IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S135 of 2012

BETWEEN:

BRADLEY DOUGLAS COOPER

Appellant

THE QUEEN

Respondent

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APPELLANT'S SUBMISSIONS

Part I: Suitability for Publication

1. The appellant certifies that this submission is suitable for publication on the Internet.

Part II: Concise Statement of Issues

2. Did the Court of Criminal Appeal err in applying the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW)?

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3. In what circumstances will an appellate court, in determining whether to apply the proviso, be obliged to consider the nature of an established error and the possible effect of the error on the outcome of the trial? How is an appellate court to approach this task?

4. Did the error upheld in the appellant's appeal, in which joint criminal enterprise liability was left to the jury when it was not supported by the evidence, preclude application of the proviso?

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5. Notwithstanding that the trial judge's directions on the following matters should not have been given: (a) joint criminal enterprise liability; (b) self-defence or defence of another; (c) the confession of Ms Julie Quinn to the witness "C", did the Court of Criminal Appeal err

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when it determined that "there was no error or inadequacy" in the directions and that the trial judge gave "appropriate directions to the jury"?

6. Did the established failures of defence counsel to adduce relevant evidence in relation to the deceased's mental condition and to cross-examine the deceased's grandmother on this issue occasion a miscarriage of justice?

7. What is the correct test to be applied to determine whether an omission to adduce evidence in support of the defence case or a failure to cross-examine a prosecution witness amounts to a miscarriage of justice?

Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

8. The appellant certifies that there is not thought to be any need to give any notice under s 78B of the *Judiciary Act 1903*.

Part IV: Citation of the Reasons for Judgment

9. The Internet citation of the reasons for judgment of the Court of Criminal Appeal is *Cooper v R* [2011] NSWCCA 258.

Part V: Narrative Statement of Facts

10. The appellant was tried before Buddin J and a jury in the Supreme Court of NSW at Bathurst for the murder of Dale Kevin Muldoon ("the deceased") on 22 March 2003. The trial commenced on 30 May 2005. The jury returned a guilty verdict on 15 June 2005.

11. The appellant had earlier stood trial with a co-accused, Julie Anne Quinn ("Quinn"), for the murder of the deceased and for a further count of disposing of the body of the deceased on 22 March 2003 with intent to pervert the course of justice. This joint trial commenced before Bell J (as her Honour then was) and a jury on 27 September 2004. At the commencement of that trial, the appellant pleaded to the pervert course of justice offence. On 29 September 2004 Bell J upheld an application for a separate trial made on behalf of the appellant and discharged the jury from giving a verdict in relation to him. Quinn's trial proceeded and she

was ultimately acquitted of the murder. The jury in Quinn's trial was unable to reach a verdict on the pervert course of justice count. Quinn was not retried on this count. She was, however, called as a Crown witness in the subsequent trial of the appellant. Quinn gave her evidence under the protection of a certificate issued pursuant to s 128 of the *Evidence Act 1995* (NSW).

12. The evidence adduced in the trial before Buddin J that is relevant to this appeal may be summarised as follows. The appellant and Quinn lived together in Lithgow with the appellant's daughter and Quinn's nine year old son. The deceased also lived in Lithgow. On Saturday 22 March 2003 at about 4.00 pm the deceased visited the home of the appellant and Quinn. The deceased was killed later that evening in the kitchen/dining room area of the home, after receiving a number of injuries to his head. Police did not discover the body of the deceased until 18 June 2003, when it was exhumed from a grave in the Ben Bullen State Forest: CCA [4], [5], [15].

13. Quinn gave evidence that the deceased did not appear to be intoxicated when he arrived at her home. At about 5.00 pm Quinn ordered a cask of wine, which was delivered by a taxi driver named Terrence Theobald a short time later. The deceased came out of the house and paid for the wine. Mr Theobald noticed that the deceased "appeared to be off his head on a mixture of drugs and alcohol". A friend of the deceased, Darren Harvey, gave evidence that he and the deceased consumed cannabis, a 750 ml bottle of bourbon and a carton of beer from around lunchtime through to the evening of 21 March 2003. The following day they consumed more beer until around lunchtime when the deceased left Mr Harvey's company. The post-mortem report recorded the deceased having a blood alcohol reading of 0.101: CCA [16]–[17].

