HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

MATTHEW WAYNE DE GRUCHY APPELLANT

AND

THE QUEEN RESPONDENT

De Gruchy v The Queen
[2002] HCA 33
8 August 2002
S252/2001

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with J S Stratton for the appellant (instructed by Andrews Solicitors)

R D Ellis with L M B Lamprati for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

De Gruchy v The Queen

Criminal law – Murder – Directions to jury – Circumstantial case – Absence of proved motive – Evidence of the appellant's good character – Accuracy and sufficiency of directions to jury – Verdict not unreasonable having regard to evidence.

Criminal Appeal Act 1912 (NSW), s 6.

1 GAUDRON, McHUGH AND HAYNE JJ. Following a trial in the Supreme Court of New South Wales, the appellant was convicted of the murder of his mother, brother and sister "on or about 12 March 1996, at Albion Park Rail" in the State of New South Wales. It is not in issue that the appellant's mother, brother and sister were murdered, each having suffered an extremely violent death. The case that they were murdered by the appellant was entirely circumstantial.

2 The appellant appealed against his convictions to the Court of Criminal Appeal of the Supreme Court of New South Wales. His appeal was dismissed[1]. He now appeals to this Court, arguing that certain directions of the trial judge were wrong or inadequate and that the Court of Criminal Appeal erred in its approach to the question whether the jury's verdicts were unreasonable and in its conclusion that they were not.

The evidence against the appellant

3 The bodies of the appellant's mother, brother and sister were found at their family home on the morning of 13 March 1996. The bodies of the appellant's mother and sister were found in their beds. The body of his brother was found in the garage attached to the house. The brother's body was severely blistered and smelt strongly of petrol. There was an open petrol container nearby. Each of the victims suffered horrific injuries as the result of blows struck with a heavy implement. The medical evidence was that "train track" injuries to the body of the appellant's brother were consistent with blows from a jack handle or wheel brace. The medical evidence placed the time of the deaths between 8.00 pm on 12 March and 1.00 am on 13 March, allowing that the deaths might have occurred as late as 3.00 am but no later.

4 The other persons who normally occupied the family home were the appellant and his father. The appellant had been at home, on his account, until approximately 10.00 pm when he left by car to go to his girlfriend's house. The evidence of his girlfriend was that he arrived at her place between 11 and 11.30 pm. His girlfriend's mother gave evidence that he arrived about 11.00 pm. He arrived later than expected. According to the account given by the appellant to his girlfriend earlier in the evening, his mother had received threatening phone calls and had asked him to stay at home. The following day, he told his girlfriend that "someone had rang and said [to his mother that] three people in your family would be deceased".

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1 *De Gruchy* (2000) 110 A Crim R 271.

5 The appellant gave evidence at his trial that his mother had told him that she had received telephone calls in which threats had been made that three people would be killed. However, he made no claim that such threats had been made when interviewed by police on 13 and 17 March. Moreover, his mother made no reference to any threatening calls in telephone conversations which she had with her mother and brother on the evening in question.

6 The appellant's girlfriend gave evidence that she did not observe blood on the appellant's clothes or body on the night of 12 March 1996. She also said that he behaved in his normal manner and did not appear to be depressed or upset. Her mother also gave evidence that she noticed nothing unusual about the appellant's behaviour.

7 The appellant's father, on his account, spent the night with his parents in Moorebank. The appellant's grandfather, his father's father, gave evidence that his son arrived at Moorebank at 8.30 pm and was still there at 10.30 pm when he (the grandfather) went to bed. He said that he saw him again at 7.30 am the next morning.

8 The appellant gave evidence that he arrived home from his girlfriend's house at about 8.35 or 8.40 am on 13 March. On his account, he walked through the house and retrieved his wallet which had been left near the pergola, went out and bought cigarettes and then returned to the house. When interviewed on 17 March, the appellant said that after returning to the house, he entered his mother's bedroom but not his sister's before running outside to get help. He spoke to a neighbour, Mr Bailey, who gave evidence that the appellant told him there was "something wrong with Mum and Sarah". Mr Bailey further gave evidence that the appellant was in a very distressed state and that he, Mr Bailey, did not observe any blood or injuries on him.

9 Forensic tests conducted at the family home located a bloodstain on the wall above and behind the bed where the body of the appellant's mother was found and another on the tiled floor in the hallway. DNA testing later showed that those bloodstains could have originated from the appellant, but not from his father. DNA testing of another bloodstain in the hallway showed that it could also have come from the appellant.

10 A doorknob to the vanity unit in the main bathroom bore the left palm print of the appellant and tested positive for blood, but DNA testing of the blood was unsuccessful. The open petrol container near the body of his brother also bore the appellant's finger prints but not those of his father who said in evidence that he also used the container from time to time.

11 Some hair which was covered in a substance that could have been blood was found in the hand of the appellant's brother. DNA material that could have been that of the appellant's brother or sister, but not that of the appellant, was detected in the substance. Testing did not enable the hair to be identified, but it was unlikely to be that of the appellant's brother whose hair was much shorter.

12 Upon examination of the main bedroom, it was observed that areas of carpet had been cut out and removed. The appellant's father gave evidence that he did not notice any missing areas of carpet when he steamcleaned the carpets a few days before the murders. DNA was located on a tuft of carpet that was found in the vehicle which the appellant drove on the night of 12 March and on the morning of 13 March. The evidence was that the DNA could have been the appellant's, but could not have been that of his father, mother, brother or sister.

13 Some two months after the murders, a number of items, many of which were identified by the appellant's father as coming from the family home, were found in a dam at the rear of the old Woonona brickworks. The dam is 31 kilometres from the family home in which the bodies were found and two kilometres from the home of the appellant's girlfriend where he stayed on the night of 12 March. The evidence of Detective Sharkey was that it took 26 minutes to drive at five kilometres per hour less than the speed limit from the family home to the dam and two minutes from the dam to the home of the appellant's girlfriend. Detective Palamara, who was with Detective Sharkey at the time, gave evidence that they travelled at about five kilometres per hour above the speed limit and that the time taken to travel from the family home to the dam was 24 minutes. The appellant was familiar with the dam and admitted to having been there as a child.

14 The items found in the dam and identified by the appellant's father as having come from the family home included a pair of binoculars, a Sega Master System II, various Sega games, a Casio calculator marked with the name A De Gruchy, a lady's purse containing cards in his wife's name, her driving licence and a NRMA membership card, a red and white "Le Sport" carry bag and a black backpack. There were other items which he could not identify. One of the items recovered from the dam but not identified by the appellant's father was a pair of blue tracksuit pants.

15 The red and white bag located in the dam was found to contain, amongst other things, two T-shirts, a kitchen knife, a red coloured towel, two pieces of carpet and a plastic ziplock bag. There was evidence that it was highly probable that the two pieces of carpet had their origin in the bedroom carpet, as did the tuft of carpet that was found in the car driven by the appellant on the night of 12 March 1996. Blood was found on the carpet pieces found in the dam but the

DNA could not be identified. Similarly, DNA was located on the two T-shirts but, also, could not be identified.

16 The plastic ziplock bag found in the dam contained a torn-up sheet of notepaper upon one side of which was written:

"open gate

throw bottle down the back

throw things down wall in roof

track suit pants 1

knife 1

T shirts 2

Shoes 2

hanky

pole

towel

open blinds to see through

Sarah Mum

Adrian

head butt mirror (mirror crossed out) bench

have shower

throw hi fi down back

hit arm with pole

hit leg pole

cut somewhere with knife".

The writing was in black ink except for the words "Sarah Mum; Adrian" which were in blue. On the other side of the paper, a series of numbers was written in red ink.

17 The appellant admitted in evidence that the handwriting on the notepaper was his but said that he could not recall writing it. In the course of his evidence, it was suggested that some of the writing might refer to preparations for his eighteenth birthday party and others might refer to presents he received on that occasion. He also identified the T-shirts found in the dam, saying one was probably his or his brother's and the other had been lent to him by a friend some time after the murders.

18 One other matter should be mentioned, namely, that neither the jack nor the wheel brace which had been supplied with the car driven by the appellant on the night of 12 March 1996 was located in the car.

The defence case

19 The defence case was that the appellant had not committed the murders with which he was charged. It was hypothesised that they could have been committed by a stranger or, more faintly, by the appellant's father. Possible explanations for the forensic evidence relating to the appellant were proffered. In particular, the appellant said he had from time to time bled in the house. Moreover, carpet offcuts were kept in the garage and placed in the car when heavy or dirty objects were transported as, for example, had happened when the carpet-cleaner was returned on the weekend prior to the murders.

20 The appellant also gave evidence that, from time to time, he was required to use the petrol container found near his brother's body to fill the car. And he explained his failure to arrive at his girlfriend's house in less than an hour on the basis that his girlfriend and her mother had gone to bed with the result that he was delayed until he found a note on a side door telling him to go in.

21 Reliance was placed by the defence on the evidence of the appellant's girlfriend that she observed no blood or injuries, on her evidence and that of her mother as to his demeanour, and on the evidence of Mr Bailey, other neighbours, police and ambulance officers as to his distraught condition on the morning of 13 March.

