HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND GORDON JJ

THE QUEEN APPELLANT

AND

GERARD ROBERT BADEN-CLAY RESPONDENT

The Queen v Baden-Clay
[2016] HCA 35
31 August 2016
B33/2016

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 and 2 of the Court of Appeal of the Supreme Court of Queensland made on 8 December 2015, and in their place order that the appeal to that Court be dismissed.*

On appeal from the Supreme Court of Queensland

Representation

W Sofronoff QC with D C Boyle and S J Hedge for the appellant (instructed by Director of Public Prosecutions (Qld))

M J Byrne QC with M J Copley QC for the respondent (instructed by Peter Shields Lawyers)

CATCHWORDS

The Queen v Baden-Clay

Criminal law – Criminal liability – Where respondent's wife disappeared and body later found – Where respondent involved in sexual affair with another woman – Where some injuries to respondent's cheek likely caused by fingernails – Where respondent gave evidence at trial denying involvement in killing wife and disposing of body – Where jury convicted respondent of murder – Where Court of Appeal held hypothesis of unintentional killing not excluded by prosecution and substituted verdict of manslaughter – Where common ground on appeal that respondent killed his wife – Whether hypothesis consistent with innocence of murder open – Whether jury's verdict unreasonable – Whether jury entitled to be satisfied beyond reasonable doubt that respondent acted with intent to kill or cause grievous bodily harm when he killed his wife.

Words and phrases – "circumstantial evidence", "hypothesis consistent with innocence", "intention", "intractably neutral", "lies", "motive", "post-offence conduct", "role of the jury", "unreasonable verdict", "whole of the evidence".

Criminal Code (Q), s 668E(1).

1 FRENCH CJ, KIEFEL, BELL, KEANE AND GORDON JJ. On 15 July 2014, following a trial in the Supreme Court of Queensland before Byrne SJA and a jury, the respondent was found guilty of the murder of his wife, Allison Baden-Clay.

2 The respondent appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland on the ground that the jury's verdict was unreasonable. The Court of Appeal (Holmes CJ, Fraser and Gotterson JJA) allowed the appeal on that ground, set aside the respondent's conviction on the charge of murder, and substituted a verdict of manslaughter.

3 The Court of Appeal held that, although it was open to the jury to find that the respondent had killed his wife, the evidence did not allow the jury to be satisfied beyond reasonable doubt that the respondent intended either to kill her, or to cause her grievous bodily harm. In particular, the Court of Appeal accepted the respondent's submission, made for the first time on appeal, that the prosecution had not excluded the hypothesis that the respondent had struck his wife in the course of a struggle and that she had died as the result of a fall, or in some other manner, that did not involve an intent on his part either to kill her or to cause her grievous bodily harm.

4 On the appeal to this Court, the Crown contended that it was open to the jury, having regard to all the evidence, to be satisfied beyond reasonable doubt that the respondent killed his wife with intent to kill her or to cause her grievous bodily harm. That contention should be accepted.

5 The respondent gave evidence at his trial. He denied that he had fought with his wife, killed her and disposed of her body. The respondent's evidence did not support the hypothesis held by the Court of Appeal to be consistent with the respondent's innocence on the charge of murder. The hypothesis on which the Court of Appeal acted was not available on the evidence; and so the Court of Appeal was wrong to conclude that it was unreasonable for the jury to find on the whole of the evidence that the deceased's death at the respondent's hands was intentional[1].

6 The appeal should be allowed and the verdict of guilty of murder restored.

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1 *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63; *MFA v The Queen* (2002) 213 CLR 606 at 614-615 [25], 623 [55]-[56]; [2002] HCA 53.

The evidence at trial

7 The respondent gave evidence that he, his wife and their three daughters were at home on the night of 19 April 2012. He said that he went to bed at about 10 pm, leaving his wife, who was watching television, in the living room. He awoke just after 6 am on 20 April 2012. His wife was not at home, but she often went for an early morning walk. That morning, he was responsible for getting the children ready for school and taking them there. He was "under the pump a little bit" and was "rushing that morning". He said he cut himself shaving.

8 The respondent phoned and sent text messages to his wife, but there was no response. He also called his parents to tell them that he did not know where his wife was. He went driving around the suburb looking for her. At 7.15 am he called 000 to report her missing.

9 The police arrived at the respondent's home at 8 am. The respondent was asked whether he and his wife were estranged; he denied it. He was asked whether there was an "indication that the marriage is going to break up" and he answered "Um I hope not." He went on to say that he "had an affair … that ended last year."

10 The deceased's body was found on 30 April 2012 under a bridge on a bank of Kholo Creek, some 13 kilometres from her home.

The forensic evidence

11 Dr Nathan Milne, the forensic pathologist who conducted the post-mortem examination of the deceased's body, was unable to determine the cause of death because of the significant level of decomposition of the body, but in his opinion, the deceased did not die of natural causes. There were no definite injuries found which might have suggested the use of a weapon. It may be noted that there was no evidence of a skull fracture.

