IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 33/16

BETWEEN:

THE QUEEN
Appellant

and

GERARD ROBERT BADEN-CLAY
Respondent

APPELLANT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

I certify that this submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

The appeal raises the following issues:

1. Whether the decision of the Court of Appeal is inconsistent with the decision of the Victorian Court of Appeal in *R v Ciantar*[1] and, if so, which is correct.
2. Whether, as a matter of law, the evidence in the case raised an inference, that it was open for the jury to accept, that the respondent killed his wife with intent to do her grievous bodily harm or to kill her.
3. Whether the evidence in the case was capable of establishing a motive relevant to an intention to kill.
4. Whether the rejection of an accused's false explanation of innocence is capable not only of strengthening an inference of guilt arising on the Crown case, but also of justifying the rejection of a second hypothesis consistent with innocence which is available but which was not offered by the accused and which was inconsistent with his defence.

Part III: SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

It is certified that no notice is required under section 78B of the *Judiciary Act 1903* (Cth).

Part IV: CITATION OF JUDGMENT APPEALED FROM

R v Baden-Clay [2015] QCA 265 (Holmes CJ, Fraser and Gotterson JJA)

Part V: RELEVANT FACTS

5. On 15 July 2014 a jury found the respondent guilty of the murder of his wife, Allison June Baden-Clay, on or about 19 April 2012.
6. The respondent gave evidence at the trial. According to him, he and his wife and their three daughters (10, 8 and 5) were at home on the night of 19 April 2012. The

[1] (2006) 16 VR 26

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parents put the children to bed and then sat on a couch discussing everyday matters. As required by a marriage counsellor whom they had consulted, he also submitted to regular questioning by her about the details of an affair which he had had with a co-worker, Toni McHugh, which his wife believed (wrongly) had ended in September 2011 but which was, in fact, ongoing. The conversation was "perfectly normal, certainly civilised".[2] He went to bed at about 10 pm. His wife stayed up watching television in the living room. He awoke just after 6 am on 20 April 2012. His wife was not at home but she frequently went for an early morning walk. His wife was to go to a seminar that day and he was to attend to the preparation of the children for school and to take them there. He was "under the pump a little bit and rushing that morning".[3] He began to shave, heard one daughter awake, and asked if she wanted to get up, and then "raced back to actually shave and I was really rushing then" and then he cut himself shaving. He asked one daughter who had awoken to put a band aid on the cuts.[4] He explained to the jury how he had cut himself and demonstrated the action.[5]

7. He raised the other children and then "started to get concerned that [his wife] wasn't home yet because she had that conference she needed to go to".[6] At 6.32 am he phoned his wife but got no answer. He called again at 6.38 am and once more at 6.45 am.[7] He then called his parents to tell them that "Allison wasn't home and [he] didn't know where she was".[8] At 6.41 am he sent her a text and again at 7.02 am. He was "getting a bit more concerned". At 7.15 am he called 000 to report her missing.[9] He then went driving around the suburb looking for her. He did not explain the reason for this level of concern at this early stage.

8. Police arrived at 8.00 am.[10]

9. That morning 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".[11]

10. In fact, the respondent had been involved in a sexual affair with another woman, Ms McHugh, since August 2008. During that time he had had sexual liaisons with two other women also. The affair with Ms McHugh began when she commenced to work for his real estate agency. It involved meeting for sex about four times a week on nights after work at Ms McHugh's home, in cars and elsewhere and, on two occasions, at his family home.[12] It continued until a friend informed the respondent's wife in September 2011.[13] He then ceased the affair and Ms McHugh left his employ; his wife then began to work at the agency. The affair recommenced at his instigation in December 2011.[14] It was ongoing when the respondent killed his wife.

11. There was evidence from Ms McHugh that during the course of the affair, the respondent told her that he had no relationship with his wife (the respondent admitted that they had not had sexual intercourse for years[15]), that he did not love

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[2] Transcript (Tx) 13.54
[3] Tx 13.56
[4] Tx 13.57
[5] Tx 13.56-57
[6] Tx 13.58
[7] Tx 14.9
[8] Tx 14.10
[9] Summing Up Tx 25; Tx 6.58; Ex 66
[10] Tx 6.58
[11] Ex 87 at p6
[12] Tx 5.63
[13] Tx 5.67
[14] Tx 5.69
[15] Tx 13.5

her,[16] that he loved Ms McHugh and that one day he wanted to come to her "unconditionally".[17] In the last months before he killed his wife, they were in contact by phone or email almost every day.[18] They were also able to meet infrequently for brief periods while his wife was engaged with the children. They met over the Christmas break.[19] On the last occasion they met before the respondent killed his wife, Ms McHugh pressed him that she needed to know what was going to happen one way or the other. He told her that he would be out of his marriage by 1 July.[20] That was the first occasion he had set a date.[21]

12. He confirmed this promise in writing. Less than three weeks before killing his wife, he wrote to Ms McHugh:

> I have given you a commitment and I intend to stick to it – I will be separated by 1 July.

13. A week later he wrote again:

> This is agony for me too. I love you. I'm sorry you hung up on me. It sounded like you were getting very angry. I love you GG. Leave things to me now. I love you. GM.[22]

14. On Friday 20 April, Ms McHugh was to attend a real estate seminar. She phoned the respondent, who was in the supermarket with his children. She referred to the conference and how she felt excited about attending. He told her "I've got to talk to you about that. Two of my staff members are going".[23] Because she knew that his wife was working in his real estate agency, Ms McHugh inferred instantly that he was referring to his wife. Ms McHugh became very upset. She told him that he needed to tell his wife and that it was unfair to both of them to have to be in the same room together. His response was to say that he was thinking of selling the business and that he would do that after he had left his wife.[24]

15. In fact, the business was probably insolvent.[25] The respondent admitted that if a separation from his wife would have a "significant financial impact" upon him and his business and that the business would, potentially, "go to the wall".[26]