14. Quinn gave evidence that she drank wine at a table in the kitchen area with the deceased and the appellant, while her son (referred to as "J" in the trial transcript) watched television in the lounge room. After consuming a few glasses of wine, the deceased appeared to become disorientated and made paranoid and irrational comments. The deceased insinuated that the appellant was a "rock spider" (someone who sexually interferes with children). He also spoke about getting a gun and that he knew some 'bikies' and could get someone "knocked": Trial transcript (T) 351. Quinn gave evidence that when the deceased ignored the appellant's

request to be quiet, the appellant punched the deceased up to three times in the face : T328, 354; CCA [18].

15. Quinn left the kitchen area for about five minutes: T330. When she returned the appellant and the deceased were still sitting at the kitchen table. She observed injuries to the deceased's face: T330, 354. While she prepared "J's" dinner, the appellant and the deceased continued to argue. The appellant yelled at the deceased and said, "You're not leaving here alive". Quinn gave evidence that she saw the appellant pick up a hollow metal child's baseball bat and strike the deceased three or four times, including once while the deceased was lying on the floor on his stomach: T332, 356; CCA [19]. She saw at least three blows administered to the back of the deceased's head, two of which were very hard: T360. On her account Quinn continued to prepare and serve "J's" dinner while the deceased was being assaulted with the bat: T362.

16. According to Quinn, the bat broke during the assault. In cross-examination Quinn said that she "sort of saw through my fingers" the appellant push the serrated edge of the broken bat into the rear side of the deceased's head (above and behind his ear): T358, 359; CCA [19]. When the appellant went to the toilet, Quinn observed blood on the back of the deceased's head: T332; CCA [20]. She unsuccessfully tried to rouse the deceased. Quinn later went to check on "J", who was asleep, and returned to find the appellant with a small axe in his hand which was used to chop firewood. She saw the appellant strike the deceased with the axe two or three times to his temple: CCA [21]. The axe head had a sharpened side and a blunt side: T365.

17. The appellant did not give evidence in the trial. The following sequence of propositions was put to Quinn in cross-examination: the deceased threatened that he was going to shoot the children and then attempted to strike at the appellant, who retaliated by punching the deceased; the deceased then picked up the baseball bat and struck the appellant with it; following a tussle in the kitchen, the appellant was lying on his back with the deceased "over the top of him"; the deceased pressed a knife against the appellant's throat. It was put to

Quinn that she then picked up the axe and struck the deceased's head four times with it. Quinn denied these propositions: T381, 396; CCA [26].

18. Kevin Denne, a long standing associate of the appellant, and a witness known as "C", the appellant's niece, both gave evidence about their involvement in the subsequent disposal of the deceased's body: CCA [27]–[47]. "C" was given an indemnity from prosecution (for being an accessory after the fact to murder) on condition that she give truthful evidence: T141–142; CCA [33]. "C" stated that she saw the body of the deceased, wrapped in a tarpaulin, and a bag with two handles poking out it, which she thought belonged to a baseball bat and an axe, placed in the boot of the car: CCA [37]–[38]. She also noticed that the appellant had swollen knuckles: CCA [40]. Contrary to Denne, "C" said that she had earlier driven the appellant and Denne to a bottle shop where two VB longnecks were purchased. She said that the appellant and Denne drank the beer during the journey to the forest. Two VB longneck bottles were later found in the area where "C" dropped off the appellant and Denne: T263–265; CCA [36].

19. "C" gave evidence that after driving to the forest, she had a conversation with Quinn during which Quinn confessed to attacking the deceased with an axe. "C" asked Quinn what had happened. Quinn replied that the appellant and deceased were "having a fight...and it got out of hand." "C" was "not sure" at first whether Quinn said that she or the appellant hit the deceased, but later said in evidence, "I was sure she [i.e. Quinn] said that she hit him." When asked what Quinn said the deceased was hit with, "C" answered, "With an axe": T157–158; CCA [43]. Quinn also told "C" that stains on the wall and ceiling were caused by blood which had "sprayed" from the deceased's injuries: T158, 162; CCA [46].

