HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

BRADLEY DOUGLAS COOPER APPELLANT

AND

THE QUEEN RESPONDENT

Cooper v The Queen
[2012] HCA 50
14 November 2012
S135/2012

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 5 December 2011 and, in its place, order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's conviction be quashed; and

   (c) a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with S J Buchen for the appellant (instructed by Legal Aid (NSW))

L A Babb SC with J H Pickering for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Cooper v The Queen

Criminal law – Appeal – Misdirection – Application of "proviso" – Appellant convicted of murder – Prosecution alleged at trial that either appellant hit and killed deceased or alternatively another person hit and killed deceased pursuant to joint criminal enterprise with appellant – Jury instructed to consider case of joint criminal enterprise as alternative to primary case that appellant hit and killed deceased – Court of Criminal Appeal held no evidence of joint criminal enterprise – Whether "no substantial miscarriage of justice" occurred.

Words and phrases – "proviso", "substantial miscarriage of justice".

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

1 FRENCH CJ, HAYNE, CRENNAN AND KIEFEL JJ. At the appellant's trial in the Supreme Court of New South Wales for the murder of Dale Kevin Muldoon, Julie Anne Quinn gave evidence that she saw the appellant beat the deceased to death by hitting him with his fists, a child's baseball bat and a small axe. The appellant's niece, known in the trial as "C", gave evidence that Ms Quinn had told her that it was she (Ms Quinn) who had struck the deceased with an axe and that she had done so because the deceased was hitting the appellant.

2 At the appellant's trial, the prosecution's primary case was that the appellant alone had hit and killed the deceased. But, as an alternative case, the prosecution submitted that even if Ms Quinn had struck the fatal blow or blows, the appellant was guilty of murder because Ms Quinn had been part of a joint criminal enterprise with the appellant. The trial judge instructed the jury that, if they considered that the prosecution did not establish that the appellant was solely responsible for the fatal injuries inflicted on the deceased, they should then consider whether the appellant had used the baseball bat, and Ms Quinn the axe, "pursuant to an agreement to cause the death of the deceased with the intention of killing him or inflicting grievous bodily harm upon him".

3 The appellant was convicted. His appeal against conviction was dismissed[1] by the Court of Criminal Appeal of New South Wales (Beazley JA, Hidden and R A Hulme JJ).

4 The Court of Criminal Appeal held[2] (and it is not now disputed) that there was no evidence at trial which would have permitted the jury to conclude that Ms Quinn and the appellant had engaged in any joint criminal enterprise to kill or inflict grievous bodily harm on the deceased. It followed, so the Court of Criminal Appeal held[3], that the trial judge (Buddin J) was wrong to direct the jury that, if not persuaded beyond reasonable doubt that the appellant had struck the fatal blow or blows, the jury might nonetheless convict the appellant of murder if satisfied that the appellant and Ms Quinn had been engaged in a joint criminal enterprise to kill or do grievous bodily harm to the deceased.

5 Although there had thus been a wrong decision of a question of law, the Court of Criminal Appeal concluded[4] that no substantial miscarriage of justice

---

1 *Cooper v The Queen* [2011] NSWCCA 258.

2 [2011] NSWCCA 258 at [72].

3 [2011] NSWCCA 258 at [73].

4 [2011] NSWCCA 258 at [256].

had actually occurred and that the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW) applied.

6 By special leave the appellant appeals to this Court. He submits that the Court of Criminal Appeal was wrong to apply the proviso. That submission should be accepted. The appeal must be allowed, the appellant's conviction quashed and a new trial had. In these circumstances, it is neither necessary nor appropriate to consider the appellant's other submissions about the adequacy of certain aspects of the trial judge's directions or about whether trial counsel's not having adduced evidence about the deceased's mental condition occasioned a miscarriage of justice.

7 It is necessary to say something further about the facts of the matter and the course of proceedings against the appellant.

The facts and proceedings below

8 On 5 May 2003, the mother of the deceased told police that her son was missing. She said that she had not seen or heard from him since 22 March 2003. A New South Wales State election was held on that day and the deceased's mother told police that the deceased had gone to vote but had not returned.

9 On 18 June 2003, police arrested the appellant, Ms Quinn and Mr Kevin Denne. Mr Denne told police that he had been present when the appellant took the body of the deceased to the Ben Bullen State Forest and buried it. Mr Denne took police to the State Forest and pointed out where the deceased's body had been buried.

10 In September 2004, the appellant and Ms Quinn were jointly indicted on one count of murder and one count of disposing of the deceased's body with intent to pervert the course of justice. The appellant pleaded not guilty to murder but guilty to the count about disposing of the body; Ms Quinn pleaded not guilty to both counts. An order was made that the two accused be tried separately.

11 Ms Quinn's trial proceeded first. She was acquitted of murder but the jury could not agree with respect to the second count. A "no bill" was subsequently entered in respect of the second count.

12 In May and June 2005 the appellant was tried on the charge of murder.

13 At his trial, expert evidence was led that post mortem examination of the deceased showed that he had four wounds to the head. At least two of those wounds were associated with skull fractures that the forensic pathologist described as requiring "a lot of force" to inflict. Some but not all of the wounds

could have been caused by a blunt object like a baseball bat or the flat side of an axe; one of the wounds could have been caused by the back of an axe. In this Court, both the appellant and the respondent accepted that the evidence did not permit the jury to conclude beyond reasonable doubt that only one weapon was used. The respondent submitted that the evidence showed that two weapons were used.

14 The prosecution alleged that these wounds were inflicted on the deceased on 22 March 2003 at the house in Lithgow occupied by the appellant and one of his children with Ms Quinn and one of her children. The appellant did not dispute these matters at trial. He denied that he had inflicted the wounds.

15 As has already been noted, Ms Quinn gave evidence at the trial. She said that the appellant had struck the deceased several times first with his fists, then with a child's baseball bat and finally with a small axe. Unsworn evidence was also adduced from Ms Quinn's then eleven year old son who described the appellant punching the deceased. Ms Quinn said that she took her son into a bedroom after the appellant punched the deceased.

16 Mr Denne and C each gave evidence describing his or her part in the appellant's burying the body in the State Forest on the day after the deceased was killed. Mr Denne also gave evidence that after the body had been buried the appellant had dropped a hessian bag into a fire at a rubbish tip. (This bag was said to have contained the murder weapons.)

17 When cross-examined by trial counsel for the appellant, C accepted that after she had driven the appellant and Mr Denne to the State Forest with the body of the deceased in the boot, she had returned to the house of the appellant and Ms Quinn. At the house she had a conversation with Ms Quinn about whose body had been taken to the State Forest and about what had happened. C accepted that Ms Quinn had told her in that conversation that she had struck the deceased in the face with an axe because he was hitting the appellant. Because Ms Quinn was available to give evidence at the trial and the asserted facts were fresh in her memory when she made the representation, C's evidence of the out of court statement by Ms Quinn was admissible[5] as evidence of the truth of the assertions made in the statement.

18 Ms Quinn denied that she had made the statement that C attributed to her. Ms Quinn denied that she had struck the deceased and her evidence was that the

---

5 *Evidence Act* 1995 (NSW), s 66.

appellant (and only the appellant) had struck the deceased. The appellant did not give evidence.

19 The Court of Criminal Appeal held[6] that the trial judge was wrong to direct the jury that joint criminal enterprise was a possible path to the appellant's conviction. That is, the Court decided that there had been a "wrong decision of [a] question of law"[7]. But the Court concluded[8] that there was "no substantial miscarriage of justice within the meaning of the proviso".

The proviso

20 It is now well established[9], and it must again be emphasised, that, as this Court held in *Weiss v The Queen*[10], there are three propositions which are fundamental to the application of the proviso to the common form criminal appeal statute. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task is objective, and is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Third, the standard of proof of criminal guilt is proof beyond reasonable doubt.

21 Performance of the appellate court's task requires[11] the court to undertake its own independent assessment of the evidence and it further requires[12] the court to determine:

---

6 [2011] NSWCCA 258 at [73].

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

8 [2011] NSWCCA 258 at [256] per Beazley JA (Hidden and R A Hulme JJ agreeing).

9 See, for example, *AK v Western Australia* (2008) 232 CLR 438 at 455 [52]; [2008] HCA 8; *Cesan v The Queen* (2008) 236 CLR 358 at 393-394 [123]; [2008] HCA 52; *Baiada Poultry Pty Ltd v The Queen* (2012) 86 ALJR 459 at 465-466 [21]-[29]; 286 ALR 421 at 428-430; [2012] HCA 14.

10 (2005) 224 CLR 300 at 315 [39]; [2005] HCA 81.

11 *Weiss* (2005) 224 CLR 300 at 316 [41].