16. Ms McHugh gave this evidence about that confrontation:

> Can I suggest to you that what happened on the 19th of April 2012 was precisely what had been going on with the affair for the last three and a half-odd years, Ms McHugh---well no. it was – it was different, because I was taking more of a stand. I wasn't going to allow it to keep happening.
>
> So you thought something was going to be different this time?---Yes[27]

17. On the morning of 20 April, in response to a question by police, the respondent, having expressed his hope to police that his marriage would not break up, then falsely told Sergeants Curtis and Jackson that he had had an affair but that it had

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[16] Tx 5.65
[17] Tx 5.69
[18] Tx 5.70
[19] Tx 5.70
[20] Tx 5.71
[21] Tx 6.13
[22] Ex. 63 and 64. The initials GG were used by them to mean "Gorgeous Girl" and GM meant "Gorgeous Man": Tx 5.72-5.73
[23] Tx 5.74
[24] Tx 5.74-5.76
[25] Tx 14.41
[26] Tx 15.19
[27] Tx 6.11

"ended last year". He explained that he and his wife had been to a counsellor, that his lover had left his employ "as soon as" and that he had told his wife about the affair. [28] He did not reveal to police that the affair was ongoing nor that he had told his lover that he intended to leave his wife for her and that he had spoken to his lover as recently as the previous afternoon and that, during that conversation, they had discussed the possible crisis that was looming if his wife and lover met at the real estate conference and his wife discovered his continuing deceptions of her and their children. Instead, he said, "I've got to rebuild trust with her. And that's what I'm, I'm working on."[29]

18. He had told Ms Carmel Ritchie, a relationship counsellor, the same thing four days before he killed his wife. In response to questions from her, he told Ms Ritchie, in the absence of his wife, that he believed that the issues that needed to be addressed were that his wife did not trust him, that she questioned him and that his expectations for counselling were to "build a future together, not regressing" and that he wanted to "get on with life, wipe it clean".[30]

19. His financial state was desperate. The respondent owed three close friends (Robert Cheesman, Stuart Christ, and Peter Cranna) principal loan amounts of $90,000 each, plus interest.[31] In early March 2012 he sought a loan of $300,000 from Dr Bruce Flegg. That was sought through Susanne Heath who said the respondent was quite distressed and said if he didn't get it then he would go broke or bankrupt.[32] The loan was refused.[33] Under an agreement for the purchase of the real estate agency rent roll, he owed two vendors $180,000 and $90,000. That was payable by 30 June 2012, with a possibility for a 90 day extension.[34] The assets and liabilities for the respondent and his wife at that time gave a net asset position of $74,663.11.[35] A total death benefit payable to the respondent under his wife's life insurance policies was $975,240.62.[36] On 1 May 2012, the respondent contacted Asteron Life Insurance to determine how a claim could be made on his wife's life insurance policy.[37] He and his father gave evidence that that approach was made on the advice of his father to inform the insurers when it became obvious the body found was the respondent's wife.[38]

20. Ms McHugh gave evidence that she attended the conference and rang the respondent at lunchtime and told him that his wife was not there. He told her his wife was missing. *On that very day and before he was charged* he told her that they "need to not ... communicate and lay low".[39] On Saturday 21 April he phoned Ms McHugh and told her that police would want to speak to her and that she should tell the truth. Then, while she was with police, he called her again and told her just to answer 'yes' or 'no'. He asked her "Have you told them that we're back together again?" and she replied "Yes". The call ended. There was one final, clandestine, meeting.[40]

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[28] Ex 87 at pp 6, 7, 15, 21
[29] Ex 92 at p10
[30] Tx 6.48
[31] Tx 10.14; Tx 10.23; and Tx 10.36
[32] Tx 8.48-8.49
[33] Tx 10.8
[34] Tx 11.39; Ex 174 and 175
[35] Ex 178
[36] Ex 177 at p 2
[37] Ex 179 at p 3 [para 23]
[38] Tx 5.8-5.9; Tx 14.20
[39] Tx 5.77
[40] Tx 5.77-5.78

21. He admitted that he had told Ms McHugh that he loved her, and had even told staff members that he loved her.[41] He admitted that he had undertaken to her to leave his wife by 1 July[42] but, he explained, in fact 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 to the jury that he actually did.

22. There were scratches on the respondent's face on the morning after he had killed his wife. They were vividly conspicuous. He told police, and maintained to the jury, that he had cut himself shaving. He had told one of his daughter's this that morning and had asked her to help him apply a band-aid. Three experts were unanimous that there were two categories of injuries to his right cheek and that it was most likely that fingernails caused one set of scratches and it was implausible that they had been caused by a shaving razor. The second set of marks appeared different and were fresher. These 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".[43] If the blade was damaged, such injury was more likely.[44] The blade was not damaged.[45]

23. In addition to the facial injuries, the Doctors also noted other injuries to the torso of the respondent. There were abrasions to the left hand side of the neck and chest which the respondent said were caused by his scratching an insect bite on the morning of 19 April. There was a bruise injury under the right armpit which was consistent with having been caused by clothing being pulled forcibly against the skin.[46] The respondent could not account for that injury.[47]

24. The respondent told police his wife's state of mind had been pretty good and that she had depression in the past but that had been managed by medication.[48] He said "she was really looking forward to the conference" and was "excited about it". She had her hair done the night before as she wanted to look her best for the seminar for two or three hundred people.[49] At his trial he nevertheless proffered suicide as an explanation for her death.