20. "C" accepted in cross-examination that her initial statement to police was a truthful account: T182. In the statement "C" related that Quinn had said that the deceased "came around and they were all chummy, talking as friends as they do...they got alcohol delivered by taxi...they were drinking...[the deceased] said something about the kids and he was going to kill Chantelle and all this sort of stuff which is [the appellant's] daughter...[the appellant] just went ballistic and started hitting him and [the deceased] started hitting [the appellant] and

[Quinn] didn't know what to do so she grabbed the axe and hit him in the head with it and she said it cut him straight down the face...[Quinn] said, I didn't know what to do because I thought he was going to kill [the appellant] and so that's where it ended": T176–177; CCA [42]. "C" confirmed that she recalled Quinn saying the words recorded in her statement: T179. In her evidence, Quinn denied the confession to "C": CCA [48].

21. A forensic pathologist, Dr Little, performed a post-mortem examination of the deceased: CCA [49]–[57]. Dr Little identified four distinct areas of injury. Injury #1 was a 45 mm long "defect" on the top right side of the deceased's head accompanied by two superficial lacerations. Injury #2 was comprised of two "fairly superficial" lacerations on the deceased's "right temple above the ear". Injury #3 was a laceration on the rear and left side of the deceased's head. Injury #4 was a "star" shaped laceration on the back of the deceased's head, comprised of four splits in the skin radiating out from a central point. Injuries #1 and 4 were associated with underlying skull fractures and were both capable of causing death. Dr Little opined that injury #4 occurred before injury #1 and that a minimum of four blows was required to cause the injuries.

22. In Dr Little's opinion, a baseball bat could have caused injuries #2, 3 and 4 but was unlikely to have caused injury #1: CCA [54]. However, and somewhat significantly for the issues raised in this appeal, Dr Little also accepted that both the back side of an axe head and its cutting edge, if it is blunt, are also capable of causing laceration injuries. Dr Little accepted that each of the injuries, including injuries #1 and 4, could have been caused by an axe: T294, 298, 304–305, 309–310. Dr Little denied that the observed head injuries would "spurt" blood, but she did accept that: scalp injuries "tend to bleed a lot"; injuries #1 and 4 would certainly have caused bleeding; and "cast-off blood" may well have resulted in blood deposits on the walls or ceiling of the room in which the assault took place: CCA [57]. Dr Little did not observe bruises, lacerations or fracturing to the deceased's facial region. She was not able to give an opinion as to the body position of the deceased at the time injuries were inflicted. In relation to injury #4, Dr Little stated that the assailant could have "been standing on either side [of the deceased] or maybe behind": T310–311.

23. There was some evidence in the trial that the deceased was a heavy user of drugs and alcohol and was prone to violent and irrational behaviour: CCA [91]. This evidence was given by acquaintances of the deceased and the taxi driver who drove the deceased to the home of the appellant: CCA [88]–[97]. However, the deceased's mother, Fiona Phillips, and grandmother, Daphne Muldoon, in the main denied that the deceased had drug or behavioural problems: CCA [98]–[103]. Mrs Muldoon suggested that there was "nothing wrong with [the deceased] at all": T48; CCA [101]. Defence counsel was in possession of mental health records that supported an inference that the deceased suffered from a psychotic mental illness, was prone to bizarre and dangerous behaviour and behaved in an "aggressive" and "paranoid" manner when intoxicated by alcohol and/or drugs: CCA [104]–[122]. These records were not adduced in the defence case: CCA [177]–[181]. In addition, defence counsel did not challenge in cross-examination evidence given by the deceased's grandmother, which was clearly contradicted by the content of the notes: CCA [182]–[187]. The appellant and his trial counsel were examined on this issue before the Court of Criminal Appeal.

24. The Crown prosecutor put his case against the appellant in two ways: the appellant was solely responsible for the death of the deceased; alternatively, the appellant was guilty on the basis of what was described as his participation in a "joint criminal enterprise" with Quinn. The Crown prosecutor opened his case in the following way:

