HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, HAYNE, CALLINAN AND HEYDON JJ

RAYMOND AKHTAR ALI APPELLANT
AND

THE QUEEN RESPONDENT

Ali v The Queen
[2005] HCA 8
8 March 2005
B42/2004

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation:

K C Fleming QC with P E Smith for the appellant (instructed by Terry Fisher & Co)

L J Clare with M J Copley for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Ali v The Queen

Criminal law – Trial – Miscarriage of justice – Competence of counsel – Joint trial of accused – Whether counsel should have applied for a separate trial – Whether application would have succeeded – Whether accused disadvantaged by joint trial – Whether counsel failed to object to evidence of bad character – Whether counsel failed to advance alternative case – Whether accused deprived of a fair chance of acquittal.

Evidence – Criminal trial – Character of accused – Failure to object to evidence of bad character – Whether objection would have succeeded – Whether evidence admissible for other purpose.

Criminal Code (Q), ss 579B, 668E.

1 GLEESON CJ. The appellant and a co-accused, Amanda Blackwell, were charged with a number of offences following the death, dismemberment, and burial of an infant. The co-accused was the mother, and the appellant was shown by the evidence to be the father. Following a joint trial, before a jury, the appellant was convicted of murder. The co-accused was convicted of manslaughter. The appellant was also convicted of improperly interfering with a corpse, and concealing the birth of a child. The co-accused was also convicted of concealing the birth of a child

2 When first interviewed, and later before the trial, the co-accused provided the police with a number of inconsistent stories about the birth, death, and burial of the child, including accounts in which she accepted sole responsibility. However, in her evidence at the trial, the co-accused said that the appellant was the father of the child, that he was present at its birth, that he took the baby away after it was born, that she never saw the baby again, and that the appellant told her he had disposed of the body. The trial, and the appeals, were conducted on the basis that the only two people who could have been involved in killing the child and disposing of its body were the appellant and the co-accused. The acts were done by one or other or both of them.

3 The appellant, when interviewed by police, denied being present at the birth of the child, or having any connection with the birth or death of the child, or with the disposal of the body. He gave no evidence at the trial.

4 The cogency of the co-accused's testimony against the appellant was diminished by her previous inconsistent stories. Much was made of this, and the trial judge's directions to the jury contained appropriate warnings. Even so, the circumstantial evidence against the appellant was very strong. He was proved to be the father of the child. He was shown to have told many lies about the matter. He had a strong motive to conceal the birth. Most telling of all was the condition of the body, considered in the light of the appellant's experience as a butcher. This appears from the reasons of Callinan and Heydon JJ, and need not be elaborated.

5 After having made an unsuccessful appeal to the Queensland Court of Criminal Appeal on the ground of alleged unreasonableness of the verdicts and errors in the trial judge's summing up[1], the appellant then raised a claim that there had been a miscarriage of justice in that he was not tried fairly because of the incompetence of trial counsel. He was given special leave to pursue that claim in this Court. Upon examination, it has been shown to be without substance.

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1 *R v Ali* [2001] QCA 331.

6 The conduct of trial counsel was criticised on a number of grounds. It was complained that counsel failed to advance a particular theory of the case consistent with his client's innocence of the principal offence. The appellant had maintained, before trial, that he had absolutely nothing to do with the birth or disappearance of the child. That continued to be his case at trial. He gave no evidence, but that was the line pursued in cross-examination and address. Now it is said that trial counsel should have invited the jury to consider, as an alternative hypothesis, consistent with innocence at least of murder, that the appellant "had nothing to do with the death of the child but may have been involved with hiding the corpse". It is worth reflecting upon some of the implications of this theory. The appellant was a butcher, experienced in the removal of sexual organs from goats. The child's skilfully dismembered body had the sexual organs neatly removed. The only two people who could possibly have done that were the appellant and the co-accused. The co-accused gave birth in circumstances that left her weak and distressed. The objective probabilities made it very likely that it was the appellant who dismembered the body. The appellant had consistently denied any involvement. Pursuit of this new theory would require that it be put in cross-examination to the co-accused, and in address. Presumably the hypothesis would have been to the effect that the child was murdered by the co-accused but that the appellant, who happened to be present, although not being implicated in the death of the child, took the body away, butchered it, and buried it. This scenario lacks forensic appeal. It was contrary to everything the appellant had previously said. It was also contrary to the principal line of defence pursued at trial. It was unsupported by any evidence. It could well have been regarded as utterly fanciful. We do not know counsel's instructions from the appellant. We do not know when, or why, a decision was made that the appellant would not give evidence. We do not know what counsel might have brought down upon his client's head had he set out, in the course of the evidence, to lay the foundation for such an hypothesis. If he had put it to the jury without first having put it to the co-accused, he would have exposed himself to devastating comment. How could he sensibly have put it to the co-accused, having regard to his principal line of defence? Furthermore, if such an argument had been advanced, the predictable reaction of the jury might well have been derision. It is not a mark of competent advocacy to pursue at trial every line of argument that can be imagined, regardless of its consistency with other arguments, and regardless of its prospects of success. On the contrary, such an approach is the hallmark of incompetence.

7 This first argument for the appellant also illustrates a basic problem involved in attempts by an appellate court to pass upon the competence of counsel's conduct of a trial; a problem to which I adverted in *R v Birks*[2] and

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2 (1990) 19 NSWLR 677 at 682-685.

TKWJ v The Queen[3]. The adversarial system is based upon the general assumption that parties are bound by the conduct of their legal representatives. Furthermore, that conduct, usually, can only be evaluated fairly in the light of a knowledge of what is in counsel's brief, a knowledge that ordinarily is unavailable to an appellate court. An appellate court's speculation as to why a particular line was not pursued in cross-examination, or in address, will often be uninformed and fruitless. So it is in the present case. I can think of no good reason why trial counsel should have advanced the hypothesis in question. I can think of a number of good reasons why he might not have done so. Ultimately, however, I simply do not know. The argument that, because the hypothesis was not advanced, the appellant did not have a fair trial is hopeless.

8 Next, the appellant asserted that evidence which was prejudicial to him was admitted at trial without objection. The detail of this complaint is considered in the reasons of Callinan and Heydon JJ, with which I agree. As those reasons demonstrate, most of the evidence was, in truth, admissible, although the use that could be made of it in the case against the appellant was strictly limited. There were, in effect, two trials being conducted together. Much of the evidence in question consisted of material relied upon by the co-accused in her defence. For example, evidence which tended to show that the appellant, to the knowledge of the co-accused, had a propensity to violence was relevant to part of her case. Her explanation of her original confessional statements, which she repudiated at trial, was that she was afraid of the appellant. The trial judge directed the jury as to the use they could make of the evidence. As to much of it, the contention that it should have been objected to does not withstand scrutiny.

9 Furthermore, the record of trial counsel's final address to the jury reveals a tactical approach that explains why some of the evidence relating to aspects of the appellant's character was elicited in cross-examination or was not the subject of objection. Counsel depicted the appellant as an earthy type who had adopted Australian ways, who may have had some of the characteristics of a larrikin, but who would never do the things alleged by the prosecution. Some of the plainly admissible evidence inevitably was going to show that the appellant had a number of human failings. It was a justifiable forensic decision to go along with that, rather than to present to the jury an appearance of desperately attempting to resist the irresistible. Ordinary standards of professional competence do not require trial counsel to object to every piece of evidence that is arguably inadmissible, especially in front of a jury. The reception of inadmissible evidence, in a given case, might produce a ground of appeal, but it does not necessarily mean that there has been unfairness or a miscarriage of justice.

