HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND CRENNAN JJ

THE QUEEN APPLICANT

AND

STEVEN WAYNE HILLIER RESPONDENT

The Queen v Hillier [2007] HCA 13
22 March 2007
C1/2006

ORDER

1. Special leave to appeal is granted.

2. The appeal is treated as instituted and heard instanter and allowed.

3. The orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 15 December 2005 are set aside and the matter is remitted to that Court for rehearing.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

D F Jackson QC with P J de Veau for the applicant (instructed by Director of Public Prosecutions (ACT))

P F Tehan QC with W P Lowe for the respondent (instructed by Nelson & Co)

CATCHWORDS

The Queen v Hillier

Criminal law – Criminal appeals – The respondent appealed to the Court of Appeal of the Australian Capital Territory against his conviction for murder – The Court of Appeal quashed the conviction and entered verdict of acquittal – Whether Court of Appeal erred in quashing the verdict of the jury – Nature of appellate jurisdiction where no common form criminal appeal statute is enacted – Extent of duties and powers given to the Court of Appeal under Pt 2A of the *Supreme Court Act* 1933 (ACT) – Principles governing the exercise of those duties and powers – Whether in this case it would have been unjust or unsafe for the Court of Appeal to allow the verdict to stand.

Criminal law – Criminal appeals – Prosecution appeal to the High Court of Australia against verdict of acquittal entered by intermediate appellate court – Circumstances in which special leave will be granted.

Criminal law – Evidence – Circumstantial evidence – Whether the Court of Appeal erred in reasoning that, because evidence looked at in isolation from other evidence was consistent with innocence, the conviction should be quashed – Whether the Court of Appeal should have considered whether it was open to the jury, on consideration of the whole of the evidence, to be satisfied beyond reasonable doubt that the respondent was guilty.

Words and phrases – "unjust or unsafe", "unsafe or unsatisfactory".

Supreme Court Act 1933 (ACT), Pt 2A.

1 GLEESON CJ. I have had the advantage of reading in draft form the reasons for judgment of Gummow, Hayne and Crennan JJ ("the joint reasons") and the reasons for judgment of Callinan J. They would allow the appeal from the decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory, but on different grounds, and with a different outcome. I agree with the joint reasons, and with the orders they propose.

2 The ground of appeal that succeeded in the Court of Appeal was that the verdict of the jury was unsafe and unsatisfactory. The sense in which that expression was relevantly understood in the Court of Appeal, both by counsel and the members of the Court, appears from the way in which the majority in the Court of Appeal expressed their conclusion. They held that it was "impossible ... to conclude that it was open to the jury to find that the guilt of the [accused] had been proven beyond reasonable doubt" and that, for that reason, "a miscarriage of justice may well have occurred".

3 As to the ground upon which Callinan J proposes that the appeal be allowed, and a new trial ordered, I would note the following. Although the majority in the Court of Appeal, in the course of considering the evidence about motive, commented adversely on what they regarded as the "potential unfairness" of not putting to Mr Hillier in cross-examination a proposition that was put by prosecuting counsel in final address, that was not the ground on which they decided the case. As senior counsel for Mr Hillier acknowledged in the course of his argument in this Court, the suggested failure to put a matter in cross-examination was not the subject of a ground of appeal in the Court of Appeal, and had not been the subject of any complaint by trial counsel. If trial counsel had raised the suggested unfairness at trial, it is the kind of problem that could have been dealt with by the trial judge in his summing-up to the jury. Any unfairness of the kind now complained of could have been remedied at trial. It was not considered by Spender J in his dissenting judgment in the Court of Appeal even though, if it had been raised, he would have had to deal with it before concluding, as he did, that the appeal should be dismissed.

4 If the point had been raised, and dealt with as a ground of appeal, I would have thought that the cross-examiner gave the witness a fairly blunt indication of what he was suggesting. He put to the witness that, at the time the telephone calls stopped, the witness was beginning to despair of his prospects of appeal (from a court order concerning custody of the children) and suggested that the witness had decided to take the law into his own hands. In context, that can only have meant the witness had decided to kill the victim. The failure of experienced trial counsel to complain that the submission put to the jury in final address was unfair, or unavailable, because of the course taken in cross-examination, strengthens this impression. Furthermore, if the point had been argued as a ground of appeal, and had been upheld, there would still have been a question whether, standing alone, it would have warranted a quashing of the conviction. That question was not addressed by any member of the Court of Appeal.

As to the ground of appeal that succeeded in the Court of Appeal, I agree with what is said in the joint reasons. The result is that the respondent's case on appeal was not decided according to the applicable legal standards. It does not follow that his case was bound to fail. This court is not a court of criminal appeal. There is a reluctance to grant special leave to appeal against an acquittal such as occurred here, sometimes expressed by reference to a need to show "very exceptional circumstances"[1]. I would grant special leave, but for the purpose, upon allowing the appeal, of remitting the matter for further consideration as proposed in the joint reasons.

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1 *R v Benz* (1989) 168 CLR 110 at 111-113; *R v Taufahema* [2007] HCA 11 at [32].

6 GUMMOW, HAYNE AND CRENNAN JJ. On 2 October 2002, Ana Louise Hardwick was found dead in her bedroom. There had been a fire in the room but she had died before the fire. She had a skin abrasion on her nose and a complex abraded injury predominantly to the left side of her neck. She had small bruises on the outer aspect of each wrist, one measuring two centimetres, the other measuring four centimetres. The cause of her death was neck compression, though the pathologist could not say whether as a result of ligature, rod or manual strangulation.

7 The respondent, Steven Wayne Hillier, was charged with Ms Hardwick's murder. Mr Hillier and Ms Hardwick had lived together for about 12 years, from 1987 to 1999. They had two children.

8 When the couple separated in 1999, they agreed that the two children would live with their father. In June 2002, on Ms Hardwick's application, the Family Court of Australia ordered that the children reside with her. Pending an appeal against those orders by Mr Hillier, orders were made that the children live week and week about with each parent, but those interim orders were discharged on 20 September 2002, with the result that the orders for the children to reside with their mother took effect. The prosecution's case at Mr Hillier's trial was that he murdered Ms Hardwick to regain custody of his children.

9 Mr Hillier was tried in the Supreme Court of the Australian Capital Territory by Gray J and a jury. The trial occupied 15 days but the jury deliberated for only a few hours before returning a verdict of guilty.

10 Mr Hillier appealed to the Court of Appeal of the Supreme Court of the Australian Capital Territory against his conviction. As finally amended, his notice of appeal stated six grounds. The first two grounds alleged that the verdict was "unsafe and unsatisfactory" and was "against the evidence and the weight of the evidence". Other grounds alleged errors in the judge's charge to the jury and in the judge not excluding certain evidence. It is not necessary to notice the detail of these other grounds.

11 The Court of Appeal held, by majority (Higgins CJ and Crispin P; Spender J dissenting)[2], that the appeal should be allowed. The only orders the Court made were that the appeal be allowed and the conviction and sentence be set aside. No order was made directing entry of a verdict of acquittal, although it would follow from the reasons given by the majority of the Court of Appeal that such an order should have been made.

