[131] was invited to consider the alternative explanations for that conduct. Additionally, the Judge's opening remarks included a careful warning to the jury to keep an "open mind about the case" and "set aside feelings of prejudice, or any feelings of sympathy". They were instructed to "weigh the evidence in a clinical fashion, without emotion and that is because emotions impair judg[e]ment…". And in summing up, the Judge said:

> [55] The next point I want to touch on is feelings of prejudice and sympathy that often arise in criminal case. In this case, there would be plenty of opportunity for those sorts of feeling to arise.
>
> …
>
> [63] It would be quite wrong however, for you to let feelings of sympathy or prejudice influence you. Society requires judges, you and me, to put our feelings, our personal likes and dislikes, to one side. Society expects us to focus only on the evidence and the issues we have to decide.

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16 *R v White* [1998] 2 SCR 72.

17 At [57], approved by this Court in *R v Reynolds* [2017] NZCA 611 at [39]–[41] and *Roberts v R* [2019] NZCA 502 at [24].

[56] We consider these directions, and particularly those directed at the post-offence conduct set out above at [53] were sufficient to address any unfair prejudice arising from the Crown's emphasis on what Mr Lingman did following the killing. We are also conscious of the fact that these directions regarding inferences were developed in consultation with trial counsel.[18]

[57] We agree with the Crown submission that as the jury had been directed not to let prejudice or sympathy drive their decision making, a stronger direction risked inviting the jury to disregard the evidence that Mr Lingman's actions were explicable as he was preserving the position by freezing the evidence until his partner returned from overseas. We note there is no record of any request by Mr Lingman's trial counsel for the further direction now contended for, and we are of the view that a further direction was not necessary.

[58] We consider that the Judge gave adequate prejudice and sympathy directions which ensured that the jury would not be overwhelmed by prejudice arising from Mr Lingman's post offence-conduct. It was admissible evidence and relevant to the issue of murderous intent.

[59] We dismiss this ground of appeal.

Ground three — admission of photograph

[60] The last ground of appeal concerns the admission of a photograph to the jury which showed the victim's body as it was found by police — in a chest freezer with legs amputated on top of him, and his face covered in blood.

[61] The appellant submits that the post-mortem photograph was unfairly prejudicial and should not have been admitted because:

(a) The photograph was irrelevant to the central issue at trial, self-defence, and the injuries were unrelated to the cause of death.

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[18] See Bench Notes of Harland J, Day 10 dated 22 March 2021 at [10] and Day 13 and 14 dated 26 March 2021 at [12].

(b) The defendant accepted that he had chain sawed the deceased's legs off and placed the body into the freezer after his death.

(c) Showing the photograph was not necessary to describe the injuries that had caused the death. It is notable that the Crown prosecutor did not refer the pathologist to the photograph during his evidence.

(d) The photograph was adequately described in the evidence of Dr Glenn, Ruben Miller and the attending Police officers.

(e) The photograph had no probative value and it only served to excited strong feelings of horror, disgust and anger in the jury, which was unfairly prejudicial.

[62] We consider that the photograph was admissible and probative for the reason the Crown submits. The photo was illustrative of a core component of the Crown case, that Mr Lingman's callous treatment of the victim's body supported an inference that he killed with intent rather than in self-defence.

[63] Equally, it could also support the defence case that this was a killing in self-defence and the post-offence conduct of Mr Lingman showed there had been no planning involved and he was preserving the evidence until his childcare responsibilities were taken over on the return of his partner.

[64] We accept that the impact of Mr Lingman's conduct post-death was generally shocking. However, while the facts were gruesome in nature, the photo was clean and clinical in its presentation and to a large extent, in our view, removed the more disturbing mental image of Mr Lingman's actions.

[65] We consider that the directions about the photographs, in addition to the general sympathy and prejudice directions, adequately dealt with any unfairly prejudicial effect of the evidence.

[66] We consider no miscarriage of justice occurred.

Conclusion

[67] The appeal against conviction is dismissed.

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