12 *Weiss* (2005) 224 CLR 300 at 316 [41].

> "whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record[13], the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty".

And although "[n]o single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given"[14], it is necessary to bear at the forefront of consideration in this case that, as was pointed out[15] in *Weiss*:

> "It *cannot* be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty." (emphasis added)

The Court of Criminal Appeal

22 In this case, Beazley JA (who gave the principal reasons of the Court of Criminal Appeal) correctly identified[16] the applicable principles. The reasons examined[17] the evidence that had been given at trial. Beazley JA referred[18] to the "unlikelihood of C's evidence being correct" but nowhere expressly identified what it was about that evidence that was "unlikely" to be correct. It may be that it can be inferred from the comparison undertaken in the reasons[19] between an account of events which had the deceased hit in the face with an axe and the post mortem findings of the forensic pathologist that the unlikelihood or improbability that was being identified concerned the *content* of what C testified Ms Quinn had

---

13 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ; [2003] HCA 22.

14 *Weiss* (2005) 224 CLR 300 at 317 [44].

15 (2005) 224 CLR 300 at 317 [44]. See also *Baiada Poultry* (2012) 86 ALJR 459 at 466 [29]; 286 ALR 421 at 430.

16 [2011] NSWCCA 258 at [250].

17 [2011] NSWCCA 258 at [251]-[255].

18 [2011] NSWCCA 258 at [251].

19 [2011] NSWCCA 258 at [42]-[46], [56]-[57], [251].

told her, rather than whether a conversation to the effect described had occurred. But whether or not this is so need not be examined. What is presently important is that the Court of Criminal Appeal did not conclude that it was satisfied beyond reasonable doubt that either Ms Quinn did not say the words attributed to her or the description of events she gave to C was false.

23 Rather, the point seen as determinative of the proviso appears to have been[20] that "when the whole of the evidence is considered, the case that the appellant at least struck the blow that caused [one of the most serious injuries to the deceased] is such, that ... there has been no substantial miscarriage of justice within the meaning of the proviso to s 6(1)".

24 This reasoning does not apply the principles set out in *Weiss*.

Applying the proviso in this case

25 As the reasons of Beazley JA recorded[21], the prosecution had submitted in the Court of Criminal Appeal that the evidence "*suggested*" that the injury in question had been caused by a baseball bat (emphasis added). Beazley JA said[22] that "[t]he *probability* was ... that a baseball bat was used" (emphasis added). But neither the submission nor the conclusion asserted satisfaction beyond reasonable doubt. The appellant could not be found guilty of murder unless it was proved beyond reasonable doubt that *he* had struck the fatal blow or blows.

26 In this Court, the respondent accepted that the jury could not have concluded on the evidence at trial that only one implement had been used to cause the deceased's injuries. And the respondent did not dispute in argument in this Court that the record of the evidence at trial did *not* permit an appellate court to conclude which blow or blows inflicted on the deceased had caused his fatal injuries.

27 Ms Quinn's evidence, if believed, could found a conclusion to the requisite standard that the appellant had struck all the blows. If that were so, it would not matter which implement caused death. If, however, there was a reasonable possibility that Ms Quinn had struck the deceased with an axe (as C's evidence suggested) the appellant was not guilty of murder unless blows *he* struck were

---

20 [2011] NSWCCA 258 at [256].

21 [2011] NSWCCA 258 at [255].

22 [2011] NSWCCA 258 at [255].

the cause of death. Confined as the Court of Criminal Appeal necessarily was to the record of proceedings at the trial, it was not open to it to decide beyond reasonable doubt that either Ms Quinn did not say what C had reported or that what Ms Quinn was reported to have said was false. Without taking at least one of those steps, the Court of Criminal Appeal could not be persuaded beyond reasonable doubt that the appellant alone had struck all the blows inflicted on the deceased. Unless satisfied beyond reasonable doubt that the appellant alone had hit the deceased, the Court of Criminal Appeal could not decide that he was guilty of murder. Unless satisfied beyond reasonable doubt that the appellant was guilty of murder, the Court of Criminal Appeal could not be satisfied that no substantial miscarriage of justice had actually occurred.

28 In this Court, the respondent sought to support the conclusion reached by the Court of Criminal Appeal by submitting that, if the jury applied the directions given at trial about what amounted to a joint criminal enterprise, the jury would necessarily have rejected that aspect of the prosecution's argument at trial. It followed, so the respondent submitted, that the jury must have decided the case by deciding that only the appellant had hit the deceased and that no substantial miscarriage of justice had actually occurred.

29 This submission should not be accepted. It depended upon relegating the prosecution's alternative case at trial to what the respondent described in this Court as a "faint suggestion ... cancelled out in the summing up by the trial judge's direction" about joint criminal enterprise. But the trial judge did not treat the prosecution's alternative case as some "faint suggestion". Indeed, the trial judge expressly rejected the submission by trial counsel for the appellant that joint criminal enterprise should not be left to the jury.

30 In his charge to the jury the trial judge described the prosecution's alternative case as inviting the jury to accept that Ms Quinn had said what C described, to accept that Ms Quinn was right to say that she had hit the deceased with an axe, but to reject that Ms Quinn did so in defence of the appellant. The trial judge instructed the jury that if it was a reasonable possibility that Ms Quinn made the admission attributed to her by C and that the admission was a truthful and reliable account of events, joint criminal enterprise was not established because, on those hypotheses, there was a reasonable possibility that Ms Quinn had been acting in defence of another. But the jury were *not* told that the prosecution's alternative case (dependent on accepting only part of what Ms Quinn was alleged to have said) was not open. And it cannot now be demonstrated that the jury must have rejected this alternative case. Demonstration of that conclusion depends upon the jury having rejected what the judge's instructions had identified as an available view of the facts.

Orders

31 The appeal must be allowed. The orders of the Court of Criminal Appeal should be set aside and in their place there be orders that: (a) the appeal to that Court is allowed; (b) the appellant's conviction is quashed; and (c) a new trial be had.

32 HEYDON J. Dale Kevin Muldoon died on the evening of Saturday 22 March 2003. He died at the house of the appellant, Bradley Douglas Cooper. The other persons in the house at that time were the appellant's de facto wife, Julie Anne Quinn, then aged about 29, and her son, known as J, then aged nine. Mr Muldoon's death was caused by one or other of two head injuries. The death was not an unfortunate accident. He had not tripped over the carpet. Someone killed him. Who? There were two possibilities.

33 The only form of the prosecution case now pressed is that the appellant, then aged 39, attacked Mr Muldoon with blows from his fists, a child's baseball bat, and a small axe. Ms Quinn's testimony supported that case. It was also supported by the appellant's behaviour after Mr Muldoon's death. He made admissions to three witnesses on 23 March 2003 that he had killed Mr Muldoon. He also procured C, his niece, then aged 18, and Kevin James Denne to help him remove Mr Muldoon's body from his house, bury it in the Ben Bullen State Forest and dispose of a hessian bag containing a baseball bat and an axe on which the appellant said there was DNA. The appellant also changed his clothing at Ben Bullen State Forest. He persuaded others to tell untruths on his behalf. And he urged others to keep what they knew from the police. The appellant threatened to murder three people if they did not comply with his wishes.

34 The defence was not obliged to have a "case". But it did have one, even though it bore no burden of proof in relation to it. That "case" rested on the testimony of C. C said that Ms Quinn had confessed to her that she had hit Mr Muldoon in the face with an axe – a proposition which Ms Quinn denied. The defence "case" was also adumbrated in suggestions put in cross-examination to Ms Quinn. One was that, because she was pregnant, she had not wished to be interrogated by the police. Another was that the appellant decided, after discussing the matter with her, to get rid of Mr Muldoon's body in order to protect her. Another was that Mr Muldoon attacked the appellant with a baseball bat and with a knife. Ms Quinn denied these suggestions. Thus the defence "case", only partly supported by evidence, was that though the appellant may have inflicted injuries in the course of a fight started by Mr Muldoon, he was provoked or acting in self-defence, and the fatal blow was struck by Ms Quinn.

35 After a trial by jury, the appellant was convicted of murder in the Supreme Court of New South Wales. The Court of Criminal Appeal dismissed his appeal. The appellant raises two points in this Court.

Counsel's failure to introduce evidence

36 Ground 2.3 of the Notice of Appeal in this Court was:

> "The Court of Criminal Appeal erred in holding that defence counsel's failure to adduce relevant evidence in relation to the deceased's mental

condition and the related failure to cross-examine the deceased's grandmother did not occasion a miscarriage of justice."