22 Three other matters bearing on the defence case should be noted. The first is that, although Detective Sharkey gave evidence that he did not notice anything unusual in relation to the front door when he attended the De Gruchy family home shortly after the murders, the appellant's father gave evidence that, some time later, he noticed some slight indentations near the doorjamb as if someone had tried to lever the door open. The second is that there was evidence that, at the time of the murders, the appellant's father had a female friend as well as his wife. Finally, there was evidence that, on 19 March 1996, a man named

Wakehim committed suicide and left a note saying that he was afraid he would be blamed for the De Gruchy murders.

23 The defence also relied heavily on the absence of any proven motive and on evidence of the appellant's good character given by his uncle, his father, his girlfriend and his girlfriend's mother who variously described him as "very gentle", "far from violent", "devoted to his mother", "polite", "quiet", "kind" and "a person ... who got on well with his family".

The trial judge's directions

24 The argument with respect to the trial judge's directions relates to the absence of any proven motive on the part of the appellant and the evidence that he was a person of gentle disposition. The trial judge instructed the jury that they were bound to take account of the unchallenged evidence of the appellant's good character. His Honour then instructed the jury that the prosecution was not obliged to prove motive and, having given that direction, turned to an issue raised by prosecuting counsel in the course of his final address.

25 Prosecuting counsel had made a statement in his final address to the effect that the acts of the person who murdered the appellant's mother, brother and sister were the product of a disturbed mind. In his address, defence counsel responded by telling the jury, correctly, that there was no evidence that the appellant had a disturbed mind and that, if there were, the prosecution could have called it.

26 In his summing up, the trial judge confirmed that there was no evidence before the jury as to the state of the appellant's mind and instructed the jury more than once that the issue was irrelevant and, in the course of so doing, observed that they did not know whether there was evidence one way or other on the subject. In his concluding remarks on the subject, his Honour said:

> " I emphasise to you there is no such evidence and I am not suggesting I know one way or other whether any such evidence exists. This matter has been somewhat elaborated, starting with a flourish by the Crown Prosecutor, as a murder by a disturbed mind and responded by his opponent that if that is what he wanted to suggest you would have heard about it. You would have heard evidence and there were no questions even hinting that the accused had a disturbed mind".

27 It was argued for the appellant that the above directions undermined the defence case in so far as that case relied on good character and absence of motive. In particular, it was put that the prosecutor's reference to "a disturbed mind" and the subsequent directions given by the trial judge left it open to the

jury to reason that, because of his disturbed mind, they could properly ignore absence of motive on the part of the appellant. Accordingly, it was said, the remark should not have been made and the directions should not have been given. In the alternative, it was contended that further directions should have been given so as to make clear the positive significance of the absence of motive.

28 Motive, if proven, is a matter from which a jury might properly infer intention, if that is in issue, and, in every case is relevant to the question whether the accused committed the offence charged. As was observed by Lord Atkinson in *R v Ball*:

> "Evidence of motive necessarily goes to prove the fact of the homicide by the accused ... inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not"[2].

So, too, absence of motive is equally relevant to the question whether the accused committed the offence charged and, as observed by Menzies J in *Plomp v The Queen*, "is commonly relied upon as a circumstance tending in favour of ... a person accused of a crime."[3]

29 Although absence of motive is relevant, the appellant's argument overlooks a critical distinction between absence of proven or apparent motive, on the one hand, and proven absence of motive, on the other[4]. In the present case, there was no evidence of motive, which is not the same thing as proven absence of motive[5]. And although the character evidence called on behalf of the appellant tended to negate possible motive, it by no means established the absence of motive.

30 The absence of evidence of possible motive is clearly a matter to be taken into account by a jury, particularly in a case based on circumstantial evidence. However, if, as in the present case, the prosecution does not have to establish motive, it is difficult to say that the absence of evidence in that regard is a matter of "positive significance", either in the sense that it is a weakness in the prosecution case or a strength in the defence case. It might be otherwise if there

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2 [1911] AC 47 at 68.

3 (1963) 110 CLR 234 at 250.

4 See *Ellwood* (1908) 1 Cr App R 181. See also Phipson, *Best on Evidence*, 12th ed (1922) §453 at 385; Best, *Presumptions of Law and Fact*, (1981) §232 at 182.

5 See *R v T* [1998] 2 NZLR 257 at 266 per Eichelbaum CJ.

were positive evidence that the accused lacked motive. However, that would be a most unusual case. The present is not a case of that kind. It is simply a case where there was no evidence of motive.

31 It clearly appears from the trial judge's directions that much emphasis was placed on the absence of motive in defence counsel's final address. Apart from instructing the jury, correctly, that the prosecution did not have to prove motive, nothing was said by the trial judge to detract from the force of defence counsel's submissions in that regard. Moreover, given the trial judge's repeated directions that the question of "disturbed mind" was irrelevant, it is not to be supposed that the jury might have thought that, on that account, the absence of evidence as to motive on the part of the appellant could be ignored.

32 Neither prosecuting counsel's reference to a disturbed mind nor anything else in the case required any specific direction with respect to motive other than that motive was not an essential element of the crime charged and, thus, did not have to be established by the prosecution. Indeed, had the trial judge gone beyond that, it would have been necessary to direct the jury that there was no evidence of motive on the part of the appellant, rather than an absence of a motive on his part. Such a direction would not have assisted the defence case.

33 The appellant's arguments with respect to the judge's directions concerning motive and disturbed mind must be rejected.

Reasonableness of the verdicts

34 The appellant's contention that the Court of Criminal Appeal erred in its approach to the question whether the verdicts were unreasonable relates to the hairs found in the hand of the appellant's brother. As already mentioned, it was unlikely that the hairs were those of the brother as his hair was shorter. The appellant's case in the Court of Appeal, as in this Court, was that it was a rational hypothesis that the hairs came from his killer. In the Court of Appeal, the prosecution proffered the explanation that the hair may already have been on the garage floor and adhered to his bloodied hand. Of this aspect of the evidence, Wood CJ at CL, with whom Sully J agreed, said:

> " In the end, the evidence concerning the strands was equivocal, since DNA that could have come from either Adrian or Sarah was found in the sample, and it could not be said with any certainty, that the hair

inevitably must have come from an assailant who could not have been the appellant."[6]

35 The evidence relating to the strands of hair was dealt with somewhat differently by Simpson J. Her Honour described the hair as "hair that could not have been that of the appellant, and which ... was very unlikely to have come from [his brother]"[7]. It is not now in issue that her Honour's description was incorrect in that DNA testing established that the substance adhering to the hair, and not the hair, itself, could not have come from the appellant. Her Honour thought that the possibility that the hair had come from the appellant's sister and had been carried on a murder weapon to the hand of her brother was not "so inherently implausible as to warrant rejection".

36 The question for the Court of Criminal Appeal was neither whether there was a plausible explanation for the hairs found in the hand of the appellant's brother nor whether they "inevitably must have come from an assailant who could not have been the appellant". The question was whether, in the light of all the evidence, including those hairs, the jury should have entertained a reasonable doubt as to the appellant's guilt. And, given the circumstantial nature of the case, that question translated into the question whether there was a reasonable hypothesis consistent with the appellant's innocence.

37 The jury was entitled to conclude beyond reasonable doubt that whoever committed the murders had disposed of the items subsequently recovered from the dam at the rear of the Woonona brickworks by throwing them into that dam. Further, it was entitled to conclude, beyond reasonable doubt, that some of those items (for example, the mother's wallet, the binoculars and the Sega Master System) had been taken from the house for the purpose of making it appear that the murders had been committed by an intruder intent upon theft. It was also entitled to conclude, beyond reasonable doubt, that strips had been cut from the carpet in the main bedroom and thrown into the dam to conceal evidence which could or might disclose the identity of the murderer.

38 In addition to the conclusions outlined above, it was open to the jury to reject the appellant's explanation of the note found in the dam and, also, his account of the receipt by his mother of phone calls threatening the lives of three family members. Once that further step was taken, it was but a short step for the jury to conclude, on the basis of opportunity, the forensic evidence implicating

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6 *De Gruchy* (2000) 110 A Crim R 271 at 291 [101].

7 *De Gruchy* (2000) 110 A Crim R 271 at 293 [116].

the appellant and the disposal in the dam of the note and T-shirts identified by him, that there was no reasonable hypothesis consistent with the appellant's innocence. It was, thus, open to the jury to conclude beyond reasonable doubt that the appellant committed the murders charged. Accordingly, the argument that the verdicts were unreasonable must also be rejected.

39 The appeal must be dismissed.

40 KIRBY J. Jeremy Bentham, in his essays on evidence, remarked on the problematic relevance of a possible motive, in a circumstantial case, to proving that a person was guilty of an alleged offence. He said: "[E]very child may be a gainer by the death of his father; yet, when a father dies, nobody thinks of attributing his death to his children"[8].

41 This appeal[9] involves a case where the accused was tried by jury and found guilty of killing a parent, as well as two siblings. The evidence at the trial revealed no motive for the crimes. On the contrary, some evidence was tendered to suggest an absence of motive[10]. The first question for this Court is whether the instructions of the trial judge on the subject of motive involved a material misdirection of the jury, thereby requiring a retrial. The second question is whether, by taking into account the want of a proved motive when considered with all the evidence, the guilty verdicts are unreasonable, obliging the substitution of verdicts of acquittal[11].