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2 *Hillier v The Queen* [2005] ACTCA 48.

12 The Director of Public Prosecutions seeks special leave to appeal against those orders. He contends that "this was an inappropriate case for the Court of Appeal to set aside the verdict of the jury" and that the majority of the Court of Appeal "erred in combining a series of factual matters which each had little or no evidentiary foundation in order to find a real possibility that the respondent did not commit the murder". The Director contends that the interests of the administration of justice in the particular case warranted the grant of special leave to appeal[3]. The application for special leave was referred for argument before the whole Court as on appeal.

13 To examine the parties' submissions it will be necessary to examine the reasons of the Court of Appeal, and the evidence given at trial. Before embarking on that task, however, it is essential to begin by considering the statutory framework within which the questions that arise in the matter must be identified and considered.

Criminal appeals in the Australian Capital Territory

14 Criminal appeals from the Supreme Court of the Australian Capital Territory have never been governed by legislation of the kind, long found in each of the States of the Commonwealth[4], which derives from the *Criminal Appeal Act* 1907 (UK). The Supreme Court of the Australian Capital Territory was created by the *Seat of Government Supreme Court Act* 1933 (Cth). Section 52 of that Act conferred an appellate jurisdiction upon the High Court in respect of convictions on indictment before the Supreme Court. Appeal to this Court lay as of right on any ground of appeal which involved "a question of law alone"[5]; appeal lay, with leave of the Supreme Court, on any ground of appeal which

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3 *Judiciary Act* 1903 (Cth), s 35A.

4 *Criminal Appeal Act* 1912 (NSW), s 6; *Criminal Appeal Act* 1914 (Vic), s 4 (now *Crimes Act* 1958 (Vic), s 568); *Criminal Appeals Act* 1924 (SA), s 6 (now *Criminal Law Consolidation Act* 1935 (SA), s 353); *Criminal Code* (Q), s 668E; *The Criminal Code* (WA), s 689 (now *Criminal Appeals Act* 2004 (WA), s 30); *Criminal Code* (Tas), s 402.

5 *Seat of Government Supreme Court Act* 1933 (Cth), s 52(a). This Act was renamed, by the *Statute Law Revision Act* 1950 (Cth), as the *Australian Capital Territory Supreme Court Act* 1933 (Cth) and by the *A.C.T. Supreme Court (Transfer) Act* 1992 (Cth) as the *Supreme Court Act* 1933 (ACT).

involved "a question of fact alone or a question of mixed law and fact"[6] or, with the leave of the Full Court of this Court, on any ground which involved a question of fact alone or a question of mixed law and fact, "or on any other ground which appears to the Full Court of the High Court to be a sufficient ground of appeal"[7]. These provisions, although amended in 1964[8], remained in substantially identical form until the establishment of the Federal Court of Australia.

15 Section 24(1)(b) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") conferred jurisdiction on the Federal Court to hear and determine appeals from judgments of the Supreme Court of a Territory. A judgment was defined by s 4 of that Act to mean "a judgment, decree or order, whether final or interlocutory, or a sentence". That definition did not include a verdict of a jury. Nonetheless, s 28(1)(e) empowered the Federal Court to "set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered". Further, the Federal Court was given power[9] to "grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial". As was said in *Duff v The Queen*[10], "a jurisdiction to entertain any appeal from a judgment entered upon a jury verdict would not be useful unless there were power to set aside that verdict". The provisions of s 28 of the Federal Court Act that have been mentioned supplied powers of the kind held in *Musgrove v McDonald*[11] to be necessary to permit an appellate court to set aside the order of conviction entered in consequence of the jury's verdict[12].

16 Unlike the common form criminal appeal statute adopted in the States, the grounds upon which the appellate jurisdiction of the Federal Court was to be exercised in a criminal appeal were not specified in the Federal Court Act. The

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6 s 52(b).

7 s 52(c).

8 *Australian Capital Territory Supreme Court Act* 1964 (Cth), s 8.

9 s 28(1)(f).

10 (1979) 28 ALR 663 at 670.

11 (1905) 3 CLR 132.

12 cf *Baume v The Commonwealth* (1906) 4 CLR 97; *R v Snow* (1915) 20 CLR 315.

appeal was not an appeal in the strict sense[13]. Not only did the powers to set aside a jury verdict[14] and to grant a new trial[15] extend beyond those which may be exercised on a strict appeal, the powers, to draw inferences of fact and to receive further evidence, conferred by s 27 of the Act, required the conclusion that the appeal was not an appeal in the strict sense. But whereas the common form criminal appeal statute speaks of setting aside the verdict of the jury on the ground "that it is unreasonable or cannot be supported having regard to the evidence", and setting aside the judgment of the court where "on any ground there was a miscarriage of justice", the Federal Court Act was silent about when the verdict of the jury, or the judgment entered in consequence of the jury's verdict, was to be set aside.

17 In 1937, in *Davies and Cody v The King*[16], this Court examined some important aspects of the operation of the common form criminal appeal statute. At that time, the Court of Criminal Appeal in England, unlike courts of criminal appeal in the Australian States, had no power to order a new trial. The English Court therefore did not have to distinguish between cases in which there had been some miscarriage at the trial which required the conclusion that the verdict could not stand and cases in which, even if there had been no miscarriage at trial, the evidence adduced would not have sufficed to support the verdict of guilt. Nonetheless, as this Court noticed in *Davies and Cody*[17]:

> "[f]rom the beginning, that court [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice".

Rather, the Court went on to say[18] in *Davies and Cody*:

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13 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107; *CDJ v VAJ* (1998) 197 CLR 172; *Allesch v Maunz* (2000) 203 CLR 172; *Western Australia v Ward* (2002) 213 CLR 1.

14 s 28(1)(e).

15 s 28(1)(f).

16 (1937) 57 CLR 170.

17 (1937) 57 CLR 170 at 180.

18 (1937) 57 CLR 170 at 180.

> "it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, *either in the conclusion itself*, or in the manner in which it has been reached, the jury may have been mistaken or misled". (emphasis added)

The distinction between the conclusion reached by the jury and the manner by which that conclusion was reached is important. The common form criminal appeal statute was understood in *Davies and Cody* as reaching both kinds of case.

18 It is against this background of the understanding of the common form criminal appeal statute that this Court's decision in *Chamberlain v The Queen [No 2]*[19] must be approached. In that case, applications were made for special leave to appeal against the dismissal of appeals to the Full Court of the Federal Court of Australia against the conviction of the applicants, in the one case for murder and in the other for being an accessory after the fact to murder, which were convictions recorded in the Supreme Court of the Northern Territory. The central ground of the proposed appeals was that the convictions were unsafe and unsatisfactory. The Court granted special leave to appeal but, by majority, dismissed the appeals.