37 In the Court of Criminal Appeal the appellant contended that there were various deficiencies in how defence counsel presented his case at trial. The Court of Criminal Appeal rejected some of these contentions, but accepted two. The first was that counsel had omitted to adduce certain evidence about Mr Muldoon's mental state in her cross-examination of Mr Muldoon's grandmother, Mrs Muldoon. The second was that counsel had omitted to tender some documents held by the Mid Western Area Health Service. Those documents related to visits by Mr Muldoon to Lithgow District Hospital. They supposedly recorded that Mr Muldoon appeared to be affected by drug induced psychosis, and he claimed to suffer from mental health problems, including possibly mild schizophrenia. Finally, the documents also revealed contacts between Mrs Muldoon and Lithgow District Hospital in which Mrs Muldoon stated that she had at times felt a little afraid of Mr Muldoon because of his violent and erratic behaviour.

38 In this Court the appellant submitted that the uncalled evidence would have provided "a compelling basis for an inference that the deceased suffered from a psychotic illness substantially aggravated by the consumption of alcohol and drugs, making him prone to paranoid, erratic and dangerous behaviour."

39 Both in this Court and in the Court of Criminal Appeal, the appellant submitted that there had been "a miscarriage of justice" within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act"). In considering that submission the Court of Criminal Appeal posed the question: "would a jury have been likely to entertain a reasonable doubt about guilt if all the evidence had been before it?" It answered that question in the negative. Thus in its view the ground of appeal before it was not made out. That made it unnecessary to consider whether the proviso to s 6(1) of the Criminal Appeal Act applied in relation to this ground. The proviso is to the effect that notwithstanding the fact that the Court of Criminal Appeal is of opinion that the point raised by the appeal might be decided in favour of the appellant, it may dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred." It was not necessary to consider the application of the proviso because the particular point raised by the appeal was not decided in favour of the appellant. However, the Court of Criminal Appeal later applied the proviso to this ground of appeal as well as to a joint criminal enterprise ground of appeal which is discussed below[23].

---

23 See below at [47]-[101].

40 The appellant submitted that the Court of Criminal Appeal posed the wrong test. He questioned whether instead of requiring only a "likelihood" that the jury would entertain a reasonable doubt, the correct test required an examination of whether there was a "significant possibility" that it would do so[24]. He also contended that the correct analysis of that likelihood or possibility turned on the fairness of the trial[25]. The resolution of this appeal does not require either point to be decided.

41 There are difficulties in the Court of Criminal Appeal's criticisms of the appellant's trial counsel.

42 One difficulty is that counsel for the appellant in the Court of Criminal Appeal submitted that the evidence given by trial counsel for the appellant to the Court of Criminal Appeal should be rejected as unsatisfactory. In some respects, in a simple contest of credibility, the Court of Criminal Appeal preferred the evidence of the appellant to that of the appellant's trial counsel. That preference is very surprising. The appellant bore the burden of proving the facts necessary to establish before the Court of Criminal Appeal that on the new evidence there had been a miscarriage of justice at the trial. The appellant, who was serving a 22 year gaol sentence, had much to lose if he failed to discharge it. In a criminal trial there are limits to the extent to which the accused's interest in acquittal can be taken into account. But the factual dispute before the Court of Criminal Appeal was not part of a criminal trial. Further, the appellant had had a very bad criminal record from the age of 16, extending over 23 years. In seriousness, his convictions ranged from driving offences, stealing and crimes of dishonesty, to assault and aggravated robbery. He had served two terms of imprisonment. He was on parole at the time of Mr Muldoon's death. The most recent item in his criminal record was a plea of guilty, in the presence of the jury, to perverting the course of justice in the aftermath of Mr Muldoon's death. At least that part of the record was before the Court of Criminal Appeal. It was not clear whether or not any other part of that criminal record was before the Court of Criminal Appeal. It is not suggested that the evidence of barristers in good standing is always to be preferred to the evidence of witnesses with bad criminal records, but the existence of the appellant's record renders the Court of Criminal Appeal's preference for the appellant's testimony remarkable.

43 A further difficulty sprang from Mrs Muldoon's testimonial position. She said that her grandson was not dangerous, and that on one relevant occasion he had gone to Lithgow District Hospital for a stomach problem only.

---

24 See *Nudd v The Queen* (2006) 80 ALJR 614 at 622 [24]; 225 ALR 161 at 170; [2006] HCA 9.

25 *TKWJ v The Queen* (2002) 212 CLR 124 at 148 [76]; [2002] HCA 46.

Mrs Muldoon had taken the same position in an interview with the appellant's trial counsel. In that interview, Mrs Muldoon had also said that she was not afraid *of* Mr Muldoon, but *for* him, lest he be a danger to himself. The Crown prosecutor had told the appellant's trial counsel that the Crown had access to other evidence to that effect. It followed that Mrs Muldoon would probably have strongly resisted any attempt to obtain evidence from her in cross-examination to the effect that her grandson was a psychotic prone to erratic and violent behaviour when under the influence of drugs and alcohol. To break that resistance down might have required the employment of robust forensic methods. That robustness might have alienated sympathy from the appellant. There was thus much to be said for avoiding this risk by not seeking to shake Mrs Muldoon from her preferred position.

44 And there is another difficulty. It is that the conduct by the appellant's trial counsel of his case as a whole, in circumstances where the appellant chose not to testify, or call evidence, with a view to denying or explaining the many damaging items of evidence against him, suggests considerable professional competence. This makes it harder to support the criticisms which the appellant now makes of his trial counsel through his new counsel.

45 The appellant greatly exaggerated the extent to which the hospital documents supported the view that Mr Muldoon was prone to acts of irrational violence (as distinct from experiencing possible mental health problems). In fact only two documents are material. One document stated:

> "Brought to [Lithgow District Hospital] by concerned family members. Drug induced psychosis. Bizarre/dangerous [behaviour]. Settled in hospital, [follow up] requested."

It is not clear whether the source of the second and third sentences was a family member not qualified to state any expert conclusion, or a medically qualified member of the hospital staff who did not witness the primary evidence on which the conclusion was based. In the second document, a Probation and Parole officer recorded that Mrs Muldoon had stated "that she felt a little afraid of [Mr Muldoon] due to his violence and erratic behaviour at times". Despite this second-hand hearsay, the primary evidence of Mrs Muldoon was likely to have been quite different – that she felt afraid *for* Mr Muldoon.

46 The decision of the appellant's trial counsel not to challenge Mrs Muldoon or tender the documents was a sound exercise of professional judgment. The unelicited evidence would not have advanced the appellant's case materially. The appellant's "case" had to be that he had not struck any blow which caused Mr Muldoon's death and that Ms Quinn had struck at least one. Quite apart from what Mrs Muldoon might have been induced to say against her will, and quite apart from the records, there was evidence that Mr Muldoon had a psychotic disorder and was prone to dangerous behaviour when under the influence of

drugs or alcohol. There was also evidence that Mr Muldoon was under the influence of drugs or alcohol or both on the evening of 22 March 2003. But how did that evidence, or further evidence to the same effect, establish that, or even raise a reasonable doubt about whether, Ms Quinn struck a blow causing his death and the appellant did not? The appellant never answered that question. There is no doubt that violence took place. Mr Muldoon's state might suggest that he insulted the appellant in such a way as to provoke violence, or that he attacked the appellant. But whoever started the quarrel, it did not immediately escalate into mortal violence. The vital question is what happened when it began to escalate in that way. On that question, Mr Muldoon's state when the quarrel began casts no light. The appellant submitted that if Mr Muldoon was in a psychotic state, it would support a suggestion put to Ms Quinn that after the appellant struck Mr Muldoon, Mr Muldoon picked up the baseball bat and struck the appellant. He also submitted that it would call in question J's evidence that the violence began with the appellant repeatedly punching Mr Muldoon. However, J was not cross-examined to suggest that his account was wrong. Indeed, parts of the cross-examination of Ms Quinn conducted by the appellant's trial counsel assumed that J's account was correct. The evidence of Mr Muldoon's medical state does not negate the prosecution theory of the case. It does not even raise a significant possibility of a reasonable doubt about it. It casts no light on what happened during the encounter between Mr Muldoon and an assailant, whoever that assailant was.

The proviso: background

47 The second point is raised in other grounds of appeal. They relate to the proviso.

48 One version of the prosecution case against the appellant was that he was guilty of murder on the ground that he was solely responsible for the death of Mr Muldoon. Another version was that the appellant was guilty of murder because of his participation in a "joint criminal enterprise" with Ms Quinn. The Court of Criminal Appeal found, and the respondent now accepts, that the alternative case should not have been left to the jury. However, the Court of Criminal Appeal considered that this did not occasion any substantial miscarriage of justice, and that the appeal should be dismissed. It thus applied the "proviso" to s 6(1) of the Criminal Appeal Act[26].