12 Dr Milne estimated that the time of death was consistent with the last time she was seen alive 11 days earlier.

13 There were no signs suggestive of drowning. Dr Milne said that if the deceased had fallen from the bridge onto the ground, significant injuries would have been expected, but acknowledged that if she fell into the water, there may not be detectable injuries.

14 Although the deceased did at various times suffer from depression, for which she was prescribed medication, Professor Olaf Drummer, a forensic

pharmacologist and toxicologist, concluded that consumption of drugs did not contribute to her death. In addition, none of the medical practitioners or psychologists who had treated her held any concerns that she was suicidal.

15 Leaves found on the body were from trees of six species that grew at the respondent and his wife's home; four of these did not grow at the site at which the body was found.

16 The respondent and his wife's eldest child thought that her mother was wearing a "sloppy jacket" and pyjama pants at the time the deceased was watching television. The deceased's body was found clothed in three-quarter length pants, socks, sneakers and a singlet top which had a bra built into it.

17 Blood matching the deceased's DNA profile was found in the rear section of her car, which had only been acquired in February 2012.

18 Tests on the respondent's mobile phone showed that it had been placed on a charger, adjacent to the side of the bed on which he slept, at 1.48 am, at a time when he claimed he was asleep.

The respondent's injuries

19 Three experts gave evidence that there were two categories of injuries to the respondent's right cheek. Their evidence was that it was most likely that fingernails caused one set of scratches and it was implausible that those scratches had been caused by a shaving razor. The second set of marks appeared to be different. They were fresher, and were consistent with having been caused by a razor "particularly if moved from side to side as it was drawn from front to back or back to front across the face."

20 There were also injuries to the respondent's torso which were examined by doctors in connection with the proceedings, but these injuries were not relied upon by the prosecution.

The respondent's relationship with Ms McHugh

21 The respondent had been involved in a sexual affair with another woman, Ms Toni McHugh, since August 2008. The affair with Ms McHugh began when she commenced working for the respondent's real estate agency and continued until a friend informed the respondent's wife in September 2011. The respondent then ceased the affair and Ms McHugh left his employ. The affair recommenced at the respondent's instigation in December 2011.

22 Ms McHugh gave evidence that, during the course of the affair, the respondent told her that he had no relationship with his wife, that he did not love his wife, that he loved Ms McHugh, and that one day he wanted to come to her "unconditionally". On the last occasion Ms McHugh and the respondent met before the deceased's disappearance, she said that she needed to know what was going to happen with respect to their relationship. The respondent told her that he would be out of his marriage by 1 July. He confirmed this promise in writing less than three weeks before the deceased's disappearance.

23 Ms McHugh gave evidence that she and the respondent had discussed their living arrangements between December 2011 and April 2012, and that although the respondent was willing to "entertain" such discussions, "[h]e never really got practical about anything." Ms McHugh, referring to the 1 July deadline the respondent had set, said: "I thought he's just pulling a number out of thin air. In actual fact, I just didn't believe it. I didn't believe it at all."

24 On 20 April 2012, Ms McHugh was to attend a real estate conference. In the late afternoon of 19 April 2012, she phoned the respondent to talk about the conference. The respondent told her that two of his staff members were going to attend. Ms McHugh inferred that one of the attendees would be the respondent's wife. Ms McHugh became upset, and told the respondent that he needed to tell his wife about their relationship and that it was unfair to both her and his wife for them to be in the same room together. His response was that he was thinking of selling the business and that he would do that after he had left his wife. Ms McHugh said that she believed that the respondent was "taking more of a stand" and that "something was going to be different this time".

25 As noted above, on the morning of 20 April, the respondent admitted to police that he had had an affair, but told the police that it had ended. The respondent told police that he and his wife had seen a counsellor the previous Monday, who had suggested that 15 minutes be set aside each night for his wife to "vent and grill" the respondent about his affair (which she thought had ended). The respondent said that he and his wife had had a 15 minute session the previous night and that there were "some difficult things that we talked about". The respondent also said that their financial situation was "pretty tight".

26 Ms McHugh gave evidence that she attended the conference on 20 April. She called the respondent at lunchtime to ask him where his wife was. He told her that his wife was missing. On that day, he told her that they "need to not ... communicate and lay low."

27 On 21 April, the respondent called Ms McHugh and told her that police would want to speak to her and that she should tell the truth. While she was with police, he called her again and told her just to answer "yes" or "no". He asked her whether she had told the police that they were together again, and she replied "yes". The call ended. Ms McHugh and the respondent met one further time, when the respondent told her that she "would have to fall in love with someone else" and that "things weren't going to be looking good for him."

28 In his evidence, the respondent admitted that he had told Ms McHugh that he loved her and that he had undertaken to leave his wife by 1 July. However, he said that he had never loved her and merely did that to "placate" her. He admitted that he told her that he did not love his wife, but insisted that he actually did.

29 For the sake of completeness, it may be noted that the respondent was experiencing financial difficulties at the time of his wife's death; but the prosecution disavowed any suggestion that the respondent was motivated to kill his wife in order to obtain the proceeds of a policy of insurance on her life. It is unnecessary to say any more about this aspect of the matter.

