IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B33 of 2016

BETWEEN:

THE QUEEN

Appellant

and

GERARD ROBERT BADEN-CLAY

Respondent

RESPONDENT'S SUBMISSIONS

1. PART I Internet Publication

1.1. It is certified that this submission is in a form suitable for publication on the internet.

2. PART II Issues on Appeal

2.1. Whether the prosecution have excluded all reasonable hypotheses consistent with the respondent having unlawfully killed the deceased without an intention to kill or to cause grievous bodily harm.

3. PART III Section 78B of the *Judiciary Act 1903 (Cth)*

3.1. It is certified that no notice is required under section 78B of the *Judiciary Act 1903 (Cth)*.

Respondent's Submissions
Filed on 27 June 2016

HIGH COURT OF AUSTRALIA
27 JUN 2016
THE REGISTRY BRISBANE

Peter Shields Lawyers
50 Morgan Street,
Fortitude Valley Qld. 4006
Ref: Peter Shields
Telephone: (07) 3850 0888
Facsimile: (07) 3850 0876

4. **PART IV Statement of contested material facts**

4.1. The respondent accepts the facts as stated in Part V of the appellant's submissions with the following qualifications and additions.

4.2. Paragraphs 9 and 17 of the appellant's submissions refer to some answers that the respondent gave to the police on the morning of 20 April 2012 concerning the state of the marital relationship. Constable Ash, the first police officer to speak to the respondent, questioned him shortly after 8am. The respondent said that he had recently had an affair and that there was some tension between him and his wife due to that and that she did not yet trust him and that their counsellor had told him that they needed to spend 15 minutes a day talking about the affair and the issues.[1] On the same morning the respondent told Sergeants Jackson and Curtis that he and his wife had seen a counsellor on Monday who had suggested 15 minutes be set aside each night for his wife to "*vent and grill me*".[2] They had a 15 minute session last night and there were "*some difficult things that we talked about*".[3] The respondent also said that their situation was "*pretty tight*" financially.[4] He told the police that his wife had asked him questions from a list that she had made.[5] On 21 April 2012 the police found a journal[6] under the bedside table in the matrimonial bedroom.[7] Some of the contents were relevant to the affair with Ms McHugh.

1 Tx 6 – 63 lines 10 – 20
2 Exhibit 87 at p15
3 Exhibit 87 at p23
4 Exhibit 87 at p22
5 Exhibit 92 at p25
6 Exhibit 98
7 Tx 7 – 23 line 27

4.3. Paragraphs 10 to 13 of the appellant's submissions refer to Ms McHugh's evidence about the state of the relationship between the respondent and her. In the period between December 2011 and April 2012 there had been discussions about their future living arrangements and Ms McHugh said that although the respondent was willing to "*entertain*" such discussions "*He never really got practical about anything*".[8] Notwithstanding the respondent's written statement dated 3 April 2012[9] that he intended to adhere to the undertaking to leave his marriage by 1 July Ms McHugh said "*I thought he's just pulling a number out of thin air. In actual fact, I just didn't believe it. I didn't believe it at all*".[10]

10 4.4. Paragraph 14 of the appellant's submissions concerns Ms McHugh's recollection of their telephone call late on the afternoon of 19 April 2012. She asked the respondent when he was going to tell her about his wife's attendance at the same conference Ms McHugh was going to and he said that he did not know about his wife going until "*the last minute. Kate had booked the tickets.*".[11]

4.5. Relevant to the respondent's financial position, referred to at paragraph 19 of the appellant's submissions, was that none of the respondent's friends had ever demanded that he re-pay them the funds that they had made available.[12] The potential sum receivable under an insurance policy in the event of the deceased's death, also referred to at paragraph 19, ultimately had no significance at all. In the
20 course of his reply to a no case submission concerning the count of murder the

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8 Tx 5 – 71 lines 30 – 33
9 Exhibit 63
10 Tx 5 – 73 lines 13 – 15
11 Tx 5 – 75 lines 18 – 19
12 Tx 10 – 17 line 10; Tx 10 – 27 line 35 and Tx 10 – 38 lines 21 – 22

prosecutor disavowed any reliance on a motive of killing to obtain the proceeds of the policy.[13]