19 In *Chamberlain [No 2]*, all members of the Court proceeded on the footing that the Full Court of the Federal Court, in exercising its appellate jurisdiction on appeal against conviction in a Territory court for an indictable offence, was to undertake a task not relevantly different from the task of a court of criminal appeal acting under the common form criminal appeal statute. In particular, Gibbs CJ and Mason J noted[20] that the power and duty of a court of criminal appeal, whose jurisdiction was governed by the common form criminal appeal statute, to set aside a verdict "if for any reason it considers that it would be unsafe or dangerous to allow the verdict to stand", was well established. Their Honours went on to say[21] that "we cannot believe that the Parliament intended that the Federal Court should be more restricted in determining criminal appeals" and accordingly concluded[22] that the Full Court of that Court, dealing with an

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19 (1984) 153 CLR 521.

20 (1984) 153 CLR 521 at 531.

21 (1984) 153 CLR 521 at 532.

22 (1984) 153 CLR 521 at 532.

appeal from a Territory court, "has the power and duty to set aside the verdict of a jury in a case where a miscarriage of justice has occurred, including a case where it would be *unsafe or dangerous to allow the verdict to stand*" (emphasis added).

20 As subsequent cases revealed, expressing the content of the proposition that it would be "unsafe or dangerous" to allow a verdict to stand was not without difficulty. The difficulties focused upon the dictum of Barwick CJ in *Ratten v The Queen*[23] that:

> "There is a miscarriage if on the material before the court of criminal appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration."

The difficulties were resolved in *M v The Queen*[24] where the Court examined what had been said in a number of previous cases[25] on the subject of a miscarriage because the jury's verdict was "unsafe or unsatisfactory". Four members of the Court in *M* (Mason CJ, Deane, Dawson and Toohey JJ) joined in stating four propositions in a form intended[26] "to provide authoritative guidance to courts of criminal appeal". Their Honours said[27]:

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23 (1974) 131 CLR 510 at 516.

24 (1994) 181 CLR 487.

25 *Whitehorn v The Queen* (1983) 152 CLR 657 at 660, 686-687; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532-534; *Knight v The Queen* (1992) 175 CLR 495 at 504-505, 511.

26 (1994) 181 CLR 487 at 495.

27 (1994) 181 CLR 487 at 494-495.

> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence[28]. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty[29]."

It was the exercise of the power to set aside the verdict of a jury where a miscarriage had occurred, in the sense described in *M*, that fell for consideration in *Chamberlain [No 2]*.

21 In *Conway v The Queen*[30], this Court examined some questions presented by the provisions of the Federal Court Act dealing with appeals to the Full Court of that Court from convictions on indictment in Territory courts. The central question in *Conway* was not whether the verdict of the jury should be set aside as unsafe or unsatisfactory. Rather, there having been misdirections at trial, was the conviction to be set aside regardless of the significance to be attached to those misdirections? If the common form criminal appeal statute had applied, the question would have been whether the proviso was engaged[31]. Those issues were resolved in *Conway* by reference[32] to the content of rules that had developed at

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28 *Chamberlain [No 2]* (1984) 153 CLR 521 at 618-619; *Chidiac v The Queen* (1991) 171 CLR 432 at 443-444.

29 *Chidiac* (1991) 171 CLR 432 at 443, 451, 458, 461-462.

30 (2002) 209 CLR 203.

31 See *Weiss v The Queen* (2005) 224 CLR 300.

32 (2002) 209 CLR 203 at 217-220 [32]-[39].

common law to govern applications for new trial[33] as applied to a criminal appeal under s 52 of what was then the *Australian Capital Territory Supreme Court Act* 1933 in *Stokes v The Queen*[34]. In *Stokes*, the Court said[35]:

> "In the end we think the decision of the application must depend upon the general rule that if an error of law or a misdirection or the like occurring at the trial is of such a nature that it could not reasonably be supposed to have influenced the result a new trial need not be ordered. The rule applies, we think, in an appeal under s 52."

22 But the questions that arise in the present case differ from those considered in *Conway* and in *Stokes* and are of the same kind as were considered in *Chamberlain [No 2]*. What was sought in this case, in the Court of Appeal of the Australian Capital Territory, was not an order for a new trial, it was an order quashing the verdict and conviction and, in its place, the recording of a verdict of acquittal, on the ground that it was not open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused. That question fell to be determined under a different statutory framework from that considered in *Chamberlain [No 2]*.

23 The legislation regulating Mr Hillier's appeal to the Court of Appeal of the Australian Capital Territory was contained in Pt 2A of the *Supreme Court Act* 1933. Those provisions were introduced into the 1933 Act by the *Supreme Court Amendment Act 2001 (No 2)* (ACT). That Act provided for the establishment of the Court of Appeal.

24 Part 2A of the 1933 Act required[36] the Court of Appeal to "have regard to the evidence given in the proceeding out of which the appeal arose", empowered[37] the Court to draw inferences of fact from that evidence, and empowered[38] the Court to receive further evidence in any of a number of ways. The powers given to the Court of Appeal by s 37O of the Act included powers

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33 *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235.

34 (1960) 105 CLR 279.

35 (1960) 105 CLR 279 at 284-285.

36 s 37N(1).

37 s 37N(2).

38 s 37N(3).

cast in terms not relevantly different from those that had previously been given to the Federal Court of Australia by the Federal Court Act in respect of appeals to that Court from convictions in Territory Supreme Courts. They included power to set aside the verdict and order in a trial on indictment and order a verdict of not guilty (or another verdict) to be entered[39] and power to order a new trial, with or without jury, on any appropriate ground[40]. But as had been the case with the Federal Court Act, the provisions of Pt 2A, governing the jurisdiction of the Court of Appeal of the Australian Capital Territory in appeals from convictions for indictable offences, said nothing about the principles governing the exercise of the powers given by the Act.

25 There is no persuasive reason to read the provisions of Pt 2A of the Act, spare as they are, as giving to the Court of Appeal of the Australian Capital Territory duties and powers in criminal appeals narrower than those described in *Davies and Cody* and held in *Chamberlain [No 2]* to apply in criminal appeals from Territories regulated by earlier, equally spare, legislative provisions. In particular, the duties and powers of the Court of Appeal given by Pt 2A of the 1933 Act extend to setting aside a conviction "whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled"[41]. The circumstances in which it might be concluded that there was a substantial possibility that "in the conclusion itself ... the jury may have been mistaken" are those identified in the joint reasons in *M*.

26 To understand how the powers and duties of the Court of Appeal fell to be exercised in this case, it is necessary to begin by considering the case at trial.

The case at trial

27 Counsel for the prosecution, in his final address to the jury, identified three "major components" of the prosecution case against Mr Hillier. First, the prosecution submitted that Mr Hillier had the opportunity to kill Ms Hardwick. It was submitted that he was alone and his movements were unaccounted for on

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39 s 37O(1)(d).

40 s 37O(1)(e).

41 *Davies and Cody v The King* (1937) 57 CLR 170 at 180.

the night she died. Secondly, it was submitted that he had a motive to kill Ms Hardwick. It was submitted that the custody proceedings in the Family Court caused him "to decide to take the law into his own hands in order to ensure that he retained custody of the children". The third "major component" of the prosecution case was evidence said to demonstrate the presence of Mr Hillier's DNA on the pyjama top Ms Hardwick had been wearing at the time of her death.