The issue of intent at trial

The Crown case

30 At trial, the Crown did not seek to suggest that the respondent had premeditated, that is to say planned, the killing of his wife. The Crown case was put on the basis that on the night of 19 April 2012, the respondent was confronted by the consequences of his conduct, which included the long-term tension in his relationship with his wife, the tension in his relationship with Ms McHugh, his discussions with Ms McHugh on the late afternoon of 19 April, and the prospect of his ongoing relationship with Ms McHugh being exposed to his wife at the conference which was to be held on the following day, and of his wife being unwilling to forgive him a second time. In these circumstances, he became involved in an altercation in which he killed his wife with the intention of doing so or of causing her grievous bodily harm.

The respondent's case

31 The defence case at trial included a suggestion that the respondent's wife may have taken her own life in a fall from the bridge over Kholo Creek or by drowning. The forensic evidence noted above provided a compelling answer to this suggestion. The jury were entitled to reject as fanciful the suggestion that

the deceased had somehow made her way over the 13 kilometres from her home in order to do away with herself by throwing herself off the bridge into Kholo Creek. Other possible causes of death suggested on behalf of the respondent such as alcohol or drug toxicity could similarly be rejected by the jury in light of the expert evidence adduced at trial.

32 The respondent's evidence was that he had nothing to do with his wife's death. In particular, he denied that he fought with her on the evening of 19 April or the morning of 20 April. He denied that he left his children alone in the house to go to the Kholo Creek bridge. He denied that he took any steps to dispose of his wife's body.

33 There was some discussion at trial as to the basis on which a verdict of manslaughter should be left to the jury as an alternative to murder. In answer to the trial judge's question: "What is the reasonable hypothesis consistent with an absence of an intention to kill?", counsel for the respondent replied: "That, on the prosecution case, death was occasioned unintentionally." His Honour responded: "But there are no fractures of the head." Counsel agreed with that observation, and in response to the trial judge's further remark: "So there's no suggestion that she's fallen and hit her head on bricks or cement", counsel answered: "No." Later, prior to the trial judge's summing up, his Honour canvassed with counsel for the respondent the possibility of a direction that the defence contended in the alternative that the conduct in question did not tend to prove an intentional killing. Counsel for the respondent said the problem with that was "it's not our contention".

34 On this footing and without objection from the respondent, the hypothesis which the Court of Appeal held to be available to the respondent was not put before the jury. The alternative verdict of manslaughter was left to the jury because the Crown bore the onus of proving that the respondent acted with intent to kill or to cause grievous bodily harm.

The Court of Appeal

35 The respondent appealed against his conviction pursuant to s 668E(1) of the *Criminal Code* (Q) on the ground that the verdict was unreasonable[2].

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2 The respondent also appealed on two grounds concerning the adequacy of the trial judge's summing up to the jury. The Court of Appeal rejected those grounds. They were not in issue in this Court.

36 The Court of Appeal, in allowing the respondent's appeal on the ground that the verdict was unreasonable, identified the "critical question" as whether it was open to the jury to conclude that the respondent intended to cause the deceased's death, or at least cause her grievous bodily harm[3], and held that "there was no evidence of motive in the sense of a reason to kill"[4]. Their Honours said[5]:

> "To explain why somebody might be in a volatile emotional state is not to provide a motive for his conduct … The evidence of financial stress and the extra-marital affair suggested a context of strain between the couple which might well have culminated in a confrontation; but it did not provide a motive or point to murder rather than manslaughter."

Their Honours also said[6]:

> "There is nothing about the facial scratches to indicate the circumstances in which they were inflicted; whether they occurred in the course of a heated and perhaps physical argument or in resisting a murderous attack."

37 In relation to the disposition of the case by the Court of Appeal, it is as well not to attempt to paraphrase their Honours' reasons. As to the respondent's evidence that he had no involvement at all in the death of his wife, their Honours observed[7]:

> "The jury could properly have rejected every word [the respondent] said as a lie. But that would, with the exception of his explanation of the scratches on his face, have done nothing to advance the Crown case. Conclusions that he had lied in that regard and that he had taken steps to dispose of his wife's body were properly to be taken into account, as evidence of a consciousness of guilt, in the context of all the evidence in the case. But the lies, or the lies taken in combination with the disposal of the body, would not enable the jury to draw an inference of intent to kill or

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3 *R v Baden-Clay* [2015] QCA 265 at [41].

4 *R v Baden-Clay* [2015] QCA 265 at [46].

5 *R v Baden-Clay* [2015] QCA 265 at [42].

6 *R v Baden-Clay* [2015] QCA 265 at [43].

7 *R v Baden-Clay* [2015] QCA 265 at [45] (footnote omitted).

> do grievous bodily harm if there were, after consideration of all the evidence, equally open a possibility that all of that conduct was engaged in through a consciousness of a lesser offence; in this case, manslaughter."