4.6. The injuries to the respondent's left neck and chest referred to at paragraph 23 (and also at paragraph 57) of the appellant's submissions were not ultimately relied on by the prosecution. The prosecutor put to the jury that the only injuries the deceased caused to the respondent were the scratches to his face.[14]

4.7. The daughters went to bed some time between 6.30pm and 7pm on 19 April 2012. The eldest child, H, got up shortly afterwards. She thought that her mother was wearing *"like a sloppy jacket"* and pyjama pants.[15] The deceased was found clothed in three-quarter length pants, socks, sneakers and a singlet top which had a bra built in to it. This clothing was correctly positioned on the body[16] and undamaged.[17] The shoe laces were tied up.[18] An undamaged jumper[19] was partly inside out and the collar and waistband were around the neck and the hands were inside the sleeves of the jumper. The carotid arteries were normal and the hyoid bone in the neck was not fractured and there was no damage or haemorrhage around it.[20]

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13 Tx 11 – 71 lines 32 – 45
14 Tx 18 – 47 lines 15 – 20. The chip to the deceased's tooth could not be aged (Tx 2 – 46 line 30)
15 Exhibit 38 p15
16 Tx 2 – 10 line 12
17 Tx 2 – 17 line 12
18 Tx 2 – 32 line 46
19 Tx 2 – 16 lines 40 – 45
20 Tx 2 – 21 lines 23 – 44

4.8. The house was thoroughly examined and searched.[21] No traces of blood were found in the house[22] and there were no indications of a clean up having occurred.[23]

5. PART V Legislative provisions

5.1. The statement of applicable legislative provisions is accepted. Also relevant is the definition of "grievous bodily harm"[24] and the provision concerning manslaughter.[25] A copy of the provisions is attached to these submissions.

6. PART VI Statement of Respondent's Argument

6.1. Disavowing any suggestion that the deceased's death was premeditated murder[26] the prosecution case was that various pressures weighing on the respondent on or about 19 April 2012[27] caused him to kill his wife intending either to kill or to do some grievous bodily harm to her.

6.2. There was no direct evidence that the respondent either caused the death or did so with the intention necessary for murder. Proof he caused the death depended upon the drawing of inferences. Proof that he killed with the necessary intent depended upon the drawing of inferences.

6.3. Rejection of the respondent's evidence that he did not cause the death did not mandate a conclusion that he caused it with the necessary intent. The jury still had to be satisfied beyond reasonable doubt on the prosecution evidence that the

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21 Tx 7 – 26 lines 35 – 40
22 Tx 7 – 38 line 43
23 Tx 7 – 39 line 5
24 *Criminal Code (Qld)*, s1
25 *Code*, s303
26 Tx 11 – 67 lines 30 – 35 and Summing Up 10/7/14 Tx 17 line 40
27 Summing Up 10/7/14 Tx 17 lines 35 – 40

respondent killed either intending to kill or intending to do some grievous bodily harm.[28]

6.4. As the case for murder depended entirely upon circumstantial evidence the jury could not return a verdict of guilty:

> *"... unless the circumstances are "such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused": Peacock v. The King. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be "the only rational inference that the circumstances would enable them to draw": Plomp v. The Queen."*[29]

6.5. No onus rested on the respondent:

> *"... it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference.".*[30]

> *"... if a reasonable jury ought to have found that an inference or hypothesis consistent with innocence was open on the evidence, then it ought to have given the appellant the benefit of the doubt necessarily created by that circumstance.".*[31]

6.6. An hypothesis consistent with innocence of murder was open on the prosecution evidence.

6.7. The prosecution contended that the respondent's relationship with Ms McHugh was the subject of discussion between the deceased and the respondent on the night of 19 April 2012.[32] By reference to the contents of Ex 98 the prosecution contended that the deceased asked the respondent *"very personal and intense questions where he's having to admit his deception and his lies, the sordid details of it".*[33] Relying upon Ms McHugh's evidence that during a telephone call at