49 The appellant's submissions to this Court on the proviso fell into two categories.

---

26 See above at [39].

50 The first category comprised submissions to the effect that the trial judge's error was of a kind which "by its very nature" meant that an appellate court was inevitably and always prevented from applying the proviso. The second category comprised submissions to the effect that even if the first category of submissions failed, in the particular circumstances of this appeal the proviso ought not to be applied.

Did the trial judge's error "by its very nature" prevent application of the proviso?

51 The appellant submitted that it was not possible to apply the proviso because of the seriousness of the error the Court of Criminal Appeal found. He cited an authority referring to "the possibility that the proviso may not be engaged if a trial was so irregular that no proper trial had taken place."[27] He also referred to discussions of whether the proviso cannot be applied where there is a "fundamental" error or an error going "to the root of the proceedings"[28].

52 There are problems in the appellant's reliance on these authorities.

53 The first problem is that some of the authorities referred to suggest that it is preferable, indeed mandatory, to concentrate on the actual words of s 6(1) of the Criminal Appeal Act rather than attempting to apply a gloss on them. Thus, for example, it is not correct to distinguish between fundamental and non-fundamental errors and then to seek to characterise a particular error as fundamental.

54 The second problem is that one of the authorities the appellant relied on is *Handlen v The Queen*[29]. The appellant submitted that *Handlen v The Queen* "is a recent example of a case involving an analogous error" to that which, on the appellant's case, the Court of Criminal Appeal made in these proceedings. The appellant submitted that in that case "the majority … concluded that the nature of the error meant that it was not open to apply the proviso." However, the analogy the appellant seeks to draw breaks down for two reasons. One reason is that in *Handlen v The Queen* there was a single prosecution case: that two drug importations were the result of a joint criminal enterprise to import drugs into Australia. In contrast to the present proceedings, there was no alternative case to the effect that the drug importations were the result of one of the appellants

---

27 *Evans v The Queen* (2007) 235 CLR 521 at 533 [39] per Gummow and Hayne JJ; [2007] HCA 59.

28 *Gassy v The Queen* (2008) 236 CLR 293 at 307 [34] per Gummow and Hayne JJ; [2008] HCA 18, discussing *Wilde v The Queen* (1988) 164 CLR 365 at 373; [1988] HCA 6.

29 (2011) 86 ALJR 145; 283 ALR 427; [2011] HCA 51.

acting alone. The other reason is that the appellants in that case had been convicted on the joint criminal enterprise case under s 11.2 of the *Criminal Code* (Cth). The difficulty in the joint criminal enterprise case in *Handlen v The Queen* was that no such crime existed under s 11.2. That difficulty does not arise here, because a joint enterprise crime exists. The difficulty which does arise here is that there was no evidence that the joint enterprise crime had been committed. It is one thing to decide that the proviso cannot be applied when the single form in which a prosecution case was advanced assumed the existence of a crime which did not exist. It is another thing to decide that the proviso cannot be applied where, although one of the two forms in which a prosecution case was advanced existed in law but there was no evidence to support it, there was another which existed in law and which was supported by evidence.

55 The authorities the appellant cited do not support his contention that the kind of error the trial judge made by its nature precludes the application of the proviso. That contention must fail.

Are there reasons for not applying the proviso in the particular circumstances?

56 The second category of the appellant's submissions about the proviso included the complaint discussed above about counsel's conduct of the trial. Since counsel's conduct has not been shown to have caused a miscarriage of justice, it may be left out of account[30]. The balance of the second category included the following.

57 First, the appellant said that the misdirections about joint criminal enterprise, and related considerations, meant that reduced weight should be given to the jury verdict of guilty against the appellant. However, the Court of Criminal Appeal's conclusion is supported without giving any weight to the jury verdict.

58 Secondly, the appellant submitted that the Court of Criminal Appeal erred in its approach to the proviso. He submitted that all it did was examine what Ms Quinn said and what C said only on the balance of probabilities. It did not analyse the conflicts in their evidence in light of the criminal standard of proof. In the following passages in the reasons for judgment of the Court of Criminal Appeal, the appellant relied on the words appearing in bold type:

> "The **unlikelihood** of C's evidence being correct is underscored by Dr Little's evidence. On Dr Little's uncontradicted evidence, there were no fractures and no lacerations to the deceased's face, which was the part of the body that C alleged Ms Quinn had said she had hit. Dr Little also gave evidence that there were no blood vessels in that part of the body

---

30 See above at [41]-[46].

> from which blood would spurt and therefore spray onto the walls and ceiling. It will be recalled that C not only said Ms Quinn said that blood had sprayed onto the wall and ceiling, but also that she had seen a stain on the wall and ceiling.
>
> It will also be recalled that Ms Quinn gave evidence that the appellant punched the deceased several times. Ms Quinn's evidence was corroborated in this regard by the evidence of her son, J, who said that he saw the appellant punch the deceased, and also by C and Mr Denne, each of whom said that the following day they noticed the appellant's knuckles were swollen. J's evidence differed in some respects from other evidence given by Ms Quinn, C and Mr Denne, particularly in relation to the time and sequence in which people came and went from the house on the night of 22 March and the following morning. However, those matters were incidental to the events of that night. J's recollection that he saw the deceased being punched was not challenged in cross-examination.
>
> Dr Little gave evidence that there was no bruising to the deceased's face … It is not clear from the cross-examination whether the questions were intended to relate to the deceased being hit on the face with an axe or other implement, or whether it related to the deceased being punched. However, the question was cast in terms of the deceased having received '*significant blows*' to the face, which would seem to indicate that the question was directed to him being hit with an implement. Dr Little's reply would also seem to indicate that that was her understanding.
>
> The Crown also relied upon the fact that there was no evidence of any defensive injuries on the deceased's body, indicating that the attack upon him occurred suddenly, as Ms Quinn had stated.
>
> Finally, the Crown relied upon the fact that the evidence suggested that injuries 2-4 and 4 in particular, had been caused by a baseball bat. There was no suggestion in the evidence or in the case advanced by the appellant in cross-examination of Ms Quinn that anyone else had used the baseball bat. The **probability** was also that a baseball bat was used, given that … C gave evidence that the handle of a baseball bat was sticking out from the hessian bag the appellant removed from the house and threw onto the fire at the tip." (italicised words in original; words in bold do not appear in bold in original)

59 There is a question whether the facts referred to need to be established beyond reasonable doubt, as distinct from being facts which if found on the balance of probabilities might, taken together with other facts, support a conclusion that the elements of the offence were proved beyond a reasonable

doubt[31]. Even assuming that they do, the appellant's submission should be rejected. It depends on taking the references to "unlikelihood" and "probability" that appear in bold type in isolation. They should not be taken in isolation, but in context. When taken in context, those words are not to be read as references to satisfaction on the balance of probabilities. They are to be read as references to satisfaction on the criminal standard of proof. The relevant context is afforded by the paragraph preceding those paragraphs just quoted. In that preceding paragraph the Court of Criminal Appeal set out three passages from *Weiss v The Queen*[32]. Each passage referred to the need for an appellate court considering the proviso to be satisfied that guilt was proved beyond reasonable doubt. There are numerous other passages in that case to the same effect[33]. The Court of Criminal Appeal would have been familiar with those passages. A less direct context is afforded by the Court of Criminal Appeal's quotation of passages from the trial judge's summing up. Those passages referred to the need for the prosecution to prove guilt beyond reasonable doubt. The Court of Criminal Appeal also quoted from the summing up delivered by the judge who presided over Ms Quinn's trial. The Court of Criminal Appeal emphasised a passage in that summing up stating that the central issue for the jury was proof by the prosecution of its case beyond reasonable doubt. Beazley JA has presided over many cases in the Court of Criminal Appeal which have involved application of the proviso. Hidden and R A Hulme JJ have been immersed in criminal litigation for the whole of their long professional careers. No doubt occasionally Homer can nod. But the proposition that the Court of Criminal Appeal thought that the civil standard of satisfaction sufficed in relation to the proviso and that the criminal standard need not be applied is, to me, completely incredible.

60 Thirdly, the appellant said that the Court of Criminal Appeal was subject to "natural limitations" in assessing the credit of Ms Quinn in her evidence against the appellant and the credit of C in reporting Ms Quinn's confession that she attacked Mr Muldoon with an axe. However, the Court of Criminal Appeal's conclusion is supported quite independently of reasoning affected by the "natural limitations" an appellate court is subject to in assessing a witness's credibility when compared to the jury. The fact that the Court of Criminal Appeal did not

---

31 See *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535-539, 570 and 599; [1984] HCA 7; *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56; Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842 at 850-851.

32 (2005) 224 CLR 300 at 316-317 [41], [44] and [45]; [2005] HCA 81.