38 The Court of Appeal went on to hold that the evidence of the respondent's post-offence conduct, including his lies, was indeed "intractably neutral" as to whether his wife's homicide was intended or not and that there was a reasonable hypothesis consistent with innocence of murder which the jury could not, acting reasonably, reject[8]. Their Honours explained[9]:

> "[W]hile findings that [the respondent] lied about the cause of his facial injuries and had endeavoured to conceal his wife's body should not be separated out from the other evidence in considering their effect, the difficulty is that, viewed in that way, the post-offence conduct evidence nonetheless remained neutral on the issue of intent. To put it another way, there remained in this case a reasonable hypothesis consistent with innocence of murder: that there was a physical confrontation between [the respondent] and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict."

The Crown's submissions

39 The Crown submitted that the trial was conducted by both prosecution and defence as a case of murder or nothing. The Crown submitted that, although manslaughter was left to the jury because the prosecution bore the onus of proving intent to kill or cause grievous bodily harm, no factual hypotheses relating to a possible verdict of manslaughter by the respondent rather than murder by him were raised by the defence. In particular, there was no evidence to support the hypothesis of "a blow" or "a fall hitting her head against a hard surface" in the course of an altercation between the respondent and the deceased; indeed, the respondent's evidence excluded that possibility. It was said that the absence of an evidentiary foundation for the factual hypothesis posed by the Court of Appeal meant that it was incapable of constituting a reasonable

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8 *R v Baden-Clay* [2015] QCA 265 at [47].

9 *R v Baden-Clay* [2015] QCA 265 at [48].

hypothesis which might have caused the jury to entertain a doubt as to whether the killing had been accompanied by an intent to kill or cause grievous bodily harm.

40 The Crown also argued that the evidence of the relationship between the respondent, Ms McHugh and his wife, and the possible imminent meeting between Ms McHugh and his wife at the real estate conference, together with Ms McHugh's demands to decide whether to leave his wife, and his wife's recriminations in the course of her "venting and grilling" on the evening of 19 April, was evidence from which a jury might reasonably infer the formation of an intention to kill or to cause grievous bodily harm at the time on the night of 19 April 2012 when the respondent killed his wife.

41 The Crown argued further that the respondent's post-offence conduct, including his lies, was capable of giving rise to an inference of guilt of murder. On the evidence, the jury could reasonably conclude that, having killed his wife, the respondent immediately engaged in a deliberate and calculated series of actions to shroud his involvement in her death and to deny to police any knowledge of his motive to kill her, and that these post-offence actions were those of a person who had intentionally killed his wife[10] rather than a panicked reaction by a man who had unintentionally caused her death.

The respondent's submissions

42 The respondent submitted that, as the case for murder depended entirely upon circumstantial evidence and the onus of proof of murderous intent was always upon the Crown, the jury could not return a verdict of guilty.

43 The respondent submitted that a hypothesis consistent with innocence of murder was open on the evidence. That was the hypothesis identified by the Court of Appeal[11]: a physical confrontation between the respondent and his wife during which he delivered a blow to the wife which killed her without intending to cause serious harm, after which he took the body to Kholo Creek in a state of panic and knowledge that he had unlawfully killed her, in the hope that the body would be washed away.

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10 See *R v Heyes* (2006) 12 VR 401 at 405 [9]; cf *R v McClutchie* [2015] QCA 120 at [32].

11 *R v Baden-Clay* [2015] QCA 265 at [48].

44 The respondent submitted that the Court of Appeal was right to proceed on the basis that motive to kill, in the sense of a settled desire to kill the deceased, was not relied upon by the prosecution at trial. In this regard, the respondent cited Glanville Williams in relation to the concept of "motive"[12]:

> "The word 'motive' has two related meanings. (1) It sometimes refers to the emotion prompting an act, eg, 'D killed P, his wife's lover, from a motive of jealousy.' (2) It sometimes means a kind of intention, eg, 'D killed P with the motive (intention, desire) of stopping him from paying attentions to D's wife.'
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> In the second sense, which is the one in which the term is used in criminal law, motive is ulterior intention – the intention with which an intentional act is done (or, more clearly, the intention with which an intentional consequence is brought about). Intention, when distinguished from motive, relates to the means, motive to the end; yet the end may be the means to another end, and the word 'intention' is appropriate to such medial end."

The respondent argued that, to the extent that "motive" was relied upon by the prosecution, it was used in the first sense rather than the second, so that the Court of Appeal did not err in putting aside evidence of the respondent's volatile emotional state as evidence of murder rather than manslaughter[13].

45 The respondent submitted that, while the Court of Appeal held that the respondent's lies concerning his affair with Ms McHugh, the scratches to his face, and the steps taken by him to dispose of the body were "properly to be taken into account as evidence of a consciousness of guilt, in the context of all the evidence in the case"[14], that evidence was neutral on the question of whether the respondent was guilty of murder or manslaughter. It was said that the Court of Appeal properly concluded from the totality of the evidence that the hypothesis of guilt of an unintentional unlawful killing was open.

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12 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 48 (footnote omitted). See also *R v Hyam* [1975] AC 55 at 73.