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28 *Liberato v The Queen* (1985) 159 CLR 507 at 515
29 *Barca v The Queen* (1975) 133 CLR 82 at 104, footnotes omitted
30 *Barca* at 105
31 *Knight v The Queen* (1992) 175 CLR 495 at 503
32 Tx 19 – 4 lines 23 – 25 and Tx 19 – 12 lines 6 – 10
33 Tx 19 – 12 line 10 – Tx 19 – 13 line 17

lunch time on 20 April 2012 she asked the respondent whether he and the deceased had argued prior to the deceased going missing the prosecution effectively suggested to the jury that an argument preceded the killing.[34] The prosecutor suggested to the jury that the evidence showed *"There was a struggle between the two of them".*[35] Thus the prosecution contended that there was a physical confrontation between the respondent and the deceased.

6.8. The hypothesis identified by the Court of Appeal[36] that *"there was a physical confrontation between the* [respondent] *and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm;"* and in panic disposed of her body was indeed still open on the prosecution evidence.

6.9. As that hypothesis was open on the evidence the issues in the trial were not narrowed to whether the prosecution had negatived hypotheses such as death due to misadventure (drowning, falls from a substantial height, alcohol/sertraline toxicity).

6.10. Whatever the precise degree of force applied to the deceased, when regard is had to the absence of any damage to her clothing (which clothing the prosecution contended the deceased had changed into)[37], the absence of blood or indicia of a disturbance in or about the house and/or evidence of a clean-up, and the absence of any injuries to the deceased, it was well open to conclude that the force was not intended to kill or to do grievous bodily harm. The scratches to the face say

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34 Tx 19 – 13 lines 40 – 50
35 Tx 18 – 47 lines 7 – 8
36 At [48]
37 Tx 18 – 35 lines 15 - 20

something about the relationship between the deceased and the respondent but nothing about intention. They do not show who initiated violence.

6.11. The existence of a hypothesis consistent with innocence of murder and which was open on the evidence was recognised in the directions[38] that the jury needed to consider whether alleged lies about scratches and conduct said to disguise scratches might have only revealed a consciousness of guilt of manslaughter.

6.12. A hypothesis consistent with guilt of only an unlawful killing was raised by the defence during the trial.[39]

6.13. The prosecution did not contend that the killing was premeditated, rather:

> *"The Crown says that the killing was this man's reaction to a particular set of circumstances that accumulated over time ...".*[40]
>
> ...
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> *"there were three significant pressures ... the pressure of his relationship with his wife, the second is the pressure he was under from his relationship with Toni McHugh, and thirdly from his business. And talking about pressure doesn't mean premeditation."*[41]

6.14. The directions concerning motive[42] did not identify a prosecution contention of a motive. This was because motive in the sense of a desire was not relied on by the prosecution.

6.15. With respect to "motive" Dickson J said: [43]

> *"There would appear to be substantial agreement amongst textwriters that there are two possible meanings to be ascribed to the term. Glanville Williams in his Criminal Law, The General Part (2nd ed., 1961) distinguishes between these meanings:*

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38 Summing up Tx 35 lines 5 – 20 and Tx 36 Line 38 – p37 line 5
39 Tx 11 – 52 lines 40 – 45 and MFI No. L at p1658 para 1 – p1662 para 27
40 Tx 18 – 8 lines 43 – 44
41 Tx 18 – 48 lines 31 - 39
42 Summing up 9/7/14 Tx 10 lines 5 – 13
43 *Lewis v The Queen* [1979] 2 SCR 821 at 831

> *(1) It sometimes refers to the emotion prompting an act, e. g., "D killed P, his wife's lover, from a motive of jealousy." (2) It sometimes means a kind of intention, e.g., "D killed P with the motive (intention, desire) of stopping him from paying attention to D's wife."* (p.48)
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> *It is this second sense, according to Williams, which is employed in criminal law:*
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> *Motive is ulterior intention – the intention with which an international (sic) act is done (or, more clearly, the intention with which an intentional consequence is brought about). Intention, when distinguished from motive, relates to the means, motive to the end.* (p.48)