28 A fourth aspect of the evidence, concerning chemical injuries to Mr Hillier's fingertips and his explanations of how he came by these injuries, assumed significance at the trial. The prosecution submitted that it showed an attempt by Mr Hillier to conceal his involvement in the offence.

29 It is convenient to examine the evidence led at trial following the pattern adopted by the prosecution.

Opportunity

30 As noted earlier, Ms Hardwick was found dead on the morning of 2 October 2002, a Wednesday. At about 9.00 pm on the previous Monday, 30 September, she had spoken by telephone with a friend. She did not attend work on Tuesday, 1 October and when she was not at work on the Wednesday, her parents went to her house to investigate. It was they who found her body. A pathologist called to give evidence at Mr Hillier's trial was unable to form an opinion about when Ms Hardwick had died.

31 Mr Hillier had picked his children up from school on Friday, 27 September 2002. He arranged for the children to sleep at his father's house on the night of Monday, 30 September as he had an early morning business meeting on Tuesday, 1 October. There was no dispute at trial that he was alone on the night of Monday, 30 September.

32 Ms Hardwick's parents, who found her body, had gained access to the house by unlocking the back door using keys their daughter had previously given them. Mr Hardwick described his wife, Ms Hardwick's mother, going to call the ambulance and then both going outside to wait for the emergency services to arrive. He said in evidence that "[a]t that stage" his wife had opened "the door", and she later gave evidence consistent with her having opened the front door of the house from inside. The only keys the parents had were keys to the back door of the house; there was no evidence that Mrs Hardwick used a key to open the front door to let the emergency services in.

33 Expert evidence was given at the trial to the effect that the four sets of keys found in the house showed no sign of having been copied and that the locks on neither the front nor the back door showed any sign of forced entry or entry

by manipulation. There was no evidence that Mr Hillier had possession of any key which would have given him access to the house. There was no evidence suggesting how the person who killed Ms Hardwick had obtained entry. As the evidence stood, one inference available was that Ms Hardwick had let her killer into the house. The evidence given by the parents about opening a door to wait for the emergency services was consistent with the possibility that the person who had killed Ms Hardwick left the house by that means, closing the door as he or she left.

Motive

34 Mr Hillier and Ms Hardwick had been actively engaged in litigation about the custody of their children for some time before Ms Hardwick was killed. At the time of her death, Ms Hardwick had obtained orders of the Family Court in her favour. Mr Hillier was dissatisfied with that outcome and had instituted an appeal against the orders. The interim arrangements that had been made for shared custody of the children had come to an end shortly before Ms Hardwick's death. The prosecution case at trial was that Mr Hillier had been taking very active steps towards the prosecution of that appeal until the end of the week before Ms Hardwick died. Those steps were not maintained on the Monday or Tuesday before the discovery of her body on the Wednesday morning.

The DNA evidence

35 Several tape lifts were taken from the pyjamas Ms Hardwick had been wearing at the time of her death and these lifts were subjected to DNA analysis. One tape lift, taken from the right-side flap of the collar of the pyjama top worn by Ms Hardwick, revealed a mixed DNA profile consistent with the profiles of Ms Hardwick and Mr Hillier. Three scientists gave evidence about the DNA analyses that were conducted. Each gave a different opinion about the probability that the contributors to the DNA found on the particular tape lift taken from the right-side flap of the collar of the pyjama top were Ms Hardwick and Mr Hillier rather than Ms Hardwick and another person chosen at random. Two witnesses, called by the prosecution, estimated the likelihood that the contributors were the deceased and Mr Hillier rather than the deceased and another person as very high. The third witness, a Dr McDonald, who was called by the defence at trial, considered that it was not possible to exclude Mr Hillier or the children as possible contributors to the DNA profile. He said that he regarded it as a "real possibility" that Mr Hillier's DNA had been transferred to the pyjama top without him ever touching the pyjamas, it having been transferred, innocently, by the children.

36 Another tape lift was taken from an area of the collar of the pyjamas closer to Ms Hardwick's neck. All three experts gave evidence that there was an

unidentified contributor to the DNA found at that point. They did not agree about whether Mr Hillier could be excluded as a possible contributor to that DNA. One expert, Ms Ristevska, concluded that he could not be excluded; another, Dr Roberts, concluded that there was no clear evidence either way; Dr McDonald concluded that there was evidence to exclude Mr Hillier.

Damage to Mr Hillier's hands

37 On 14 October 2002, police wrote to Mr Hillier's solicitors asking that he provide fingerprints and DNA samples. A court order was subsequently obtained that these be provided and on 1 November Mr Hillier attended to provide fingerprints. His fingers had been damaged and he told the officer taking the prints that the damage had been caused by chemicals he had been using while cleaning. Other evidence was given which the prosecution alleged showed Mr Hillier giving inconsistent or implausible accounts about the cause of damage to his fingers. The prosecution submitted that this evidence showed consciousness of guilt because, so it was submitted, the jury should conclude that the injuries to the fingers had been self-inflicted in order to impede the police investigation. The trial judge instructed the jury that the evidence could be used as pointing to Mr Hillier's guilt only if the jury were satisfied beyond reasonable doubt that what had happened to his fingers was a deliberate act on his part done because he knew the taking of his fingerprints could implicate him as the person who killed Ms Hardwick. The judge further directed the jury that even if they were satisfied of those matters, that evidence, standing by itself, could not prove Mr Hillier's guilt. No exception was taken to these instructions at trial or on appeal.

The reasons of the Court of Appeal

38 All members of the Court of Appeal referred to this Court's decision in *M*. Examination of the joint reasons of the majority of the Court of Appeal reveals, however, that the answer given by the majority to the question presented in *M* – whether "upon the whole of the evidence [at Mr Hillier's trial] it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty"[42] – depended, in important respects, upon considering certain features of the circumstantial case sought to be made against Mr Hillier, in isolation from the evidence as a whole. In particular, the identification of facts which, when examined in isolation from other evidence led at the trial were consistent with Mr Hillier's innocence, was treated as requiring the conclusion that it was not open to the jury to be satisfied of Mr Hillier's guilt beyond reasonable doubt.

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42 (1994) 181 CLR 487 at 494-495.

39 The ultimate conclusion reached by the majority was expressed[43] as being that "there is a real possibility that another person was responsible" for Ms Hardwick's death. That, of course, is no more or less than a conclusion that it was not established beyond reasonable doubt that Mr Hillier was responsible for her death. Five, perhaps six, matters were identified[44] as yielding one or more alternative hypotheses consistent with Mr Hillier's innocence. Those matters were, or at least included, some evidence about handcuffs found at Ms Hardwick's house and some marks on her bed-head, the bruises on her wrists, the DNA from an unknown person on her collar, some footprints observed in soot deposited by the fire in her bedroom and other evidence said[45] to be consistent with the presence of a third person at the relevant time.