42 The background facts are stated in the joint reasons of Gaudron, McHugh and Hayne JJ[12] and in the reasons of Callinan J[13]. The course of the trial, the addresses of counsel and the trial judge's instructions to the jury are also set out in those reasons[14].

43 I agree that the appeal must be dismissed. I agree generally with the joint reasons. I agree specifically with Callinan J[15] that the treatment by the trial judge of the issue of "disturbed mind" was neither unreasonable nor unfair, having regard to the way that counsel had addressed the jury. His Honour firmly told the jury that there was no evidence of a mental infirmity of mind on the part of the appellant. I do not consider that there was any misdirection on that score. However, I wish to add some comments of my own concerning judicial

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8 Bentham, *A Treatise on Judicial Evidence* (1825) at 175-176.

9 From a judgment of the New South Wales Court of Criminal Appeal: *De Gruchy* (2000) 110 A Crim R 271.

10 See reasons of Gaudron, McHugh and Hayne JJ ("the joint reasons") at [21]-[23].

11 Pursuant to the *Criminal Appeal Act* 1912 (NSW), s 6(1), (2).

12 Joint reasons at [1]-[23].

13 Reasons of Callinan J at [69]-[99].

14 Joint reasons at [24]-[27]; reasons of Callinan J at [100]-[109].

15 Reasons of Callinan J at [117]-[120].

directions on the issue of motive and on the proper approach, in the circumstances, to the submission that the verdicts are unreasonable.

Directions on motive

44 *The basic principle*: The fundamental rule governing all judicial directions to a jury is that stated by this Court in *Alford v Magee*[16]. The only law that it is necessary for the jury to know is so much "as must guide them to a decision on the real issue or issues in the case"[17]. The trial judge is obliged to decide what the real issues are and to tell the jury, in the light of that decision, what the relevant law is. The judge should explain the law "not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case"[18].

45 Because obligatory instructions, out of context, can sometimes lead to artificiality in the communication between a judge and the jury (and to directions that are of little relevance to the issues of the case), there is a contemporary tendency to reduce the number and detail of such obligatory directions[19]. Of course, there remain some subjects upon which judicial instruction is compulsory[20]. In criminal trials, I favour the trend to more economy in judicial directions on the law[21].

46 *Circumstantial cases and inferences*: It is of the nature of many crimes that their perpetrators perform the deeds in secret. They do so in the hope of avoiding observation, detection and consequent prosecution and conviction. In such cases, a prosecutor must necessarily rely upon circumstantial evidence to

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16 (1952) 85 CLR 437.

17 (1952) 85 CLR 437 at 466.

18 There is a requirement, not material to the present case, that a judge in a criminal trial instruct a jury concerning any defence that fairly arises on the evidence, even if not put in issue by a party: *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.

19 *Zoneff v The Queen* (2000) 200 CLR 234 at 261-262 [68].

20 *Zoneff v The Queen* (2000) 200 CLR 234 at 256-257 [56]. See also *Longman v The Queen* (1989) 168 CLR 79.

21 *BRS v The Queen* (1997) 191 CLR 275 at 330; Flatman & Bagaric, "Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions", (2001) 75 *Australian Law Journal* 190 at 204; cf *KRM v The Queen* (2001) 75 ALJR 550 at 572 [108]-[110]; 178 ALR 385 at 413-414.

prove the case against the accused. Circumstantial evidence "can, and often does, clearly prove the commission of a criminal offence"[22].

47 In Australia, but not in England[23] and some other countries[24], a rather strict approach is taken to the instruction that must be given about circumstantial evidence. The jury must be warned that the primary facts, from which an inference of guilt is to be drawn, must themselves be proved beyond reasonable doubt. The inference of guilt must be the only inference that is reasonably open on all the primary facts which the jury find to be established to the requisite standard of proof[25].

48 There is nothing in the law that renders proof by circumstantial evidence unacceptable or suspect of itself – "[i]t is no derogation of evidence to say that it is circumstantial."[26] Sometimes circumstantial evidence constituting a "chain of other facts sworn to by many witnesses of undoubted credibility" can actually be stronger than disputable positive eye-witness evidence[27]. However, circumstantial evidence necessarily calls upon processes of reasoning that involve the drawing of inferences from a jigsaw of established facts. Amongst the pieces of the jigsaw (and any gaps in the picture that it presents) may be evidence or lack of evidence concerning motive. It is when there is such evidence (and sometimes where there is no such evidence) that a judge, conformably with the primary rule, may be expected to assist the jury on the use that may be made of any conclusions that the jury may reach concerning the presence or absence of motive.

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22 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 599 per Brennan J.

23 *Hodge's Case* (1838) 2 Lewin 227 [168 ER 1136] per Alderson B; *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276; [1973] 1 All ER 503. Samuels, "Circumstantial Evidence", (1986) 150 *Justice of the Peace* 89.

24 As to New Zealand, see *R v Hedge* [1956] NZLR 511; *R v Hart* [1986] 2 NZLR 408 at 413; cf *Police v Pereira* [1977] 1 NZLR 547. As to the position in Canada see *R v Cooper* [1978] 1 SCR 860 and in the United States see *Holland v United States* 348 US 121 (1954).

25 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 599 per Brennan J; cf *R v Van Beelen* (1973) 4 SASR 353 at 379-380. See also *Peacock v The King* (1911) 13 CLR 619 at 634; Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842 at 852-853.

26 *Taylor, Weaver & Donovan* (1928) 21 Cr App R 20 at 21.

27 *Commonwealth v Harman* 4 Pa St 269 at 272 (1846) cited in Costanzo, "The Indispensability Of Shepherd To The Flock", (1997) 16 *Australian Bar Review* 138 at 138-139; cf *Taylor, Weaver & Donovan* (1928) 21 Cr App R 20 at 21.

49 *The mind–body dualism*: Discourse about the significance of evidence (or lack of evidence) concerning an accused's motive for committing an alleged crime must be viewed against the background of a large philosophical debate, that needs only to be mentioned, and the specific concern of the criminal law about proof of an accused's guilty intent.

50 According to Waller and Williams[28], "[a]lmost all expositions of criminal law theory accept, without discussion, the Cartesian theory of mind and body … That is to say, they treat mental operations as being related to physical activity as cause is related to effect." Many philosophers and some legal scholars have rejected this dualism as "implausibly mechanistic"[29]. This is not the occasion to explore the assumptions that are commonly made (and that form the basis of judicial opinions and instructions to juries) concerning the way intentions may sometimes grow out of the emotions involved in motivation and lead on to criminal acts and omissions. Theorists may criticise the assumptions inherent in all such reasoning as "robotic". However, our legal system continues to observe an "ongoing commitment to a fairly unreflective mind–body dualism"[30].

51 Distinguishing between the usually essential ingredient of a criminal intention and a person's desire, purpose or motive will sometimes be important[31]. But, as such, motive is rarely, if ever, an element of a criminal offence[32]. Motive must not, therefore, be confused with intention. Motive may be "the reason that nudges the will and prods the mind to indulge the criminal intent"[33]. It may be the feeling that prompts the operation of the will, the ulterior object of the person willing. It generally has two evidential aspects. These will be the emotion that is supposed to have led to the act and the external fact that is the possible exciting cause of such emotion, but not identical with it[34].

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28 Waller & Williams, *Criminal Law: Text and Cases*, 9th ed (2001) §1:20 at 9.

29 Naffine, Owens & Williams, "The Intention Project", in Naffine, Owens & Williams, *Intention in Law and Philosophy* (2001) 1 at 7.

30 Naffine, Owens & Williams, "The Intention Project", in Naffine, Owens & Williams, *Intention in Law and Philosophy* (2001) 1 at 7.

31 Mason, "Intention in the Law of Murder", in Naffine, Owens & Williams, *Intention in Law and Philosophy* (2001) 107 at 113-117.

32 cf Cane, "*Mens Rea* in Tort Law", in Naffine, Owens & Williams, *Intention in Law and Philosophy* (2001) 129 at 136-139.

33 *United States v Benton* 637 F 2d 1052 at 1056 (1981).

34 *Wigmore on Evidence*, vol 1A (rev) (1983), §117 at 1696-1697.

52 Such analysis of motives and intentions assumes the capacity to dissect the contributing forces of human will and human action in the precise ways described. Whether this is physiologically or psychologically sound, or philosophically satisfying, are not questions that judges or jurors generally have the time or inclination to ponder, still less answer.

53 *Motive is neither necessary nor sufficient*: Because motive, as such, is not an ingredient of a legal offence (such as the murders with which the appellant was charged), it is not necessary, as a matter of law, for the prosecution to prove that an accused had a particular motive, still less one to commit the offence in question. This rule is based not only upon sound legal analysis of the actual ingredients of the offence. It is also grounded in highly practical considerations. The United States Supreme Court in *Pointer v United States*[35] explained:

> "The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it."