33 (2005) 224 CLR 300 at 312 [29], 315 [38]-[40], 316 [42] and 317 [43].

see Ms Quinn or C give oral testimony was not a disadvantage preventing it from applying the proviso. That is so for the following reasons.

61 The duty of an appellate court considering the proviso was stated thus in *Weiss v The Queen*[34]:

> "The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty." (footnotes omitted)

The assessment demands a survey of the whole of the trial record[35]. The task is to be carried out by each member of the appellate court personally. The relevant question to be asked is not whether the jury which returned the guilty verdict would have done so if there had been no error. Nor is it whether a reasonable jury would convict[36]. Instead, the question for each member of the appellate court personally is whether that member thinks that the evidence properly received established the accused's guilt beyond reasonable doubt.

62 The appellant submitted:

> "So long as an impermissible path to conviction was left open for the jury, particularly in circumstances in which it could not be said that the defence case was adequately placed before the jury, assertions about the strength of the prosecution case do not provide a basis for the application of the proviso."

That is not so. It flatly contradicts what was said in *Weiss v The Queen*. Questions about applying the proviso do not arise unless there has been an appellable error in the conduct of the trial – whether the error lies in leaving open an impermissible path to conviction, or in a failure to put the defence case, or in any other of many possible ways. But once there is an appellable error, it is necessary to examine the strength of the prosecution case as part of an inquiry into whether the appellate court is convinced of guilt beyond a reasonable doubt.

---

34 (2005) 224 CLR 300 at 316 [41] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

35 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [43].

36 *Weiss v The Queen* (2005) 224 CLR 300 at 314-316 [35]-[40].

63 Before stating the conclusions which the assessment leads to in this case, it is desirable to describe the evidence of the three primary non-expert witnesses.

64 *C's testimony.* C gave evidence by closed circuit television and under indemnity. She broke down in the witness box more than once. She said that on the morning of 23 March 2003, the appellant called her and asked her to give him a hand. She picked him and Ms Quinn up at his house. She said that, after dropping J at school, they went to Mr Denne's house and spent some minutes there. She then went back to her car with the appellant and Mr Denne. Ms Quinn stayed at Mr Denne's house. The appellant asked C to drive to a bottle shop. C said: "he then explained to me that somebody – he didn't mention names – had come around to the house, threatened the kids [sic] lives and he'd put a stop to it." In cross-examination, C was asked:

> "Q. What I'm putting to you is that what your uncle said to you around that time were words to this effect, okay, and I'm not suggesting these are the exact words either, but it was more to this style; that a person had come around and been threatening his children and Mr Denne's children – are you nodding, it – do you – –
>
> [A]. I – I'm nodding in listening to what you're saying sorry.
>
> Q. Okay, do you agree that that was part of what he said?
>
> A. To the best of my recollection is what is in my statement. It's possible that that's what could have been said but – –
>
> Q. And that he indicated to you that he had had a fight with a person?
>
> A. That – I really can't remember exactly the conversation.
>
> Q. But it was certainly to that effect wasn't there, that there'd been a fight?
>
> A. Yes.
>
> Q. And so far as the precise words that were used, you really can't be sure what they were?
>
> A. Not a hundred per cent no."

C did not retract her evidence that the appellant admitted that he had put a stop to the person making the threats. That person could only have been Mr Muldoon. On C's evidence, the appellant said that he had "put a stop to it" by killing Mr Muldoon.

65 C testified that the appellant then purchased some beer. In cross-examination, she said that it was Mr Denne who had purchased the beer.

The party returned to the appellant's house. The appellant and Mr Denne took Mr Muldoon's body out of the house and placed it in the boot of C's car. A hessian bag was placed in the boot as well. Two handles were protruding from it. They looked like the handles of a baseball bat and an axe. C then drove the appellant and Mr Denne away. The appellant told C not to exceed 80 kilometres per hour in order to avoid attracting attention. C noticed that the vehicle was being followed by a motorbike, the driver of which was an acquaintance of hers. She told the appellant this. The appellant told C to pull over and tell the acquaintance that she was taking the appellant and Mr Denne camping. C complied with this instruction.

66 The appellant then instructed C to stop at a small clearing in the Ben Bullen State Forest. The appellant and Mr Denne got Mr Muldoon's body and the hessian bag with the protruding handles out of the boot. C asked the appellant what the bag was for. She testified that he said: "we have to get rid of it because it had DNA on it". C was not cross-examined with a view to suggesting that the appellant did not say this. The appellant then told C to go back to Lithgow, and said that he and Mr Denne would find their own way home. The appellant also told C to tell Ms Quinn that he and Mr Denne would find their own way home. On her return to the appellant's house, C met Ms Quinn. The transcript records the following evidence:

"Q. Did you speak to her?

A. Yes.

Q. What did you say to her?

A. I asked her, I, I told her what my uncle had told me to tell her and asked her what went on.

Q. What'd she say?

A. That, that was when she told me that it was Dale, she said they were having a fight.

Q. Who was having a fight?

A. My uncle and Dale and it got out of hand. *I'm not sure whether it was, she said that she hit him or whether it was my uncle that hit him*.

Q. When you say 'hit him', who do you mean by 'him'?

A. Hit Dale.

Q. Did she say what Dale was hit with?

A. With an axe." (emphasis added)

C then testified that she saw blood on the wall and the ceiling. The transcript continued:

"Q. Was there any conversation between you and [Ms Quinn] about the blood on the wall and the ceiling?

A. I asked her what the stain was and she said – –

Q. The stain, I beg [your] pardon, yes.

A. – – that was, that it was blood.

Q. Did she say anything about how it got there?

A. Just that it *sprayed*.

Q. Did she say where it *sprayed* from?

A. It was from Dale.

Q. Did she say anything about where Dale was hit with the axe?

A. On the face.

Q. Did she say who it was that hit him *on the face*?

A. I was sure she said that she hit him." (emphasis added)

67 C testified that at some time after 23 March 2003, but before she spoke to the police in June 2003, the appellant told her that "the police had been to [the appellant's] house and spoke to [Ms Quinn]. [Ms Quinn] said that she didn't know who I was. [The appellant] told me just to pretend that [Mr Muldoon] was still here and don't tell the police anything." The transcript continued:

"Q. Did you say anything to him when he said that to you?

A. I told him that I can't lie.

Q. What did he say to that, if anything?

A. He just told me that, you know, I'd be able to do it.

Q. Did he say anything else apart from that?

> A. He thought that Kevin [Denne] was [the one] who told the police and he said that if – whoever tells the police is going to end up in the same place that Dale did."

68 In cross-examination, C made it plain that she did not know the identity of the deceased person she had driven to the Ben Bullen State Forest. The cross-examination elicited one part of what C had said to the police in June 2003. That part concerned what Ms Quinn had said to her when she returned alone from Ben Bullen State Forest:

> "I asked her who [the body] was because [the appellant] wouldn't tell me, and she told me it was Dale Muldoon … and the officer said 'yeah' and then you continued 'and she told me about the fight that her – that [the appellant] and Dale had had' and the police officer said 'okay what did she [say] happened in the fight'. 'She said that Dale came around and they were all chummy, talking as friends as they do and then Dale, they got alcohol delivered by taxi, right, and then they were drinking and then Dale said something, I got told Dale said something about the kids and he was going to kill Chantelle and all this sort of stuff which is [the appellant's] daughter' and then the police officer said 'all right', then you said 'and [the appellant] just – she said [the appellant] just went ballistic and started hitting him and – and Dale started hitting [the appellant] and [Ms Quinn] didn't know what to do so she grabbed the axe and hit him in the head with it and she said *it cut him straight down the face*'. The police officer said '[Ms Quinn] said that?' and you said 'yes' and the police officer said 'all right' and then you said 'and that's what he's told me so that was, she said, I didn't know what she said, I didn't know what to do because I thought he was going to kill [the appellant] and so that's where it ended …'." (emphasis added)

C had also made statements to the police about the axe which Ms Quinn had allegedly used to hit Mr Muldoon. C said: "I'm not sure which way that it had hit his head but he was still alive and blood was *spurting* on the roof and all around the house and stuff like that" (emphasis added). By "roof" she meant "ceiling". Then, speaking of a blood stain on the ceiling, C told the police: "I noticed the one on the roof when I came back to speak to [Ms Quinn] and when I came back and it was still on the roof that was when she told me that was where she'd hit [Mr Muldoon] with the axe and it had *sprayed* the roof" (emphasis added). C also said to the police that Ms Quinn had told her that the "blood was *spurting* from [Mr Muldoon's] head onto the roof" (emphasis added). C used the word "spurting" several times during this part of the interview. C described to the police Ms Quinn's manner in saying that she had hit Mr Muldoon in the face with an axe thus: "Just at [sic] like it was she'd gone to the shop and bought and [sic] ice cream, basically she didn't seem, she didn't seem upset or worried or anything like that".