> "I have told you during the course of my opening to you that the Crown alleges that the accused alone was responsible for the death of the deceased *or he was acting in company with Julie Quinn.* Julie Quinn is going to give evidence in these proceedings. I anticipate that she will tell you that the blows that were struck to the head of the deceased were struck by Mr Cooper. I anticipate that she will tell you that she saw him strike the deceased to the head first of all with a baseball bat knocking him to the floor apparently unconscious and sometime after that she saw him using an axe to strike the deceased in the head. I have told you that [witness "C"] I anticipate will tell you that Quinn made an admission to her that she was the one that used the axe upon the deceased. There's obviously a disparity there and that is a disparity that you will need to direct your minds to during the course of this trial. It's one of the principle issues in the case, one of the main issues or the principle in this case will be who was it that was responsible for inflicting the injuries upon the deceased. You have or you will have I expect the evidence of Julie Quinn, if you accept her

and you accept her beyond reasonable doubt you would have no difficulty in concluding that it was the accused who delivered those fatal blows. *We put this case on an alternative basis. We put it on the basis that Mr Muldoon met his death another way and that is when the accused and Miss Quinn acted in combination to bring about the death of the deceased. Now during the course of his summing up to you I anticipate that his Honour will give directions of law about what is known by lawyers as joint criminal enterprise.*"[1]

25. In his closing address, the Crown prosecutor restated the "alternative case", although his "primary submission" was that the jury would reject "C's" evidence about her conversation with Ms Quinn: T443, 463, 465).

26. The trial judge included directions on "joint criminal enterprise" in his written directions to the jury. The summing up proceeded on the basis that "joint criminal enterprise" was available and was to be founded in effect in Quinn's admission to "C" coupled with a rejection of self-defence: Summing Up (SU) 33, 39–41. This, it was put, could be established by the Crown proving either that Quinn did not believe it was necessary to do what she did to defend the accused, or, if she did so believe then the acts were not a reasonable response in the circumstances as she perceived them: SU 40.5–40.8. The trial judge later reiterated that the Crown had an "alternative basis" for establishing guilt, namely, the case on joint criminal enterprise: SU 81.2.

27. After they had retired, the jury returned with a question that sought clarification on joint criminal enterprise: SU 93.2. The trial judge then repeated and gave further directions on joint criminal enterprise, emphasising the evidence of Quinn's alleged confession to "C" and, in particular the words, "I didn't know what to do because I thought he was going to kill Coop": SU 94–98. Liability based on joint criminal enterprise was said to arise if the Crown "had not established that the accused was solely responsible for the fatal injuries": SU 97.3. Joint criminal enterprise was said, then, to be established if the Crown could establish that "Ms Quinn did not believe at the time of doing her act or acts that it was necessary to do what she did in order to defend the accused, or if it is reasonably possible that she did have such a belief, that nonetheless the act or acts were not a reasonable response in the circumstances as

[1] T7–8 (emphasis added)

she perceived them": SU98.4. In this way, the jury was effectively directed that the appellant's liability for murder, on a joint criminal enterprise basis, turned on Quinn's state of mind and the reasonableness of her conduct. Counsel for the appellant objected to the directions given in relation to joint criminal enterprise and self-defence (or defence of another) and applied, in effect, for a discharge of the jury. The application was refused: SU 103–111.

28. The appellant appealed against his conviction for murder. The appellant's grounds of appeal may be grouped into three broad areas of complaint. First, the appellant contended that the Crown's "alternative case" of "joint criminal enterprise" was not supported by evidence and that the resulting directions on joint criminal enterprise and self-defence were misconceived. Second, it was argued that the trial miscarried by reason of defence counsel's failure to adduce evidence, including the mental health records of the deceased, and to cross-examine the deceased's grandmother on this material. Third, the appellant contended that the acquittal of Quinn of murder disentitled the prosecution from relying on a case of joint criminal enterprise involving Quinn in the subsequent trial of the appellant.[2]

29. The Court of Criminal Appeal dismissed the appeal. Beazley JA, with whom Hidden and R.A. Hulme JJ agreed, accepted the submission that there was no evidence to support a joint criminal enterprise and that liability on this basis should not have been left to the jury: CCA [72]–[73]. The proviso to s 6(1) of the *Criminal Appeal Act 1912* was applied to this error: CCA [249]–[257]. The Court (somewhat anomalously it is submitted) also held that the resulting directions on joint criminal enterprise, self-defence (and defence of another) and the significance of Quinn's confession to "C", "subject to the overriding difficulty that there was no evidence of a joint criminal enterprise", were not erroneous or inadequate, and rejected the grounds of appeal that concerned these directions (grounds 2–4): CCA [84]–[86].

