HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

JAMIL YOUSEF KAMLEH APPELLANT

AND

THE QUEEN RESPONDENT

Kamleh v The Queen [2005] HCA 2
3 February 2005
A30/2004

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation:

B J Powell QC with C J Caldicott for the appellant (instructed by Caldicott & Co)

W J Abraham QC with S McDonald for the respondent (instructed by Director of Public Prosecutions (South Australia))

CATCHWORDS

Kamleh v The Queen

Criminal law – Evidence – Hearsay – Appellant charged with murder – Alleged accomplice not called as witness – Admissibility of evidence of out-of-court statements to prove relevant facts other than the truth of the representations made in the statements – Whether evidence of out-of-court statements adduced to prove intention is admissible – *Walton v The Queen* (1989) 166 CLR 283 discussed.

Evidence – Hearsay – Criminal law – Admissibility of out-of-court statements to prove relevant facts other than the truth of the representations made in the statements – *Walton v The Queen* (1989) 166 CLR 283 discussed.

1 GLEESON CJ AND McHUGH J. Following a trial in the Supreme Court of South Australia before Gray J, sitting without a jury, the appellant was convicted of two offences of murder[1]. He was sentenced to imprisonment for life, and a non-parole period of 27 years was fixed. An appeal against conviction was dismissed by the South Australian Court of Criminal Appeal[2]. A co-offender, Natale Zappia, was tried separately, and convicted of two offences of manslaughter. Neither the appellant nor Zappia gave evidence at the trial of the appellant. The issue in the present appeal concerns the admissibility at that trial of evidence of certain statements made out of court by Zappia.

The case against the appellant

2 The victims were Faraz Rasti and Rhiannon Ellul. Ms Ellul was a prostitute, aged 16. Mr Rasti, aged 22, organised customers, provided security and a driver, and received the proceeds of her prostitution. At the time of their deaths they occupied unit 22 of the Grand Apartments in Melbourne Street, North Adelaide. Their bodies were discovered by cleaners in unit 22 at about 2 pm on 3 April 2000. Mr Rasti died as a result of two gunshots, one to the left eye and one to the throat. Ms Ellul died as a result of a single gunshot to the forehead. Forensic evidence, combined with records of telephone conversations to which Mr Rasti was a party, established that the deaths of both victims occurred at some time between 1.16 am and 4 am on 3 April 2000.

3 The appellant and Mr Rasti were well known to each other. There was evidence that Mr Rasti was a man of volatile personality, and that, on occasion, he behaved offensively and violently towards the appellant, taunting him about being overweight, and sometimes abusing him physically. The appellant and Zappia were close friends and frequent companions. The appellant was aged 23, and Zappia was aged 22.

4 In view of the limited issues the subject of the present appeal, it is unnecessary to set out in full detail the evidence against the appellant. It is sufficient to refer to so much of it as provides the context in which the admissibility of the out-of-court statements by Zappia is to be considered.

5 There was a substantial body of evidence to show that, over the days leading up to 3 April 2000, the appellant and Zappia spent much of their time in each other's company, and that, together, they visited unit 22. Fingerprints of the appellant and Zappia were found on various items in unit 22. Zappia's

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1 *R v Kamleh* [2003] SASC 3.

2 *R v Kamleh* [2003] SASC 269.

fingerprints were found on a drinking glass which was on a coffee table. DNA samples on the drinking glass also matched Zappia's DNA profile. In addition, there were other samples on the glass which had the same DNA profile as the appellant. In a record of interview with police, the appellant told police that he had lent a mobile telephone to Mr Rasti. The trial judge found that Mr Rasti was using that telephone (and another telephone) on 1 and 2 April 2000.