69 Two points of detail in C's evidence may be noted. First, most of her evidence related to the day after the murder – Sunday 23 March 2003. C testified that *before* the time she went to the appellant's house, which she said was just before primary school started, she drove her brothers to school. C testified that *while* at the appellant's house she saw J getting ready for school. And she testified that *after* going to the appellant's house she dropped J at school. Non-private schools do not operate on Sundays, unless they are Sunday Schools. No elaborate statement of reasons is necessary to exclude a Sunday School or a private school as an available possibility in this case. J's mother, Ms Quinn, thought that J in fact went out that morning to play tennis with a friend. That understanding corresponds with what J told the police. Secondly, telephone records reveal that C received a call on her mobile telephone at 10.51am on Sunday 23 March 2003. The call – the appellant's call – was made from a public telephone adjacent to a BP service station near the appellant's house. An unsuccessful attempt had been made to contact C's mobile telephone from the same public telephone at 8.38pm the previous evening. Children do not go to school after 10.51am.

70 *Mr Denne's testimony.* Mr Denne testified that he had received a telephone call from the appellant at about 1am on Sunday 23 March 2003. Telephone records indicated that a call was made to him at 1.24am from the public telephone adjacent to the BP service station. The appellant said that there was something he wanted to talk to Mr Denne about. He said the matter was "more important than Sally". Sally was Mr Denne's eldest daughter. Mr Denne obeyed the appellant's instruction and went to the appellant's house. At the front door, the appellant said that he had something to show Mr Denne. He told Mr Denne "not to freak out". Mr Denne entered the house and observed a body wrapped in a blanket. He recognised it as Mr Muldoon, and the appellant confirmed this. Mr Denne asked the appellant what he had done. The appellant said that Mr Muldoon had "threatened his family and my family" – that is, the appellant's family and Mr Denne's family. The families were in fact closely linked: Mr Denne was bringing up as part of his family a daughter of whom the appellant was the biological father. The appellant asked Mr Denne to help him get rid of the body. Mr Denne said he did not want anything to do with it. The appellant said again that Mr Muldoon "threatened his [ie, Mr Denne's] family and my family". The appellant also said that he had helped Mr Denne many times and that Mr Denne had to help him. He asked Mr Denne to return at 8am. Speaking of Mr Denne's partner Tracey, the appellant said: "Don't tell Tracey, don't tell no one."

71 Mr Denne did not return to the appellant's house in the morning, but the appellant came to Mr Denne's house in C's motor vehicle with Ms Quinn. Mr Denne testified that he and the appellant went into the backyard. He testified that the appellant "said I had to come and help him get rid of Dale and I said I didn't want anything to do with it and he said I think something to the words of

'If you don't come and help me I'll put you with him'." Mr Denne's evidence continued:

> "Q. What did you understand when he used the word – well the word 'him' who did you understand him to be talking about?
>
> A. Dale.
>
> Q. How would you describe his tone of voice when he used those words to you?
>
> A. Angry."

72 Mr Denne recollected travelling back to the appellant's house. He did not recollect stopping to buy beer on the way, and in cross-examination he denied it. He agreed with C's evidence that the body and the hessian bag were placed in C's car by the appellant.

73 Mr Denne's evidence described the drive to Ben Bullen State Forest and the meeting with the motorcyclist with whom C was acquainted. He said that he had dug a hole for the body with a stick. He described the burial. Mr Denne also said that he was crying at the time, and that the appellant told him "to stop my blubbering or he'll put me in there with Dale." He described the appellant's manner in saying this as "[v]ery serious". He described the burning of the hessian bag, and said that the appellant then changed his clothing. The two later returned to the appellant's house and Mr Denne went home. At some time after that day, the appellant told Mr Denne not to tell the police or anyone what had happened. Mr Denne testified that he had seen television reports of the police investigation. He said that after he had seen them, the appellant "came around" to find out if Mr Denne had said anything to anyone, including the police.

74 Mr Denne was not cross-examined in relation to his evidence in chief about any of the express admissions made, threats given or warnings issued by the appellant.

75 *Ms Quinn's testimony.* Ms Quinn gave evidence to the effect that the appellant injured Mr Muldoon by punching him, then by hitting him with a baseball bat, and then by hitting him with an axe. She testified that after the appellant had punched Mr Muldoon but before the appellant had hit him with the baseball bat, the appellant became "quite upset, he was yelling, he said 'You're not leaving here alive'." She also said that after the appellant had hit Mr Muldoon with the axe, the appellant said to her: "I've known this fuckwick [sic] all my life and I killed him like that, I've only known you five years, imagine what I'll do to you." Her version of Mr Denne's visit in the early hours of Sunday 23 March 2003 corresponded with Mr Denne's account. She testified that Mr Denne told the appellant: "I've helped you out at other times but this time you're on your own", to which the appellant replied: "no, you will help me,

you will help me, I don't want to have to dig two holes". Ms Quinn said that on the morning of Sunday 23 March 2003 she was driven to Mr Denne's house. She said that the appellant told her not to return home to the appellant's house until midday. She obeyed. She said that C, on returning to the appellant's house after midday, told her that "the boys" would find their own way back that evening. She denied saying anything to C about having attacked Mr Muldoon with an axe.

76 Ms Quinn was cross-examined extensively, particularly in relation to the admission which C had attributed to her. She adhered to her denial. Some other aspects of the cross-examination may be noted.

77 It was suggested to her that when Mr Denne came to the appellant's house some time after 1am on 23 March 2003 he was informed that she had hit Mr Muldoon on the head with an axe. She denied this. This was not an allegation which Mr Denne supported; nor was he asked in cross-examination to support it. He was asked whether he had told a Christine McKinnon that Ms Quinn had told him that she had killed Mr Muldoon. He denied this. The defence did not call Christine McKinnon or anyone else who claimed that Mr Denne said this.

78 Other specific matters were put to Ms Quinn which she denied – that Mr Muldoon said he was going to shoot the children, that he was going to shoot Crystal and Chantelle, and that J was "a – – of a kid". She said she would have recalled that expression because if it had been used she "would've been very, very upset". It was also put to her that on the morning of 23 March 2003, Mr Denne came to the appellant's house. She denied that proposition and her denial was supported by Mr Denne.

79 The appellant submitted that Ms Quinn's evidence – particularly her evidence about completing preparations for her son's dinner and not discussing the death of Mr Muldoon – was circumstantially incredible. That submission must be rejected. Even if C's evidence were accepted, the position is that the appellant had brutally inflicted injuries on Mr Muldoon, that Mr Muldoon had died, that Ms Quinn was pregnant and that she was responsible for the wellbeing of both that child and her young son, J. In the presence of a man who had just committed acts of terrible violence and threatened others, to say as little as possible and carry on as normally as possible was not incredible, but credible.

80 The appellant also submitted that Ms Quinn's denial of C's evidence about her admission was incredible. In fact, it was much more credible than C's assertion of the fact asserted in the alleged admission, for that fact was contradicted by the medical evidence. So far as C's account was favourable to the appellant, it contained three elements: that Ms Quinn had struck Mr Muldoon because he had overpowered the appellant; that Ms Quinn had

struck Mr Muldoon's face with the axe; and that blood spurted from Mr Muldoon's wounds to the ceiling. In a passage quoted above[37], the Court of Criminal Appeal explained the difficulties in reconciling C's testimony with the medical evidence. Contrary to C's claim that Ms Quinn spoke of an axe cut straight down Mr Muldoon's face, there were no fractures or lacerations to his face. Indeed, Dr Little testified that none of the injuries to Mr Muldoon's head could have been caused by the sharp part of an axe. Nor were there blood vessels in that area which would spurt and spray onto the walls and ceiling. The appellant submitted in this Court that this reasoning of the Court of Criminal Appeal was defective, because Dr Little had given evidence that blood could have got onto the wall and ceiling if it were "cast-off blood". She said that that phenomenon occurs "when an implement that for example hits someone over the head gets blood on it. Then when it's lifted up again the blood that's on it gets flung off and that's called 'cast-off blood' so that can be propelled quite a distance." Contrary to the appellant's submission, that evidence is in fact inconsistent with the words of Ms Quinn as reported to the jury by C. Those words were that blood "sprayed" or "was spurting" from the head of Mr Muldoon. Those words purportedly described a primary event actually observed by Ms Quinn. They did not merely state an inference from the existence of blood on a ceiling. There is a further difficulty with C's assertion. Neither the appellant nor Mr Muldoon had any injuries indicative of a fight in which Mr Muldoon overpowered the appellant at a time before the baseball bat and the axe were used to injure Mr Muldoon. J's evidence was that it was the appellant who first punched Mr Muldoon, and that Mr Muldoon did not retaliate but asked the appellant, a bigger man, to stop. J's evidence on this point was not challenged. It was consistent with the evidence of Ms Quinn.