30. After considering evidence from defence counsel and the appellant, the Court found that there was no reasonable explanation for defence counsel's failure to tender the deceased's mental

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[2] The appellant has not been granted special leave to appeal the Court of Criminal Appeal's rejection of this ground of appeal.

health records and to cross-examine the deceased's grandmother about the deceased's violent and erratic behaviour: at [202]. The conduct of the trial by defence counsel was not found, however, to have caused a miscarriage of justice: CCA [204]–[209]. The proviso was also applied to this deficiency in the trial: CCA [256].

Part VI: Appellant's Argument

Ground 1: The Court of Criminal Appeal erred in applying the proviso to s 6(1) of the Criminal Appeal Act 1912 (NSW).

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Ground 2: Although the Court of Criminal Appeal upheld the primary ground of appeal (ground 1) that the trial judge erred in leaving joint criminal enterprise as a basis for liability, the Court erred in holding that notwithstanding that error, there was no error or inadequacy in the trial judge's directions on joint criminal enterprise, self-defence (or defence of another) and Ms Julie Quinn's confession to witness "C" (grounds 2, 3, and 4.)

<u>The error concerning joint criminal enterprise liability and resulting misdirections</u>

31. The Court of Criminal Appeal correctly held that joint criminal enterprise liability was not
20 open on the evidence and should not have been left to the jury: CCA [72]–[73].

32. The established error of leaving joint criminal enterprise liability to the jury necessitated the finding that the related directions on joint criminal enterprise, self-defence (or defence of another) and the use of Quinn's confession to "C" were fundamentally flawed. The Court erred, it is submitted, in holding that these directions did not involve error, or were appropriate, "subject to the overriding difficulty that there was no evidence of a joint criminal enterprise": CCA [86]. This "overriding difficulty" entailed that the directions were entirely misconceived and should not have been given to the jury.

30 33. The directions on joint criminal enterprise liability leave open the possibility that the appellant was convicted of murder on an impermissible basis. There is a real risk that the

appellant was found guilty on the basis of a fatal act, or fatal acts, done by Julie Quinn. In the circumstances of the case, this path to conviction was not open: there was no basis in the evidence for a case of joint criminal enterprise, nor had the Crown sought to make other forms of derivative liability part of its case. The asserted risk should be measured against the fact that during its deliberation the jury requested, and were given, further directions on joint criminal enterprise: see *Quartermaine v The Queen* (1980) 143 CLR 595 at 612.[3]

34. The defence case was directed towards the raising of a reasonable doubt about Quinn's evidence. The primary case for the Crown relied on the version given by Quinn. This version described the appellant as the aggressor who was solely responsible for inflicting the injuries inflicted upon the deceased. The defence case required the jury to consider evidence that supported an alternative scenario, in which the deceased's violence towards the appellant caused Quinn to attack the deceased and to inflict the fatal injuries. Leaving the joint criminal enterprise case had two consequences. It provided the basis for an impermissible finding of guilt, as explained above. It also operated to wholly confuse the issues at trial, thereby depriving the defence case of any or much of its efficacy. If the jury accepted the possibility that Quinn delivered the fatal blows, or, if the jury had a reasonable doubt about Quinn's evidence, the joint criminal enterprise case provided a mechanism by which these doubts could be disregarded and the appellant found guilty of murder.

35. Assuming that the evidence had in fact provided a basis for joint criminal enterprise to be left to the jury, the directions would still have involved error. If the jury accepted as a reasonable possibility that Quinn made the admissions described in "C's" evidence, this evidence could not be used as a basis for fixing liability upon the appellant. The error is contained in the following passage from the summing up:

> "If you were to come to the conclusion for any reason whatsoever that the Crown had not established that the accused was solely responsible for the fatal injuries, then you would proceed

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[3] Mason and Wilson JJ said: "A misdirection at a stage when a jury has returned to seek an answer to a specific question will generally be a matter of grave import, requiring serious consideration in any appellate review, for the reason that being isolated from the charge itself it is likely to carry great weight with the jury."

to consider the alternative basis upon which the Crown case was put, namely that the accused and Ms Quinn in combination inflicted the fatal blows.

The Crown's case upon this alternative basis is that whilst it was the accused who used the baseball bat, it was Ms Quinn who used the axe and that in so doing they were acting pursuant to an agreement to cause the death of the deceased with the intention of killing him of inflicting grievous bodily harm upon him.