13 *R v Baden-Clay* [2015] QCA 265 at [44].

14 *R v Baden-Clay* [2015] QCA 265 at [45].

Hypothesis consistent with innocence

46 The prosecution case against the respondent was circumstantial. The principles concerning cases that turn upon circumstantial evidence are well settled[15]. In *Barca v The Queen*[16], Gibbs, Stephen and Mason JJ said:

> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v The King*[17]. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v The Queen*[18]; see also *Thomas v The Queen*[19]."

47 For an inference to be reasonable, it "must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence"[20] (emphasis added). Further, "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

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15 *Barca v The Queen* (1975) 133 CLR 82 at 104; [1975] HCA 42.

16 (1975) 133 CLR 82 at 104; [1975] HCA 42.

17 (1911) 13 CLR 619 at 634; [1911] HCA 66.

18 (1963) 110 CLR 234 at 252; [1963] HCA 44.

19 (1960) 102 CLR 584 at 605-606; [1960] HCA 2.

20 *Peacock v The King* (1911) 13 CLR 619 at 661, quoted in *Barca v The Queen* (1975) 133 CLR 82 at 104.

on the evidence"[21] (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal[22].

48 Further, a criminal trial is accusatorial but also adversarial. Subject to well-defined exceptions, "parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue."[23]

Approach of the Court of Appeal

49 The onus of proof of murder, including proof of the respondent's intention to kill or cause grievous bodily harm, was always upon the prosecution. It is common ground that the jury rejected (and were entitled to reject) beyond reasonable doubt the respondent's hypotheses that his wife had taken her own life or had died of alcohol or drug toxicity. The Court of Appeal's reasoning proceeded on the assumption that there could be no reasonable doubt that the respondent killed his wife.

50 Given the unchallenged conclusion that the respondent was the agent of his wife's death, the compelling inference is that he was the last person to see his wife alive and was the only person who knew the circumstances of her death. That inference did not, of course, diminish the overall burden on the prosecution of proving beyond reasonable doubt all elements of the offence of murder with which the respondent was charged. In the case of circumstantial evidence, the prosecution's burden requires it to exclude all reasonable hypotheses consistent with innocence. However, where an accused person with knowledge of the facts is silent, then as was said in *Weissensteiner v The Queen*[24]:

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21 *R v Hillier* (2007) 228 CLR 618 at 637 [46]; [2007] HCA 13 (footnote omitted).

22 *R v Hillier* (2007) 228 CLR 618 at 638 [48]. See also *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535; [1984] HCA 7.

23 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [9]; 225 ALR 161 at 164; [2006] HCA 9. See also *Ratten v The Queen* (1974) 131 CLR 510 at 517; [1974] HCA 35; *Doggett v The Queen* (2001) 208 CLR 343 at 346 [1]; [2001] HCA 46.

24 (1993) 178 CLR 217 at 227-228 per Mason CJ, Deane and Dawson JJ; [1993] HCA 65.

> "in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused."

51 That passage was quoted with approval in *RPS v The Queen*[25]. The significance to be attached to what was said in *Weissensteiner* must be understood in its context, as explained in *Azzopardi v The Queen*[26]. *Weissensteiner* was not simply a case in which the accused failed to contradict direct evidence of other witnesses. It was a case in which, if there were facts which explained or contradicted the evidence against the accused, they were facts which were within the knowledge only of the accused and thus could not be the subject of evidence from any other person or source.

52 In any event, this is not a case where the accused remained silent. It is a case where the accused gave evidence. The present case is stronger for the prosecution than the Crown case in *Weissensteiner* because here the respondent gave evidence, which not only did not support the scenario hypothesised by the Court of Appeal, but was inconsistent with that scenario. The respondent's evidence was that he had nothing to do with the circumstances in which his wife was killed. On his evidence he simply was not present when her death occurred; and he could not have been the unintentional cause of her death.

53 The Court of Appeal considered that there was a reasonable hypothesis that the respondent was guilty of manslaughter, but was not guilty of murder, because he did not have the requisite intention to kill his wife or cause her grievous bodily harm. That hypothesis was[27]:

> "that there was a physical confrontation between the appellant and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it

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25 (2000) 199 CLR 620 at 633 [27], 641 [54], see also at 654-655 [104]; [2000] HCA 3.

26 (2001) 205 CLR 50 at 73 [61]; [2001] HCA 25.

27 *R v Baden-Clay* [2015] QCA 265 at [48].

would be washed away, while lying about the causes of the marks on his face which suggested conflict."

54 The evidence given in the present case by the respondent narrowed the range of hypotheses reasonably available upon the evidence as to the circumstances of the death of the respondent's wife. Not only did the respondent not give evidence which might have raised the hypothesis on which the Court of Appeal acted, the evidence he gave was capable of excluding that hypothesis.