81 A further reason for rejecting C's evidence regarding Ms Quinn's admission is that in chief C testified initially that she was "not sure" whether Ms Quinn had said that she had hit Mr Muldoon with an axe or that the appellant had hit Mr Muldoon with an axe. This was a strange answer. It was strange because she must have appreciated that her evidence about what Ms Quinn said about the identity of the person using the axe was, if true, a most important part of her evidence. Her uncertainty cuts away any credibility in her later claim that Ms Quinn had made the admission. Procedurally, C's evidence created difficulties for the prosecution. She was called by the prosecution, either because the prosecution saw it as its duty to do so[38] or because some aspects of her evidence favoured the prosecution case. From the defence point of view, initially C did not give the "right" answer in chief on the admission. She gave the "right" answer a little later, and repeated it in cross-examination. But she only did so in

---

37 See above at [58].

38 *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38.

cross-examination after a great deal of her interview with police officers had been read out to her – that is, after questions of an extremely leading kind had been put to her. But the prosecution had no opportunity to challenge her on those answers, nor to test to what extent they were the product of coaching, or worse, by her uncle. It could not invoke s 38 of the *Evidence Act* 1995 (NSW), because C's initial evidence in chief was not "unfavourable" to the prosecution.

82 It is inherently improbable that Ms Quinn would have attacked Mr Muldoon. She had nothing against Mr Muldoon. The appellant was bigger than Mr Muldoon, who was in turn bigger than Ms Quinn. Ms Quinn only weighed 54 kilograms. On the evidence which was admitted, there was no reason to suppose that the appellant acting alone was incapable of "stopping" Mr Muldoon. It would have been against nature for her to commit murder while her young son was present in the house. The greater the doubt that Ms Quinn attacked Mr Muldoon, the greater the likelihood that the appellant attacked and killed him. There is no other possible killer.

83 In the circumstances, taken as a whole, C's evidence about Ms Quinn's alleged admission is valueless.

84 *The significance of the appellant's failure to cross-examine.* Trial counsel representing the appellant cross-examined the prosecution witnesses on some points but not others. She is not to be criticised for this. It is not suggested that counsel's tactics in cross-examination were anything other than soundly judged. For example, leaving aside ethical questions, it would have been totally counterproductive for counsel to have cross-examined Ms Quinn to suggest that she had inflicted all the blows on Mr Muldoon. The contrary evidence of J, the state of the appellant's knuckles, and Ms Quinn's size, convincingly negate that version of events. It would have been pointless to have cross-examined the prosecution witnesses about the appellant's conduct after Mr Muldoon's death. The appellant had already pleaded guilty to the offence of perverting the course of justice which was based on that conduct.

85 However, the failure of counsel for one party to cross-examine a witness called by the other side on evidence which the witness has given on a particular matter can support an inference that the cross-examining party accepts the evidence. That inference could be negated if the party calling the witness is on notice that the point is disputed or if there exists some other special factor, for example that the evidence is inherently incredible[39]. Failure to cross-examine on a particular point can also make it easier for the trier of fact to accept the witness's evidence on that point, especially if it is uncontradicted by other evidence. In the absence of a formal admission, a plea of not guilty puts in

---

39 *Seymour v Australian Broadcasting Commission* (1997) 19 NSWLR 219 at 236.

controversy all main facts in issue, like, here, whether Ms Quinn struck a blow. There was full cross-examination on the main facts in issue in this case. But a plea of not guilty does not necessarily put in controversy subordinate or collateral facts in issue, like the details of the witnesses' behaviour after the death, from which inferences might be drawn in relation to the main facts in issue[40]. These propositions are, of course, subject to the overriding caveat that, in the absence of a formal admission, it is not possible in criminal cases to remove an issue from the jury's consideration[41]. However, when the proviso is under consideration, the appellate court performs the role of the trier of fact. Trial counsel for the appellant put many aspects of the defence "case" to C, Mr Denne and Ms Quinn. It is significant that she did not put other aspects of that "case" to them. That renders it easy to make findings adverse to the defence "case" in areas where the prosecution witnesses gave evidence in chief undermining that "case" but were not cross-examined.

86 *Evidence suggesting a consciousness of guilt.* Evidence suggesting a consciousness of guilt is receivable as an admission. A great deal of evidence of this kind was received at the trial without objection. It is open to the party against whom the evidence is tendered to offer some innocent explanation of it which may nullify its force[42]. No innocent explanation was offered here, for the appellant did not testify and the defence called no other evidence. And no innocent explanation was elicited in cross-examination.

87 Various standard categories of evidence revealing a consciousness of guilt are relevant to this appeal. One category comprises the appellant's attempts to preserve secrecy in relation to the circumstances of Mr Muldoon's death and the removal of his body from the appellant's house. This category included the appellant's express admissions and his attempts to keep them secret.

> "If an accused engages in conduct calculated to prevent the disclosure of something capable of implicating him or her in the commission of an offence, it is conceivable that the conduct may properly be interpreted as evincing consciousness of guilt … [W]here an offender has a conversation with a friend, of which the contents are capable of incriminating the offender, and thereafter engages in conduct calculated to prevent disclosure of the incriminating sections of the conversation, it is

---

40 See *HML v The Queen* (2008) 235 CLR 334 at 425 [274]; [2008] HCA 16; *BBH v The Queen* (2012) 86 ALJR 357 at 393-394 [194]; 286 ALR 89 at 135; [2012] HCA 9.

41 *R v Rajakaruna (No 2)* (2000) 15 VR 592 at 608 [53].

42 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 391-392; [1975] HCA 8.

> open to a jury to infer that the offender's conduct is motivated by consciousness of guilt of the offence and fear that disclosure of the contents of the conversation will reveal his or her involvement in the offence."[43]

Another category comprises the burial of Mr Muldoon's body, the burning of the hessian bag containing the baseball bat and axe, and the appellant's decision to change out of the clothes he had worn at and after the time of the killing.

> "[I]f an accused attempts to hide a weapon known to have been used in a homicide, or to hide a motor car involved in a hit and run accident, or to destroy clothes seen to have been worn by a burglar, a jury may infer that the accused is motivated by consciousness of guilt of the offence charged and fear that disclosure of the item will reveal his or her involvement in the offence."[44]

The "clandestine disposal of a body" is "of itself discreditable"[45]. Another well-known category is lies[46]. The procuration of others to lie can reveal consciousness of guilt. One example of procuration to lie is the subornation of false testimony[47]. A related example is the appellant's subornation of false statements to police officers.

88 There is a question whether the reception of admissions by conduct other than lies is regulated by rules which are similar to those employed in relation to lies[48]. It is not necessary to decide that question. The admissibility of the appellant's conduct after Mr Muldoon's death was not in issue either at trial or on appeal. If it had been, those rules would have been satisfied. The conduct relied on was identifiable and identified. The conduct related to a knowledge of some

---

43 *R v Farquharson* (2009) 26 VR 410 at 454 [174] per Warren CJ, Nettle and Redlich JJA.

44 *R v Farquharson* (2009) 26 VR 410 at 454 [174] per Warren CJ, Nettle and Redlich JJA. See also *R v Panozzo* (2007) 178 A Crim R 323 at 335 [28].

45 *R v Wildy* (2011) 111 SASR 189 at 197 [34] per Vanstone J.

46 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 564; *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63.

47 *Moriarty v The London, Chatham, and Dover Railway Co* (1870) LR 5 QB 314 at 319. See also *R v Watt* (1905) 20 Cox CC 852 at 853; *R v Flanigan* (1997) 190 LSJS 499 at 504.

48 For the rules, see *Edwards v The Queen* (1993) 178 CLR 193 at 210-211.

aspect of the offence. The conduct was carried out because the appellant knew that if it had not been carried out he would have been implicated in the commission of the offence. There was no reasonable possibility that the conduct was carried out for some innocent reason.

89 *The evidence reviewed.* In summary, there are several reasons for concluding beyond reasonable doubt that the appellant was responsible for the murder of Mr Muldoon.

90 The appellant obviously had the means to murder Mr Muldoon. He also had the opportunity. And he had a motive for murder, quite apart from whatever insulting, provocative or dangerous remarks Mr Muldoon made just before violence broke out. There was animosity between the two men. This animosity related to a Ms Burley. Ms Burley commenced a relationship with Mr Muldoon at the age of 14. After separating from Mr Muldoon, she commenced a relationship with the appellant. It lasted six to eight months. Thereafter she returned to Mr Muldoon for two years. And after that she went back to the appellant for two years. Ms Burley testified that after she had left the appellant for the first time and resumed her relationship with Mr Muldoon, the appellant said to Ms Burley that if he found out that she was running around with Mr Muldoon again he would "get" Mr Muldoon. Ms Burley's mother repeatedly testified to a similar threat made by the appellant against Mr Muldoon.