40 To understand the significance to be attached to at least some of these matters it is necessary to say something more about some aspects of the way in which the trial was conducted by the parties.

41 In his final address at the trial, counsel for Mr Hillier expressly disavowed a suggestion that had emerged in the course of the trial that Ms Hardwick may have died as a result of a sexual misadventure. For present purposes, it does not matter how or why that suggestion had first emerged. Police examining Ms Hardwick's bedroom had seen a pair of handcuffs in her wardrobe. The handcuffs appeared to be in their original packaging. Police had investigated the possibility of death as a result of sexual misadventure, and evidence was given at the trial that there were some marks on the bed-head that were consistent with the use of handcuffs. But the point which counsel for Mr Hillier sought to make at trial was not that Ms Hardwick had met her death as the result of sexual misadventure, it was that there was a real possibility that there was "someone else involved in this case". Who that person might be, and why that person might have murdered Ms Hardwick, was not identified.

42 The jury heard evidence from Ms Hardwick's boyfriend, Mr Michael Koppie, and from a person described as her "best friend", Ms Lesa Wells, as well as from Mr Hillier. Neither Mr Koppie nor Ms Wells knew of any possible involvement of Ms Hardwick with some other man. Mr Koppie knew nothing of the handcuffs, and knew nothing about certain pornographic videos found at the

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43 [2005] ACTCA 48 at [106].

44 [2005] ACTCA 48 at [99].

45 [2005] ACTCA 48 at [99].

premises. There was, however, evidence of a third, unidentified contributor to DNA found on Ms Hardwick's pyjamas. It was in this setting that trial counsel for Mr Hillier, in his final address, said to the jury:

> "Now, why isn't there, on this evidence because of C1 [the tape lift revealing DNA of a third, unidentified person], a Mr X, who may or may not have been involved in bondage and discipline, who may or may not have been involved in porno videos or handcuffs. Just because there was handcuffs that were there, that doesn't mean they were the ones that were used, but the marks are consistent with handcuffs, and why would Ana tell Mick Koppie or Lesa if there was something going on of this sort that she didn't want anyone to know about? But why wouldn't the pattern have been that the front door was left open for Mr X to come in?
>
> There's a real possibility of that and even if it doesn't go to the scenario of bondage and handcuffs, the evidence of someone else on C1 is something of great significance in this case that the Crown can't counter and forms a foundation for you to acquit in this case."

43 The majority in the Court of Appeal added several further features of the evidence, to the matters advanced by counsel for Mr Hillier in final address, to reach the conclusion that "there is a real possibility that another person was responsible" for Ms Hardwick's death[46]. Although no witness gave evidence to this effect, the majority concluded that the bruises found on Ms Hardwick's wrists, and some marks similar to fingermarks found on her thigh, "are all suggestive of a sexual relationship or incident with someone" other than Mr Hillier or Mr Koppie[47], though when this might have happened was not stated. In addition, their Honours referred[48] to evidence of fingerprints from an unidentified person which had been found on door handles in Ms Hardwick's house and also on an ashtray, cigarette packet and lighter found near her bed. And as noted earlier, their Honours also referred[49] to evidence of footprints observed in the soot that had been deposited in the bedroom as a result of the fire that had taken place after Ms Hardwick's death and that were footprints "not those of firemen or of [Mr Hillier]". Their Honours recognised[50], however, that

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46 [2005] ACTCA 48 at [106].

47 [2005] ACTCA 48 at [97].

48 [2005] ACTCA 48 at [102].

49 [2005] ACTCA 48 at [84].

50 [2005] ACTCA 48 at [103].

the footprints may have been left by Ms Hardwick's father when he discovered her body and that the evidence which had been led at trial had not excluded that possibility. Finally, their Honours referred[51] to evidence that hair had been found on Ms Hardwick's pyjamas and in the bed which had not been identified as being hair of Ms Hardwick or Mr Hillier.

44 Their Honours said[52] that "[a]t face value" these considerations provided "strong grounds for an inference that someone else may have entered the house and been responsible for [the] death" of Ms Hardwick. The majority went on to say[53] that "there may be explanations for these matters that are compatible with the Crown case" but said[54] that "potentially exculpatory inferences cannot be ignored merely because there may be other possible explanations for the relevant facts".

45 This reasoning was erroneous.

A circumstantial case

46 The case against Mr Hillier was a circumstantial case. It has often been said that a jury cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances[55]. It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence[56].

47 The force of that proposition is well illustrated by the decision in *Plomp v The Queen*[57]. There, this Court held that the motive of the accused to murder his

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51 [2005] ACTCA 48 at [102].

52 [2005] ACTCA 48 at [102].

53 [2005] ACTCA 48 at [103].

54 [2005] ACTCA 48 at [104].

55 See, for example, *Martin v Osborne* (1936) 55 CLR 367 at 375; *Plomp v The Queen* (1963) 110 CLR 234 at 243 per Dixon CJ.

56 *Shepherd v The Queen* (1990) 170 CLR 573 at 579 per Dawson J.

57 (1963) 110 CLR 234.

wife (he having proposed marriage to another woman on the representation of his being a widower) was one circumstance to be taken into account in deciding whether he had killed his wife while they were surfing alone together, at dusk, in apparently good conditions. His application for special leave to appeal against conviction was refused upon the basis that it was open to the jury to be satisfied beyond reasonable doubt that he had murdered his wife.

48 Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs CJ and Mason J said in *Chamberlain [No 2]*[58]:

> "At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence: cf *Weeder v The Queen*[59].
>
> Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together': per Lord Cairns, in *Belhaven and Stenton Peerage*[60], cited in *Reg v Van Beelen*[61]; and see *Thomas v The Queen*[62] and cases there cited."

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58 (1984) 153 CLR 521 at 535.

59 (1980) 71 Cr App R 228 at 231.

60 (1875) 1 App Cas 278 at 279.

61 (1973) 4 SASR 353 at 373.

62 [1972] NZLR 34 at 37-38, 40.

And as Dixon CJ said[63] in *Plomp*:

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

49 In the present case, there was evidence (such as the evidence of unidentified DNA on the pyjama top) which was consistent with Mr Hillier's innocence. But the question for the Court of Appeal was whether, on the *whole* of the evidence, it was open to the jury to be persuaded beyond reasonable doubt that he was guilty.

50 In that regard it is important to recognise that Mr Hillier gave evidence at his trial. The Court of Appeal made no reference to this evidence when considering whether the jury's verdict should be set aside. One question which the jury was bound to consider was what they made of Mr Hillier's evidence. Did they believe that Mr Hillier may have been telling the truth when he denied responsibility for Ms Hardwick's death? Or were they, as the verdict revealed, positively persuaded on a consideration of *all* of the evidence (including his) that he was not?

51 None of the matters mentioned by the majority in the Court of Appeal as permitting an inference that someone other than Mr Hillier caused Ms Hardwick's death was said to require that conclusion. (As the majority said[64], "[T]here may be explanations for these matters that are compatible with the Crown case.") And as the majority also said[65]:

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63 (1963) 110 CLR 234 at 242.