25. Allison Baden-Clay's body was found on 30 April 2012 dumped under a bridge in the mud on a bank of Kholo Creek 13 kilometres from her home.[50]

26. There was evidence from which the jury could have concluded that death was not from natural causes, nor from an overdose of drugs or suicide or any of the suggestions offered by the respondent. Dr Nathan Milne conducted the post-mortem. The estimated time of death was consistent with the last time she was seen alive 11 days earlier.[51] Hypostasis indicated that the deceased had been in the position in which she was found within a matter of hours of death.[52] There were no definite injuries found.[53] There were no diatoms in the samples taken which may have been suggestive of drowning if diatoms were present.[54] If she had fallen from

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[41] Summing Up Tx 42; Tx 14.26-14.27
42 Tx 14.48
[43] Summing Up Tx 31. See also Tx 30.33; Tx 8.12.
[44] Summing Up Tx 33; Tx 8.63
[45] Summing Up Tx 29; Tx 7.47
[46] Tx 8.33; Tx 8.17 and Tx 8.58
[47] Tx 15.23
[48] Ex 86 at pp 4-5
[49] Ex 163 at p 4
[50] Photographs of the scene were Ex 6 to 10
[51] Tx 2.14
[52] Tx 2.19
[53] Tx 2.20
[54] Tx 2.29; 10.46

the bridge onto the ground, significant injuries would have been expected.[55] In Dr Milne's opinion, the deceased did not die from natural causes, but the cause of death was undetermined[56] because of the significant level of decomposition.[57]

27. The deceased did at various times suffer from depression which was first diagnosed during the pregnancy with her second child.[58] At the time of her death she was prescribed Zoloft (Sertraline). Professor Drummer concluded that he did not think that drugs had any contribution to her death.[59] Since diagnosis for depression, the deceased had been treated by medical practitioners and psychologists. None held any concerns that she was suicidal.

28. Leaves that were found on the body were from trees of six species which grew at her home; four of these did not grow at the dump site. The respondent could not account for them.

29. Allison Baden-Clay's blood was found in the rear section of her car, which had only been acquired in February of that year. The respondent could not explain how it came to be there.[60]

30. Tests on his mobile phone showed that it had been placed on a charger (adjacent to the side on which he slept) at 1.48 am[61] at a time he claimed that he was asleep.

31. The Court of Appeal acknowledged that the circumstantial evidence left it open to the jury to conclude that the respondent and his wife had had "an altercation" and that he had killed her at their home, that he had taken her body to Kholo Creek and dumped it there. However, the Court concluded that it was not open to conclude beyond reasonable doubt that he had intended to kill her or to cause her grievous bodily harm.[62] The Court held that financial and marital "stress" suggested "strain between the couple which might well have culminated in a confrontation" but that "it did not provide a motive or point to murder rather than manslaughter".[63] Nor did the scratches indicate the circumstances in which they were inflicted.[64]

32. The Court observed that the lies he told in combination with his disposal of the body could not raise an inference of intention if there was another possibility consistent with innocence.[65] The Court held that while findings that he lied about the cause of his facial injuries and his disposal of his wife's body should not be separated out from other evidence when considering their effect, the difficulty was that the evidence of post-offence conduct remained "neutral" on the issue of intent.[66] The Court considered that there was a reasonable hypothesis that the respondent had "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".[67] While smothering was a "reasonable possibility", there was another reasonable possibility and the jury could not have been satisfied that the requisite intention existed.[68]

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[55] Tx 2.30
[56] Tx 2.30
[57] Tx 2.45
[58] Tx 8.69
[59] Tx 10.55
[60] Summing Up Tx 29, 41; Tx 13.48
[61] Summing Up Tx 42; Ex 179, Admission #17, p2
[62] Criminal Code (Qld), s.302(1)(a)
[63] *R v Baden-Clay* [2015] QCA 265 at [42]
[64] *ibid.* [43]
[65] *ibid.* [45]
[66] *ibid.* [48]
[67] *ibid.* [48]
[68] *ibid.* [48]

33. The Court set aside the verdict of murder and substituted a verdict of manslaughter.

Part VI: APPELLANT'S ARGUMENT

34. The trial was conducted by prosecution and defence on the footing of murder or nothing. At the start of his examination in chief the respondent gave the following evidence:[69]

> Did you kill Allison?---No, I did not.
>
> Did you fight with her on the evening of the 19th?---No, I did not.
>
> Or the morning of the 20th of April 2012?---No, I did not.
>
> Did you, at that time, leave your children alone in the house to go to the Kholo Creek bridge?---Definitely not. Never.
>
> Did you ever take any steps to dispose or conceal Allison's body?---No.

35. It followed that the prosecution had to prove that the respondent killed his wife and that he did so with murderous intent.

36. The evidence raised an inference of unpremeditated murder in a number of ways. There was evidence of motive. The desire and longing of a man to be with another woman has for a long time been regarded as relevant to the question of intent.[70]

37. In this case, there was evidence upon which the jury could have concluded that the respondent was desperate to be rid of his wife. He told Ms McHugh that he loved her. He had undertaken to her, and emphatically repeated to her in writing, that he would be free from his wife by 1 July. Mr and Mrs Baden-Clay had received advice from a marriage counselor that she should put questions to him about his affair and that he should answer them. As a result, he was compelled to reveal to his wife, in response to her daily questioning him, the details of an ongoing affair which he had led her to believe had ended 8 months ago while at the same time enduring the demand of his lover to reveal it to his wife. He was living a life in which he was compelled to lie to his wife, to his parents and sibling, to the counsellor and, on his own evidence, to Ms McHugh. In writing, he described his circumstances as "agony".