54 Yet even if a motive can be proved, as part of the circumstantial case which the prosecutor seeks to build against the accused, it will not, of itself, be sufficient to establish guilt of the offence. A motive may, in the circumstances, be so remote or unlikely that it makes any conversion of emotion into action an unlikely possibility. A person may hate another but be unwilling, or unable, to convert such hate into action or be restrained by fear of detection and punishment[36]:

> "The mere fact … [that] a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. … Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof".

55 *Motive and proof*: It is because motive (or lack of it) will sometimes be considered highly relevant to the drawing of inferences and the pursuit of the chain of proof, that questions can arise in a criminal trial as to what the judge should tell the jury about the subject. The reason that assistance is sometimes necessary follows from the experience of humanity that ordinary people "do not

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35 151 US 396 at 413 (1894); cf *Wigmore on Evidence*, vol 1A (rev) (1983), §118 at 1698-1699.

36 *Best on Evidence*, 12th ed (1922) at 384.

act wholly without motive"[37]. It is for just such a consideration that evidence of motive is generally regarded as admissible in criminal cases, because it is thought to make it more likely that the crime was committed[38]. It was also upon such bases of "sound sense"[39] and common reasoning that this Court, in *Plomp v The Queen*[40], a case involving the drowning of the accused's wife whilst swimming with him, upheld the proof of the facts that the husband had formed a liaison with another woman, to whom he had represented himself to be a widower and whom he had promised to marry.

56 In the cases before *Plomp* there had sometimes been suggestions that evidence of motive should not be received without some independent proof of the accused's involvement in the crime first being established[41]. That approach had grown out of a concern that too much weight might otherwise be accorded by a jury to evidence of motive[42]. Occasionally, the exploration of the motives of a witness or of the accused may open up impermissible considerations, having regard to the accusatorial nature of the criminal trial[43]. However, the decisions of this Court have consistently recognised that, in some circumstances in criminal trials, evidence of motive may be "of the greatest importance"[44]. In *Plomp*, Dixon CJ emphasised[45]:

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37 *Kennedy v The People* 39 NY 245 at 254 (1868). As to proof of prior threats of menaces or irritating behaviour see: *R v Bond* [1906] 2 KB 389 at 400; *R v Wilson* [1970] VR 693 at 695-696. Motive can also sometimes be relevant to understanding the facts in issue: *Alister v The Queen* (1984) 154 CLR 404 at 461.

38 *The King v Ball* [1911] AC 47 at 68 per Lord Atkinson.

39 *Plomp v The Queen* (1963) 110 CLR 234 at 249 per Menzies J.

40 (1963) 110 CLR 234.

41 *Cross on Evidence*, 6th Aust ed (2000) at [1140]; cf *Georgiev* (2001) 119 A Crim R 363.

42 *Best on Evidence*, 12th ed (1922) at 384; *Cross on Evidence*, 3d NZ ed (1979) at 42.

43 *Palmer v The Queen* (1998) 193 CLR 1 at 41-43 [100]-[103]; Gans, "'Why Would I be Lying?': The High Court in *Palmer v R* Confronts an Argument that may Benefit Sexual Assault Complainants", (1997) 19 *Sydney Law Review* 568.

44 *Mutual Life Insurance Co of New York v Moss* (1906) 4 CLR 311 at 321 per Griffith CJ.

45 *Plomp v The Queen* (1963) 110 CLR 234 at 242.

> "All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done."

57 *Judicial instructions on motive*: It follows from the foregoing that a number of general propositions can be accepted to guide judges in the consideration of whether they should give instructions to a jury concerning motive, where that issue has arisen as a live one in the course of the trial, and if so in what terms:

(1) No general direction can be formulated to accommodate all the different circumstances that can arise[46]. If any directions are given on the subject of motive, they should be brief because the consideration of the relevance of motive (or lack of it) is quintessentially a task for the jury, viewing questions about motive in the context of the evidence as a whole.

(2) Where the prosecution has not sought, or has failed, to prove a motive on the part of the accused for the crime, the judge may consider whether it is appropriate to make it clear to the jury that the prosecution has no obligation to show a possible motive[47], and that the absence of a proved motive cannot as a matter of law be fatal to its case[48]. Sometimes the precise motives of individuals (if any) will never be known to anyone other than themselves. In such circumstances, it would be completely unreasonable to require the prosecution to prove a motive and the law does not impose that obligation.

(3) Where a motive of some kind is proved by the evidence, but it appears a trivial one, disproportionate to the crime alleged, it may be proper for the judge to draw such disproportion to the notice of the jury, in fairness to

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46 cf Glissan and Tilmouth, *The Right Direction* (1990) at 54-55; *Moore v United States* 150 US 57 (1893); *Goldsby v United States* 160 US 70 (1895).

47 *Wigmore on Evidence*, vol 1A (rev) (1983), §118 at 1698-1699.

48 *Wigmore on Evidence*, vol 1A (rev) (1983), §118 at 1697-1701.

the accused, given that "[t]he stronger the motive the more influence it is likely to have [on the jury]"[49]. On the other hand, the judge may also point out that proportion in such matters will sometimes be absent. To reasonable and law abiding citizens many serious crimes appear to have been committed upon trivial motives, wholly disproportionate to the gravity of the wrong[50].

(4) Where the prosecution has established strong evidence of a motive, it will often be necessary to warn the jury that they must look at all the circumstances of the case and not be unduly affected by the evidence that the accused had a motive to commit the crime. This is because of the fact that many who have powerful motives to offend never do so. Motivation is simply one item of the evidence in the case that may tend to show that a particular person committed an alleged act. The jury may therefore need to be reminded that allowance should be made for the fact that having a motive, and even expressing it, does not, as such, constitute proof of involvement in a crime.

(5) Where there is no evidence that the accused had a motive to commit the crime alleged, that is "always a fact in favour of the accused"[51]. There is some authority to suggest that a trial judge need not draw that fact to the notice of the jury[52]. However, especially in circumstances of a heinous crime, if a judge gives any direction about motive, it would generally be fair and prudent to draw to the jury's notice the absence of proved motive as a consideration favouring the accused. As Griffith CJ observed[53]: "the more heinous the act … the more important becomes the question of motive." If none is proved, that is a consideration that the jury will need to weigh in judging whether the prosecution has proved the guilt of the accused to the criminal standard.

(6) Nonetheless, if any such comment is made, it should be balanced by drawing attention to the obvious fact that, in a particular case, "there may

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49 *Mutual Life Insurance Co of New York v Moss* (1906) 4 CLR 311 at 321.

50 *R v Shaw* (1917) 17 SR (NSW) 383 at 387-388 per Street J; cf *Pointer v United States* 151 US 396 at 413-414 (1894).

51 *Best on Evidence*, 12th ed (1922) at 385. See also Best, *Presumptions of Law* (1981), §310 at 182.

52 *Askeland* (1983) 18 A Crim R 102 at 114; cf *Robinson v State* 317 NE 2d 850 (1974); *Peoples v Commonwealth* 137 SE 603 (1927).

53 *Mutual Life Insurance Co of New York v Moss* (1906) 4 CLR 311 at 317.

be a motive, and perhaps a strong one, but no evidence of it available"[54]. In *Pointer v United States*[55], the Supreme Court of the United States put it this way: "The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction."

58 *The present case and conclusions*: When regard is had to the foregoing general principles, and the overriding need to provide the jury with a relevant, comprehensible and balanced instruction on the applicable law, I am not convinced that the charge given to the jury in the present case concerning motive fell short of the legal requirements.

59 This was not simply a case of lack of motive – a missing part of the jigsaw that the prosecution had failed to provide. It was a case where the appellant had set out affirmatively to prove the absence of motive. He did this by calling evidence of his own good character (suggested to be incompatible with such terrible crimes) and by calling the testimony of witnesses that is referred to in the joint reasons[56]. Both the prosecutor and counsel for the appellant addressed the jury concerning the absence of evidence of motive. In discussion between the trial judge and counsel before the judge's charge was delivered, the issue of motive was raised. Counsel for the appellant did not contest that the prosecution had no obligation to establish motive; nor could he have done so.

60 The judge's directions about motive followed the instructions concerning the use to which the jury could put the evidence of the appellant's good character. Correctly, the judge told the jury that such character evidence could be regarded as pointing to the unlikelihood that the appellant would have conducted himself in the way alleged by the prosecution. He also told the jury that such evidence could persuade them to give greater weight to his sworn testimony. He did not incorrectly tell the jury that the absence of proof of motive was irrelevant to their deliberations. Such a statement would have been erroneous and a material misdirection[57].

61 On the issue of motive, the judge accurately told the jury that the prosecution was not required to prove a motive. He informed them that the use

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54 *Askeland* (1983) 18 A Crim R 102 at 114.

55 151 US 396 at 414 (1894).

56 Joint reasons at [23].

57 *R v O'Donoghue*, unreported, Court of Criminal Appeal (NSW), 21 November 2001 per Heydon JA, Dowd and Bell JJ; [2001] NSWCCA 458 at [25], [34].

they made of the question of motive was for them to evaluate. He pointed out that it is "comforting to an ordinary human being where you are seeking to assess somebody's action to know why they did it".