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3 (2002) 212 CLR 124 at 128 [8].

10 Some of the material described as prejudicial was of marginal significance only. It was argued, for example, that trial counsel, in cross-examination, "incompetently brought out the fact that the appellant was not a very good Muslim because he smoked, consumed alcohol and got drunk." There was plainly admissible evidence that the appellant had prostituted the co-accused, and threatened her with violence. The prosecution case, supported by strong circumstantial evidence, was that the appellant murdered an infant, dismembered the body, removed the sexual organs, and buried the remains secretly. Evidence that he was a smoker and a drinker, even if that was against his religion, was not likely to become prominent in the overall picture.

11 The appellant and the co-accused ran cut-throat defences. There is nothing unusual about that. Counsel was criticised for not seeking a separate trial. There are two answers to the criticism. First, as Callinan and Heydon JJ explain, a joint trial was almost inevitable. Secondly, a joint trial had one significant tactical benefit for the appellant. It was important to the appellant's case that the jury should learn that the co-accused, in her original interviews with police, had accepted full responsibility herself, and had exonerated the appellant. It was at least doubtful that evidence of what the co-accused had said to the police would have been before the jury if the appellant had been tried separately. It is unnecessary for this Court to reach a decision on that hypothetical question, the answer to which may have depended on exactly how a separate trial was conducted. It suffices to say that there is a clear, rational explanation of why a separate trial might not have been sought.

12 It is not to the point for the appellant to show that in certain respects the trial might have been conducted differently, or that in certain respects it might have been conducted more skilfully. Nor is it sufficient to show that some inadmissible evidence was received. Notwithstanding that her previous inconsistent stories made her evidence vulnerable to attack, the jury found the co-accused to be a convincing witness. (That is reflected in her conviction of manslaughter rather than murder.) There was, in addition, a strong circumstantial case against the appellant. He said nothing at trial, either to contradict the co-accused, or to explain away the damaging circumstances. Those are the reasons why he was convicted. The attempt to blame his counsel is misdirected.

13 It has not been shown that the appellant, by reason of the conduct of his counsel, did not have a fair trial or that there was a miscarriage of justice.

14 The appeal should be dismissed.

McHUGH J. This appeal should be dismissed for the reasons given by Hayne J.

16 HAYNE J. The facts and circumstances giving rise to this appeal are fully set out in the reasons of Gleeson CJ and of Callinan and Heydon JJ. I need not repeat them except to the extent necessary to explain my reasons. For the reasons that follow, I agree that the appeal should be dismissed.

17 Much of the argument on the hearing of the appeal proceeded from the premise that the determinative question was whether counsel who appeared for the appellant at trial had been flagrantly incompetent. To identify the issue in that way has at least two difficulties. First, there is an evident difficulty in giving content to the pejorative expression "flagrantly incompetent". Secondly, and more fundamentally, framing the issue by reference to the quality of trial counsel's conduct diverts attention from the question presented by s 668E of the *Criminal Code* (Q), namely, whether the Court of Appeal should have found "that on any ground whatsoever there was a miscarriage of justice".

18 As McHugh J pointed out in *TKWJ v The Queen*[4], "[t]he critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred". The conduct of counsel remains relevant as an intermediate or subsidiary issue[5] because the issue of miscarriage of justice in a case such as the present requires consideration of the two questions which McHugh J identified in *TKWJ*[6]. Did counsel's conduct result in a material irregularity in the trial? Is there a significant possibility that the irregularity affected the outcome? But the ultimate question is whether there has been a miscarriage of justice.

19 In the present case, two complaints were made about trial counsel's conduct: (a) that trial counsel did not object to evidence which showed the appellant to be of bad character; and (b) that trial counsel should have applied for a separate trial. The first of these grounds was amplified by contending that trial counsel for the appellant failed to object to the form in which some evidence was led at trial and failed to object to the leading of evidence about some subjects at trial. (By contrast, in *TKWJ*, the issue concerned counsel's decision not to lead some evidence.) Other aspects of the conduct of trial counsel (for example, that some of his objections were said to be incomprehensible) appear to have been advanced as indicative of his incompetence. Beyond the forensic purpose of adding colour to the allegation made, these further allegations were not said to

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4 (2002) 212 CLR 124 at 149 [79].

5 *R v Scott* (1996) 137 ALR 347 at 362; *TKWJ v The Queen* (2002) 212 CLR 124 at 149 [79] per McHugh J.

6 (2002) 212 CLR 124 at 149 [79].

have affected what evidence was led at trial or the course that trial took. They may be put aside.

20 As to the complaint that trial counsel for the appellant should have, but did not, seek to have the appellant tried separately from the co-accused (Ms Blackwell) it is enough to say that I agree with Callinan and Heydon JJ that such an application, if made, would have failed. The prosecution contended, among other things, that the two accused acted in concert. In the circumstances of this case, joint trial of that issue, and thus joint trial of the two accused, was appropriate. This aspect of the matter may also be put aside.

21 As Gleeson CJ points out, an important consequence of the appellant being tried with the co-accused was that statements Ms Blackwell had made to police, in which she took full responsibility for killing the child and then cutting up the body, were before the jury. Had there been separate trials, those statements may not have been admissible at the appellant's trial[7]. The admission in evidence of these confessions did not disadvantage the appellant.

22 It was said that trial counsel for the appellant could successfully have objected to some questions asked of witnesses by counsel for the prosecution and by counsel for Ms Blackwell. In some cases, it was said that objection could have been taken to the form of the question. In other cases, it was said that objection could have been taken to the relevance or admissibility of the evidence which it was sought to lead.

23 Showing that objection could have been taken to some questions that were asked by other counsel during the course of a trial does not show that trial counsel was incompetent or show that there has been a miscarriage of justice. Counsel is not bound to take every objection that is open. Objecting to the form in which evidence is led, or objecting to evidence on a subject about which other evidence has been or is to be heard, may convey an impression of obstructionism detrimental to the interests of the party for whom counsel is appearing. Demonstrating that counsel *could* have objected to certain evidence does not demonstrate that counsel *should* have made that objection.

24 Where it is alleged, as here, that there has been a miscarriage of justice because counsel did not object to the reception of evidence, it is necessary to exercise considerable care when considering whether counsel should have objected. There are at least two reasons why that is so. First, it is necessary to put aside the benefit of hindsight. Whether counsel not only could have but should have objected, must be judged, as far as possible, having regard both to the state of evidence at the time the question was asked and to what might then

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7 *Bannon v The Queen* (1995) 185 CLR 1.

reasonably have been expected to be the likely future course of the matter. So, in a matter like the present, it is necessary to take account of the possibility (perhaps even the then known probability) that the appellant would not give evidence on his own behalf. If it was possible, even probable, that the jury would not hear from the appellant, it would ill serve his cause to have the jury form the impression that he feared the facts of the matter being fully elicited.

25 An appellate court does not and may not know what information trial counsel had when deciding whether or not to object to evidence. That is why, in *TKWJ*, I concluded that the question of miscarriage does not turn on a factual inquiry into why trial counsel acted or did not act in a particular way[8]. That kind of inquiry cannot be made. Rather, the question is whether there *could* be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process[9] that no miscarriage of justice is shown to have occurred.