55 The Court of Appeal's conclusion to the contrary was not based on evidence. It was mere speculation or conjecture rather than acknowledgment of a hypothesis available on the evidence. In this case, there was no evidence led at trial that suggested that the respondent killed his wife in a physical confrontation without intending to kill her. There were "no positive proved facts from which the inference" drawn by the Court of Appeal could be made[28]. There was no evidence at trial of any injury to the wife's body that might have killed her. Due to the decomposition of the body, the precise cause of her death remains unknown. There was a probable bruise on the internal lining of the left front of the chest wall, but it was unclear whether it occurred pre- or post-mortem. If it was a bruise, the evidence was that it was the result of a "mild force injury" because there were no underlying rib fractures. There was a chipped tooth but no signs of trauma to the teeth or the hard tissues of the jaw. Not only were there no fractures to the head, which might have suggested the wife had fallen and hit her head on a hard surface (as in the example given by the Court of Appeal), there were no other fractures on the body.

56 Counsel for the respondent sought to rely upon *Knight v The Queen*[29] to support the approach of the Court of Appeal. In that case, Mason CJ, Dawson and Toohey JJ held that the hypothesis that an accused charged with murder did not fire a shot which hit the complainant with intent to kill so as to sustain a charge of attempted murder was open on all the evidence in the case, notwithstanding that the jury were entitled to disbelieve the accused's evidence that he was not aware of cocking and discharging the rifle which fired the shot that wounded the complainant. But that was not a case where the only evidence which raised the hypothesis consistent with an absence of intention to kill came from the accused. In *Knight*, the prosecution had conceded that another shot

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28 See *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169-170.

29 (1992) 175 CLR 495; [1992] HCA 56.

fired shortly before the shot which wounded the complainant had not been fired with intent to kill the person wounded by it; the second shot was fired in a continuation of the same struggle in the course of which the first shot was fired. In addition, the absence of a trigger guard meant that the rifle could easily have been fired as a consequence of the struggle rather than as the result of a conscious application of pressure to the trigger[30]. In the present case, by contrast, the only evidence which actually related to the hypothesis on which the respondent sought to rely was evidence which was inconsistent with that hypothesis.

57 The Court of Appeal appears[31] to have reasoned that the respondent's evidence could be disbelieved by the jury, as it plainly was, so that there was no evidence at all in relation to the hypothesis. If it were truly the case that there was no evidence from the respondent as to the circumstances of his wife's death, the application of the principles explained in *Weissensteiner* would have required consideration; and they were not adverted to by the Court of Appeal. But the respondent chose to give evidence. To say that the respondent's evidence was disbelieved does not mean that his evidence could reasonably be disregarded altogether as having no bearing on the availability of hypotheses consistent with the respondent's innocence of murder. His evidence was important, even if it was disbelieved, because it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility.

58 The Court of Appeal should not have treated the case as one in which it was open to it to identify a hypothesis as to the circumstances of the death of the deceased on the basis that the respondent's evidence could be disregarded as if it had not been given at all.

59 There remains another difficulty with the Court of Appeal's approach. The Court of Appeal's hypothesis was never put to the jury by the respondent's counsel, either directly or indirectly. The hypothesis was contrary to, and excluded by, the case that the respondent put to the jury. That statement requires explanation.

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30 (1992) 175 CLR 495 at 504.

31 *R v Baden-Clay* [2015] QCA 265 at [45].

60 Aware that the prosecution case was circumstantial, the trial judge invited the respondent's counsel to state the reasonable hypotheses consistent with the respondent's innocence that he wished to be put as part of the summing up. The respondent's counsel provided a document listing four hypotheses to account for the death – drowning; falling from a height to her death or to cause drowning; alcohol and/or sertraline toxicity; or the effects of serotonin syndrome, which led to her drowning or falling from a height to her death. None of these hypotheses raised manslaughter – none of them involved the respondent playing any part in the death of his wife.

61 In his closing address, the respondent's counsel told the jury there were two possibilities – the respondent murdered his wife or, as the respondent had told the jury in evidence, he expected his wife to walk back in the door or be found, having slipped over or hurt herself. The respondent's counsel agreed with the trial judge that that approach was a "considered tactical position". Further, in an exchange with the trial judge, the respondent's counsel accepted there was "no suggestion that [the wife had] fallen and hit her head on bricks or cement" because there were "no fractures of the head".

62 It may readily be accepted that "it is not incumbent on the defence either to establish that some inference other than that of guilt should reasonably be drawn from the evidence or to prove particular facts that would tend to support such an inference."[32] That proposition merely reflects that it remains for the prosecution to prove the accused's guilt of an offence beyond reasonable doubt[33]. And it does not detract from, and is consistent with, the further proposition that a "trial judge must be astute to secure for the accused a fair trial according to law."[34] A trial judge must adequately direct the jury "both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part"[35]; the trial judge is under a "duty to put to the jury with adequate assistance any matters on which the jury, *upon the evidence*, could find

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32 *Barca v The Queen* (1975) 133 CLR 82 at 105.

33 *Knight v The Queen* (1992) 175 CLR 495 at 502.

34 *Pemble v The Queen* (1971) 124 CLR 107 at 117; [1971] HCA 20.