64 [2005] ACTCA 48 at [103].

65 [2005] ACTCA 48 at [105].

> "[A]spects of the evidence, particularly that relating to motive, timing and DNA extracted from the 15C7 tape lift, provided ample grounds for grave suspicion that [Mr Hillier] may have murdered [Ms Hardwick]."

But the conclusion then reached[66] (that it was "*impossible* ... to conclude that it was open to the jury to find that the guilt of [Mr Hillier] had been proven beyond reasonable doubt") was said[67] to depend upon:

> "*other* aspects of the evidence, such as that relating to the unusual features of the injuries she suffered and the apparent use of the handcuffs [which] make it difficult to reconstruct what actually occurred on the night in question and the evidence suggesting that another person *may* have been present at the time of her death". (emphasis added)

52 Assuming, as one must, that these "*other* aspects of the evidence" were those identified earlier in their Honours' reasons, it by no means followed that it was not open to the jury to conclude that guilt had been proved beyond reasonable doubt. The asserted conclusion would follow only if the significance to be given to the "*other* aspects of the evidence" was assessed separately from the rest of the evidence. The reasoning of the majority was, therefore, erroneous.

Conclusion and orders

53 It has been said that this Court will grant special leave to the prosecution to appeal only in very exceptional circumstances[68]. While it is clear that the Court has several times said it is, and should be, reluctant to grant special leave to the prosecution, it is not necessary to consider the exact content of the principle that underpins that reluctance.

54 Where, as here, the verdict of a jury has been quashed by an intermediate court of appeal, and it is demonstrated, as here, that that court reached its order by a path that was not in accordance with proper principle, it is in the interests of the administration of justice, both generally and in this particular case, that the error be corrected. Because the error that has been made will require that the *whole* case be reviewed to decide whether "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was

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66 [2005] ACTCA 48 at [105].

67 [2005] ACTCA 48 at [105].

68 *R v Wilkes* (1948) 77 CLR 511 at 516-517; *R v Lee* (1950) 82 CLR 133 at 138; *R v Benz* (1989) 168 CLR 110 at 111, 119-120, 131-132, 146.

guilty"[69], the interests of justice will best be served by granting special leave to appeal, treating the appeal as instituted and heard instanter and allowed, setting aside the order of the Court of Appeal, and remitting the matter to the Court of Appeal for rehearing.

55 Upon a rehearing by a differently constituted Court of Appeal, it will be open to the parties to canvass the whole of the evidence at trial to an extent greater than reasonably possible in this Court, and to do that in light of this Court's identification of the error made by the majority of the Court of Appeal in the judgment which gives rise to this appeal.

56 We would therefore make the following orders:

1. Grant special leave to appeal.

2. Treat the appeal as instituted and heard instanter and allowed.

3. Set aside the orders of the Court of Appeal of the Australian Capital Territory made on 15 December 2005 and remit the matter to that Court for rehearing.

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69 *M v The Queen* (1994) 181 CLR 487 at 494-495.

57 CALLINAN J. I agree with Gummow, Hayne and Crennan JJ for the reasons that their Honours give, that special leave should be granted, that the appeal should be allowed and that the orders of the Court of Appeal of the Supreme Court of the Australian Capital Territory should be set aside. Instead, however, of remitting the appeal for rehearing by that Court, I would order a retrial.

58 The circumstantial evidence referred to in the joint judgment, and upon which the applicant relied, included a spate of telephone calls proved to have been made by the respondent in the week before Ana Hardwick died and their immediate cessation after it. No reference was made to these matters in the applicant's opening. A written record of the calls made by the respondent was introduced into evidence without any specific commentary or explanation during the applicant's case. When the respondent gave evidence, he was cross-examined about them, but no particular imputation was directly made to him of the kind that was forcefully pressed in the applicant's closing speech to the jury. I would read the cross-examination, as do Gummow, Hayne and Crennan JJ[70], as focussing upon motive, rather than secret and guilty knowledge of Ms Hardwick's murder, because of its reference to the respondent's inability to fund an appeal, and realization that his prospects of success in it were poor.

59 The relevant part of the cross-examination should be set out:

> "All right. Well, the term's probably a bit extravagant but what you did during that week was to make a number of phone calls to various doctors, psychologists, lawyers and so forth for the purposes of strapping up your appeal? --- Well, there was a process I had to go through to - to get through the appeal and I needed the assistance of these professional people and I had to search for who was the most appropriate.
>
> I won't take you through them again because Mr Purnell drew your attention to them on the chart, but you rang a number of doctors during that week? --- Yes.
>
> Starting from The Royal Australian and New Zealand College of Psychiatrists, I think it was? --- Yes.
>
> Looking for names of psychiatrists in the field, were you? --- Looking for - yes, I suppose, yes.
>
> And in ringing some psychiatrists? --- Yes.
>
> Dr Nielsen was a psychiatrist, is he? --- I believe so.

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70 At [34].

Was he from the Paddington Practice? --- I believe that's where he practised from, yes.

Were you generally aware of the need to produce some evidence of that type if your appeal was to have any prospects of success? --- I'm sorry, the type of?

Psychiatrists? --- Well, I was looking for something so that could possibly support us if the fresh evidence was allowed.

Well, you'd need to negative the effects of Antoinette Harmer's report, would you not? --- Yes, probably a fair comment.

Had you also looked for new solicitors that week? --- No.

One of the calls on the 23rd is to Ray Swift and Associates, Solicitors, do you remember ringing them? --- Yes.

Are they your current lawyers? --- No.

Lawyers who'd been representing you in the Family Court? --- No, they previously were the ones who arranged Deed of Agreement [sic].

Sorry, what? --- They arranged the deed of agreement for me.

And is Ms Moutrage from that firm? --- Yes, she's the lawyer that actually handles my matter, or handled my matter.

But not the lawyers who acted for you at the hearing in the Family Court? --- No, she started off in the Family Court.

You also spoke to Christine Paynter during that week, did you not? --- Yes.

And discussed with her the prospects of her being able to provide some sort of report which would assist your appeal? --- There was two things there, one to see how she could help me, and the second was to see - reading the documentation and Antoinette Harmer and her - Antoinette's handwritten notes to see if she could help in any way with the appeal.

When you say help you, do you mean help you with some counselling? --- Yes.

Did you feel that you needed that? --- Well, maybe. She probably thought it - well, that's why she suggested - she thought it would be a good thing.

And what did you think? --- I agreed. That's why we made a further appointment.

And why did you think you needed some counselling? --- Just to help me think things through and just get around things, help me be comfortable with things.

What sort of things? --- Just the way I was feeling that, you know, this had happened and what was my next step, and do I take the stay matter back, and so we discussed a range of things.

Well, she wasn't a lawyer, was she? So she wasn't there to give you legal advice? --- No, no, no.

How were you feeling? --- Upset.

Angry? --- I suppose at times, yes.