6 At about 1 am on 2 April 2000, two men, consistent in appearance with the appellant and Zappia, were seen by witnesses to enter the Grand Apartments. At about 1 am on 3 April 2000, one of those witnesses saw what appeared to be the same two men again walking into the Grand Apartments. The witness was not sure about the shorter man, but such description as he was able to give of the man's appearance was consistent with that of the appellant. Another witness, Ms Stewart, received a telephone call from Mr Rasti at about 1 am on 3 April 2000. The call lasted for about 10 to 15 minutes. In the course of the conversation, Mr Rasti passed the telephone to another man. Although the evidence of Ms Stewart was vague, the trial judge was entitled to infer, and inferred, that the other man was described, or described himself, as "Jamie", a name by which the appellant was known. The trial judge summarised the effect of the identification evidence by saying that it "had a tendency to prove that the [appellant] was in the vicinity of the Grand Apartments at 1.00 pm on Saturday 1 April 2000 and at the Grand Apartments at or about 1.00 am on the morning of Sunday 2 April 2000, at or about 6.00 pm on Sunday 2 April 2000 and then at about 1.00 am on Monday 3 April 2000."

7 The defence case, although unsupported by any sworn testimony of the appellant, relied upon an alibi. Both the appellant and Zappia were interviewed by police in April 2000, and they gave substantially similar accounts of their movements on the night in question. Both said they went together to a nightclub called the Q Club at about 11 pm on 2 April 2000 and remained there until about 4 am on 3 April 2000. Much of the trial was taken up with an investigation into that alibi. There was evidence from a number of young people who were at the Q Club. The reasons of the trial judge contain a detailed evaluation of that evidence and its reliability. There was no doubt that the appellant and Zappia were together at the Q Club between about 2.30 am and 4 am on 3 April 2000. There was some evidence, which the trial judge accepted, that they arrived at the club in the early hours of the morning of 3 April 2000, and that a relative of the appellant, in the hearing of the appellant and Zappia, asked other people to vouch for the presence of the appellant and Zappia at the club from an earlier time. The trial judge, relying particularly on the evidence of Ms Mouroufas, concluded that the appellant and Zappia arrived together at the Q Club at some time between 2.30 am and 3 am on 3 April 2000. He found that, in collaboration, they had concocted a false account of the time of their arrival at the club with a view to providing each other with an alibi. This, he held, reflected a consciousness of guilt on the part of the appellant.

8 A prison informer named Loader gave evidence that the appellant confessed to him that he had shot the two victims. The trial judge examined that evidence with particular care, giving detailed consideration to the dangers involved in accepting it, and ultimately concluded that the evidence should be accepted. That finding was closely scrutinised in the Court of Criminal Appeal, where it was held that the appellant had failed to establish any error in the acceptance of the informer's evidence. That would be an important feature of the case if the appellant were to make good any of his grounds of appeal to this Court, and it became necessary to consider the proviso. For reasons that will appear, that question does not arise. In the Court of Criminal Appeal, certain grounds of appeal (not those with which this Court is concerned) were upheld, and the Court of Criminal Appeal applied the proviso. There is no ground of appeal in this Court relating to that aspect of the reasoning of the Court of Criminal Appeal.

The grounds of appeal

9 There are three grounds of appeal in this Court. They are as follows:

1. The Court of Criminal Appeal erred in admitting the evidence of Mr Simoniuk of conversations with Mr Zappia on 3 April 2000.

2. The Court of Criminal Appeal erred in holding that evidence of statements made by Mr Zappia in the absence of the appellant after the police investigation had commenced was admissible.

3. The Court of Criminal Appeal erred in holding that evidence of statements made by Mr Zappia in the absence of the appellant was admissible to prove Mr Zappia's intention.

10 Ground 2 was originally expressed by reference to statements made by Zappia to Mr Simoniuk, but at the commencement of argument counsel for the appellant said that the ground was directed to statements made by Zappia to the police in his record of interview.

11 The third ground of appeal relates to statements made by Zappia to Mr Simoniuk, some days before the killings, at a McDonald's restaurant.

12 All of the evidence the subject of the grounds of appeal was of statements made out of court by Zappia. It is submitted on behalf of the appellant that the reception of that evidence by the trial judge, and the use he made of it, contravened the rule against hearsay. Whether evidence of a statement made out

of court by a person who is not called as a witness at a trial is hearsay depends upon the use that is sought to be made of that evidence[3]. If what is relevant is the fact that the statement was made, rather than the truth of what was said, so that the statement is not relied upon to prove the facts narrated in the statement, then what is involved is not hearsay. As Ferguson J put it in a note in the first volume of the *Australian Law Journal*[4]:

> "The hearsay rule does not forbid the proof of what somebody said out of Court. What it does forbid is the proof of a fact by telling what somebody said about that fact out of Court, a very different matter. Whether the evidence in any particular instance is admissible or not depends upon the question what fact it tends to prove."