38. Unknowingly, both women were planning to attend the same real estate seminar on 20 April. There was a real chance that his continuing double-dealing would be revealed if his wife met his lover and there was, therefore, a powerful reason for him to prevent his wife going. The respondent revealed this to Ms McHugh on 19 April. Ms McHugh said that during the telephone conversation she "lost it" ... "went into a rage" and was "getting angry".[71] The respondent gave evidence that Ms McHugh had a fairly volatile personality.[72] He agreed that she had yelled at him and was quite aggressive in the phone call on 19 April but insisted that he "had no concerns about there being an issues with Allison".[73]

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[69] Tx 12.22
[70] *e.g. Mutual Life Insurance Co. of New York v Moss* (1904) 4 CLR 311 at 317; *R v Plomp* (1963) 110 CLR 235 at 242-243 (Dixon CJ), 248 (Menzies J, with whom Walsh and McTiernan JJ agreed); and see *Circumstantial Evidence*, Wills, 5th American Edition, 1872, at 40
[71] Tx 5.75
[72] Tx 13.37
[73] Tx 14.78

39. It is submitted that the relationship between the respondent, Ms McHugh and his wife and their possible imminent meeting, as well as Ms McHugh's insistent demands, is evidence of motive and is, therefore, evidence from which a jury might infer intention.[74] In *Mutual Life Insurance Co. of New York v Moss*[75] Griffith CJ said:

> When, therefore, the question for consideration is whether such an act is intentional or not, it is of the highest importance to consider whether the person in question, in the circumstances in which he was placed, had any inducement to form such an intention. On charges of murder sometimes the question is whether or not the accused caused the death, and sometimes whether, if he caused it, he did so intentionally or accidentally. The existence of a motive may tend to show either that the person in question did the act *simpliciter*, or that he did it intentionally. Such evidence is given on the subsidiary question of probability; and in cases depending on circumstantial evidence the question of probability may be most important.[76]

40. It has been said that:

> In ordinary parlance, purpose, desire and motive may be used interchangeably. However, in the law motive describes the reason that prompts the formation of the accused's intention.[77]

41. In *de Gruchy v The Queen*[78] Gaudron, McHugh and Hayne JJ said:[79]

> Motive, if proven, is a matter from which a jury might properly infer intention, if that is in issue, and, in every case is relevant to the question whether the accused committed the offence charged.

42. In *R v Ball*[80] Lord Atkinson said:

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his 'malice aforethought,' inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.[81]

43. In *Plomp v The Queen,*[82] Dixon CJ said:

> It was proved that Plomp had formed a liaison with another woman whom he had promised to marry, that he had represented himself as a widower and that he was continuing the liaison. In the circumstances, proved by apparently credible evidence, it was open to conclude that Plomp had the strongest reasons to be rid of his wife. It is unnecessary to traverse all the circumstances in detail. They were placed before the

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[74] It has been held repeatedly that evidence of motive is relevant to proof of intent: *Mutual Life Insurance Co. of New York v Moss* (1906) 4 CLR 311 at 317 (Griffith CJ), 323 (Higgins J); *R v Plomp* [1962] Qd R 161 at 175 (Mansfield CJ), 185-186 (Wanstall J); *Lewis v R* [1979] 2 SCR 821 at 831; *R v Heath* [1991] 2 Qd R 182 at 195 (Shepherdson J), 202 (Cooper J); *Richardson v R* [2013] NSWCCA 218 at [56]; see also *Cross on Evidence,* 8th Australian ed. at pp. 22-24.

[75] (1904) 4 CLR 311 at 317

[76] *Ibid* at 321 and 323 (Higgins J)

[77] *Zaburoni v The Queen* (2016) 90 ALJR 492 at [17]

[78] (2002) 211 CLR 85

[79] At 92-93 [28]; and see *R v Wilson* (1970) 123 CLR 334 at 337 (Barwick CJ), 344 (Menzies J, with whom Walsh and McTiernan JJ agreed)

[80] [1911] AC 47 at 68

[81] Cited with approval by Menzies J in *Plomp* at 249-250 and by Gaudron, McHugh and Hayne JJ in *de Gruchy, supra,* at 92-93 [28]

[82] (1963) 110 CLR 235

> jury and doubtless considered by them. It is enough to say that on the whole case I think it was reasonably open for the jury to be satisfied beyond reasonable doubt that the deceased had been drowned as a result in some way of the conscious agency of the applicant Plomp.[83]

44. Later, his Honour commented upon the significance of the evidence of the affair with another woman:

> I think that if the whole of the evidence is read and what the accused said and did both before and after his wife's drowning is considered with all the circumstances of her drowning a reasonably strong circumstantial case is made against him, but I cannot think that this is so if you omitted from it all the detailed circumstances of his dealings with the other woman.
>
> ... In the present case it 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 juncture, presaged as it was by his talk and actions, were fulfilled by her completely fortuitous death although a good swimmer and in circumstances which ought not to have involved any danger to her.[84]

45. It is submitted that evidence of motive is circumstantial evidence that can be relied upon to raise a relevant inference, in this case to raise an inference that the respondent killed his wife intentionally. His desire to be rid of his wife in order to be with Ms McHugh provides the reason why he would wish to kill his wife. His false denials to police about his ongoing love affair, his injunction to Ms McHugh that she should "lie low" and his inquiry of her whether she had revealed the affair to police were all capable of being regarded by the jury as evidencing his anxiety to hide from police the existence and true nature of his affair with Ms McHugh *because it was the reason why he killed his wife*. These lies and deliberate concealment of the true state of his relationship with his wife showed the important significance which the respondent himself attached to these matters and thereby rendered the evidence of motive even more acute. At the trial, his admission of the affair was inevitable but he maintained, in a way the jury evidently rejected, that it was his affair, and not his marriage, that was a sham.

46. Second, there was evidence of post-offence conduct which was capable of giving rise to an inference of guilt of murder. There was evidence that he got rid of the primary evidence, the body of his wife, by leaving it on the banks of the Brisbane River under a bridge and that he returned home and faked fresh scratches on his face to disguise those his wife had inflicted upon him. He asked one of his daughters to put a band-aid on the scratches, telling her they were shaving cuts. He affected concern about his wife's disappearance and sent texts to her phone. His wife's phone was never found.[85] It contained an app by which his movements could be tracked by reference to his own phone. He asked his sister to help in a search of the neighbourhood. Throughout he maintained contact with his lover and sought her aid. The jury could have concluded these were deceptions to hide guilt.