62 Having opened up the issue of motive and made the foregoing comments, the judge did not tell the jury that the want of proof by the prosecution of any motive on the part of the appellant was a factor that the jury might conclude supported the appellant's protestations of innocence. He merely reminded them of the prosecutor's statement, in address, that some "crimes of great violence have been committed without motive". In my view, it would have been preferable had his Honour balanced his reiteration of the Crown's assertions with instruction to the jury concerning the significance that the lack of proof of motive might have in their estimation of the evidence. Instead, his Honour became diverted into a suggestion, raised by counsel, that whoever had committed the offence had a "disturbed mind" and that, therefore, rational conduct in accordance with a proved motive was not to be expected in this case.

63 With respect, I do not agree with the joint reasons that the judge was exempted from calling to the attention of the jury the lack of evidence of motive on the basis that, had he raised this, he would have been obliged to point to the distinction between a lack of proof of motive and the absence of motive in fact. A proper direction, in the present case, could not have ignored the affirmative evidence called by, and for, the appellant (mentioned in the joint reasons[58]) which sought to establish positively, from his relationships with the deceased family members and his conduct before and after the killings, that he had no motive in fact to act in the way alleged[59].

64 Whilst expressing a sense of unease concerning the balance of the judge's instruction on motive, I have concluded that there was no material misdirection in the circumstances. The law does not establish a set formula to be followed on this subject. It is undesirable that it should do so. So far as it went, what the judge said was accurate. There was no legal obligation upon him to go further. He was not expressly asked to do so. Instead, the debate at trial became enmeshed in the side issue of "disturbed mind" from which there was, ultimately, adequate extrication. I remind myself, once again, of the need to avoid an unduly censorious scrutiny of a judge's instruction to the jury "sentence by sentence, in search for a fault"[60]. I am not prepared in the circumstances to hold that any want

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58 Joint reasons at [23].

59 cf *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 565 per Gibbs CJ and Mason J, 572 per Murphy J.

60 *Jones v Dunkel* (1959) 101 CLR 298 at 314 per Windeyer J; cf *R v Sorlie* (1925) 25 SR (NSW) 532 at 539 per Street CJ.

of balance in the judge's instructions on the issue of motive amounted to a material misdirection vitiating the lawfulness of the appellant's trial.

The unreasonable verdict issue

65 It is not accurate to say that, in considering the appellant's challenge to the reasonableness of the jury's verdicts[61] this Court (or the Court of Criminal Appeal) confines itself to "questions of law, not fact"[62]. In *Hargan v The King*[63], referring to the broad statutory mandate imposed in criminal appeals by the terms of s 6 of the *Criminal Appeal Act* 1912 (NSW), Isaacs J remarked:

> "It is, therefore, not an answer to the appellant to say that what he complains of is not an error in strict law. If he can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance."

66 These observations were recalled in the reasons of McHugh J in *Chidiac v The Queen*[64]. That decision stands between *Ratten v The Queen*[65] and *M v The Queen*[66], as providing the guidance of this Court concerning the proper approach to appeals complaining that the verdict of the jury should be set aside "on the ground that it is unreasonable, or cannot be supported, having regard to the evidence … or that on any other ground whatsoever there was a miscarriage of justice"[67]. Not only is scrutiny of the factual evidence permissible; it is obligatory. It is the duty of appellate courts, acting as the last resort, to prevent a miscarriage of justice resulting from a trial that was otherwise technically without blemish. That can only be done where an unreasonable verdict ground is raised, by examining all of the evidence at the trial and any fresh evidence that may have been admitted by the intermediate appellate court.

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61 Pursuant to the *Criminal Appeal Act* 1912 (NSW), s 6(1).

62 Gans, "The Case of the Improbable Murderer: *De Gruchy v R*", (2002) 24 *Sydney Law Review* 123 at 124.

63 (1919) 27 CLR 13 at 23.

64 (1991) 171 CLR 432 at 463.

65 (1974) 131 CLR 510.

66 (1994) 181 CLR 487. See also *Jones v The Queen* (1997) 191 CLR 439 at 450-451, 465-468.

67 *Criminal Appeal Act* 1912 (NSW), s 6(1).

67 For all the reasons stated in the joint reasons[68], and the further reasons stated by Callinan J[69], this is not a case where this Court would be authorised to conclude that the jury, who heard all of the evidence, were bound to have a reasonable doubt as to the guilt of the appellant or obliged to accept some reasonable hypothesis consistent with his innocence. The effect of the decision of this Court is not to reverse the onus which the prosecution bore at the trial, of which the judge properly, repeatedly and accurately instructed the jury. It is not to oblige the appellant to establish his innocence in order to secure relief on this footing. It is simply to conclude (as it was open to the jury to do) that the prosecution case established too many affirmative links between the appellant and the murders and demonstrated too many objective flaws in the explanations of his conduct offered by the appellant. Thus, from within the prosecution case, and not by reference alone to the weaknesses of the appellant's defence, the real possibility of the appellant's innocence is excluded. In making that judgment, the appellate court, like the jury, is entitled, and required, to look at the entirety of the evidence[70]. That is what I have done.

Order

68 The appeal should be dismissed.

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68 Joint reasons at [34]-[38].

69 Reasons of Callinan J at [124].

70 cf *Conway v The Queen* (2002) 76 ALJR 358 at 374-375 [81]-[84], 379 [101]-[103]; 186 ALR 328 at 350-351, 356-357.

CALLINAN J.

Facts

69 Adrian De Gruchy, a boy of 15 years, his sister Sarah, 13, and their mother, about forty-two years old, were brutally bashed to death by the wielder or wielders, almost certainly of a heavy metal implement or implements, at the residence in which they, the appellant, and his father resided on Shearwater Boulevard in Albion Park Rail, New South Wales, on the night of 12 March 1996. Adrian's body, which was blistered from petrol that had been poured on it, was lying on the floor of the garage, and those of the other two victims were found in their beds in their respective bedrooms. The attack upon the appellant's mother was so vicious that her face was disfigured beyond recognition. Each of the murder scenes was heavily spattered with blood. Some strands of hair were found clasped in the fingers of Adrian's right hand.

70 The appellant's father, Wayne De Gruchy, sometimes stayed overnight during the week at his parents' house at Moorebank. On Tuesday 12 March 1996 he played golf at Pennant Hills Golf Club. He telephoned his wife between 6 pm and 6:30 pm to tell her that he would not be coming home that evening. Mr Ronald De Gruchy, the father of Wayne De Gruchy, gave evidence that Wayne De Gruchy was at his home from 8:30 pm until 10:30 pm when Mr Ronald De Gruchy retired for the night. He next saw his son the following morning at 7:30 am.

71 Mr Ronald De Gruchy was not aware at the time of the murders, but subsequently became aware that Mr Wayne De Gruchy had a female friend. No statement was taken from her by any police officers although they too came to know of her.

72 The appellant's grandmother, Mrs Dorothy Halliwell telephoned the De Gruchy household between 7 pm and 7:30 pm, on the evening of the murders, and spoke to both the appellant and his mother. The appellant's uncle, Raymond Halliwell, received a telephone call from the appellant's mother at about 7:45 pm and spoke to her for 10 to 15 minutes. The appellant's girlfriend, Alyssa Brindley, telephoned the appellant at the residence at about 8 pm.

73 Alyssa Brindley was a witness at the appellant's trial. She said that he came to her home at about 11 pm to 11:30 pm on 12 March 1996, and stayed the night with her. He left at 8 am the following morning. The appellant explained to her that he was late because his mother had been receiving threatening telephone calls and had asked him to wait. Miss Brindley saw the appellant that evening both clothed and naked, and noticed no blood on him or his clothes, and no apparent injuries. She said that he was behaving in a natural manner, and did not appear to be depressed, overexcited or upset. Alyssa Brindley's mother, Mrs Gail Brindley, confirmed that the appellant arrived at her house at about 11 pm,

and that she woke him the next morning. She too said that she had noticed nothing unusual about his demeanour.

74 At about 3:30 am on 13 March 1996, a neighbour of the De Gruchy family, Mrs Barbara Curtain, heard a "sharp bang". She also heard the noise of a car at about the same time. Detective Sharkey later said that a neighbour (who may have been Mrs Curtain) reported seeing a dark blue sedan at the De Gruchy home during the night. Mr Ian Schubert, another neighbour of the De Gruchy family, later told police officers that at about 6:15 am to 6:30 am he saw a dark blue metallic Commodore being driven along Shearwater Boulevard, by a man with a beard, a description not inconsistent with the appearance of the appellant's father.

75 The circumstances of the discovery of the bodies were these. At about 8:30 am, on Wednesday 13 March 1996, the appellant called at the house of Steven Bailey, who lived opposite the residence of the De Gruchy family. He was crying, and he said: "There is something wrong with Mum and Sarah". He did not appear to Mr Bailey to have any blood on him or any apparent injuries. The police and the ambulance service were called. The first police officers to respond were Constables Williams and Pepper. Constable Williams described the appellant as being very upset and distressed. Constable Pepper said that the appellant was lying face down on the ground, very distraught. Another neighbour, Laurens Hoogvliet also noticed the appellant lying face down on the ground and sobbing. Mr Garvey, an ambulance officer, described the appellant as being upset and crying. Another ambulance officer said that he was very upset and distressed, so much so that the ambulance officers decided to take him to Shellharbour Hospital.