Both the trial judge and the Court of Criminal Appeal held that the evidence presently in question was relevant and admissible, not for a hearsay purpose, but for other purposes. It was not received, or considered, as evidence of the facts stated by Zappia. It was the fact that he made the statements that was relevant, not their truth. Indeed, in the case of one of the statements, the prosecution alleged that what Zappia said was substantially untrue.

13 A fact in issue at the trial was whether the appellant was present in unit 22 between 1.16 am and 4 am on 3 April 2000. A fact relevant to that fact in issue was whether Zappia was present in unit 22 between those times. The evidence in question was tendered in support of that second fact. The reason why Zappia's presence in the unit was probative of the appellant's presence was that there was a substantial body of evidence, including statements made by the appellant in his record of interview with the police, which tended to show that the appellant and Zappia were together during the early hours of the morning of 3 April 2000, and had been together for most of the preceding day. The trial judge disbelieved the assertion that the appellant and Zappia were together at the Q Club from 11 pm on 2 April 2000 until 4 am on 3 April 2000, but he did not doubt that they were together. The point of disbelief related to the time at which they arrived together at the Q Club. When the trial judge found that the appellant and Zappia were together when they arrived at the Q Club, and thereafter, he did not mean (as an argument for the appellant appeared to suggest) that they were not out of each other's company even for a moment. He meant that they were substantially in

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3 *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970; *Ratten v The Queen* [1972] AC 378 at 387; *Walton v The Queen* (1989) 166 CLR 283 at 301.

4 Ferguson, "Hearsay Evidence", (1927) 1 *Australian Law Journal* 195 at 196. Ferguson J, who had lectured in evidence for many years at the Sydney University Law School, went on to apologise for the need to write the note.

company over the whole time. Apart from the appellant's assertions about his movements, and those of Zappia, there was other evidence which showed that they were together. Although the eye witness identification evidence was not conclusive, it supported an inference that the appellant and Zappia were seen arriving at the Grand Apartments at about 1 am on 3 April. The evidence of Ms Stewart was capable of supporting an inference that she spoke to the appellant over the telephone, shortly after 1 am, at a time when he was in unit 22. There was evidence, and it was common ground, that the appellant and Zappia arrived together at the Q Club. In those circumstances, if the prosecution could establish, as part of its case against the appellant, that Zappia was present in unit 22 at the time of the shootings, then that fact was inculpatory of the appellant.

14 The conversation between Zappia and the witness Simoniuk the subject of the first ground of appeal took place on 3 April 2000, at some time in the evening. The evidence of the conversation was adduced in a curious form. Defence counsel did not object to counsel for the prosecution leading the witness, or to the witness giving evidence in a rather vague manner. There might have been a tactical reason for that. It is not the point of the ground of appeal. Mr Simoniuk said that Zappia looked nervous and tired. He said that, after having read his statement and refreshed his memory, he believed that Zappia had told him about the shootings. He said that Zappia had told him he had turned up the television set while in the room. That was a significant matter. When the cleaners at the Grand Apartments found the bodies of the victims on 3 April 2000, the television set in unit 22 was turned on at full volume. An available inference was that the television set had been turned up in order to mask the sound of gunshots. However that may be, the fact that the television set had been turned up to full volume was not something that had been made known to the public at the time of the conversation between Zappia and Mr Simoniuk on 3 April 2000. It was referred to by the trial judge as "esoteric knowledge", that is to say, information that was not in the public domain, and that was likely to be available only to somebody who had been present at the shootings.

15 The prosecution tendered the evidence of the conversation for the purpose of showing that, on the evening of 3 April 2000, Zappia knew that the television had been turned up to full volume. In the circumstances, such knowledge was likely to have been available only to somebody who was present in unit 22 at the time the victims met their death. There was no plausible explanation of how Zappia could have come by that knowledge innocently. The fact that he knew something about what went on in unit 22 in the early hours of the morning of 3 April 2000, in the circumstances, was as incriminating as the fact that he was seen entering the Grand Apartments, or the fact that his fingerprints and his DNA were found on objects in the unit. It tended to prove that he was there. That, in turn, tended to prove that the appellant also was there.