26 Secondly, when considering whether a failure to object to evidence has brought about a miscarriage, it is necessary to consider the effect of the evidence which it is said trial counsel could have had adduced in a different form or could have prevented being led. It is important to recognise that this question is separate from the question whether there has been any want of proper instruction of the jury about the use of the evidence led at trial, including the evidence which now is said should not have been before the jury. In the present case, therefore, one important premise to be accepted in considering the effect of the evidence which it is said should not have been led must be that the trial judge gave a proper separate consideration direction instructing the jury to differentiate between evidence relevant to the guilt of the appellant and evidence relevant to the guilt of the co-accused.

27 In his notice of appeal, the appellant gave particulars of his complaint that trial counsel had failed to object to bad character evidence adduced concerning the appellant. Many instances were given of this alleged failure. Reference was made to particular aspects of evidence given by certain witnesses or about certain subjects.

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8 (2002) 212 CLR 124 at 159 [110].

9 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34], 65 [38] per Gaudron, Gummow, Kirby and Hayne JJ.

28 Some of those more particular aspects of evidence can be dismissed from consideration because they are evidently trivial. They include such matters as a passing reference in a recorded interview of the appellant by police to his then facing charges in the Beenleigh Magistrates Court about his butchery business and his denials (in that same interview) of instigating arrangements for Ms Blackwell to marry the appellant's nephew and receiving a gift to do so.

29 Other instances of alleged failure to object to evidence must be examined having regard to the way in which the case for and against the co-accused was presented.

30 Ms Blackwell had made several statements to police. In some of those statements she suggested that she alone was responsible for the death of her child; in others her account suggested that the appellant had done so. In some statements she said that she had cut up the child's body; in others she said, in effect, that she didn't know who had done this. The evidence she gave at trial was consistent with the prosecution case that the appellant had killed the child and then cut up the child's body. Her explanation at trial for the changes in her version of events was that she was terrified of directly implicating the appellant.

31 The appellant contends that his trial counsel should have objected to evidence being given of Ms Blackwell's out of court statements showing (so Ms Blackwell contended) both that she did fear the appellant and that she had cause to do so. Those out of court statements were an integral part of the statements which Ms Blackwell had made to police. The statements she had made to police were relevant and admissible in evidence against her because they contained admissions by her. Those parts of the statements which were self-serving of her interests were not to be excised[10]. Any objection to this evidence by trial counsel for the appellant would have failed. Further, as the trial judge was at pains to point out to the jury, more than once, what Ms Blackwell said in her statements to police was not to be used as evidence against the appellant. The reception in evidence of what Ms Blackwell had said in her police statements about the appellant brought about no miscarriage of justice.

32 It must then be recognised, however, that it was open to counsel for Ms Blackwell to attempt to buttress his client's case by attempting to elicit evidence that would show that his client's stated grounds for fearing the appellant were well founded. It is those attempts which form by far the largest group of questions to which the appellant submits his trial counsel should have taken objection as revealing the appellant's bad character.

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10 *R v Higgins* (1829) 3 Car & P 603 at 604 [172 ER 565 at 565].

33 The evidence adduced by Ms Blackwell's counsel tended to show that Ms Blackwell was scared of and dominated by the appellant, that the appellant had not only had a long established sexual relationship with her but had prostituted her for his own gain and gratification, and that the appellant had been violent towards her and others. In the context of the issues fought at the trial of the appellant and Ms Blackwell, and having regard, in particular, to the statements Ms Blackwell had made to police, all of this evidence was relevant for purposes other than demonstrating that the appellant was a man of bad character. Thus, counsel for Ms Blackwell asked police officers who had interviewed her several questions that might be understood as designed to demonstrate that what Ms Blackwell had said about the appellant and his conduct to her and to others was true. For the most part, this evidence did no more than repeat what Ms Blackwell had said in her statements to police. Often the questions that were asked by Ms Blackwell's counsel about these matters were merely the preface to other lines of questioning. The reception of this evidence made no significant addition to the evidence the jury heard.

34 In some other cases, counsel for Ms Blackwell asked witnesses about out of court statements that the appellant was alleged to have made. Again, these statements tended to portray the appellant in a bad light. All these out of court statements by the appellant may, perhaps, have been understood as either making some admission against the interests of the appellant or as having some relevance for the fact that they were made. It is not necessary to reach a concluded view about whether that impression of the evidence is accurate.

35 In other cases, counsel for Ms Blackwell asked witnesses about threatening or violent conduct of the appellant. In particular, some questions were asked of a witness, Mr Mobeen Ali, about an altercation at a New Year's Eve party and about threats the appellant was supposed to have made to him. This examination was directed to showing that Mr Mobeen Ali feared the appellant. Again, that line was taken in order to explain why Mr Mobeen Ali had made statements to police which might have suggested that he, not the appellant, was the father of Ms Blackwell's child. And if that were so, it would be Ms Blackwell rather than the appellant who, of the two persons on trial, might be thought to have some motive to kill the child. Cross-examining Mr Mobeen Ali before counsel for the appellant, counsel for Ms Blackwell had to deal with the statements the witness had made to police lest contrary evidence be elicited by counsel for the appellant putting the witness's prior inconsistent statement to him.

36 Ms Blackwell's counsel also asked questions of a police officer about allegations by a former employee of the appellant that the appellant had held him over a butcher's block and threatened him. This evidence came out in cross-examination about transcripts of intercepted conversations of the appellant recorded by a listening device. The police officer was asked about what the appellant had said when the appellant was apparently recounting a suggestion that he not only had threatened someone else but also had cut up the body of the

deceased child. Like some of the other evidence earlier described, the appellant's statements, recounted in evidence, might have been understood as admissions against interest by the appellant or as relevant for the fact they were made. But again it is not necessary to reach a concluded view about whether that is so. What is of critical importance is that the jury had in evidence before them both the tapes of the intercepted conversations in which the appellant made the statements which counsel for Ms Blackwell explored, and transcripts of those tapes.

37 It is not necessary to examine in any greater detail the other matters of evidence upon which the appellant relied in this appeal. For present purposes, what is important is that none of the evidence which the appellant now says that his trial counsel should have attempted to have excluded was evidence that created any new issue for the jury to consider, or put before the jury any information of any importance which otherwise would not have been before them.

38 I do not find it necessary to reach any concluded view about whether trial counsel for the appellant acted incompetently at the trial. I tend to the view that criticisms of his conduct which may now appear to have some foundation might be capable of deflection on the basis that to appear to obstruct the course of evidence would have damaged what little chance the appellant may have had of securing an acquittal. If trial counsel's conduct of the trial does merit criticism, any irregularity which occurred in the trial was immaterial and there is no possibility that it affected the outcome.

39 Finally, the appellant's notice of appeal alleged that the trial judge had failed to direct the jury "as to the permissible use to be made of the bad character evidence". This point was not developed in written or oral argument. No direction on this subject was sought at trial. It is entirely possible that the point was thought sufficiently met by the separate consideration direction given to the jury and that to seek more explicit direction would have emphasised the absence of any sworn evidence from the appellant.

40 The appeal should be dismissed.

41 CALLINAN AND HEYDON JJ. The only ground of appeal in this case is that, during his trial, which was a joint trial, for murder, of improperly interfering with the corpse of a female infant, and of concealing her birth, of all of which he was found guilty, the appellant's counsel was flagrantly incompetent.