35 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118.

for the accused"[36] (emphasis added). No complaint is made in this Court that the directions given to the jury were inadequate. The directions "put fairly before the jury the case which the accused" made[37]. The trial judge left manslaughter to the jury and put to them the four hypotheses identified by defence counsel.

63 But it is quite another matter, as occurred on appeal to the Court of Appeal and again to this Court, to contend for a hypothesis which was not put to the jury for tactical reasons, which is directly contrary to evidence of the respondent at trial, which is directly contrary to the way in which the respondent's counsel conducted the defence and which, in response to direct questions from the trial judge, was expressly rejected by the respondent's counsel. The issues and available lines of argument to be pursued were narrowed by the way the case was conducted at trial. That is commonplace. But it cannot be ignored. The hypothesis identified by the Court of Appeal was not open. Once that hypothesis is rejected, no other hypothesis consistent with guilt of manslaughter, but innocence of murder, has ever been identified at trial, before the Court of Appeal or in this Court.

64 This conclusion is sufficient to require that the appeal be allowed and the respondent's conviction for murder restored. It is necessary, however, to explain why the jury were entitled reasonably to regard the whole of the evidence as satisfying them beyond reasonable doubt that the respondent acted with intent to kill or cause grievous bodily harm when he killed his wife and so reject the alternative verdict of manslaughter in favour of murder.

The whole of the evidence

The role of the jury

65 It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact."[38] Given the central place of the jury trial in the

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36 *Pemble v The Queen* (1971) 124 CLR 107 at 118. See also *James v The Queen* (2014) 253 CLR 475 at 481 [10]; [2014] HCA 6.

37 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41].

38 *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16. See also *Brennan v The King* (1936) 55 CLR 253 at 266; [1936] HCA 24; *Sparre v The King* (1942) 66 CLR 149 at 154; [1942] HCA 19; *Keeley v Mr Justice Brooking* (1979) 143 CLR 162 at 188; [1979] HCA 28; *Chamberlain v The Queen [No 2]* (1984) 153 CLR

(Footnote continues on next page)

administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect[39], the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial[40]. Further, the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way by the considerations expressed in the passages from the reasons of the Court of Appeal explaining its disposition of the appeal.

66 With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] 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."[41]

Motive

67 As to the respondent's reliance upon Glanville Williams' discussion of the concept of motive, it should be noted that Glanville Williams himself considered that the difference between the two senses in which he described the concept was "merely terminological"[42]. This terminological difference should not be allowed

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521 at 601; *MacKenzie v The Queen* (1996) 190 CLR 348 at 365; [1996] HCA 35; *MFA v The Queen* (2002) 213 CLR 606 at 621 [48].

39 *Kingswell v The Queen* (1985) 159 CLR 264 at 301; [1985] HCA 72; *Brown v The Queen* (1986) 160 CLR 171 at 201; [1986] HCA 11; *Katsuno v The Queen* (1999) 199 CLR 40 at 63-64 [49]; [1999] HCA 50; *Cheng v The Queen* (2000) 203 CLR 248 at 277-278 [80]; [2000] HCA 53; *Alqudsi v The Queen* (2016) 90 ALJR 711 at 715 [2], 718 [16], 753 [195]; 332 ALR 20 at 22, 26, 73; [2016] HCA 24.

40 *M v The Queen* (1994) 181 CLR 487 at 494; *MFA v The Queen* (2002) 213 CLR 606 at 621-622 [49]-[51], 623 [56].

41 *M v The Queen* (1994) 181 CLR 487 at 494-495. See also *R v Hillier* (2007) 228 CLR 618 at 630 [20] and the authorities cited.

42 Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 48 fn 1.

to obscure the undeniable relevance to the task of the jury of evidence of "[t]he relations of the murdered ... [person] to his [or her] assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment"[43].

68 In the present case, it was for the jury to determine whether, in a physical confrontation on the night of 19 April 2012, the respondent formed the intention to kill his wife because he suddenly found intolerable the consequences of his years of deception, including his wife's recriminations in the course of her "venting and grilling", and the prospects of her discovery of his ongoing infidelity and deception. The respondent had told Ms McHugh that he would be free from his wife by 1 July; and he was aware that both women were planning to attend the same real estate conference on 20 April.

69 It was for the jury to determine the likely effect upon his mind of the difficulties in which he found himself when he took her life. It was not unreasonable for the jury to conclude, on the whole of the evidence, that it tested credulity too far to suggest that his evident desire to be rid of his wife was fortuitously fulfilled by her unintended death. So, in *Plomp v The Queen*[44], this Court rejected the contention that the jury had unreasonably convicted a man of murdering his wife by contriving to drown her in the surf in some unknown manner. The death occurred in circumstances in which the accused had expressed a wish to be free of his wife. Dixon CJ, with whom Kitto, Taylor and Windeyer JJ agreed, said[45]:

> "[I]t appears to me that if the jury weighed all the circumstances they might reasonably conclude that it would put an incredible strain on human experience if Plomp's evident desire to get rid of his wife at that particular

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43 *R v Bond* [1906] 2 KB 389 at 401, cited with approval in *Wilson v The Queen* (1970) 123 CLR 334 at 343-344 by Menzies J, with whom McTiernan and Walsh JJ agreed; [1970] HCA 17. See also *Mutual Life Insurance Co of New York v Moss* (1906) 4 CLR 311 at 317, 323; [1906] HCA 70; *R v Plomp* [1962] Qd R 161 at 175, 185-186; *Lewis v The Queen* [1979] 2 SCR 821 at 831; *R v Heath* [1991] 2 Qd R 182 at 202-203; *Richardson v The Queen* [2013] NSWCCA 218 at [56].