16 Such evidence did not offend against the hearsay rule. The evidence was not tendered or used to prove the truth of what Zappia said to Mr Simoniuk. It was not tendered to prove that the television set had been turned up. Rather, the fact that Zappia said what he did about the television set was relevant because it disclosed a state of knowledge on his part which had a tendency to prove that he was in unit 22 at the time of the killings. Thus, it had a tendency to prove a fact relevant to a fact in issue, because of other evidence which showed that he was in the presence of the appellant at all relevant times.

17 As to the second ground of appeal, the appellant was interviewed by police on 6 April 2000. Although there was some argument in the Court of Criminal Appeal and in this Court about the matter, both the trial judge and the Court of Criminal Appeal correctly found that what the appellant said was unambiguous, and that he claimed to have been at the Q Club, with Zappia, from about 11 pm on 2 April to about 4 am on 3 April. As has been noted above, he did not specifically claim that the two were never separated, but the tenor of what he said was that they arrived, remained at, and left, the Q Club in each other's company. The interview with the appellant ended at 1.50 pm on 6 April. Telephone records showed that four telephone calls were made from the appellant's land line telephone to the telephone at Zappia's residence at 2.53 pm, 5.07 pm, 6.42 pm and 7.15 pm on that day. A mobile phone associated with the appellant was used to ring the Zappia land line at 7.22 pm and 7.52 pm. There was continuing telephone contact between the two men over the next few days. The police intercepted two telephone calls between the appellant and Zappia on 13 April 2000. On 14 April, the police interviewed Zappia. He made no admissions. He gave an account of his movements on 2 and 3 April 2000 which was almost identical to that given by the appellant. The prosecution tendered the record of interview, not to establish the truth of what Zappia said (on the prosecution case much of what he said was false), but for the purpose of showing that he and the appellant had concocted an alibi that was shown by other evidence, and in particular by the evidence of witnesses who had been at the Q Club, to be false. According to the prosecution argument, accepted by the trial judge, this was done by the appellant out of a consciousness of guilt.

18 This, again, was a use of evidence of statements made by Zappia out of court, not to prove that what he said was true, but to prove that, acting in concert with the appellant, he said something that could be shown to be false. The evidence was not led or used for a hearsay purpose.

19 The third ground of appeal is directed specifically to what was called "the McDonald's conversation", although, as a matter of principle, the point raised by it applied equally to another conversation between the same parties (referred to as "the Hectorville conversation").

20 Mr Simoniuk gave evidence that, on or about 24 March 2000, he spoke to Zappia in a car outside a McDonald's restaurant while the appellant was in the restaurant. The conversation, therefore, was not in the presence of the appellant. Mr Simoniuk said that Zappia told him that he and the appellant were planning to catch up with Mr Rasti because "[h]e owed them something or they had something to settle with him."

21 The relevance of this evidence, again, is related to the evidence which showed that the appellant was in Zappia's company late on 2 April and in the early hours of 3 April. The Court of Criminal Appeal held that what Zappia said to Mr Simoniuk was evidence of Zappia's intention to "catch up with" Mr Rasti, and was available to be considered together with a larger body of evidence (including identification evidence) which supported the conclusion that Zappia visited Mr Rasti early on 3 April.

22 In *Walton v The Queen*[5], Mason CJ said:

> "Statements by a person about his intentions or state of mind are often admitted into evidence, whether described as an exception to the hearsay rule or as original evidence ... *Wigmore on Evidence*, Chadbourn rev (1976), §1715, suggests that such statements are an exception to the hearsay rule on the ground that a statement about a person's intentions is direct and testimonial, whereas conduct indicative of such intentions is indirect and circumstantial. But the better view is that evidence of such statements is not merely hearsay. Even when the testimony proffered is not that of the maker of the statement, but that of a person who heard the author make the statement, it is original evidence. It is because the making of the statement has independent evidentiary value in proving the author's intentions, those intentions being a fact in issue or a fact relevant to a fact in issue, that the witness's testimony does not infringe the hearsay rule. It is original evidence rather than an exception to the hearsay rule".