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6.16. To the extent to which "motive" was relied on by the prosecution, it fell into the first category rather than the second. Consistently with this understanding, in the Court of Appeal the prosecution relied on the pressures as going to "*motive, as that term is understood to signify an explanation for uncharacteristic conduct*".[44] The observation[45] that these pressures did not "*provide a motive*" was clearly no more than an observation that no motive in the usual sense was relied on. That this is the context in which the Court spoke of the absence of a motive is made clear by what was said at [44] and [46] of the reasons:

> "*[44] Putting aside the idea that the pressures on the appellant provided a motive in any* 20 *conventional sense of the word, ...*"
>
> *[46] ... But in the present case there was no evidence of motive in the sense of a reason to kill, ...*"

6.17. The Court correctly appreciated that a motive might have assisted in proving an intention.[46] Nevertheless, there is no room to doubt that the Court of Appeal had regard to the evidence concerning the suggested pressures on the respondent in determining whether there remained open an hypothesis consistent with innocence because it was only "*the idea*" that the pressures provided a "*motive in any* 30 *conventional sense of the word*"[47] which was put aside.

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44 At [42]
45 At [42]
46 At [42]
47 At [44]

6.18. Keane JA said:[48]

> *[50] while ... it is for the jury to determine whether the circumstances are such that a lie can be said to be understood as revealing a consciousness of guilt of the greater offence, where the false statement is capable of amounting to an acknowledgment of guilt of one or more of several offences with which the accused stands charged, it is necessary for the trial judge to point out to the jury the possibility that the consciousness of guilt revealed by the lie relates to the lesser offence. The position has been stated in similar terms in the Victorian Court of Criminal Appeal and Court of Appeal in ... R. v. Ciantar..."*

10 6.19. Conformably with this approach the Court of Appeal held[49] that the lies concerning the scratches and the steps taken to dispose of the body were "*properly to be taken into account as evidence of a consciousness of guilt, in the context of all the evidence in the case*". However, even approached this way the Court concluded[50] that the lies and steps to dispose of the body considered with all of the other evidence still left open the hypothesis of guilt of unlawful killing, hence a verdict of murder was not reasonably open. This conclusion is correct. The Court of Appeal applied the orthodox approach[51] of considering and evaluating all of the evidence in determining whether there remained an inference consistent with innocence reasonably open on the evidence. The
20 probative weight of all the circumstances together was considered. So much is apparent from what was said immediately prior to the conclusion that a reasonable hypothesis remained. The Court said[52]:

> *"Thus, while findings that the appellant lied about the cause of his facial injuries and had endeavoured to conceal his wife's body* ***should not be separated out from the other evidence in considering their effect****, the difficulty is that, viewed in that way, the post-offence conduct evidence nonetheless remained neutral on the issue of intent".* (Emphasis added)

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48 *R. v Mitchell* [2008] 2 Qd R 142 at [50]
49 At [45]
50 At [48]
51 *R v Hillier* (2007) 228 CLR 618 at 637 [46] – 638 [48]
52 At [48]

6.20. What was said at [45] also illustrates the orthodoxy of the Court's approach. It was there stated that:

> *"Conclusions that he had lied in that regard and that he had taken steps to dispose of his wife's body were properly to be taken into account, as evidence of a consciousness of guilt, **in the context of all the evidence in the case.** But the lies, or the lies **taken in combination** with the disposal of the body, would not enable the jury to draw an inference of intent ... if there were, **after consideration of all of the evidence,** equally open a possibility that ...."*

(Emphasis added)

7. PART VII Argument on notice of contention or on cross-appeal

7.1. There is no notice of contention and no notice of cross-appeal.

8. PART VIII Time estimate

8.1. It is estimated that the respondent's argument will take approximately 1 ½ hours.

DATED: 27 June 2016

M. J. Byrne

M. J. Copley

COUNSEL FOR THE RESPONDENT

Telephone: (07) 32298181
Facsimile: (07) 32297546
Email:byrneqc@qldbar.asn.au

Telephone: (07) 30127921
Facsimile: (07) 32297546
Email: copleyqc@qldbar.asn.au