76 Dr Cala, the forensic pathologist who attended the scene and later conducted the post mortems, said that the ferocity of the attacks upon the deceased persons was so marked that they produced injuries of the kind ordinarily only suffered in collisions at high speed between motor vehicles, or in an aircraft crash. A police officer who examined the scene, Sergeant Smith, became so distressed that he has never worked a day since as a police officer.

77 Dr Cala estimated that the time of death of the three deceased was sometime between 8 pm and 1 am, but it could have been as late as 3 am.

78 Some strands of hair, 8 to 10 centimetres in length, were found between the fingers of Adrian's right hand. Adrian De Gruchy's hair at the time was, at the longest, 4 centimetres. The strands of hair had blood on them. They were subjected to DNA analysis by Dr Goetz, a forensic biologist. Dr Goetz tested the substance on the hairs and not the hairs themselves. Dr Goetz said the likelihood of obtaining a DNA result from the hair after the blood was washed from it was low. His evidence was to the effect that, in any event, hair usually responded poorly to DNA tests.

79 Dr Goetz's conclusion was that the DNA material could have originated from either Adrian or Sarah De Gruchy but *not* Mrs De Gruchy, or Wayne De Gruchy, or the appellant. Dr Goetz subsequently sent the hairs to the Victorian Institute of forensic Medicine.

80 The report from that Institute indicated that there was blood adhering to the hair submitted for DNA analysis. The DNA profiling result could not exclude Adrian De Gruchy as the source of the DNA and found no evidence of DNA from the appellant. The report did not say whether the DNA that was isolated came from the blood or the hair.

81 An open jerry can containing petrol was standing near the body of Adrian De Gruchy. The appellant's fingerprints were found upon it. The appellant's father gave evidence that both he and the appellant used jerry cans from time to time to put petrol into the two cars in the family.

82 A large square of carpet had been cut from an area near the bed in the main bedroom where Mrs De Gruchy was found. Two smaller sections had also been cut from an area at the foot of the bed. A small tuft of carpet was found in the vehicle, a Toyota Corolla, being driven on the night of the murders by the appellant. It was stained with blood, which, according to DNA analysis, could have come from the appellant, but not from any of the deceased persons or Mr Wayne De Gruchy. Expert evidence was given that it was "highly probable" that the tuft came from the same carpet as the one in the main bedroom.

83 There were some stains, apparently of blood, in the bathroom, the main bedroom, the en suite to the main bedroom, and the laundry. The blood stains were subjected to DNA analysis. The DNA analysis of the blood stains in the main bedroom, and the hallway matched the DNA of the appellant's blood. The DNA analysis of the other bloodstains yielded no relevant results. The appellant's fingerprints were found in a smear, which may have been blood, on the doorknob to the cupboard under the vanity unit in the en suite to the main bedroom.

84 A video recorder had been removed from the living room of the house. The appellant's bedroom was in an untidy state with items strewn on the floor.

85 Dr Cala said that the injuries to Mrs De Gruchy were consistent with their having been inflicted while she was asleep. The injuries to all three were of a kind that could have been caused by a sledge hammer, or a heavy straight object a centimetre in width, such as a jack handle or wheel brace. A jack for the Corolla was found, but no jack handle or wheel brace.

86 A video recording was made of an interview of the appellant by police officers on 17 March 1996. He told the officers that he spent the night at Alyssa

Brindley's house. When he returned home on the morning of 13 March, he put down his overnight bag, but then went back to the car to go out to buy some cigarettes at a supermarket before looking for his mother or siblings. When he returned he discovered the body of Mrs De Gruchy and ran outside for help. He did not, on his account, go into Sarah's room.

87 On 19 March 1996 a man named Wakehim committed suicide and left a suicide note, stating that he was afraid he would be blamed for the De Gruchy murders.

88 It is relevant to refer again to the carpet in the main bedroom. The appellant's father gave evidence that he steam cleaned the carpet on Saturday 9 March 1996, three days before the murders. He did not notice any areas where carpet was missing. Detective Doherty testified that a large section of carpet had been cut out. Two pieces of carpet were found in a red and white sports bag in a dam to which reference will later be made. Mr Pailthorpe, a forensic scientist, said that having regard to seven points of comparison it was "highly probable" that the two pieces of carpet found in the red and white sports bag had their origin in the bedroom carpet. Mr Goetz gave evidence that although blood was not found on the carpet discovered in the dam, DNA matter was identified on it which could not be typed. It was the Crown case that the pieces of carpet had been removed in order to dispose of incriminating evidence. The Crown case was that the tuft of carpet found in the Corolla had become detached from the carpet pieces found in the dam.

89 Police officers recovered from the dam, among other things, the red and white sports bag and a black coloured backpack. Both bags contained a number of objects. A number of loose items were also found. The contents of the red and white sports bag included a plastic zip-lock bag in which was a torn up sheet of paper. The sheet contained notes in the appellant's handwriting, a fact that the Crown proved by a handwriting expert Mr Westwood.

90 When reconstructed, it appeared to have been a sheet of notepaper from "Noah's on the Beach", on the back of which the following were written in black coloured ink: "open gate; throw bottle down the back; throw things down wall in roof; track suit pants 1; knife1; T shirts 2; Shoes 2; hanky; pole; towel; open blinds to see through; Sarah Mum; Adrian [in blue ink]; head butt mirror [mirror crossed out] bench; have shower; throw hi fi down back; hit arm with pole; hit leg pole; cut somewhere with knife."

91 Written on the other side of this sheet of paper were a series of numbers in red ink.

92 The note on its face was clearly capable of being highly inculpatory of the appellant. The Crown contended that, found as it was, with the various items at the dam, the note pointed to the appellant as the person who had thrown the items

into the dam: if the note were innocent and someone else killed the deceased, it was incomprehensible that a piece of paper would have been taken from the appellant's room and dumped. How would a killer, the Crown rhetorically asked, have had the time and the presence of mind to read such a note and to exploit its potential for use against the appellant? The notations on the paper appear to be a checklist of "things to do" or remember in the aftermath of the killings. "Track suit pants 1", "T shirts 2", "knife 1", (objects found in the dam), are all items which might need to be disposed of after the killings. The words "head butt mirror" with the word "bench" replacing "mirror", and "have shower" and also "hit arm with pole" and "cut somewhere with knife" are indicative of a need by the appellant to falsify the scene of the slayings, to effect wounds to himself, and to remove incriminating evidence from his person. That these or some of them did not eventuate or could not be proved as having been done, does not mean that they had not been contemplated at an earlier time, or that the appellant had not been weighing up ways and means of carrying out, and concealing his commission of, the murders.

93 Further reference to the objects found in the dam is required. Detective Doherty's evidence was that he had gone to the dam on 13 May 1996. In addition to the objects already mentioned he found a towel, Sega games cases and control pads, a black coloured lady's wallet containing credit cards, papers and a licence in the name of Mrs De Gruchy, a light coloured sock, a pair of scissors, a pair of blue track pants, and a calculator with the name "A De Gruchy" and a telephone number inscribed on the back. A handkerchief was found lying in the mud of the dam. Another was found beside a game case near the western bank of the dam, after it was drained. A hammer was found under a tree. The red and white sports bag contained various items including two T shirts (one maroon, one blue), a video tape recorder, a pair of binoculars, an empty bottle of Sambucca, two pieces of carpet, and a plastic zip lock bag. The black backpack contained a Sega Master System II, two calculators, some Sega game cases, a video cassette, "Gameboy" and games cartridges, a light coloured sock, a "Batman" bag and a black sports velcro wallet.

94 Dr Goetz found DNA on the T shirts but was unable to attribute a type to it. Stephen Heyman, a childhood acquaintance of the appellant, gave evidence that the appellant was familiar with the dam. The appellant admitted that he had been there as a child. Detective Sharkey measured the distance from the dam to the appellant's house on Shearwater Boulevard. It was 31 kilometres by road and could be negotiated by car in 26 minutes at a speed five kilometres an hour below the speed limit. The dam was only two kilometres from Ms Brindley's residence. The appellant's father was able to identify some of the objects as household objects but not all of them. In the former category were an NEC video recorder, a leather key ring, a pair of binoculars, an empty Sambucca bottle, a Sega Master System II with some control leads and hand pieces, two calculators, some videos and video cases, a calculator which had inscribed on it "A De Gruchy" and a telephone number, a pair of blue handled scissors, various Sega games, a black

coloured lady's wallet together with various cards with Mrs De Gruchy's name on them including a driver's licence and NRMA membership card, a red and white sports bag, and a black backpack.

95 Items he was unable to identify were various compact discs, shirts and some shoes. He could not say whether a flannelette sheet which was also found came from the residence.

96 The appellant wore two T shirts to Ms Brindley's house on the evening of the murders. He claimed that one of the T shirts in the dam, a "Quicksilver" T shirt, was not his: that it had been given or lent to him after the deaths as he had had no access to his clothing after that time. He had no explanation for the presence of the T shirt in the dam.

