

BETWEEN:

THE QUEEN
Appellant

and

GERARD ROBERT BADEN-CLAY
Respondent

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APPELLANT'S REPLY

Part I: INTERNET PUBLICATION

1. It is certified that this reply is in a form suitable for publication on the internet.

20 **Part II: REPLY TO THE ARGUMENT OF THE RESPONDENT**

2. The Respondent contends that "a hypothesis consistent with guilt of only an unlawful killing was raised by the defence at the trial".¹ To support this he refers, first, to the following exchange between defence counsel and the trial judge:²

HIS HONOUR: What is the reasonable hypothesis consistent with an absence of an intention to kill?

MR COPLEY: That, on the prosecution case, death was occasioned unintentionally.

3. That was not a statement of a hypothesis. It was a mere tautology.
- 30 4. The Respondent also relies upon the *whole* of the written outline he put forward at the trial in support of the submission that there was no case to answer.³ However, that document argues only that the circumstantial evidence does not raise an inference of intention to kill or cause grievous bodily harm.⁴ It put forward no hypothesis.
5. Of course, the prosecution bore the burden of proving intent. However, if in that connection the question is asked whether there was, on the evidence, a reasonable hypothesis consistent with unintentional killing, then the answer is "No". The only

¹ Outline paragraph 6.12.

² Tx 11-52 lines 40 to 45: AB 785.40-45.

³ MFI #L paragraphs 1 to 27: AB 1179-1783.

⁴ See paragraph 1 of MFI #L: AB 1779.

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actual hypotheses consistent with the innocence of the Respondent that he raised were those that posited his entire lack of involvement in his wife's killing.⁵ Evidence was led to refute them and the jury must have been satisfied to reject them.

- 10 6. The Respondent's reliance upon that particular exchange at the trial and upon that written trial submission demonstrates the Respondent's confusion between a hypothesis and the burden of proof upon the prosecution to prove intent. Although consideration of the significance of a reasonable hypothesis consistent with innocence may be part of the general inquiry into whether the prosecution has discharged its onus, it is only a particular incident of that inquiry; and it requires there to be a hypothesis for consideration, a factual theory, based upon the evidence.⁶ It is not permissible after the conclusion of the trial to posit imaginary possibilities to explain an embarrassing death and then to assert that these have not been addressed or excluded by the prosecution.⁷
- 20 7. The result of the way the case was conducted by the parties was that, although the issue of intent remained in contention throughout, in considering whether the prosecution had proved its case the jury had to consider, on the one hand, whether the evidence sustained the prosecution hypothesis of murder and, on the other hand, whether the evidence had excluded the four defence hypotheses according to which Allison Baden-Clay had died by misadventure. It is submitted that on the evidence before it, the jury was entitled to (and did) reject these defence hypotheses and was entitled to (and did) conclude that the prosecution had proved intentional killing.
- 30 8. The jury was not required to consider factual theories of which they were never informed and which, in fact, the Respondent himself denied. The Respondent told police 'we had a fifteen minute session last night which was, it's never much fun for me, to be honest.'⁸ He said there was nothing that happened that may have "set her off". Asked if she screamed at him when she "vented", he replied "no, she's not like that".⁹ Following the discussion about the affair they discussed plans for the following day including arrangements for the children.¹⁰ There didn't seem to be any lingering animosity, any more than normal.¹¹ The respondent gave evidence that the mood was "perfectly normal - certainly civilised".¹²
9. Even if this unarticulated hypothesis was in issue at the trial, it is not germane on this appeal to submit, as the Respondent does, that "an hypothesis consistent with innocence of murder was open on the prosecution evidence".¹³ If it was open, the question for the jury was whether, on the evidence, it had been excluded, and for the Court of Appeal, whether the jury could reasonably have excluded it. The jury's verdict demonstrated

⁵ See paragraphs 52 to 55 of the Appellant's submissions.

⁶ See Appellant's Submissions paragraphs 62 to 63 and the cases there cited.

⁷ See Appellant's Submissions paragraphs 65 to 67.

⁸ Ex 92 at p20: AB1566.14-15.

⁹ Ex 87 at p15: AB1534.27.

¹⁰ Ex 92 at p22: AB1568.33-46.

¹¹ Ex 92 at p23: AB1569.11-14.

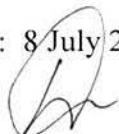
¹² Tx 13-54.5: AB917.5.

¹³ Respondent's Submissions paragraph 6.6.

that the jury was satisfied beyond a reasonable doubt that all hypotheses consistent with innocence had been excluded.

10. The Respondent, in his Submissions, also submits that it was open to the jury to find that any force used was not intended to kill or do grievous bodily harm.¹⁴ However, in referring to the relevant evidence, he fails to mention all of it. He omits reference to the scratch marks which the experts said were probably made by nails and to the injuries on his own body and Allison Baden-Clay's blood found in the car, neither of which he could explain.
11. Further, it is respectfully submitted that the Respondent's submissions concerning motive are misconceived. In *Zaburoni v The Queen* Kiefel, Bell and Keane JJ said "in law motive describes the reason that prompts the formation of the accused's intention".¹⁵ The judgment cited Phipson on Evidence which stated "[m]otive is the reason which prompts the intention".¹⁶ In *Cross on Evidence*¹⁷ the editors say that "[f]urther examples [of motive] are afforded by almost any murder trial in which proof is given of facts supplying a motive for revenge, financial or amatory gain", citing *Plomp*.¹⁸
12. Consequently, for the reasons advanced in the Appellant's Submissions, the proposition that the motives relied upon by the prosecution were mere "pressures" which did not "provide a motive"¹⁹ cannot be sustained. The Court's conclusion that "in the present case there was no evidence of motive in the sense of a reason to kill" was contrary to the dicta in *Plomp*,²⁰ which the Respondent has not sought leave to argue should be overruled. It is respectfully submitted that this error in identifying evidence of motive led the Court of Appeal to consider the rest of the circumstantial evidence in a false light.
13. The Respondent's counsel certainly understood at trial that the evidence led went to motive; they addressed it in their written no case submissions.²¹ Both prosecution²² and defence²³ counsel spent substantial portions of their addresses dealing with the motive evidence.

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¹⁴ Respondent's Submissions paragraph 6.10.

¹⁵ (2016) 90 ALJR 492; [2016] HCA 12 at [16]-[17].

¹⁶ Phipson on Evidence (14th ed, 1990), p356-357 [16-19].

¹⁷ Ninth Australian edition, 2013 at [1140].

¹⁸ (1963) 110 CLR 234 at 243 *per* Dixon CJ, at 248-249 *per* Menzies J.

¹⁹ See Reasons of Court of Appeal at [44], [45] and [46]: AB 1813.

²⁰ (1963) 110 CLR 234.

²¹ See MFI "L", AB 1780, 1782.

²² Tx 18-51 to 18-59, 19-3, 19-5 to 19-7, 19-16, 19-17: AB 1264-1272, 1276, 1278-1280, 1289-1290.

²³ Tx 17-26 to 17-37, Tx 17-44 to 17-46: AB1166-1177, AB1184-1186.