47. He hid the truth of his ongoing affair from police from the first while affecting candour by a partial revelation. He told them falsely that it was over and that he was working

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[83] *op. cit.* at 241-242

[84] *op. cit.* at 242-243; Menzies J also said that evidence of motive and the accompanying lies supplied the necessary evidence to justify a verdict of murder: at 251-252; Professor Glanville Williams has described motive in the sense used in the cases as ulterior intention, namely "the intention with which an intentional act is done (or, more clearly, the intention with which an intentional consequence is brought about).": *Criminal Law, the General Part*, (2nd ed, 1961) p.48 see also *R v Hillier* (2007) 228 CLR 618 at [47]

[85] Tx 11.27

to rebuild trust. He advised Ms McHugh to "lay low". He then inquired of her whether she had revealed to police that the affair was still ongoing. This cloaking of the ongoing affair at the point just after he had killed his wife was significant. It was capable of giving rise to an inference that, in his mind, the very subject of the jury's consideration, the killing and the affair (with all of its auxiliary aspects and its demands on him) were crucially inter-related.

48. His wife's blood was in the back of her car and the respondent could not explain its presence. Foliage present at the house, the scene of the killing, were attached to the body; that foliage was not to be found at the disposal site.

49. Any circumstantial case is pregnant with competing inferences.[86] It is therefore "essential to inquire with the most scrupulous attention what other hypotheses there may be which may agree wholly or partially with the facts in evidence".[87] Such a hypotheses might arise from within the prosecution case or they might arise from evidence led by the defence.

50. It has been said that this is no more than an amplification of the rule that the prosecution must prove its case beyond a reasonable doubt.[88]

51. Conscious that the prosecution case was one based upon circumstantial evidence, the learned trial judge invited defence counsel to state the reasonable hypotheses consistent with his client's innocence that he wished to be put as part of the summing up.[89]

52. In due course defence counsel tendered a document listing four hypotheses to account for the death. None of them raised manslaughter as a hypothesis.[90] They were:

    a. The deceased could have drowned; or

    b. The deceased could have fallen from a height to her death or to cause drowning; or

    c. The deceased could have died from alcohol and/or sertraline toxicity; or

    d. The deceased could have suffered from the effects of serotonin syndrome which led to her drowning or falling from a height to her death.

53. Upon his Honour having read the document, the following occurred:

> His Honour: That doesn't raise manslaughter. What am I to do about that? I have to lead it, don't I?
>
> Mr Byrne: You do, your Honour. Yes.
>
> His Honour: But what am I going to say the defence case is on manslaughter?
>
> Mr Byrne: That's why I said this is a working draft. We'll try to get something more detailed to your Honour.[91]

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[86] *Peacock v The King* (1911) 13 CLR 619 at 651-652 (Barton J), 670-671 (O'Connor J); and see KJ Heller, *The Cognitive Psychology of Circumstantial Evidence,* (2006) 105 Michigan Law Review 241 at 292

[87] per Griffith CJ in *Peacock, supra,* at 629; *In re Hodge* (1838) 168 ER 1136 at 1137; *Plomp supra* at 243 (Dixon CJ), 252 (Menzies J); *Barca v R* (1975) 133 CLR 82 at 104 (Gibbs, Stephen and Mason JJ); *Shepherd v R* (1990) 170 CLR 573 at 578 (Dawson J)

[88] *Knight v The Queen* (1992) 175 CLR 495 at 502 (Mason CJ, Dawson and Toohey JJ)

[89] Tx 11.77; Tx 15.62; Tx 15.66

[90] MFI #O

[91] Tx 15.63

54. Later, defence counsel furnished a longer document setting out the defence responses to lies and post-offence conduct.[92] In relation to lies about the scratchmarks, it was said:

> If the statements are found to be lies then they go to manslaughter, not murder.

55. Thus, the issue of intent was left as a matter of onus, in the sense of raising the question whether the prosecution case, taken on its merits and without competing inferences for consideration, was capable of proving intent, not by way of raising a competing explanation for the inferences raised by the prosecution evidence.

56. The learned trial judge gave an Edwards direction.[93] He had invited defence counsel to make submissions to negate the prosecution's reliance upon the respondent's lies as evidence of his guilt if the jury were to find them to be such. None were offered.[94]

57. None were offered. No submissions were made which, in the event that the jury concluded that the presence of the scratches, the attempt to disguise them, the abrasions and the bruise, the evidence of motive, the lies, the blood in the car, the deceased's chipped tooth, and the other circumstances implied murder, would explain those circumstances consistently with an unlawful killing without murderous intent. The respondent's case was limited to the narrow ground that the inferences simply ought not be drawn and the jury should accept the respondent's denials of involvement. No competing factual inferences were offered to justify a verdict of manslaughter rather than murder.

58. Accordingly, in his closing address, counsel for the respondent put forward for the jury's consideration the four possibilities to account for the death and then, in summarising his client's case, he said:

> Now there are two possibilities when you think about it: (1) he has murdered his wife and disposed of the body, placed it underneath the Kholo Creek bridge in the mud. That's one possibility on the morning of the 20th. The other possibility is as he told you in evidence, that he was worried, that he expected Allison to either walk in the door or be found, having slipped over or hurt herself, in the near future, and he wanted that done as soon as possible. Now, they're the two possibilities.[95]

59. Nevertheless, his Honour directed the jury that manslaughter was an available verdict and said:[96]

> As you know, neither the Prosecution, nor the Defence, contends for manslaughter. In these circumstances you may wonder why I advert to that prospect at all. The answer is that the law obliges me to do so.

60. His Honour also directed the jury about the need to be satisfied about intent and the consequence if the jury was not satisfied.