23 It was not argued that *Walton* was wrongly decided, or that, as an example of the acceptance of evidence of an out-of-court statement of intention, it could be distinguished. In *Walton*, the evidence in question was that of witnesses who said that the deceased person had told them she intended to meet the accused at a certain time and place. That intention was held to be relevant, and the deceased's statements were held to be probative of that intention. The majority held that the evidence was admissible. The approach of Mason CJ is set out above. Wilson, Dawson and Toohey JJ, on the other hand, acknowledged that "an element of

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5 (1989) 166 CLR 283 at 288-289.

hearsay [could] be said to be present"[6], but considered that this "need not necessarily preclude evidence of [the] kind being treated as conduct from which an inference can be drawn rather than as an assertion which is put forward to prove the truth of the facts asserted." There being no challenge to *Walton*, it is unnecessary to pursue the significance, if any, of the difference in the majority reasoning. It may be noted that, in those Australian jurisdictions where the Uniform Evidence Act applies, it is now provided by statute that the hearsay rule does not apply to evidence of a representation made by a person being a contemporaneous representation about the person's intention[7]. That legislation, however, is not in force in South Australia.

24 The decision of the Court of Criminal Appeal on the point was correct.

Conclusion

25 The grounds of appeal all fail. The appeal should be dismissed.

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6 (1989) 166 CLR 283 at 302.

7 eg *Evidence Act* 1995 (Cth), s 72.

26 KIRBY J. For the reasons given by Gleeson CJ and McHugh J[8], the appellant's first two grounds of appeal fail. However, like Heydon J[9], I have difficulties with some of the reasoning of Mason CJ in *Walton v The Queen*[10] relied on by Gleeson CJ and McHugh J to sustain their dismissal of the third ground of appeal[11].

27 With respect, I find the dissenting reasons of Deane J in *Walton* compelling as a matter of logic and principle. Although, for the reasons given by Heydon J, the point was not argued, the point is one of law. It is directly applicable to this case. Dissecting the "McDonald's conversation" between Mr Simoniuk and Mr Zappia into (1) a fact that the conversation occurred and (2) a fact that emerged in the conversation, and distinguishing that fact from (3) the inculpating content of the conversation as to intention, requires a feat of mental gymnastics that should be avoided in the highly practical context of a criminal trial. This is especially so because usually (unlike in this case) the permissible process of reasoning must be explained to, and performed by, a jury.

28 Because in this appeal there was no direct challenge to the reasoning of Mason CJ in *Walton* and because the residual common law rule has been overtaken in four Australian jurisdictions by the Uniform Evidence Acts[12], I would not struggle in this instance to resolve the point concerning the statement of intention of Mr Zappia. It is itself a point that is becoming esoteric for most legal and practical purposes. Like Heydon J, I am content to assume that, on the third ground, the appellant might strictly have been able to establish a misdirection of law on the part of the trial judge, if the applicable common law were properly applied.

29 However, for the reasons given by Heydon J[13], such an error gives rise to no relief in this case. The third category of challenged evidence is ultimately of minor consequence. The prosecution case against the appellant was compelling. The appellant's conviction was inevitable on the admissible evidence. The

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8 Reasons of Gleeson CJ and McHugh J at [12]-[24].

9 Reasons of Heydon J at [37]-[39].

10 (1989) 166 CLR 283 at 288-289.

11 Reasons of Gleeson CJ and McHugh J at [22]-[23].

12 See *Evidence Act* 1995 (Cth), s 72 (applicable in the ACT by s 4); *Evidence Act* 1995 (NSW), s 72; *Evidence Act* 2001 (Tas), s 72.

13 Reasons of Heydon J at [39], referring to the *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

outcome was in every other way accurately reasoned by the trial judge. The Court of Criminal Appeal would have been bound to apply the proviso[14]. On the third ground, there has been no substantial miscarriage of justice.

30 I agree, therefore, that the appeal should be dismissed.

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14 See *Kelly v The Queen* (2004) 78 ALJR 538 at 551 [56], 563 [123]; 205 ALR 274 at 290, 306-307.

31 HAYNE J. I agree that the appeal should be dismissed. For the reasons given by Gleeson CJ and McHugh J, the first two grounds of appeal fail.