Is that why you wanted some assistance from her to help you with your anger? --- Well, initially I hadn't thought about myself, I was thinking about the children, but it was her suggestion that she does it, I don't know, maybe she was - maybe she thought that would help me, and maybe she thought that was good for her practice.

Did she give you some counselling? --- Yes.

What day was that? --- I think it was around the 26th or thereabouts we had a session.

I think those names were drawn to your attention this morning, but the Canberra Psychiatry Group. Is that somebody who you contacted for assistance? --- Yes.

Lee Leonard, a psychiatrist from Elizabeth Street in the city, Sydney, presumably? --- Yes, that was one of the names I'd received from the association.

And the others, I think, Mr Purnell mentioned this morning, Dr Waters, Dr Potter, Dr Dureck? --- Yes, they're all people that I'd received from the societies to contact.

Silk Chambers was somebody who contacted you - Silk Chambers Pty Ltd, was there a lawyer from there? --- They're - that's a chambers for counsel.

Right. Had you been looking for counsel? --- No, no, they were doing some work for me with the appeal.

Is it fair to say that you spent a fair bit of your time that week, that is the week after you received the news on 20 September, exploring options for

the appeal - or an appeal? --- No, I hadn't explored options for the appeal. I was exploring the next stages of the appeal.

And did that include the sort of evidence and other assistance that you might need to run an appeal? --- Yes.

Did it become clear to you that money was going to be a major issue in relation to mounting an appeal of the type that was necessary? --- No, my indications from my legal representative, Mr Lardner, was that I had more than sufficient funds to run an appeal.

Was it correct that Legal Aid was no longer available to you? --- I never applied for an appeal.

So any appeal would be privately funded? --- Yes.

Did Mr Lardner tell you how much money would be involved in mounting an appeal? --- Yes.

How much was that? --- He said somewhere between $8,000 to $20,000.

Before you abandoned the appeal, as you said, this afternoon, how much money had you spent? --- On the appeal?

Yes? --- Less than $2,000 at that stage.

Did you pay Mr Lardner for that? --- Sorry, are you talking about prior to Ana's - - -

No, I'm talking about when you finally abandoned it? --- Okay, sorry, no, I'd probably spent about $4,500 to $5,000.

You paid Mr Lardner that? --- Well, it was not only to Mr Lardner, there was various parties and things that needed to be done along the way, such as acquiring the transcripts.

Have you paid Mr Lardner? --- Yes, I did pay Mr Lardner for that, yes.

But you're in dispute with Mr Lardner over legal fees, aren't you? --- Not for the issue of the appeal.

Was it the fact by the end of the week, when you'd made these various efforts in relation to the appeal, that you were beginning to despair of your prospects on appeal? --- No.

Did you take the view that your chances of overturning the decision were becoming low? --- No.

Did you realise that the findings of fact made by the judge, Purdy J, the chances of getting the decision overturned were going to be remote? --- My advice was we had a better than not success [sic].

HIS HONOUR: Better than not?

MR PURNELL: Better than not.

MR HASTINGS: Did you tell Mr Polkinghorne that the proceedings had not gone well? --- Well, Mr Polkinghorne on many occasions asked me how things were going, and that was possibly one of the discussions or questions he asked me.

Did you tell him that your wife had lied and got away with it? --- Probably not in those words, but yes.

Did you tell Daphne Hillier that you'd had to tell Daniel that you couldn't take it any further because you'd run out of money? --- No.

Did you hear her say that in evidence? --- I did actually, yes.

I see. What was she mistaken was she? --- Well I'm not - not exactly sure what she was talking about, or what she was going to, but - - -

Did you ever have a conversation with her about whether you'd be able to take the matter any further? --- I rarely had conversations with Daphne.

Did you ever have a conversation with her when you told her something to the effect that you wouldn't be able to take it any further? --- No, I would've been discussing it with my father.

Well, was there an occasion when she - did you discuss it with your father and tell him that you'd had to tell Daniel that you couldn't take it any further because you'd run out of money? --- No.

Had you run out of money? --- No.

Was that the point at which you decided you should take the law into your own hands? --- No.

The end of that week, had you decided that there was little prospect of you going through the Family Court in order to regain custody of your children? --- No.

Had you decided that you'd have to take the law into your own hands? --- No.

Did you go there on the Monday night and strangle Ana? --- No."

60 In his closing speech the applicant said this:

"And what's clear, we suggest, from the phone records and from what the accused himself has said, that come the next week, on Monday the 23rd, he embarked upon a very vigorous program of proceeding with his appeal. And you will remember the telephone chart identifies the lawyers and the psychiatrists and the doctors whom he rang or spoke to quite constantly during the week commencing 23 September.

But in the course of all that, problems started to emerge, we suggest, particularly in relation to money. Whilst he asserts that he had a redraw facility which provided him with the funding for the appeal, the fact is that the evidence of Daphne Hillier was that he said to her that he'd had to tell Daniel that he couldn't take it any further because he'd run out of money and was upset and the evidence of the psychologist, Christine Paynter, was that they'd had some discussions about the funding and that the accused had indicated that he was no longer able to get legal aid as a result of which they'd have to talk about money.

So that even though the accused might assert that he had a redraw facility, he'd already drawn on it to some significant extent and was faced with more substantial charges if he was going to run the appeal in the way that he thought he might. And what we suggest is that over the weekend of 28 and 29 September it's highly likely that the realisation set in for the accused that this was all getting too hard to run the appeal.

The evidence was against him. The psychologist who'd given evidence was against him. The judge had been against him. He was running out of money. And some time over that weekend he decided to take the law into his own hands and that night kill the competitor for the custody of his children.

And the fact which I suggest very compelling [sic] demonstrates that is if you go [sic] the phone records on the Monday, all the calls of the previous week to the psychiatrist, the doctors and the lawyers suddenly stop. And if you go to the Tuesday, 1 October, he doesn't make one single call to any lawyer or any doctor or anybody else. There's one incoming call which is unsuccessful from a person he can't remember, but it's quite marked, we suggest, when you look at the week of 23 September, and he's making up to a dozen calls a day to various people including doctors and psychiatrists and lawyers, but then in the week commencing 30 September there are no such calls apart from a couple incoming and then when you get to 1 October, the day after the probable death of the deceased, he makes absolutely no calls at all.

…

> So it just seems, we submit however, that when you look at the pattern of phone calls, it's just quite consistent with the prosecution case that over the weekend of the 28th and 29th he suddenly realised that he was in real trouble in the Family Court and at that point decided to take the law into his own hands and on the night of 30 September, went to the home of the deceased and strangled her.
>
> And 1 October's significant as well because on the evidence, he didn't know of the death of Ana until after the police contacted him and you can pick up that call which is at 2 o'clock on 2 October whereupon he went to Tuggeranong Police Station for the first time and learned of her death so that otherwise of course he would have no reason for taking no further action in his appeal if he knew she was deceased because he didn't find out that she was dead until, on the police evidence anyway, he was told at Tuggeranong Police Station sometime after 2 o'clock.
>
> So all of that we suggest provides a very neat and concise and logical motive which fits very squarely with the prosecution's circumstantial case in the broad terms that I have outlined."