The facts

42 The appellant, his wife, their young child and Amanda Blackwell, a young woman of about 20 years of age, (the "co-accused") lived in the same household at Logan Village near Brisbane for about two years. The appellant and the co-accused frequently engaged in clandestine sexual intercourse during this period. The appellant raised and slaughtered goats, poultry and pigeons on the property where they lived. He is a Muslim butcher, experienced in the dismemberment of the corpses of animals and the removal of their sexual organs. He sold the meat from the animals that he butchered as Halal meat to other Muslims. He also worked on occasions as a taxi-driver.

43 On or about 7 or 8 September 1998, the co-accused gave birth to a female infant. Testing of samples of DNA pointed to the appellant as the father.

44 Minutes after her birth the infant died from multiple injuries to her body and head of an extremely violent kind. Her umbilical cord was also torn soon after her birth.

45 Not long after the termination of her short life, the child's body was dismembered by a person experienced in the dismemberment and dissection of bodies. Severed organs including part of the reproductive organs were discovered near the appellant's house. The upper section of her torso was found in a shallow grave on an adjoining property.

46 The dismemberment had been done by a sharp instrument or instruments. The torso was severed just above the umbilicus, and the right leg just above the knee. A forensic pathologist gave evidence at the trial that the removal of the reproductive organs was most unusual. His opinion was that their precise severance implied the purposeful use of a sharp instrument, and a degree of anatomical knowledge. He described the severance as "remarkably neat". The appellant was adept at doing this to female goats to misrepresent their sex in order to achieve higher prices from potential purchasers of the meat.

47 No preparations had been made in the household for the birth and rearing of a baby. The case against the appellant was that he personally killed the baby,

or aided or counselled or procured[11] the co-accused, with whom he was jointly tried, to do so.

48 During the investigation of the crimes the appellant told many lies to the police officers and others: that he had not known that the co-accused was pregnant; that he had not been in a sexual relationship with her; that he possessed no particular ability to remove the sexual organs of animals; and that he had not slaughtered goats. He also lied about his presence on 8 September 1998 on his neighbour's property where the torso of the child had been buried in a shallow grave.

49 The co-accused gave a number of different and conflicting accounts to investigating police officers of her role in the events leading to the baby's death. At first she denied that she had recently been pregnant but later she said that she had given birth to a stillborn baby whose body she had left at the rear of the appellant's residence. On another occasion she said that she had killed the baby, and had cut the body into pieces and buried them. She retracted the latter part of this admission very soon after she made it. She also admitted to a long sexual relationship with the appellant. In another interview some months afterwards, she told the investigating officers that the appellant had taken the child from her while it was still alive, and had carried it away.

50 There was also a deal of evidence that the appellant dominated and manipulated the co-accused who became accustomed to doing as he demanded. His demands included that the co-accused submit to sexual relations with him whenever he wished, that she become engaged to be married to a nephew of his, Mobin Mukhtar Ali, who lived in Fiji, that she have sexual relations with other men for money, and that on occasions intercourse with them take place in the appellant's presence.

51 The investigation into the crimes was a prolonged one. The co-accused's mother and police officers became concerned for the co-accused's safety soon after it began. The latter installed a listening device in the appellant's house in

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11 Section 7 of the *Criminal Code* (Q) relevantly provides:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -
>
> ...
>
> (d) any person who counsels or procures any other person to commit the offence."

which the co-accused continued to reside after the death of the child, and recorded a number of the appellant's conversations. The appellant too recorded some conversations at the house between the co-accused, himself and his wife. The contents of these were canvassed during the trial. The police also conducted an interview with the appellant which was video-taped.

The trial

52 At the trial before Wilson J and a jury, the co-accused gave evidence after a formal admission on her behalf was made that she and the accused had been in a sexual relationship for almost two years. Her evidence was that an earlier pregnancy had resulted from it in 1997 and that the appellant had assisted her to arrange for the foetus to be aborted at a clinic. Unbeknown to the appellant, the co-accused cancelled her appointment at the clinic and she eventually miscarried. When the appellant found out about the pregnancy with which this case is concerned he told her that she would have to "fix it".

53 The co-accused said that she went into premature labour more than 24 hours before the birth. She told no-one of this. The actual birth occurred near a tank stand on the appellant's property at night time more than a day later. She tried to tear the umbilical cord. Either then, or very soon afterwards, the appellant was present. He took the baby and forbade the co-accused to follow him. When subsequently she asked the appellant what had happened he told her that the baby was a boy, that the child had died and that he had fixed everything.

54 As to her earlier different versions, the co-accused's final position was that her confession of infanticide and dismemberment of the body was false. She knew that she had to try to explain the baby's injuries. She was scared of the appellant. The co-accused was convicted of manslaughter and of concealing the birth of her child. The appellant did not give evidence at the trial.

The appeal to the Court of Appeal of Queensland

55 The appellant's appeal to the Court of Appeal of Queensland (McMurdo P, Davies and Thomas JJA) was dismissed. The only ground of appeal there was that the verdict of murder was unsafe and unsatisfactory. No point was sought to be taken that incompetence of counsel had deprived the appellant of a fair chance of acquittal.

The appeal to this Court

56 In this Court where he is represented by other counsel, the appellant has sought to identify numerous instances of incompetence on the part of trial counsel. It will be necessary to deal with each of these in turn.

57 The first complaint relates to the introduction into evidence of a videotape of an interview with the co-accused by police officers on 17 December 1998. Trial counsel, having told the Court that a lot of it was prejudicial to the appellant, said "[i]t is not my position really to object." He made no applications to exclude portions of it, or for a separate trial despite the fact that, as it was submitted, there was inadmissible and prejudicial material on the tape, and even though in its entirety the tape was admissible against the co-accused only.

Separate trials?

58 Any application for a separate trial would have been doomed to failure. Section 597B of the *Criminal Code* (Q) confers a discretion on the trial judge, at any time during the trial of two or more persons, as here, charged in the same indictment, that the persons charged be tried separately. The events leading up to the murder and dismemberment of the infant, and the guilt or innocence of the appellant and the co-accused, were closely interconnected. Their relationship, their similar motives, their almost equal opportunity to commit the crimes, and their capacity, either separately or jointly to commit them, all argued very strongly in favour of a joint trial. There were no special or other features of the case requiring that they be tried separately. That one might seek to incriminate the other, as each accused here did, could provide no justification for a direction that the appellant and his co-accused be tried separately[12]. A joint trial of the appellant and the co-accused served to give the jury the means of obtaining a conspectus of the respective roles of each of them in the crimes with which they were charged.

Statements by the co-accused

59 The police interview of the co-accused on 17 December 1998, made as it was, out-of-court, was hearsay and not admissible in evidence against the accused. It was concerned principally with the sexual relationship between the appellant and co-accused in the period immediately leading up to the birth and certainly did indicate that the appellant would have been aware of the pregnancy. Another matter the subject of the interview was that the appellant had on occasions been violent towards the co-accused.