In advancing this alternative basis, the Crown still relies upon the evidence of Ms Quinn together with other evidence, at least in relation to the accused's use of the baseball bat. *It would also accept for this purpose, Ms Quinn's admission to C that she used the axe. It asks you however to reject the suggestion allegedly made by Ms Quinn in that admission that she did so in order to come to the defence of the accused.* It simply submits that it is contrary to the remainder of the evidence in the case."[4]

36. In response to the jury's question concerning joint criminal enterprise liability, this direction was repeated.[5] Contrary to these directions, evidence of the confession was not capable of supporting a case of joint criminal enterprise liability. The confession could, however, have been properly relied on as evidence that raised a reasonable doubt about Quinn's evidence, which was a matter relevant to the defence case.

37. It was also erroneous for the jury to be directed that the appellant's liability for murder somehow turned on Quinn's subjective state of mind or the reasonableness of her conduct. The trial judge directed the jury as follows:

"C said that she told police that Ms Quinn also said, "I didn't know what to do because I thought he was going to kill Coop". The Crown asks you to reject that evidence either upon the basis that the admission was not made in those terms or upon the basis that if it was made, then it was neither truthful nor reliable essentially because it is at odds with the other objective evidence in the case...

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[4] SU39 (emphasis added)
[5] SU97

[I]f you were to come to the view that it is a reasonable possibility that Ms Quinn made the admission to C in the terms to which I earlier referred and also that the admission was a truthful and reliable representation of what occurred, then the Crown will not have established that there was a joint criminal enterprise between the accused and Ms Quinn to intentionally kill of inflict grievous bodily harm upon the deceased, because it will not have excluded the fact, which it must, that Ms Quinn was acting in defence of another. The law treats defence of another in the same way as it does self-defence. Although "self-defence" is referred to as a "defence" I direct you that the onus is upon the Crown to exclude it as an issue in this case. *It may do so by proving beyond reasonable doubt one of two things, namely: that Ms Quinn did not believe at the time of doing her act or acts that it was necessary to do what she did in order to defend the accused; or, if it is reasonably possible that she did have such a belief, that nonetheless the act or acts were not a reasonable response in the circumstances as she perceived them.*"[6]

38. However, the Court of Criminal Appeal appeared to endorse this approach: CCA [85]. The Court, it is submitted, erred in doing so.

39. The established error of leaving joint criminal enterprise liability to the jury meant that the impugned directions should never have been given in the first place. For this reason, the Court's overall approach, of inquiring into whether the directions were "correct" or "appropriate", was misconceived: CCA [84]–[86]. However, it is submitted that the Court also erred by not finding that the directions, on their own terms, involved error.

The proviso

40. The Court of Criminal Appeal determined that the proviso should be applied on the basis of evidence that purportedly either contradicted "C's" evidence or supported the version given by Quinn: at [251]–[256]. The analysis concerned the relative likelihood or unlikelihood of their respective accounts. The Court did not make a finding of satisfaction beyond reasonable doubt as to the appellant's guilt. It is submitted that this approach fell well short of what was required in the circumstances.

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[6] SU40 (emphasis added); repeated at SU98

41. The question whether the proviso should have been applied required consideration of the following matters:

a. The appellant was prosecuted on a basis of liability that was not open on the evidence;
b. The jury was misdirected, both orally and in writing, that it could find the appellant guilty on this basis;
c. The jury specifically sought, and was given, further directions on joint criminal enterprise liability, which repeated and amplified the misdirection referred to in point b. above;
d. The directions leave open the possibility that the appellant was convicted of murder on the basis of fatal acts done by Quinn in circumstances in which (i) non-derivative joint commission ("joint criminal enterprise") liability was not open on the evidence and (ii) other derivative forms of joint commission liability formed no part of the prosecution case;[7]
e. The directions on self-defence or defence of another and the significance of the evidence of Quinn's confession to "C" involved additional errors;
f. The trial was also affected by the established failure on the part of defence counsel to adduce evidence relevant to the defence case and to adequately challenge the prosecution case through cross-examination (this is addressed in more detail below in the submission on Ground three);
g. The "natural limitations" experienced by the appellate court in assessing the credibility of important witnesses such as Quinn and "C";
h. The reduced weight that should be accorded to the verdict of guilty given the misdirections of law outlined above.