97 The appellant claimed that there had been threatening telephone calls to the residence of the family during the evening before he left. When Alyssa Brindley had asked him why he was late his reply was, "My mum was having prank calls and she asked me to stay".

98 In evidence at his trial the appellant said that he had planned to leave for Alyssa Brindley's place earlier than 10:00 pm but that he had been delayed because of a couple of prank calls. He said that "someone had rung and said three people in your family would be deceased". He said that when he had answered the telephone whoever was calling would hang up. He could hear a dial tone only. In cross-examination he agreed that he did not contact his father about the calls. He further agreed that when he made a statement to police on 13 March 1996, and later, when he was interviewed by police officers on 17 March 1996 he did not mention what he claimed his mother had told him, that three people would be killed. The numerical composition of the household on that evening was a matter uniquely within the appellant's knowledge (except perhaps for Mr Wayne De Gruchy).

99 Regard has to be had to the appellant's conduct on the discovery of the body. In his favour, but far from conclusive, was the fact of his apparent, great distress, a condition verified by more than one witness. On the version that he gave to police officers of his discovery of the body, he could not have been aware of Sarah's condition, as, according to it, he had not gone to her room. This differed however from what he told a neighbour, Mr Bailey, that there was "… something wrong with Mum and Sarah."

The trial

100 The appellant was charged with, and tried for the three murders before Grove J and a jury in the Supreme Court of New South Wales. As I have already mentioned, he gave evidence at his trial.

101 The appellant's counsel sought the production of police records of an investigation into two extraordinarily violent murders in respect of which a man named Mark van Krevel was arrested and charged on 1 October 1998 whilst the trial of the appellant was proceeding. The murders were committed in the same general area as the appellant's residence but occurred some time after the appellant was charged with the murders of his siblings and mother. The two victims of the other murders had been mutilated.

102 Counsel at the trial also sought to cross-examine police officers concerning these two other crimes and other murders in the greater Wollongong area. The appellant contended that he was entitled to pursue these matters because there was a legitimate forensic purpose for that course, to demonstrate the existence of an alternative hypothesis consistent with the appellant's innocence: that either van Krevel, or an unidentified person living in the area disposed to acts of random and fiercesome violence, could well have been responsible for the murders with which the appellant was charged.

103 The trial judge refused the subpoena and rejected the proposed cross-examination on the basis that there were insufficient similarities between the murders to render the material admissible under s 98 of the *Evidence Act* 1995 (NSW).

104 During his address to the jury the prosecution made reference to the killer's disturbed mind. The speech was not transcribed but the sense of his remarks appears from counsel for the appellant's objection to it:

> "The Crown has now put as a proposition that the actions of the accused were the actions of a person with a disturbed mind. That is, it was put it was a disturbed mind that committed these offences. The Crown knows very well that it has not sought to have the accused examined at any stage, and indeed, he knows – though it will not be before this jury – something very clear, that is there have been examinations conducted as directions by the Supreme Court, and they have come to a totally contrary proposition. It is something that my learned friend has asserted, and I submit that that assertion should be publicly withdrawn."

105 In his summing up to the jury, the trial judge said at one point:

> "… before you can find an accused person guilty of a crime on the basis of circumstantial evidence, you must be satisfied that such a finding is not only reasonable, but that it is the only reasonable finding to make."

106 The trial judge also gave a direction as to the good character of the appellant. His Honour said that the appellant was put before the jury as a person of gentle disposition. He told them that they were bound to take into account the unchallenged evidence of good character, both in respect of the likelihood of the

appellant committing the crimes charged, and in respect of his credibility. His Honour also commented on the apparent absence of motive, pointing out that the Crown was under no obligation to prove one. A little later his Honour referred to the statement that had been made by the Crown prosecutor in his closing address, that the three killings at the level of violence with which they were perpetrated would have, or must have been, the product of a disturbed mind. He criticised the use of that expression in these terms:

> "Let me say that at the very least I would suggest to you that that was an unfortunate expression for counsel to use in the flourish of advocacy.
>
> This is not a case about disturbed mind. You will remember that I said to you there were two elements of the crime of murder. One is that was it the act of the accused that caused the death and the second is that in causing that death the accused intended death or grievous bodily harm. Insofar as there is an exploration of the state of mind of the perpetrator of the killing it is the intention which is relevant to these proceedings.
>
> However, the remark by the Crown Prosecutor provoked – and I am not being critical of either him or his opponent – this response. In the course of address on Friday counsel for the accused said there was no evidence here or anywhere else that the accused had a disturbed mind. I confirm to you there is no evidence here that the accused has a disturbed mind or anything that might be described. So far as anywhere else is concerned, neither you nor I know whether there is such evidence one way or other and it is entirely irrelevant. To your mind, excise it in this case. Because counsel have engaged in this dispute, I think it appropriate that I should say a few further things to you.
>
> I expect in the course of your ordinary lives you would have read in newspapers or heard from other organs of the media that in trials for murder evidence is given by psychiatrists and the like as to what the state of mind of an accused person is in terms of normality. Sometimes issues arise in a trial, for example where a person is charged with murder, as to whether or not that person should be found not guilty on the grounds of mental illness. That involves an inquiry as to whether or not that particular accused suffered a defect of reason so as to be not responsible for his or her act because that person either did not appreciate the nature and quality of the act of killing or if that person did that they did not know it was wrong. Sometimes, in a case of murder, defences, as they are called, arise concerning what is called diminished responsibility.
>
> That involves issues as to whether or not a particular accused in a particular case suffered from such an abnormality of mind as to reduce that person's culpability for killing. The result of that I will mention to you in passing is that the crime of murder can be reduced to manslaughter.

No such issue arises in this case. If such an issue had arisen, it is conceivable that evidence could have been called about the state of mind of the accused.

I emphasise to you there is no such evidence and I am not suggesting I know one way or other whether any such evidence exists. This matter has been somewhat elaborated, starting with a flourish by the Crown Prosecutor, as a murder by a disturbed mind and responded by his opponent that if that is what he wanted to suggest you would have heard about it. You would have heard evidence and there were no questions even hinting that the accused had a disturbed mind.

For my part and this is a comment of mine, I do not know what the Crown Prosecutor meant by his expression 'disturbed mind' but this I can tell you, there is no issue in this case about the state of mind of the accused other than the allegation that if he was the person that caused the death, at the time of causing the death he intended to kill or do grievous bodily harm. You should put entirely to one side, first, the observation by the Crown Prosecutor about 'disturbed mind' and secondly the observations by his opponent that you could have heard evidence called by the Crown or otherwise about it.

It is, as I said to you earlier, to say the least, unfortunate that this contretemps has arisen but what I tell you as a matter of law is that you in this case put entirely to one side both the observations as to disturbance of mind made by the Crown Prosecutor and by counsel for the accused because one thing is certain in this case, there is no evidence as to the state of mind of the accused, so far as disturbance is concerned one way or the other. What you are invited to infer from the evidence is that whoever perpetrated these killings intended at that time to cause death or grievous bodily harm.

But insofar as the remarks that have been made to you invite you to speculate about disturbance of mind, in the sense that that phrase is commonly used, that is not an issue for deliberation in this case. As I say to you, I do not know precisely what the Crown Prosecutor meant when he used the phrase in the first place and I can say no more than that the response to it, which seems to me to carry the implication that the Crown was somehow seeking to raise one of the issues that I mentioned to you that you could have in some trials but not as an issue in this trial was perhaps an understandable response but nevertheless an unnecessary one. I apologise to you for spending so much time on this. I am only seeking to emphasise that you should put to one side the original remark and the response to it."

107 Counsel for the appellant sought a redirection after the summing up was concluded. These exchanges occurred:

"COUNSEL: In my submission you should withdraw all your remarks in respect of this argument about a disturbed mind.

HIS HONOUR: Yes all right. That can be noted.

COUNSEL: And in addition to that, your Honour put specifically there is no evidence as to the state of mind of the accused so far as disturbance of the mind before you. My submission is that there was evidence on which the jury could determine to the contrary in respect of that, that he in fact was not of a disturbed mind, and that should be drawn to the attention of the jury.

HIS HONOUR: The case … *The Queen v Anderson*, which it is said there is no assumption of sanity applicable to either you or to me –

COUNSEL: I am well aware of that your Honour, and I am well aware of your Honour's role in respect of that case, but in this case –

HIS HONOUR: That is the law.

COUNSEL: In this case, where it has been specifically raised, my submission is that there was general evidence that the accused was not of a disturbed mind.

HIS HONOUR: Yes I hear that submission. It has been noted."

108 No redirection of the kind sought was given by the trial judge.

109 The appellant was convicted on all three counts.

The appeal to the Court of Criminal Appeal

110 An appeal to the Court of Criminal Appeal of New South Wales (Wood CJ at CL, Sully and Simpson JJ) was unanimously dismissed[71].

111 With respect to the appellant's first ground, that the verdict was unreasonable and could not be supported on the evidence, the Court of Appeal held that the case was a powerful circumstantial one and that it was not persuaded that the jury ought to have entertained a reasonable doubt.