60 These matters, taken with the rest of the statement, were relevant to the co-accused's role and admissible against her even though they were also apparently inculpatory of the appellant. Their reception into evidence in a joint trial could not be challenged. It was for the trial judge to deal with them by appropriate directions and warnings. The warning to be given in cases of this

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12 *R v Palmer* [1969] 2 NSWR 13.

kind must depend upon the facts of the particular case. The nature of the warning, the detail to which the trial judge should descend in giving it, and indeed, whether in some cases it should be given at all, are matters susceptible of no universal rule except that the interests of justice must be kept in mind and maintained[13]. No complaint is made in this case of any defect in the warnings and directions. And nor could there be. The trial judge on several occasions told the jury in unmistakable language that they should disregard this and like evidence so far as the appellant was concerned.

61 At the trial, counsel correctly said that the facts recorded in the interview were prejudicial to his client. He did then object on grounds of irrelevance to some references during the interview to the appellant's medication. He also sought to object on the basis that the prejudicial effect of the matter and the language in which it was expressed upon the appellant outweighed its probative value. Next he raised the possibility of the exclusion of some of the material. Apart perhaps from specifying in detail the material which might arguably be excisable, and stressing to the trial judge the need for careful directions, there was nothing further that he could do. Specification of arguably excusable material would have been futile, as the whole of it was relevant to the case against the co-accused, and counsel did in fact request further directions from the trial judge. After pointing out that she had already done this twice, her Honour undertook to do it again. The argument with respect to trial counsel's treatment of the tape of the interview should therefore be rejected.

Objections not taken

62 The appellant then listed a large number of complaints to the effect that trial counsel failed to object to evidence when he should have, or otherwise acted incompetently in the course of the trial. It is convenient to summarize and number the instances referred to by the appellant as follows: (1) a hearsay statement by the investigating police officer, as to another woman who ceased to work for the appellant because of the appellant's, unspecified, conduct towards her; (2) cross-examination about the appellant's temper and that the appellant had made a number of threats against a police officer; (3) cross-examination about the appellant's having been recorded as making a highly offensive remark about the investigating police officers; (4) cross-examination to the effect that the appellant had tried to have the co-accused perform sexual acts in the presence of a neighbour and of the appellant's procuring for her; (5) cross-examination that the appellant told the co-accused to abort the earlier pregnancy and of his making the arrangements for an abortion; (6) evidence from the witness Mobeen Iftikar

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13 See discussion by Toohey J (Mason CJ and McHugh agreeing) in *Webb v The Queen* (1994) 181 CLR 41 at 92-95.

Ali that the appellant proposed that the co-accused marry his nephew, Mobin Mukhtar Ali, who lived in Fiji; (7) evidence from another witness that he saw the appellant and the co-accused engaging in sexual relations despite the fact that there had been a formal admission of those relations; (8) further evidence that the appellant procured men to have sexual intercourse with the co-accused for amounts of $30 to $50; (9) a question by the co-accused's counsel to a police officer: "Can I suggest you informed her mother of that, you told her mother, that is Helen Blackwell, that 'Amanda is obviously scared that I have told her that. If we can guarantee to put Raymond away would she tell us the truth?'"; (10) the co-accused's mother's evidence that the appellant followed her around when he was driving a taxi.

63 It was next submitted that trial counsel could, and should have objected to a number of matters put to the witness Mobeen Iftikar Ali; (11) in particular some leading questions which caused the trial judge to direct the prosecutor not to lead; (12) again, the witness' awareness of sexual intercourse between the co-accused and the appellant; (13) evidence that the appellant called and told him that police officers would speak to him; (14) evidence that the appellant was violent and that he (the witness) was frightened of him; (15) cross-examination of the witness suggesting that he had seen the appellant assault a man at a New Year's Eve party; (16) that the appellant had a bad temper and had made threats to the witness; (17) and that the witness had sexual relations with the co-accused on two occasions while the appellant watched.

64 The appellant then submitted, with respect to another witness, a police officer, Detective Hutchinson, that trial counsel did not seek, when he should have, to exclude the following matters which were captured on a video recorded interview of the appellant: (18) that the appellant was charged with other matters in the Magistrates Court; (19) double hearsay that the appellant had made arrangements for the marriage of the co-accused (which was denied by him); (20) double hearsay that the appellant received a gift to arrange the marriage (which was denied by him); (21) cross-examination out of court of the appellant by police officers; (22) questioning of the appellant by police officers about pornographic films; (23) the tender of a box of knives (without the identification of any of them as a relevant weapon); (24) an offensively expressed refusal to provide a sample to a police officer, and the cross-examination on that topic; and a police officer's opinion evidence that the co-accused's confession was untrue; (25) evidence that the appellant had said that he was writing a book, "How I Beat the Cops"; and (26) evidence that a witness, Gomes, had alleged that the appellant threatened to have his head chopped off by a band saw. (27) It was also submitted that the appellant's trial counsel should have made a timely objection to some exchanges between the co-accused's counsel and Detective Hutchinson:

"Q: Now in the interview of the 27th that we heard yesterday, there was some talk, there was some questions about Lisa Kahn?

A: Yes.

Q: She was a woman who was known to both Bronwyn and Raymond Ali previously?

A: Yes.

Q: And who had spoken about Bronwyn being basically a chronic alcoholic?

A: She did tell us that.

Q. And spoke about an incident that involved Raymond that she then said she was not going to tell anybody about it because of the fear of Raymond and specifically also Bronwyn wouldn't believe her."

The trial judge then raised a question about the admissibility of the evidence. Only then did trial counsel demur. He said:

"COUNSEL: Your Honour, you indicated that you would be directing the jury in relation to the evidence of cross-examination in relation to Bronwyn Ali, a particular part being hearsay – cross-examined by way of hearsay. I would be asking your Honour also to direct the jury in the same terms in relation to ... the allegation of Gomes and this band saw incident where Gomes says: 'Here Gomes says that Amanda witnessed that?' And he said: 'I think that's right.' I will be objecting to that.

WILSON J: ... you really should make your objections at the time the evidence is led or about to be led.

COUNSEL: I am well aware of that. I must say at the time of listening to the tapes all morning and – not that it is an excuse to be preoccupied, but I did not hear the way it was put by [counsel for the co-accused] and that is why I was – I was of a most urgent nature at lunchtime trying to get a copy of the transcript and this is the first available opportunity of being able to read it.

WILSON J: Well, as I understood what was said after lunch on Friday Mr Gomes will, in fact, be called and will be giving that evidence directly and I had the impression that in the circumstance neither you nor the prosecution were concerned about this part of the evidence."

65 Trial counsel continued:

> "What I discussed with my learned friend, your Honour, was Mr Gomes will be giving evidence, and I go a little bit further. Of course, the allegation of the band saw arises if the Crown calls Mr Gomes to give evidence and in cross-examination I cross-examine him on his credibility and truthfulness and go to the affidavit or statutory declaration that has been referred to and if I said to him, for instance, 'Well, you signed a statutory declaration or the affidavit', but it doesn't need to go that far. I can achieve the same by putting to Mr Gomes, for instance, 'Mr Ali reported you to the police on the basis of allegations that you stole from him and that's why you're upset', or continue on from there without having to prove that Mr Gomes did, indeed, commit a crime which is irrelevant. The basis of Mr Gomes – whether or not he actually stole meat and money off [the appellant] is irrelevant in this case. What is relevant is that Mr Gomes or [the appellant] made an allegation ... which the police investigated and [the appellant] was upset about the alleged theft and Mr Gomes is obviously upset about being reported to the police. I don't need to go to the affidavit material because Mr Gomes' alleged crime does not need to be made in this case."