32 The third ground of appeal raised more difficult issues. Consistent with what was decided in *Walton v The Queen*[15], the ground must fail. Neither the decision in *Walton* nor the applicability of principles derived from it was put in issue in this appeal.

33 The fundamental proposition that there is a real and radical distinction between tendering evidence of an out of court assertion as proof of the content of the assertion and tendering proof of an out of court assertion as proof only of the fact that it was made is undoubted. If there is a difficulty about the application of that distinction it lies, at least in part, in identifying why the fact that an out of court assertion was made is relevant to an issue in the case except for the purpose of demonstrating the truth of the content of the assertion. Where an out of court assertion is tendered to demonstrate that the person making the assertion then had a particular intention, the line between proof of the fact asserted and proof of the fact that the assertion was made is difficult to draw. No less importantly, the fact that the person then had a particular intention must often find its relevance to the facts in issue in a chain of reasoning which begins by accepting that the expressed intention not only was truly held but would probably be acted on. In the present case, it is not self-evident how a statement of the co-accused's intention was relevant to any issue in the appellant's trial.

34 It is, however, not necessary to pursue any of these questions. The evidence against the appellant, apart from the conversation the subject of ground 3, was overwhelming.

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15 (1989) 166 CLR 283.

35 HEYDON J. I agree with the reasons of Gleeson CJ and McHugh J for rejecting the first two grounds of appeal.

36 The third ground of appeal concerns the reception of Simoniuk's evidence that Zappia had told him at a McDonald's restaurant that he and the appellant were planning to catch up with Rasti. The trial judge admitted the evidence as an act in furtherance of the common purpose of Zappia and the appellant. The Court of Criminal Appeal concluded that it was not an act of that kind, but upheld the reception of the evidence on the basis that it proved Zappia's intention. In this Court the Crown submitted in writing that evidence of Zappia's intention to catch up with Rasti was relevant to a fact in issue, namely whether Zappia committed the murder, and that it was significant because the appellant and Zappia were together at the time when Rasti and Ellul were murdered[16]. The appellant's argument was that Zappia's intention to catch up with Rasti was irrelevant, for the reason that it had not been shown that Zappia and the appellant were in each other's company on the night of 2-3 April 2000 continuously, and hence no inference could be drawn that if Zappia was carrying out his intention, the appellant was present. This argument fails on the grounds given by Gleeson CJ and McHugh J: there was ample material from which to infer that Zappia and the appellant were in each other's company at all relevant times on the night of 2-3 April 2000.

37 The appellant advanced no other argument to the effect that the words to which Simoniuk testified were not admissible evidence either of Zappia's intention or of the fact that it was carried out. The appellant appeared to accept the applicability of *Walton v The Queen*[17]. In that case the four majority Justices held that testimony by certain witnesses that another person, with whose murder the accused was charged, had stated an intention to meet the accused at a particular place – the Town Centre – proved the existence of that intention and was admissible on that basis[18]. Mason CJ held that the evidence was also admissible on the issue of whether the intention was carried out – to prove both that the deceased went to the Town Centre and that the deceased met the accused there. Wilson, Dawson and Toohey JJ were silent on that issue, beyond saying that the trial judge correctly explained the use to be made of the evidence. The trial judge said that the evidence tended to prove the deceased's state of mind and

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16 This was contradicted by an oral argument that evidence of Zappia's intention "does not prove by itself that he did catch up at any stage with … Rasti". If that was so, it is unclear how it would be relevant.

17 (1989) 166 CLR 283.

18 (1989) 166 CLR 283 at 289 per Mason CJ, 305 per Wilson, Dawson and Toohey JJ.

explained why the deceased left the house where the witnesses heard her statements of intention and why she caught a particular bus; but he warned the jury that the evidence must not be treated as evidence that she did in fact meet the accused[19]. Yet it is hard to see how the intention was relevant unless it was used for that purpose, as Mason CJ did. Deane J dissented: he thought that the evidence was not admissible to prove either that the deceased went to the Town Centre or that she met the accused there, and he thought that the evidence of intention was not otherwise admissible[20]. As Mason CJ acknowledged, the authorities were "in a state of disarray"[21]. The decisive factor in Mason CJ's conclusion that the evidence was rightly admitted was that another witness proved an admission by the accused that he had made an arrangement to meet the deceased at the Town Centre[22].