44 (1963) 110 CLR 234.

45 (1963) 110 CLR 234 at 243.

juncture, presaged as it was by his talk and actions, were fulfilled by her completely fortuitous death".

70 "Motive, if proven, is a matter from which a jury might properly infer intention"[46]. The Court of Appeal found that "there was no evidence of motive in the sense of a reason to kill"[47]. The Court of Appeal accepted that "[t]he evidence of financial stress and the extra-marital affair suggested a context of strain between the couple which might well have culminated in a confrontation" but concluded that "it did not provide a motive or point to murder rather than manslaughter."[48] That was an error.

71 The Court of Appeal appears not to have considered and weighed all of the circumstances established by the evidence at trial. For example, the Court of Appeal's conclusion does not account for the evidence that the respondent had made promises to Ms McHugh about leaving his marriage by 1 July; that the respondent could not afford to divorce his wife; and that there was a possibility that his wife and Ms McHugh would run into each other the next day and that Ms McHugh might reveal the respondent's lies about their ongoing affair. There was also evidence before the jury of post-offence concealment and lies by the respondent which was not referred to by the Court of Appeal.

Post-offence concealment and lies

72 The respondent's false denials to police about his ongoing affair, his suggestion to Ms McHugh that she should "lie low", and his enquiry of her as to whether she had revealed the affair to the police were all capable of being regarded by the jury as evidencing a strong anxiety to conceal from police the existence and true nature of his affair with Ms McHugh. This anxiety could reasonably be seen as indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not an unintended, tragic death of his wife, but an intentional killing.

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46 *De Gruchy v The Queen* (2002) 211 CLR 85 at 92 [28]; [2002] HCA 33.

47 *R v Baden-Clay* [2015] QCA 265 at [46].

48 *R v Baden-Clay* [2015] QCA 265 at [42].

73 In *R v White*[49], in the Supreme Court of Canada, Major J said:

> "As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role."

74 In *R v White*, Major J went on to say that there may be cases where post-offence conduct, such as the accused's flight or concealment, is so out of proportion to the level of culpability involved in a lesser offence that it might be found by the jury to be more consistent with the more serious offence charged[50]. There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder[51]. There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter. As Major J said[52]: "The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute."

75 In *Lane v The Queen*[53], the Court of Criminal Appeal of the Supreme Court of New South Wales rejected the contention that a count of manslaughter of the accused's child should have been left to the jury as an alternative to murder. The Court held that the jury were entitled to take the post-offence conduct of the accused as evidencing consciousness of guilt of murder. In particular, the Court held that the lies told by the accused "alone were sufficient

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49 [1998] 2 SCR 72 at 89 [27].

50 [1998] 2 SCR 72 at 91 [32].

51 *R v Ciantar* (2006) 16 VR 26 at 39 [38]-[40], 47 [65]-[67]; *R v DAN* [2007] QCA 66 at [89], [99].

52 [1998] 2 SCR 72 at 91 [32].

53 (2013) 241 A Crim R 321.

to provide the evidentiary foundation for an inference that … she acted with the intention of killing."[54] Their Honours went on to say that the false accounts given by the accused "provide no factual foundation for an inference that the manner in which she killed [her child]" would establish manslaughter by criminal negligence[55].

76 It was open to the jury, in this case, to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife.

77 However, even if the evidence of post-offence conduct were neutral on the issue of intent, that alone would provide no basis to conclude that the reasonable hypothesis relied upon by the Court of Appeal was open on the evidence led at trial. To so conclude is to adopt an impermissible "piecemeal" approach to that evidence. All of the circumstances established by the evidence were to be considered and weighed, not just some of them.

78 Finally, the jury could take into account the absence of any signs that a weapon was used to cause the death of the deceased, and make their own judgment about the respondent's intention at the time, bearing in mind the difficulty involved in killing a human being without the use of a weapon unless the act of killing is driven by a real determination to cause death or grievous bodily harm.

79 In all the circumstances of this case, other than speculating about how things might have happened, it was open to the jury rationally to conclude that the respondent killed his wife and did so with intent, at least, to cause her grievous bodily harm. Upon the whole of the evidence led at trial, it was open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty of murder.

Conclusion

80 The appeal should be allowed. Orders 1 and 2 of the Court of Appeal made on 8 December 2015 should be set aside and in their place the appeal to that Court should be dismissed.

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54 (2013) 241 A Crim R 321 at 349 [111].

55 (2013) 241 A Crim R 321 at 349 [111].