66 It should be pointed out that trial counsel did successfully object subsequently to an attempt by the co-accused's counsel to bring out that the appellant had not paid the wages of Gomes, a former employee.

Incompetence in cross-examination

67 (28) The appellant submitted that trial counsel incompetently asked a number of questions of the investigating officer of an obviously damaging kind.

> "Q: And [the appellant] was charged on a suspicion by yourself that he is involved.
>
> A: Not at all.
>
> Q: That's what I'm putting to you because there was no particular piece of evidence to establish [the appellant's] involvement in the death of the child as in scientific physical evidence.
>
> A: Oh no, but in my experience there never is one piece of evidence that proves that a person is responsible. That's why we call [a] number of witnesses. That's why we have them and why we continue to.
>
> Q: But you can't point, can you, the one piece of evidence you are relying on – to clarify it for you, it's completely a basis of circumstances in relation to [the appellant]?

A: Well, we have to debate then what circumstances are and what I say is there are a number of witnesses who will be called, they will give evidence, they will produce exhibits and totally accepting all of the evidence that those witnesses give, it will show beyond reasonable doubt that Ali is responsible for the murder of his child.

...

Q: [The appellant] was charged eleven months after the death of the child?

A: Yes.

Q: So something you say obviously changed between 7 and 8 September to the date of [the appellant's] arrest?

A: Well lots of things change. From then the body – the leg was found and the body was found, then both accused were interviewed, witnesses were identified, statements were taken from those witnesses and slowly a body of evidence – well, your body of information increases and points toward various people and from all the evidence that we've collected now, I'm satisfied that the two people sitting in the dock are responsible for the murder of their child.

Q: See what I'm suggesting is you have no more evidence today than you did on the first occasion you went to [the appellant's] property.

A: No, that's ridiculous.

...

Q: See, if I suggested to you that indeed you charged [the appellant] to make Blackwell feel secure and on that basis alone so she would feel secure and speak more freely to involve herself more, what would you say to that?

A: No, I'd say that was foolish as well. [The appellant] was charged because we had, in my opinion, collected sufficient evidence to show he was responsible for the murder of his child as was Blackwell in that same position."

The complaints considered

68 We turn now to a consideration of each of the complaints. Some of them may be grouped together for this purpose. In doing so it is important to keep in mind the context in which each arises.

69 (1) The complaint as to the first matter is well-made. The respondent, speaking of another earlier employee of the appellant asked this leading question and elicited this irrelevant and prejudicial answer:

> "Q: She left because of things – concerns she had about [the appellant's] conduct towards her?
>
> A: Yes, that's fair."

We will consider the impact of this upon the trial in combination with the other complaints that the appellant has made out.

70 (2) The second complaint has validity. The suggestion, not objected to, is that the appellant was of a violent disposition, in effect of purported propensity. It was adduced however during re-examination on a topic that had been opened up in cross-examination by both the appellant and the co-accused, that is as to the reasons for the co-accused's different accounts of the relevant events. In the event, the threats alleged were not ones which the person to whom they were made took seriously. No actual violence took place. In the circumstances any temporary adverse effect upon the appellant could be cured by a trial judge's directions. Accordingly it is not necessary to consider either the current application of *R v Randall*[14] and *Lowery v The Queen*[15] or their possible relevance to the co-accused's case in defence.

71 (3) It is not possible to say that the evidence of the offensive remark, which was not only about the police, but also was directed to them, was necessarily irrelevant and inadmissible. The appellant was contending that the police were "out to get" him. He was recorded as saying that the body had been dismembered by dogs. These were at least arguably lies that he told when he was aware that his remarks might be recorded and heard by police officers. Evidence that he addressed a listening device was capable of constituting an admission that he knew that the officers were listening to, and could hear his false claims.

72 (4), (5), (6) and (8) The evidence referred to in these instances was adduced in court during cross-examination of investigating police officers by the co-accused's counsel on a statement made to the officers by his client. It was relevant to the co-accused's defence. It tended to establish the appellant's callousness towards the co-accused, and the hold that he had upon her. The same

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14 [2004] 1 WLR 56; [2004] 1 All ER 467.

15 [1974] AC 85.

can be said of these other pieces of evidence: that the appellant had arranged for the abortion of a child earlier conceived by him with the co-accused; that he had arranged for the marriage of her to his nephew Mobin Mukhtar Ali; and that he had been a procurer for her at his insistence. This body of evidence was therefore potentially exculpatory of her, and could improve her chances of escaping a verdict of murder. It was relevant to matters contained in the co-accused's statements to the police, and could not in fairness to her have been rejected. Together with other evidence prejudicial to the appellant, it called for, and, as will appear, in fact attracted, a strong direction by the trial judge.

73 (7) and (12) The fact that a formal admission of a matter relevant to an issue had been made does not mean that no evidence of it at all may be given, at least where the evidence goes beyond the admission[16]. Here, it was not simply the existence of the sexual relationship that was relevant: its duration, the imbalance between the parties to it, its relevance to motive, and its nature were all of significance, and bore closely upon the guilt or innocence of the appellant and co-accused.

74 (9) The question to which this complaint relates was also put by the co-accused's counsel in cross-examination of an investigating police officer. Unless it was intended as, and could be justified as an attempt to put a prior inconsistent statement, it should not have been asked. But the answer to it stated no more than facts self-evident from other evidence and was not of itself damaging to the appellant:

> "What I was saying in a conversation with the mother that it was obvious that she was scared, that being that she had given birth, the details of how she'd given birth were sketchy at best because she wasn't telling the truth. The reason she wasn't telling the truth was open to a number of possibilities."

Furthermore, the trial judge directed the jury that suggestions in questions asked which were not assented to did not constitute evidence and should be disregarded.

75 (11) The appellant's contention with respect to the leading questions earlier referred to is correct but the impact of them in view of the trial judge's intervention was innocuous.

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16 *R v Raabe* [1985] 1 Qd R 115 at 116 per Connolly J, 123 per Thomas J, 124 per Derrington J; cf *R v Smith* [1981] 1 NSWLR 193 at 195, permitting evidence whether it goes beyond the admission or not.

76 (10), (12), (13), (14), (15) and (16) It was relevant to the case against the appellant that he had told Mobeen Iftikar Ali that the police would speak to him. That evidence, taken with other evidence, of his relationship with the appellant, tended to show that he was concerned to ensure that Mobeen Iftikar Ali say nothing that could be inculpatory of the appellant. Evidence was elicited from the co-accused's mother that the appellant had threatened her and that he had said that he "was the victim" and that had she been a better parent her daughter "wouldn't have turned out this way". The effect of the evidence that the appellant was following the co-accused's mother in his taxi-cab could at most be marginally relevant to show that the appellant had a guilty mind, and was attempting to threaten a potential witness against him, but it also might have been open to an inference that the appellant was a dangerous, generally malicious person. Other similar evidence, of threats, and the appellant's tendency to violence was given by Mobeen Iftikar Ali and others. This evidence should have been the subject of objection.

77 (17) The appellant's presence during intercourse between Mobeen Iftikar Ali and the co-accused may have had some relevance to the appellant's domination of the co-accused. It could only have been of limited probative value and might have been excluded if the appellant's counsel had objected. Having regard however to the evidence of Mobeen Iftikar Ali of the appellant's attempt to have him accept responsibility for the pregnancy, it added little and was most unlikely to have caused any real prejudice to the appellant.