91 The appellant made numerous express admissions of killing Mr Muldoon – one to Ms Quinn, two to Mr Denne, and one to C. Immediately after the killing he said to Ms Quinn that he had killed Mr Muldoon[49]. In contrast to the extremely detailed and searching cross-examination of her on other subjects, Ms Quinn's evidence on that point was only challenged in relation to when the appellant said that, not whether he said it. The appellant twice admitted killing Mr Muldoon when Mr Denne, on seeing the body in the early hours of 23 March 2003, asked the appellant what he had done[50]. Mr Denne's evidence in chief on these points was not challenged in cross-examination, though other aspects of his testimony were strongly challenged. The appellant admitted to C on the morning of 23 March 2003 that somebody, who can only have been Mr Muldoon, "threatened the kids' lives" and "he'd put a stop to it". C's evidence on this point was not directly challenged in cross-examination. The appellant also made an express admission to C that the hessian bag containing the baseball bat and axe had DNA on them. When that statement is taken in context, it is plain that the appellant was referring to his own DNA. That evidence was not challenged in cross-examination.

---

49 See above at [75].

50 See above at [70].

92 Further, the appellant made numerous admissions by conduct.

93 One admission by conduct was the appellant's role in arranging for the destruction of evidence by burying the body and burning the hessian bag containing the baseball bat and the axe.

94 Another was the appellant's procurement of others to tell lies. He asked C to lie to her friend on the motorbike about the purpose of their journey to the forest. He procured C to tell a lie by pretending that "Dale was still here".

95 The appellant also made admissions by conduct in his endeavours to maintain secrecy. He told C not to tell the police about Mr Muldoon's death. In the early hours of 23 March 2003 he told Mr Denne not to tell Tracey or anyone. After he and Mr Denne buried Mr Muldoon he told Mr Denne not to tell the police or anyone else.

96 There were other most important admissions by conduct. They were in the form of threats. The appellant threatened others in relation to his need for their assistance in disposing of the body and the bag. He also threatened others to secure their silence. In substance, the appellant threatened Ms Quinn with death immediately after the killing of Mr Muldoon when he said that he had known Mr Muldoon all his life "and I killed him like that, I've only known you five years, imagine what I'll do to you." This was a threat to kill his de facto wife, carrying an unborn child of which he was the father. He threatened Mr Denne with death after Mr Denne refused to help dispose of the body. This was a threat to kill an old friend. That threat is established by the evidence of Ms Quinn, who testified that the appellant said: "no, you will help me, you will help me, I don't want to have to dig two holes". That threat is also established by the evidence of Mr Denne, who testified that the appellant said: "If you don't come and help me I'll put you with him". Neither item of testimony was challenged in cross-examination. The appellant also threatened Mr Denne with death while Mr Denne was weeping after Mr Muldoon's burial. There was no challenge to this evidence in cross-examination. The appellant threatened C with death after she said that she would not lie to the police. He said "whoever tells the police is going to end up in the same place that Dale did." This was a threat to his 18 year old niece. This evidence was not challenged in cross-examination. The man who made these chilling threats to murder his de facto wife (pregnant with his child), his old friend and his young niece would not have had any scruples about murdering Mr Muldoon. There was no time limit to the threats. They stand to this day, ready to be carried out whenever suitable opportunities present themselves. They have an even deeper significance. A man who tells his 18 year old niece, for example, that if she tells the police anything she will "end up in the same place [Mr Muldoon] did" is conveying the message that it was he who caused Mr Muldoon to end up in that place. In that callous message lies the terrifying aspect of the threat. It is the terrifying aspect which makes it efficient. It must have been even more callous and terrifying when the threat was

made – as all of them were – in the presence of Mr Muldoon's body or shortly after its burial. The appellant was a well-built man in the prime of life. He was luridly indicating that he had both the disposition and the capacity to kill if necessary. The extent of the duress he applied to Ms Quinn, Mr Denne and C is measured by its success in achieving its goals for some months. These threats and the other admissions by conduct indicate that the appellant viewed himself as being entirely responsible for Mr Muldoon's death, not as a man merely seeking to help his de facto wife out of the consequences of a killing by her for which he was not responsible.

97 There is one further group of relevant considerations. It comprises inferences which can be drawn from the instructions evidently given to the appellant's trial counsel for the purposes of conducting cross-examination. The following propositions were stated in leading questions put to Ms Quinn in cross-examination: that Mr Muldoon had put a knife to the appellant's throat; that Ms Quinn had hit Mr Muldoon with an axe four times; and that Mr Muldoon had struck the appellant with a baseball bat. However, no questions were put to C, Mr Denne or Ms Quinn suggesting that the appellant had ever denied guilt, or that the appellant said that Ms Quinn had struck any blows, or that the appellant said that Mr Muldoon had attempted to knife him, or that the appellant said that Mr Muldoon had hit him with a baseball bat, or that the appellant remonstrated with Ms Quinn for murdering Mr Muldoon. There was no evidence to this effect. The defence "case" was that Ms Quinn struck the fatal blow and that Mr Muldoon had employed a knife and baseball bat on the appellant. No attempt was made to elicit any evidence that the appellant had propounded that "case" to anyone on 22-23 March 2003, or at any time before the trial. Yet if the events supposedly underpinning that "case" had happened, it would have been strange that he had not mentioned them very close to the time when they allegedly took place. It would have been strange, for example, if the appellant had not attempted to improve his position in the eyes of the shocked Mr Denne by saying that Ms Quinn had killed Mr Muldoon and that Mr Muldoon had menaced him with a knife and a baseball bat. This reasoning does not contravene the appellant's right to out-of-court silence. That right applies in relation to questions from police officers[51]. Circumstantial inferences may be drawn from silence, coupled with what was said, in the presence of persons who are not police officers, but members of an accused person's own circle.

98 Some of the admissions which Ms Quinn said the appellant had made to her were challenged in cross-examination. However, they were not dissimilar to those to which C and Mr Denne testified, and the admissions to which C and Mr Denne testified in chief were not challenged in cross-examination. The challenges to Ms Quinn's evidence were often only of the most formal kind.

---

51 *Petty v The Queen* (1991) 173 CLR 95 at 99; [1991] HCA 34.

Thus it was put to Ms Quinn that the appellant "never threatened you", to which she said: "Yes he did." In these circumstances, the evidence of C and Mr Denne was powerfully corroborative of Ms Quinn's.

99 In this Court, counsel for the appellant correctly submitted that "all this post-event conduct … may look bad, and it does look bad". But he went on:

> "in the context of what one is actually considering here, it does not point determinately in the direction of one version against the other. It is adverse evidence, but it does not actually strongly assist in the resolution of the narrow issue that is involved in this case."

100 One view of the narrow issue is whether Ms Quinn is to be believed in relation to what she said she observed the appellant do and in relation to her denial of C's evidence that she admitted hitting Mr Muldoon with the axe. That issue is capable of being investigated by analysing the totality of the post-killing conduct of the appellant, Mr Denne, Ms Quinn and C. That conduct reveals that the only person who instigated the removal and burial of Mr Muldoon's body and the burning of the hessian bag with the baseball bat and axe, which the appellant said contained DNA evidence, was the appellant. It reveals that the appellant made a series of brutal threats to commit murder if his orders were not obeyed. The recipients submitted to those threats without demur and without fail, at least for a time. The appellant through his counsel – in the form of questions which were asked, and in the questions which were not asked – accepted the correctness of the evidence about the express admissions, the arrangements for removal and burial, the burning of vital evidence and the making of the threats. The appellant's conduct in relation to Ms Burley suggests that making threats of this kind was for him a standard modus operandi.

101 The "united force of all the circumstances put together"[52] is very powerful even if attention is limited to the appellant's behaviour. But it is not right to limit attention in that way. It is necessary to take into account and weigh together all the circumstances[53]. One key circumstance is that on the appellant's theory of the case, Ms Quinn had at least as much reason to dispose of the body and the murder weapons as the appellant. But she took no initiative whatever in that regard. Only the appellant did.

---

52 *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279 per Lord Cairns LC, quoted with approval by Gibbs CJ and Mason J in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535.

53 *R v Hillier* (2007) 228 CLR 618 at 637-638 [46]-[48]; [2007] HCA 13.

102 Those considerations show beyond reasonable doubt that the appellant's behaviour was the sole cause of Mr Muldoon's death and that the killing was murder.

Order

103 The appeal should be dismissed.