61 The majority in the Court of Appeal summarized the submissions made by the applicant about the calls in his address, and took the view, erroneously in my opinion[71], that they could not be circumstantially evidentiary of the respondent's guilt. The criticism of the way in which that evidence was sought to be used did, however, have validity. They said this of it[72]:

> "The Crown also referred to evidence that on the weekend of Friday, 27 September 2002, the [respondent] had made numerous phone calls concerning his pending appeal from the custody decision. The learned Crown prosecutor suggested that this evidence was very compelling because the phone records for the following Monday and Tuesday showed that the calls that the [respondent] had made during the previous week to a psychiatrist, doctors and lawyers 'suddenly stopped'. Counsel asserted that this was 'quite remarkable' and said that it was consistent with the prosecution case that, over the weekend of 28 and 29 September 2002, the [respondent] had suddenly realised that he was 'in real trouble in the Family Court' and decided to take the law into his own hands by strangling the deceased.
>
> Despite the somewhat forceful language with which these submissions were apparently delivered it is, with respect, difficult to see how any

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71 cf *Plomp v The Queen* (1963) 110 CLR 234 at 242 per Dixon CJ.

72 *Hillier v The Queen* [2005] ACTCA 48 at [27]-[29] per Higgins CJ and Crispin P.

> substantial support for the Crown case could have been fairly derived from the fact that a spate of telephone calls made during the previous week had not been maintained after the weekend. As previously mentioned, an order effectively lifting the stay of proceedings in relation to the residence orders had been made on Friday, 20 September 2002. It was entirely understandable that a father, who was distressed by an order of this nature and believed that his children were also very distressed by it, might make a flurry of enquiries during the next few working days with a view to ascertaining whether anything could be done to prevent the orders appealed from coming into effect. There was no reason to suppose that he would have continued to make numerous telephone calls about the appeal once those enquiries had been completed.
>
> Furthermore, if it had been intended to attach such a sinister connotation to the pattern of calls, then the issue should have been raised with the [respondent] in cross-examination so that he could have had an opportunity of providing an explanation in respect of it. Yet this was not done. The potential unfairness of raising the matter in the Crown's closing address without having given the accused an opportunity to deal with the matter in cross-examination was compounded by the fact that it had not been mentioned by the Crown when opening the case. Whilst the telephone records had been tendered, nothing apparently occurred during the course of the trial to alert the accused to the possibility that they might be used as anything other than evidence of the extent of his feelings during the previous week. There appears to have been no forewarning of any suggestion that the [respondent] may have stopped making the calls because he knew that the deceased was already dead and that further action on the appeal would be unnecessary."

62 I would not wish to be unduly critical of the prosecutor in proceeding as he did. As evidence is adduced and cross-examination conducted, pieces of evidence can come to assume different complexions, or a higher degree of significance than, or even a different relevance from what may have earlier, even earlier in the trial itself, been foreseen. That may explain what occurred here. Nonetheless, the absence of a direct and unmistakeable imputation of guilt demonstrated by the sudden cessation of telephone calls to the persons to whom they had regularly recently been made, is of consequence to the order that should be made here.

63 In *Shepherd v The Queen*[73], Dawson J said this of evidence in a circumstantial case[74]:

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73 (1990) 170 CLR 573.

74 (1990) 170 CLR 573 at 579.

"Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.

On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference may be drawn. But where – to use the metaphor referred to by *Wigmore on Evidence*, vol 9 (Chadbourn rev 1981), par 2497, pp 412-414 – the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence."

64 I would use somewhat different or additional terminology. A circumstance, that is, a relevant fact, proved, but not of itself alone directly probative of guilt, must have some weight and significance to qualify for admissibility. Some circumstances however will be of greater or lesser weight or significance than others. The required degree of satisfaction of the

adjudicative mind of the jury as to the veracity of such a circumstance and fact is likely to vary according to its significance to the case overall[75]. I do not myself therefore see the division as being one between intermediate facts and ultimate facts, or inferences of fact. None of this is in any way to detract from this fundamental proposition: a case, whether circumstantial or not, against an accused must be proved beyond reasonable doubt, which means that each element of it but not necessarily every circumstance of relevance to guilt, must be so proved, and a jury instructed accordingly.

65 Whilst I agree that the Court of Appeal failed to undertake the appellate review in the way that the other members of this Court say that it should have, as I have foreshadowed, I think that there is force in the observations of the majority of the former regarding the possibility of prejudice to the respondent lying in the denial to him of an opportunity to deal in cross-examination with the specific imputation about the telephone calls and their sudden cessation strongly pressed in final address. This was a case in which compliance with the rule in *Browne v Dunn*[76] was required. In saying that, I do not wish to depart from anything said about that rule by Gummow and Kirby JJ and myself in *MWJ v The Queen*[77]. The sorts of measures to cure non-compliance with the rule to which reference was made there, could not satisfactorily be adopted in this trial. It would be quite inappropriate to interrupt a final address, or await its conclusion and then to recall an accused to put to him an imputation already made to the jury. It would be quite unfair to an accused to proceed in that way.

66 The present position can be summarized in this way. The respondent has been convicted by a jury. The case was an entirely circumstantial one. The evidence was such however that it would not be possible to say that the jury could or should not have convicted the respondent. As to this, and subject to what follows, I agree with the reasoning of Spender J in the Court of Appeal, particularly with respect to the force and relevance of the DNA evidence and the trial judge's directions concerning it. There remains however the fact that a significant irregularity occurred in the conduct of the trial. That irregularity was the subject of submissions in the Court of Appeal and in this Court. The Court of Appeal by majority thought the irregularity notable and important and so do I. That Court after its review, albeit not undertaken as it should have been, quashed the conviction. This Court, conscious of the gravity of allowing an appeal against acquittal, has been bound to uphold the appeal from the Court of Appeal. This Court has, in doing that, necessarily itself reviewed the substance of the

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75 cf *Rejfek v McElroy* (1965) 112 CLR 517.

76 (1893) 6 R 67.

77 (2005) 80 ALJR 329; 222 ALR 436.

case. In any event, enough has appeared to show that a material irregularity in the conduct of the trial occurred. This Court is, in my view therefore, in as good a position to decide what should follow, as a Court of Appeal differently constituted to which the majority in this Court would remit the appeal. No court, and in particular no jury yet, has had the benefit of a response by the accused to the imputation made against him in address, but not in cross-examination. His response to that in the context of the evidence as a whole, particularly in an entirely circumstantial case, is a matter quintessentially for a jury. In my view therefore, an order for a retrial is right and inevitable. This Court may, and I think, should so order. There are further interests involved which favour such an order, the public interest and the personal interest of the respondent in the early resolution of the case, and the avoidance of the expense of a further hearing in the Court of Appeal.

67 I would accordingly grant special leave to appeal, allow the appeal and order a retrial.

68 It is the combination of the matters to which I have referred that dictates for me the course that should follow. It is that combination also which makes this case special, and such that it warrants the grant of special leave.