78 (16) It was submitted that trial counsel should have objected to evidence of a telephone conversation between the appellant and Mobeen Iftikar Ali. The submission should be rejected. The evidence was probative of the appellant's state of mind, his motive and his wish to shift the responsibility for the pregnancy to Mobeen Iftikar Ali. The questions which were asked by the co-accused's counsel and the answers were as follows. They were relevant and admissible.

"Q: Your uncle rang you and spoke to you before the police came to see you?

A: Yes.

Q: Did he know that the police were coming to see you or warning you of that fact?

A: Yes.

Q: He told you at that point, didn't he, that you ought to say that you were obviously the father of this baby?

A: Yes."

79 (18), (20), (22), (24) and (26) The references to other charges against the appellant in the Magistrates Court, the possibility of a gift to arrange the co-accused's marriage, pornographic films, the refusal to provide a sample, and threats to Gomes could and should have been excluded even though the effect of some of these would have been innocuous. The reference to other charges made clear that they related to the appellant's butchery.

80 (19) The characterization of the matter the subject of this complaint, that the appellant had arranged for the marriage of his co-accused and Mobin Mukhtar Ali, as double hearsay is erroneous. The matter was suggested by a police officer and its source identified by him to enable the appellant to understand the detail of the questions that he was being asked. It was relevant to his motive and hold over the co-accused. It was, in any event, denied and not pursued.

81 (21) There are a few passages in the questioning of the appellant verging on, but not quite reaching the stage of cross-examination. Some of the questions were invited by responses to answers, some of them lengthy, previously given by the appellant. Others were no more than legitimate explanations prefacing further questions. The evidence was not of a kind which the trial judge would have been likely to exclude in the exercise of her discretion.

82 (23) Objection to the tender of the knives as exhibits would have been overruled. They were referred to in the course of the interview of the appellant which was conducted by police officers and which was properly in evidence. That knives of the kind were available to, and used efficiently by the appellant, provided evidence of opportunity and capacity to dissect the corpse.

83 (25) Evidence that the appellant was obstructing the police officers in their investigation of crimes alleged against him was relevant and admissible. Taken with other matters it was capable of establishing that he was their perpetrator.

84 (27) Trial counsel should have objected in a timely way as suggested by the trial judge to the evidence the subject of this complaint. Some of the evidence however with respect to the appellant's wife, and the fear in which she held the appellant, to the extent that the co-accused was aware of, and affected by these matters, may have been relevant to, and admissible as bearing upon, the co-accused's relationship with the appellant. Its precise relevance to that issue and its bearing upon the guilt or innocence of the appellant were matters for direction by the trial judge. It was inadmissible however, as the trial judge said, as similar fact evidence.

85 (28) The cross-examination by trial counsel of the investigating police officer about the quantity and quality of the evidence upon which the respondent relied may have been ill-considered and could hardly be described as a triumph.

But, as must already be apparent, the case against the appellant was a strong one. Opportunities for a forensic triumph of any kind in the course of it were scarce. The cross-examination may have had the forensic purpose of heightening the fact that aspects of the case against the appellant were circumstantial only, and of demonstrating an overzealousness on the part of the investigators. The fact that the purpose may not have been achieved does not mean that the questioning should be stigmatized as incompetent.

86 The appellant contends that his trial counsel should have objected to, or even perhaps have applied for a new trial in respect of, references to topics already mentioned in this judgment which were made in the opening of the co-accused's case, or at least should have objected to the evidence upon which those statements were based when it was elicited. They were to this effect: that the appellant cajoled the co-accused into having sexual relations and prostituted her even when she was pregnant; that the appellant had been involved in a fight at a New Year's Eve party; that he had assaulted the co-accused, and threatened to kill her if she became pregnant, and that he had assaulted Gomes and threatened to cut his head off.

87 The observations that we have already made with respect to these and related matters apply equally to the comments about them made in the opening and need not be restated, except to repeat that with the exception of the evidence concerning Gomes and the fight, they tended to establish motive, and the appellant's domination and manipulation of the co-accused.

88 The appellant submits that there were nine occasions upon which trial counsel made incomprehensible objections. One of the instances was not, on examination, an objection, but part of a submission of no case. The others discernibly were, although they could no doubt have been articulated more precisely. They were essentially objections on grounds of irrelevance. They were not incomprehensible.

89 The appellant submitted that trial counsel's incompetence could also be seen from his failure in cross-examination of witnesses for the respondent and the co-accused, to put relevant matters which "reflect[ed] [which we take to mean, putting or highlighting] the case theory" of which a number of examples were given.

90 The first instance advanced is a passage in the cross-examination of the appellant's neighbour on whose property the shallow grave for the infant's torso was found. True it is that much of the cross-examination is inconsequential, but there was little that trial counsel could usefully put to this witness. Two matters that he did put were, that the soil was loose and soft, and that dogs and a fox were on the property on occasions. Affirmative answers to these questions could lay some foundation for propositions to be put to the jury in the appellant's

closing speech, that the co-accused could easily have been able to dig the grave in which to place the remains of the baby, and that the appellant, as a strong male, could and would have been expected to dig a deeper one if he were responsible for the disposal of the body. So too, it was put, dogs or a fox could have disinterred and scattered parts of the body. Questions, the subject of complaint by the appellant, to a similar end, were also asked by trial counsel, not imprudently, of another witness, a police officer (Ms Brown). Questions about the straying of the appellant's goats on to the neighbour's property could also provide an explanation for the appellant's presence there at any material time. On any view, the neighbour, with whom the appellant had clashed before the trial, was a witness to be handled with some care.

91 The next instance selected is of some cross-examination of Dr Naylor, an experienced pathologist who performed the post-mortem examination of the infant's remains. His evidence included this:

> "My opinion is that to remove [the reproductive organs] ... must have involved the purposeful use of a sharp instrument and probably also required some degree of anatomical knowledge."

92 He added that practical experience in dissecting the structures would have been required. And later he explained his reasons for his opinion that the infant's life was viable at, and after birth, that the damage to the tearing of the umbilical cord would not have been fatal, and that the other injuries were the substantial cause of death.

93 Two things may be said of this evidence. Given as it was by a highly experienced, disinterested expert, it was effectively beyond challenge. It was not evidence upon which any accused would wish a jury to dwell. All that could be done with it, and this would not have been without its risks, was to attempt to show that the dissection was not especially expertly performed, in order to found a later submission that the co-accused was capable by reason of her experience of doing it. This, it seems to us, was what trial counsel reasonably carefully tried to do.

94 The appellant next referred to some further questioning of the police officer, Detective Hutchinson who interviewed the appellant and the co-accused. Trial counsel sought to make some capital out of something that the co-accused had told this witness. The trial judge intervened and counsel desisted. What happened in no way damaged the appellant and was of no significance.

95 Dr Keeping was an experienced obstetrician and gynaecologist called by the respondent to prove that the umbilical cord would be difficult to remove by tearing alone, and that the loss of blood from even the complete removal of it, or tearing of it, would be unlikely to cause death. He also explained that it would

be difficult for a person without experience in dissecting live creatures to do the dismemberment that was done here.