61. There being evidence capable of raising an inference that the respondent killed his wife and that he did so intentionally, the question arises whether, on the evidence led at the trial, there arose a competing inference that explained the death, that was reasonable and was consistent with the respondent's innocence and that had not been excluded. The hypotheses actually relied upon by the respondent were met

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[92] MFI #P at [4]
[93] *Edwards v R* (1993) 178 CLR 193
[94] Tx 16.18
[95] Tx 18.5
[96] Summing Up, p9

by evidence led by the prosecution; the jury must have accepted that prosecution evidence to exclude those theories to explain the death and they are not in issue on this appeal. Although the prosecution still had to prove murder, there remained no other reasonable hypothesis consistent with innocence.

62. It must be emphasised that a hypothesis capable of being considered must be one which arises from the evidence and not from speculation about all the infinite ways in which a death might have resulted. Thus, in *Barca v The Queen*[97] Gibbs, Stephen and Mason JJ said:

> However, "an inference to be reasonable 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.

63. Concerning a hypothesis offered by an accused, Griffith CJ said in *Peacock,* approving a passage from Starkie on Evidence:

> ...but the prisoner so far as he alone is concerned can always afford a clue to them; and although he be unable to support his statement by evidence, his account of the transaction is for this purpose always most material and important. The effect may be on the one hand to suggest a view of the case which consists with the innocence of the accused, and which might otherwise have escaped observation. *On the other hand its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence.*[98] (emphasis added)

64. The hypotheses put forward by the respondent, coupled with his denial of killing, narrowed the questions in the case to the consideration whether the prosecution evidence excluded the four hypotheses, and if they had been, whether the inference of guilt should be drawn from the prosecution evidence to find the respondent guilty. There was no competing inference to consider in that event. It is submitted that the last sentence in Griffith CJ's dictum means that, in a circumstantial case, when an accused person offers hypotheses consistent with innocence which arise from the evidence, the issues in the trial may be narrowed to a consideration of such hypotheses only; while the onus remains on the Crown, factual possibilities advanced by neither party and not arising in the evidence need not be addressed by the prosecution. This is merely consistent with the uncontroversial proposition that, apart from special exceptions, criminal cases are adversarial in nature and the parties are free to define the issues and thereby bind themselves by the way they conduct the case.[99]

65. In *R v Momcilovic*[100] the appellant had been charged with trafficking under a statute pursuant to which proof that drugs were in her residence raised a rebuttable presumption that they were in her possession. Proof of possession of a traffickable quantity of drugs was prima facie evidence of trafficking. The defence case at trial was that the appellant had not known that the drugs were in the house and she gave evidence to that effect.[101] On appeal she raised, for the first time, a contention that she lacked any intent to traffic in the drugs. The submission was rejected on the

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[97] *supra* at 104
[98] *ibid.* at 629
[99] *Nudd v R* (2006) 80 ALJR 614 at 619 [9] (Gleeson CJ); *R v Luhan* (2009) VSCA 30 at [31]-[37] (Maxwell P, Vincent and Neave JJA); Meichel v R (2010) 207 A Crim R 334 at 340-341 [26]-[35] (Maxwell P, Neave JA and Lasry AJA); *Bertrand v R* [2008] VSCA 182 at [106]-[147] (Vincent, Redlich and Weinberg JJA)
[100] (2010) 25 VR 436; overruled in *Momcilovic v The Queen* (2011) 245 CLR 1 but not on this point; *R v Lane* (2013) 241 A Crim R 321
[101] *ibid* at 480 [162]

ground that intent was had not been put in issue at the trial and she was bound by the way the trial had been conducted.[102]

66. In *R v Luhan*[103] on a charge of drug trafficking, proved by establishing the weight of the drugs, the single issue in the trial had been whether the accused had not been involved in the offence. On appeal he raised for the first time the argument that the weight of the drugs might have included the weight of water.[104] The submission was rejected. The Court (Maxwell P, Vincent and Neave JJA) said:

> The vice inherent in all three grounds of appeal is that they were premised on a different trial having been conducted from that which was actually conducted on Luhan's behalf. Those who seek to challenge the result of a trial will be treated as bound by the manner in which the trial was conducted, and confined to the matters actually put in issue by them or by their counsel (except where a matter, thought [sic] not raised, can reasonably be seen to have emerged as a real question from the evidence actually adduced at the trial).

67. In *Luhan* the Court also observed that if the defence had been raised, it might have been addressed by evidence.[105] In the present case, if a factual hypothesis of unintentional killing had been raised by the defence as a real factual issue, the cross examination of the respondent would have been very different. Of course, it can be inferred that such a hypothesis was not raised for tactical reasons. In a case conducted in that way, it may well be that the defence does *not* wish manslaughter to be left open; at least, the defence may not wish that to be a matter of emphasis. During the trial, the learned trial judge said:

> His Honour: ... I have to draw the jury's attention in respect of lies and the other post-offence conduct to the possibility that the conduct in question may go only to prove unlawful killing ...
>
> ... and may not go to prove the additional element of intent that's requisite to murder. And I say that because it may be that part of your response, Mr Byrne, is that if the jury considers that a lie was told about one or other of those, they ought not to infer that it establishes anything more than a consciousness of guilt in respect of the killing.
>
> Mr Byrne: And that was foreshadowed to you Honour last week.
>
> His Honour: I know, but it involves a considered tactical position ...
>
> Mr Byrne: I understand.
>
> His Honour: ... on your side because of its obvious implications.[106]

68. This is not a case, like *Gilbert v The Queen*[107] or *Gillard v The Queen*[108] in which an accused has been deprived of the chance of a verdict of manslaughter because that verdict was not left to the jury. Nor was it a case like those adverted to by Barwick CJ in his reasons in *Pemble v The Queen,*[109] in which evidence threw up an actual defence, such as provocation, which it became the duty of the trial judge to put to the jury. It is a case in which, although manslaughter was left open because the

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[102] *ibid* at 481 [166]-[168]
[103] *supra*
[104] *ibid* at [32]
[105] *ibid* at [32]
[106] Tx 15.60
[107] (2000) 201 CLR 414
[108] (2003) 219 CLR 1
[109] (1971) 124 CLR 107 at 118

prosecution bore the onus of proving intent, there were no competing factual hypotheses in issue relating to a possible verdict of manslaughter..[110]

69. It was, therefore, open to the jury to conclude that the respondent had killed his wife but that the circumstantial evidence did not satisfy them that the respondent intended to do so; that is to say, it was open for them to conclude that the proof offered by the prosecution was not sufficiently persuasive on that issue. It was also open for them to conclude that it did. This was, indeed, how the defence was conducted and the learned trial judge directed the jury accordingly that they had to be satisfied about intent but did not put any factual hypothesis consistent with manslaughter to the jury for consideration, no such hypothesis having arisen on the evidence.[111] A consideration of proof of intent in this case did not require conjecture about factual scenarios.