42. The Court of Criminal Appeal omitted to adequately consider, or to consider at all, these matters. The most important omission concerns the failure to properly consider the nature of the errors which had been established, together with the possible effect of those errors on the outcome of the trial. This latter question required consideration of whether the appellant was possibly convicted on an impermissible basis or "lost a real chance" of being acquitted.

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[7] Dr Little's evidence, which was summarised above, left open the possibility that an axe caused each of the four injuries. When considered in combination with the evidence of Quinn's confession to "C" concerning her (i.e. Quinn's) use of the axe, the possibility in point d. arises.

43. It is submitted that the principal error upheld by the Court of Criminal Appeal precluded application of the proviso in this case. The contention that an error or defect in the trial may, by its very nature, make application of the proviso inappropriate, finds support both in the language of s 6(1) of the *Criminal Appeal Act 1912* (NSW) and consideration of the provision (or like provisions) in a number of decisions of this Court.[8] To the extent that this involves a question of statutory construction, it is the words of the statute that have primacy in determining the meaning of s 6(1), rather than the "many subsequent judicial expositions" on the operation the proviso to the common form appeal provisions: *Weiss v The Queen* (2005) 224 CLR 300 at [9].[9]

44. Section 6(1) is the following terms:

> The court on any appeal under section 5(1) 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 cannot 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 other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of 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.

45. The use of the prescriptive "shall" and the reference to the formation of an "opinion" that the verdict or judgment of the trial court should be set aside indicates a level of satisfaction and a degree of finality in the appellate court's analysis, or judgment.[10] The types of grounds of

[8] *Evans v The Queen* (2007) 235 CLR 521 especially at [37]–[51]; *AK v Western Australia* (2008) 232 CLR 438 at [42] and [59]; *Gassy v The Queen* (2008) 236 CLR 293 at [34]; *Cesan v The Queen* (2008) 236 CLR 358 at [124]; *Handlen v The Queen* at [43] and [47].

[9] Section 6(1) of the *Criminal Appeal Act 1912* (NSW) is not in identical terms to s 568(1) of *the Crimes Act 1958* (Vic), which was the provision under consideration in *Weiss v The Queen*. The NSW provision refers to an appellate court "being of *opinion*" (rather than "thinks") and refers to a miscarriage of justice on "any other ground *whatsoever*" (the italicised word is omitted in the Victorian provision). The proviso to the NSW provision also refers to "the point *or points* raised by the appeal".

[10] See McHugh J in *TKWJ v The Queen* (2002) 212 CLR 124 at [68]; see also the justification for removing the proviso from the corresponding English provision outlined in the Runciman Report of the Royal Commission on Criminal Justice, 1993, Cm2263 at [31].

appeal specified in the provision are exhaustive. They include a ground that the verdict of the jury is unreasonable and cannot be supported by the evidence. It is difficult to conceive how the proviso could ever be applied to an unreasonable verdict ground, given that the appellate court, by forming an "opinion that the verdict of the jury should be set aside", would presumably have already considered the entire record of trial for itself and determined that it could not be satisfied of the guilt of the appellant beyond reasonable doubt. These aspects of the language used in s 6(1) suggest that situations may arise in which the appellate court may well have reached the point where it is inevitable that the proviso could not be applied, even although that step requires formal consideration. *Handlen v The Queen* (2011) 86 ALJR 145 is a recent example of a case involving an analogous error, in which the majority of this Court concluded that the nature of the error meant that it was not open to apply the proviso.[11]

46. The Court of Criminal was also obliged to consider the particular effect of the combination of the following circumstances: the fact that the misdirection on joint criminal enterprise liability left open an impermissible path to conviction; the content of the related misdirections, which operated to confuse the issues at trial and to deprive the defence case of efficacy; and the established failures on the part of defence counsel to adduce significant evidence relevant to the defence case and to challenge an important Crown witness in cross-examination. The combined effect of these matters provide an additional reason for the conclusion that there was a substantial miscarriage of justice, or that the negative formulation in s 6(1) of the *Criminal Appeal Act 1912* ("the court may…dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred") cannot be made out.