112 The ground based upon the rejection of the line of cross-examination about, and the refusal of the subpoena of files of the investigation into other

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71 *De Gruchy* (2000) 110 A Crim R 271.

killings also failed, on the basis that it could not provide an alternative hypothesis, and that any inferences from it would be merely conjectural.

113 A third ground, that the remarks by the Crown prosecutor and the prejudice that they must have engendered regarding the disturbed state of mind of the person responsible for the murders were not cured by the directions of the trial judge, indeed, that they would have aggravated that prejudice, and undermined the evidence of good character, was similarly rejected.

114 The last ground argued in the Court of Appeal was that the summing up of the trial judge was unbalanced and unfavourable to the appellant. The Court of Appeal held that this ground was not made out and that the case for the defence had been clearly and comprehensively put to the jury.

115 The principal judgment in the Court of Appeal was given by Wood CJ at CL with whom Sully J agreed. Simpson J agreed with the conclusion of the other two judges and the reasoning of Wood CJ at CL with one exception only which related to the source of the hairs found in Adrian's hand. She did not think it likely, as suggested by the Crown, that the hair may have already been on the floor and come into contact with Adrian's hand during or after a struggle. Her Honour said that it would not be surprising if some of Sarah's hair had become attached to the assailant who then transferred it to Adrian. For that reason, and having regard to the other evidence, her Honour said that she was left in no reasonable doubt that the Crown had established that the appellant was the killer.

The appeal to this Court

116 In this Court the appellant advances these arguments only: that the evidence with respect to the hairs was, in effect, sufficient to raise a reasonable doubt about the guilt of the appellant, and that the Court of Appeal erred, by requiring that the evidence "inevitably suggest[s]"[72] the innocence of the appellant; that by so requiring, the Court of Appeal had reversed the onus of proof: and, that the trial judge's directions with respect to "disturbed mind" had deprived the appellant of his right to a fair trial, or a chance of an acquittal that was reasonably open to him.

117 It is convenient to deal with the last of the grounds first. It seems to me that much of the argument on this ground was misconceived. It effectively proceeded upon the basis that "disturbed mind" was a synonym, indeed the only synonym, for a diseased state of, or infirm mind. This appears from, among other things, the way in which counsel for the appellant addressed the jury in his

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72 *De Gruchy* (2000) 110 A Crim R 271 at 291 [98] per Wood CJ at CL.

closing speech. He told them that there was no evidence in the case that the appellant had a disturbed mind and that had such evidence been available, the Crown prosecutor could have called it. That, no doubt, set the scene for the way in which the trial judge dealt with it by responding to the substance of what the appellant's counsel had said. This explains why the trial judge remarked that the observation of the Crown prosecutor was entirely irrelevant, and made specific reference to cases in which mental illness, or diminished responsibility might be relied on as a defence.

118 I disagree with the proposition that "disturbed mind" should have only the meaning which, at first instance the appellant's counsel sought to attribute to it, and to which the trial judge responded in terms. I reject that to say that a person has a disturbed mind necessarily means that he has a diseased or infirm mind, or that he is in any way mentally impaired. In ordinary parlance it is by no means inappropriate to say that a person's mind may, for example, be disturbed by a shocking, frightening, or distressing event or communication. The fact that lawyers may speak from time to time of a disturbance of the mind in the sense of a mental illness or an impairment of the mind, by no means forecloses the ordinary use of "disturbed mind" to describe a state of mind, occasioned, for example, by events or communications of the kind to which I have referred, or participation in them or indeed even possibly contemplation of them. Furthermore, I would not regard it as an unreasonable submission for a prosecutor to say to the jury, as he here did, that the tragic events which occurred at the De Gruchy household were the product of a disturbed mind, meaning thereby an extraordinarily violent mind at the time of the killings, particularly, as the victims were entirely innocent children and their mother. In the circumstances, therefore, I would not regard the criticisms of the prosecutor's remarks by the appellant's counsel as a legitimate criticism. Nor was it unreasonable or unfair for the trial judge to respond to them by referring to mental illness and diminished responsibility, a response directly provoked by the submissions of counsel for the appellant to the jury and the language in which he made them.

119 There was however, a refinement to the appellant's submission with respect to the trial judge's summing up on this matter. The appellant complains that the way in which his Honour dealt with disturbed mind during the course of his observations about motive, exacerbated the problem that the prosecutor's remarks had created. The remarks of the prosecutor, the appellant argued, were an invitation to the jury to embark upon a line of invalid reasoning: that because the murders were so violent, whoever committed them must have had a disturbed mind. This, it was said, was a veiled reference to, and explanation for absence of proof of motive. The argument went, that although the Crown did not have to prove motive, its absence was a factor, and could be a compelling one in favour of the accused person. I accept this last to be so. It is only natural to look for a motive because to find it is comforting, and may do much to remove any residual disquiet. But it remains the case that a jury does not have to be satisfied beyond

reasonable doubt as to the presence of any, or any particular motive. To describe absence of proof of a motive as "a missing link" in the evidence, as the appellant did in his submissions to this Court, however attractive it might be as an argument on the facts, would be to misstate the position as a matter of law. Absence of motive may be a valuable factor, and may present a compelling line of argument for an accused, but its presence is not a necessary link in the chain of evidence of guilt, any more than its absence is a missing legal link in that chain.

120 The appellant argued that for the submission by the prosecutor and the trial judge's response to it to make sense, the jury had to assume what the Crown was required to prove, that the appellant was the killer. I disagree. The bludgeoning of innocent people to death is clearly capable of being a manifestation of a mind far removed at the time from tranquillity. Whoever was the killer may well have had a disturbed mind[73] in the sense in which the term may be used, a mind of violent or destructive disposition and would, I think often be used by lay people, in respect of a mind that was neither diseased nor infirm in any medical sense. It was not inappropriate in the circumstances therefore for the trial judge to give directions about the matter in the way in which he did. His direction that the jury approach the matter upon the basis that there was no evidence of a mental infirmity of mind was not inappropriate.

121 Nor do I think that what the trial judge said undermined another important element of the defence case, of good character and apparently gentle disposition. When the trial judge referred to the latter, he did so in clear and unexceptionable terms. Naturally, the jury would ask of themselves the question, how it might be that such a person might murder close members of his own family. I think it almost inconceivable that they would not then ask themselves whether, for some undiscovered and indeed ultimately undiscoverable reason, the appellant in a fit of destructive violence, might have killed the three people. In this respect, there is no circular reasoning. I do not myself, particularly having regard to the course of the trial, think that the trial judge's directions were capable of giving rise to any miscarriage of justice or could have operated to deny the appellant the chance of an acquittal. At worst the Crown prosecutor's remarks may have been unnecessary.

122 I turn now to the arguments with respect to the presence of the strands of hair in Adrian's fingers. The appellant is right in his submission that the proper

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73 *The Shorter Oxford English Dictionary*, 3rd ed (1973) vol 1 at 582 gives these meanings for "disturb": "to agitate and destroy (quiet, etc); to break up the quiet, tranquillity, or rest of; to stir up, trouble, disquiet; to agitate …; to unsettle … . To agitate mentally, discompose the peace of mind or calmness of; to trouble, perplex … . To interfere with the settled course or operation of; to interrupt, hinder, frustrate … . To deprive of the peaceful enjoyment or possession of … ."

test is not whether the evidence "inevitably suggest[ed]"[74], an expression used in the Court of Criminal Appeal, that the strands of hair were torn from the head of an assailant. But that expression was only used by way of contrast with descriptions of other available hypotheses. Its use did not involve a disregard of the fundamental matter of onus of proof.

123 The presence of the strands of hair, the results obtained on DNA analysis, and the significance of all of these were matters for the jury. No doubt hypotheses other that those of Wood CJ at CL and Simpson J in the Court of Appeal could be advanced, both consistent and inconsistent with the guilt of the appellant. It is not suggested that the summing up of the trial judge about these matters was in any way defective. Accordingly, in my opinion this ground also fails.

124 The circumstances of these crimes were horrific. The mind recoils from the idea that an apparently quiet, gentle young man of good character and with no known animus or reason for an animus against his family, should brutally slay his mother and young sister and brother. In accordance with authority, and bearing in mind the counterindications to which I have just referred, I have sought to scrutinise the evidence and to form my own view whether the verdict was unreasonable. In the end, despite those matters and other matters in the appellant's favour, including his apparently normal demeanour on the night of the slayings and the absence of injury to him, I find myself unable to say that the verdict was unreasonable. There are too many improbabilities in the appellant's account, particularly in respect of the number and content of the telephone calls to his residence before he left home. Equally, his explanation with respect to the T shirts is not credible. So too the explanation regarding the list in his handwriting, that it was compiled for the purposes of a birthday party some months earlier, makes little or no sense. And the presence of the notepaper and the objects in the dam, the location of which he knew, his ability to drive the distances involved within the periods available, the likely times of the deaths, and his apparent physical capacity to carry out the killings are some only of the matters strongly pointing to guilt and providing a foundation for such a finding of the jury.

125 I would accordingly dismiss the appeal.

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74 *De Gruchy* (2000) 110 A Crim R 271 at 291 [98] per Wood CJ at CL.