96 Again, this was a witness to be handled with some care. Whilst it is true that trial counsel's questions did invite a repetition, by reference to this witness's evidence at the committal, of the prejudicial fact that the dissection was likely to have been done by a person of some practical knowledge and experience of anatomy, they also brought out that at an earlier time, the doctor had said that he had thought that a section of the uterus was an autopsy specimen, and accordingly, it might have been submitted, a result of something beyond the skill even of the appellant. Some benefit, arguably, it might be suggested, flowed from that questioning. In all of the circumstances of this long and difficult trial it is impossible to say that trial counsel incompetently chanced his arm with this witness, or failed to put something to him that he ought to have.

97 Little can be more risky for a trial counsel than the cross-examination of a co-accused in a joint trial. In his submissions the appellant argued that trial counsel failed to put to the co-accused also, matters which "reflected the case theory." Trial counsel not surprisingly first took up with the co-accused the inconsistencies in her various accounts and her attempted explanations of her conduct. He then put to her that she had dismembered the body, and that she was well able to do this because of her experience in assisting the appellant when he butchered goats. He extracted an admission that the co-accused had observed and assisted in their slaughter and the removal of their organs. The appellant then brought out that the co-accused had done nothing in preparation for the rearing of an infant. He also established by his questions a possible motive for her to kill the baby, namely her hope and expectation of marrying Mobin Mukhtar Ali, a nephew of the appellant whom she had met in Fiji. Counsel then returned to some further inconsistencies in the co-accused's accounts of her involvement, and brought out that she had some knowledge of the anatomy of human beings. On one occasion the appellant put a matter, the different paternity of the child, that he should have, but had not put to the alleged father Mobeen Iftikar Ali who had earlier given evidence. On objection he withdrew the question. If the matter had been in any way critical he could have asked to be allowed to press it, and to seek the recall of the witness, if available, so that the matter could be asked of him. No doubt trial counsel was putting his instructions in relation to the paternity of the child, but in view of the DNA and other evidence, and of the long sexual relationship between the appellant and the co-accused, it would have been very difficult to put the matter with any conviction. To press the question may have been to emphasize to his disadvantage, the appellant's persistence in a falsehood.

98 It follows from what we have so far set out that counsel for the appellant at the trial has not been shown to have been flagrantly incompetent in his conduct of the appellant's defence. It is true that he did make some errors but it would be

wrong to describe them as flagrant ones. The conduct of a difficult criminal defence in an adversarial system is no simple matter. Sometimes it will be more prudent for counsel not to object than to object to evidence adduced on the other side. It may be that the point sought to be established could be proved in a more damaging way by other evidence. It may be that the evidence, if admitted, will produce an inconsistency with damaging evidence already led. It may also be that part of the inadmissible evidence will be helpful to the accused. To object repeatedly and unconvincingly can also irritate a jury. Considerations of these kinds may have influenced trial counsel here. It must be remembered that trial counsel has not been party to this appeal, and has had no opportunity to defend himself against the appellant's criticisms. What trial counsel did or did not do, could not have affected the result for the appellant here.

99 It will frequently be difficult to make a confident judgment, after the event, of the actions taken and decisions made by counsel in the conduct of a long criminal trial before a jury. It is also difficult to make an assessment of the likely impact of them upon the deliberations of the jury. What may now appear obvious with the advantage of hindsight, may at the time have presented an entirely different, and on occasions, insoluble dilemma. Sometimes it may, not imprudently, seem to an advocate, better to abstain from objecting to only marginally or relatively innocuous, or barely credible evidence, even if technically it is inadmissible. Such a stance might be taken for tactical reasons: for example, not to be seen to be objecting to what is obvious, or will be proved by another witness or witnesses anyway, or which, if objected to, might suggest that the accused has something to hide, or might give the impression that counsel and whom he represents are being obstructive. These are tactical decisions, to be made, sometimes intuitively and on the basis of the client's instructions[17], often upon an impression of a witness necessarily formed hurriedly, and having regard to the fluidity of any trial in which the outcome depends upon viva voce evidence. Decisions whether and how to cross-examine are not always easy. They are much more difficult when the trial is a joint one of those who once were close and now seek to escape conviction by blaming each other. And they are possibly most difficult, when, as here, the case against the appellant was an overwhelmingly strong one. It is in the light of these matters that the relatively few omissions and mistakes of trial counsel and their relevance to and effect upon the trial of the appellant have to be evaluated. The evaluation that has to be made is whether the conduct in question produced a miscarriage of justice, that is, whether it deprived the accused of a chance of acquittal that was fairly open. As Gaudron J in *TKWJ v The Queen* said[18]:

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17 cf *TKWJ v The Queen* (2002) 212 CLR 124 at 150-151 [80]-[83] per McHugh J.

18 (2002) 212 CLR 124 at 133 [26]-[27] (footnotes omitted).

> "[W]hether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on the basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open.
>
> One matter should be noted with respect to the question whether counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage. That is an objective test."

100 The appellant has not demonstrated that any conduct on the part of his counsel at the trial deprived him of a fair chance of acquittal. In saying that we would not want to be taken as suggesting that the fact that a case appears a strong one in any way diminishes the obligation of those conducting the trial to ensure that it is a fair one. Indeed the contrary is the case. One particular difficulty confronting the appellant here however was the fact that there was much independent evidence that falsified his assertions about relevant matters. It was quite open to the jury to regard them as lies told out of a consciousness of guilt. They included lies about his ignorance of the co-accused's pregnancy, his denial of a long sexual relationship with the co-accused, and his knowledge of anatomy.

101 It has to be kept in mind that the appellant could have been found guilty of murder either because he inflicted the death blow or blows to the infant, or because he counselled or procured the killing by the co-accused. The former seems more probable for the reason that the force was "very substantial" and inflicted within thirty minutes of the birth which had caused the co-accused to lose a great deal of blood and to weaken her. The two other particularly telling features of the case against the appellant were his first denied and then proved skill and experience in dissection, and his motive, as a married man living with his wife and child, and in a clandestine affair which had produced a child, to kill and dispose of that child.

102 With respect to the many complaints that trial counsel failed to object to evidence of what the co-accused said about him out of court, the problem for the appellant was that these were admissible against her either as lies told by her out of a consciousness of guilt, or as part of a statement or statements by her, which included matter which was capable of amounting to an admission against interest, and therefore required that the whole of the statement or statements be received.

103 The trial judge relevantly instructed the jury that what the co-accused said out of court was not admissible on any account against the appellant. Her Honour also made it clear that questions asked were not evidence and required a positive response to be so. No suggestion was made by the appellant that these instructions were in any way defective or inadequate. So too, the trial judge told the jury several times that the cases against the appellant and the co-accused were separate cases requiring careful and separate consideration of them. Her Honour emphasized on no fewer than six occasions in her summing up that statements made by either of them out of court could not be used against the other. No criticism of her Honour's summing up, either in whole or in part has been made and nor could it have been. Not only did it include the instructions to which we have referred, but also it quite distinctly put the cases against and for the appellant and co-accused.

104 This trial was long and difficult. The case which the Crown presented against the appellant was very strong. Such errors as may have been made by trial counsel in this long and difficult, but very strong case against the appellant were not egregious ones. They could have had very little or no impact upon the trial, and the jury's view of the appellant's guilt or innocence. Such impact, if any, as they may have had could only have been slight and temporary. That impact was capable of being cured, and was in fact cured, by the trial judge's careful and repeated instructions as to the use to which the different types of evidence could be put. The appellant was not deprived of a fair chance of an acquittal by anything done or omitted to be done by trial counsel. No miscarriage of justice occurred. The appeal should be dismissed.