70. It is respectfully submitted that, in deciding that there was no evidence capable of proving intent, the Court of Appeal fell into error because it concluded that there was no evidence of motive to kill.

71. The Court of Appeal said:

> 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.[112]

> ...But in the present case there was no evidence of motive in the sense of a reason to kill...[113]

72. This view led to the Court's erroneous conclusion that there was insufficient evidence of intent.[114] It is respectfully submitted that, for the reasons given in the authorities cited earlier, evidence of a clandestine love affair with another woman (and evidence of financial distress in this case) constitutes evidence of motive; and evidence of motive is evidence that can be used to infer murderous intent. However, having come to that conclusion, the Court led itself to the ultimate conclusion that evidence was "neutral on the issue of intent".[115]

73. The Court said:

> A reasonably open hypothesis was that the appellant's wife had attacked him scratching his face. In endeavouring to make her stop he had killed her without intending to do so, with his conduct thereafter being attributable to panic.[116]

> ...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 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

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[110] There are cases in which intent is not in issue at all; they arise when the cause of death itself implies intent see eg, *The Queen v Hillier* (2007) 228 CLR 618, the deceased had been strangled: at 625 [6] and see *Roberts v Western Australia* (2007) 34 WAR 1

[111] See Summing-up at p9 (manslaughter open although nobody contends for it); 35 (distinction between inference of killing and further inference of intent)

[112] Court of Appeal Reasons [42]

[113] Court of Appeal Reasons [46]

[114] Court of Appeal Reasons [44], [48]

[115] Court of Appeal Reasons [48]

[116] Court of Appeal Reasons [39]

> 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. Smothering, the Crown's thesis, was a reasonable possibility, but while there was another reasonable possibility available on the evidence, the jury could not properly have been satisfied beyond a reasonable doubt that the element of intent to kill or do grievous bodily harm had been proved.[117]

74. It is respectfully submitted that this reasoning is erroneous. First, not only was there no evidence to support an inference of "a blow" or "a fall hitting her head against a hard surface" to compete with the prosecution case, the respondent positively denied any such thing.

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.[118]

75. 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 hypothesis for the consideration of the jury.

76. Second, if that submission is wrong, and if there were two competing hypotheses for the jury's consideration, then the jury had to consider the hypothesis of an unintentional killing in the course of a physical fight in the context of all of the other evidence in the case.[119] In that respect, they had to consider that hypothesis against the significance and weight they gave to the respondent's post-offence conduct: to what degree was the respondent's proven conduct consonant with that of a man who had *unintentionally* killed his wife in an altercation?

77. On the evidence, the jury could 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 police any knowledge of his motive to kill her. He bundled his wife's body into the back of her own car, leaving blood that was found later, and discarded it in the mud of a riverbank under a bridge 13 kilometres away from where he had killed her. Having distanced himself from the corpse, he then undertook an elaborate and cold-blooded deception to hide his involvement and his reason to kill her. He left phony voice mail messages on a phone he knew his wife would not answer. He phoned his parents feigning concern about her absence. Evidently to furnish himself with some self-corroboration, he recruited one of his daughters to apply a band-aid to the scratches that her mother had made in defending herself against his attack, lying to her that they were shaving injuries. He engaged in a mock display of concerned searching of the neighbourhood for her, with his sister's unwitting accompaniment, knowing all the time where her body lay in the mud. He concealed his motive to kill her by his lies to police and he asked his mistress to stay away from him to prevent any discovery. He permitted his children to wonder for ten days whether their mother was alive or dead as police searched for her, all the while knowing that he had killed her and exactly where she lay. His lies, about all of these matters, continued through the trial and were multiplied. He now asserted that he didn't love Ms McHugh, he loved only his wife and his statements to the contrary, to Ms McHugh and to others, were the lies. He was

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[117] Court of Appeal Reasons [48]
[118] *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152; cited with approval in *Lane v R* (2013) 241 A Crim R 321 at 348 (NSWCCA); see also *Barca v R (supra),* at 104-5
[119] *R v Hillier* (2007) 228 CLR 618 at [46]-[49]

unable to explain the injuries to his face and body or the way in which foliage, present at the scene of the killing but not at the place where he dumped the body, came to be entangled in his wife's hair. He falsely denied dumping her body but could not explain how his wife's blood came to be in the back of a recently purchased car.