47. The Court of Criminal Appeal's analysis of the evidence concerned the "likelihood" or otherwise of competing versions being correct. No finding was made that the appellate court was satisfied beyond reasonable doubt of the appellant's guilt. In this sense, the "negative proposition" contained in para [44] of *Weiss v The Queen* was not satisfied. Nor could the proposition have been satisfied, as the errors of defence counsel affected the evidence in a material way, while the misdirections significantly impugned the weight that could be

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[11] Particularly at [42]–[47]

attached to the verdict. The appellant also contends that the appellant court's analysis of the evidence[12] is inadequate and defective.[13]

Ground 3: The Court of Criminal Appeal erred in holding that defence counsel's failure to adduce relevant evidence in relation to the deceased's mental condition and related failure to cross-examine the deceased's grandmother did not occasion a miscarriage of justice.

48. It is submitted that the Court of Criminal Appeal also erred by holding that established failures or omissions on the part of defence counsel to adduce relevant evidence and to cross-examine a Crown witness did not result in a miscarriage of justice: at CCA [204]–[208]. The evidence that should have been adduced is summarised at CCA [104] ff. The evidence, if adduced, would have provided a compelling basis for an inference that the deceased suffered from a psychotic illness substantially aggravated by the consumption of alcohol and drugs, making him prone to paranoid, erratic and dangerous behaviour. This inference had the potential to materially advance the defence case. For this reason, the Court of Criminal Appeal erred by not upholding this ground of appeal (which was ground five in the court below). The submissions on this ground are relevant to the analysis concerning ground one of this appeal.

Part VII: Applicable Legislation

49. *Criminal Appeal Act 1912* (NSW), No 16: ss 5 and 6, as at 17 February 2011, still in force; *Crimes Act 1900* (NSW), No 40: ss18 and 319, as at 22 March 2003, still in force. See Annexure attached.

Part VIII: Orders Sought

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[12] At CCA [251]–[256]

[13] The evidence concerning blood spurts or sprays did not have the significance accorded to it by the appellate court, given Dr Little's evidence concerning cast-off blood spatter (summarised above). "J's" corroboration of the appellant punching the deceased was actually consistent with the version of events described in the evidence of "C" and hence tended to support "C's" evidence. So too was the absence of evidence of defensive injuries sustained by the deceased. The forensic evidence did not establish that the baseball bat was used to inflict injury #4; the circumstantial evidence concerning the bat was not sufficient to found the conclusion reached in CCA [256]. In this respect, the witness Denne did not give evidence that the handle of a baseball bat was sticking out of the hessian bag: T215, 219. There was no reference to a baseball bat in his evidence.

50. The appellant seeks orders that:

(a) the appeal is allowed;

(b) the orders of the Court of Criminal Appeal are set aside;

(c) the appellant's conviction for murder is quashed;

(d) a new trial is ordered.

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Dated: 8 June 2012

Simon Buchen

IN THE HIGH COURT OF AUSTRALIA No. S135 of 2012

SYDNEY REGISTRY

BETWEEN:

BRADLEY DOUGLAS COOPER

Appellant

AND

THE QUEEN

Respondent

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ANNEXURE: PART VII LEGISLATION

No.	Legislation	Date
1.	*Criminal Appeal Act* 1912 (NSW), No. 16 ss5, 6 (Historical version for 07 December 2010 to 31 December 2011)	As at 17 February 2011 (still in force).
2.	*Crimes Act* 1900 (NSW), No. 40 ss18, 319 (Historical version for 10 February 2003 to 30 April 2003)	As at 22 March 2003 (still in force).

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Source: www.legislation.nsw.gov.au

Filed on behalf of the Appellant
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Karen Psaltis

Criminal Appeal Act 1912 No 16

5 Right of appeal in criminal cases

(1) A person convicted on indictment may appeal under this Act to the court:

(a) against the person's conviction on any ground which involves a question of law alone, and

(b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and

(c) with the leave of the court against the sentence passed on the person's conviction.

(2) For the purposes of this Act a person acquitted on the ground of mental illness, where mental illness was not set up as a defence by the person, shall be deemed to be a person convicted, and any order to keep the person in custody shall be deemed to be a sentence.

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Criminal Appeal Act 1912 No 16

6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) 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 cannot 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 other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of 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.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal under section 5 (1) 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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Crimes Act 1900 No 40

18 Murder and manslaughter defined

(1)

(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2)

(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

(b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

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Crimes Act 1900 No 40

319 General offence of perverting the course of justice

A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.

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