38 In the present case, the Court of Criminal Appeal, like Mason CJ in *Walton v The Queen*, appeared to uphold the admission of the evidence to prove that Zappia's intention was carried out[23]. As noted above, the Crown contended in this Court that it was admissible on that basis. However, quite apart from the condition of the authorities, the force of Deane J's dissenting judgment, the questionable nature of Mason CJ's reliance on other evidence to lever the evidence as to the deceased's intentions into admissibility and the absence of relevant reasoning in the joint judgment, *Walton v The Queen* has been attacked to some effect[24]. The proposition stated in the passage from *Walton v The Queen* quoted by Gleeson CJ and McHugh J that past statements by a person who is not a party about that person's intentions, which are reported to the court by that person or another witness, are admissible is certainly true in some circumstances. However, it is highly controversial whether those statements are generally admissible to prove that the intention was carried out or that an intention to do an act with a second person is evidence that that act was performed.

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19 (1989) 166 CLR 283 at 300.

20 (1989) 166 CLR 283 at 307.

21 (1989) 166 CLR 283 at 289-291.

22 (1989) 166 CLR 283 at 291-292.

23 Lander J said (*R v Kamleh* [2003] SASC 269 at [244], Debelle and Nyland JJ agreeing): "[The Crown] argued that the statement was admissible to establish … Zappia's intention and his intention was relevant because it was the appellant's case that he and … Zappia were never outside each other's company over the whole of the relevant period. I agree with that submission."

24 Tapper, "Hillmon Rediscovered and Lord St Leonards Resurrected", (1990) 106 *Law Quarterly Review* 441.

39 The parties did not advance any arguments on these questions. In particular, the appellant advanced no argument challenging *Walton v The Queen*. From his point of view it stands as a decision of this Court, whatever the merits of its reasoning, and it was no doubt correctly thought better to seek to outflank it than assault it frontally. For its part, the Crown did not seek to explain how Zappia's intention was relevant unless it could be inferred that it was carried out, and did not explain how the reasoning in *Walton v The Queen* could be applied here. In the absence of any argument on these issues it is undesirable to decide whether the Court of Criminal Appeal's decision to uphold the trial judge's reception of the evidence was open to doubt. In any event, even if the Court of Criminal Appeal erred, no substantial miscarriage of justice occurred within the meaning of s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA), since the appellant's conviction was inevitable for the following reasons.

40 In the first place, the admission of the McDonald's restaurant conversation, which occurred 10 days before the killings, can have had only a marginal impact on the appellant's interests in view of the admission of the Hectorville conversation to the same effect in more menacing circumstances, which included Zappia's request for ammunition, and occurred a few hours before the killings. Secondly, there was very strong direct evidence against the appellant in the form of his confession to Loader that he murdered the victims. Thirdly, there was the strong circumstantial evidence referred to by Gleeson CJ and McHugh J. This included visual and oral identification evidence, fingerprint evidence and DNA evidence suggesting that Zappia was in the flat at the relevant time, and that the appellant was there with him; evidence of conduct suggesting a consciousness of guilt in the attempted procurement of a false alibi by the appellant's cousin, the apparently orchestrated false alibis by Zappia and the appellant in their police interviews, and the appellant's lies to the police about his alibi and about when he last saw Rasti; Simoniuk's evidence about what Zappia said to him on the evening of 3 April 2000, revealing what is in South Australia known as "esoteric knowledge"[25]; and evidence that a mobile phone which was lent by the appellant to Rasti, and which was used by Rasti up until the time of the killings, could not be found at the scene of the crime or elsewhere.

41 The grounds of appeal fail and the appeal should be dismissed.

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25 See *In re Van Beelen* (1974) 9 SASR 163 at 215-216, 225 per Walters, Wells and Jacobs JJ. See also Wells J's ruling at trial in *R v Szach* (1980) 23 SASR 504 at 529-530, his summing up quoted at 572, King CJ's approval of Wells J's approach at 572-573, Legoe J's agreement at 588-589, and Mohr J's agreement at 594.

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