78. Charles JA observed in *R v Heyes*[120] that post-offence conduct may support a distinction between two levels of culpability when the accused's actions are out of all proportion to the lesser degrees of culpability. It is submitted that it was open to the jury, if the factual hypothesis posed by the Court of Appeal had been put to them by the respondent at the trial, to conclude that the post-offence actions of the respondent were those of a callous murderer and not those of a man who had unintentionally killed his wife.[121]

79. In *R v Ciantar,*[122] a decision of a five member Court of Appeal, the Court said:

> ...it is folly, if not impossible to attempt to formulate general propositions or rules which will govern the occasions on which lies or conduct give rise to an inference that the accused thereby displayed a consciousness of guilt. Everything depends on the circumstances of the particular case. There is no sound legal reason to restrict, to the two circumstances mentioned in *Heyes*[123], the circumstances in which a jury may find evidence of consciousness of guilt to be probative of guilt of a specific offence as opposed to another offence. To do so would be to usurp a large part of the fact finding function of the jury and in most cases require juries to act contrary to the dictates of common sense and experience which they are charged to bring to their task.[124]

80. This Court said in *Doney v R*:[125]

> But it is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case conflict, what evidence is truthful.[126]

81. Further, the jury was entitled to take into account, as reinforcing the strength of the inference contended for by the prosecution, that the respondent had lied and that, as a consequence, there was no evidence from him to explain or to contradict the inference of murder.[127]

82. This is *a fortiori* if the jury concludes that the accused's failure to offer an explanation of potentially incriminatory conduct is because the proffered explanation is a lie. In such a case, not only is there an absence of a contrary hypothesis but the telling of lies may itself be taken by a jury to be evidence of guilt.[128]

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[120] (2006) 12 VR 401 at [9] per Charles JA; and the *obiter dictum* of Brooking JA in *R v Rice* [1996] 2 VR 406 at 420.6 "...I would not have withdrawn ..."
[121] *cf. R v McClutchie* [2015] QCA 120 at [32] per Holmes JA
[122] (2006) 16 VR 26
[123] *R v Heyes* (2006) 12 VR 401
[124] *ibid.* at [69]; but compare *R v M* (1995) 1 Qd R 213 at 223, 225; *R v Wehlow* (2001) 122 A Crim R 63 at [14]-[16], [33]-[34]; *R v Huebner* [2004] QCA 98 at [121]; *R v DAN* [2007] QCA 66 per Holmes JA at [133], *contra per* de Jersey CJ at [87]-[89]; *R v Lennox* [2007] QCA 383 at [52] per Holmes JA; at [26]-[27] per Williams JA
[125] (1990) 171 CLR 207 at 214
[126] See *Gipp v The Queen* (1998) 194 CLR 106 at 123, 125; *M v The Queen* (1994) 181 CLR 487 at 494
[127] *Weissensteiner v R* (1993) 178 CLR 217; *Chalmers v R* (2011) 37 VR 464 at [42]
[128] *Edwards v R* (1993) 178 CLR 193 at 209,

83. Thirdly, it is respectfully submitted that the Court of Appeal fell into error by undertaking a piecemeal evaluation of the evidence rather than looking at it as a whole.[129] Thus, the Court said[130]:

> Indeed, we would accept the respondent's submission that the evidence of the disposal of the body could, as a circumstance in a larger case, properly be left to the jury as relevant to both manslaughter and murder. The fact that, like the scratches on the face, it was equivocal as between the two crimes did not mean that it was not properly admitted and left for the jury's consideration as to both ...
>
> However, to say that equivocal circumstantial evidence is admissible for consideration in the context of the case as a whole is not to say that it can support a finding of intent for which there is no other evidentiary support.

84. It is submitted that this process of dissecting the prosecution case into its component parts was a result of the Court's judgment that there was no evidence of motive which gave significance to the other evidence.[131]

85. It is submitted that the evidence of the respondent's relationship with his wife and Ms McHugh, his concealment of the affair before the killing, his financial position, his resentment at his wife's daily questioning of him, his promises to his lover, his disposal of his wife's body, the callous manner of that disposal, his pretence of concern for her absence, his use of his daughter and of his parents in his shows of fake concern for her whereabouts, his lies to the police, his inability to explain incriminatory evidence, his reliance upon false theories to account for her death, his failure to put forward any reasonable hypothesis for the killing consistent with his innocence of murder, his false denial of killing and the sheer callousness of his acts after he had killed his wife, were all capable of giving rise to an inference that he killed her intentionally which the jury could accept in finding him guilty of murder.

Part VII: APPLICABLE CONSTITUTIONAL AND STATUORY PROVISIONS

The applicable statutory provisions are attached in the Annexure.

Part VIII: ORDERS SOUGHT

1. Appeal allowed.
2. Set aside the orders of the Court of Appeal made on 8 December 2015 and in lieu thereof dismiss the appeal to that Court.

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[129] *Chamberlain v R* (1983) 153 CLR 521 *per* Gibbs CJ and Mason J at 535-6; *Hillier v R* (2007) 228 CLR 618 at [48].
[130] Reasons of Court of Appeal [44]
[131] See eg at Reasons of Court of Appeal [46]

Part IX: TIME ESTIMATE

The presentation of the appellant's oral argument is estimated to take 3 hours.

Dated: 10 June 2016

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 33/16

BETWEEN:

THE QUEEN
Appellant

and

GERARD ROBERT BADEN-CLAY
Respondent

ANNEXURE TO PART VI

LEGISLATIVE PROVISIONS

Criminal Code (Qld)

Section 23 Intention - motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for-

(a) an act or omission that occurs independently of the exercise of the person's will; or

(b) an event that-

(i) the person does not intend or foresee as a possible consequence; and

(ii) an ordinary person would not reasonably foresee as a possible consequence.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Filed on 10 / 06 / 2016 on behalf of the appellant

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Per: Peter Negerevich

Section 300 Unlawful homicide

Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case.

Section 302 Definition of murder

(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say-

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

(b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of murder.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

Section 668E Determination of appeal in ordinary cases

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard

to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

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Section 668F Powers of Court in special cases

(1) If it appears to the Court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed at the trial or pass such sentence, whether more or less severe, in substitution therefor, as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.

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(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

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(3) Where, on the conviction of the appellant, the jury have found a special verdict, and the Court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence, whether more or less severe, in substitution for the sentence passed at the trial, as may be warranted in law.

(4) If on any appeal it appears to the Court that, although the appellant committed the act or made the omission charged against the appellant, the appellant was not of sound mind at the time when the act or omission alleged to constitute the offence occurred, so as not to be responsible therefor according to law, the Court may quash the sentence passed at the trial, and order the appellant to be kept in strict custody in the same manner as if a jury had found that fact specially under section 647.

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