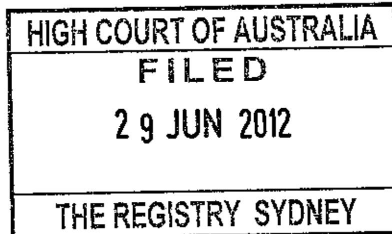
IN THE HIGH COURT OF AUSTRALIA **No. S 135 of 2012**
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:



BRADLEY DOUGLAS COOPER

Appellant

AND

THE QUEEN

10 Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

20 1. Whether putting an alternative basis of liability which was not supported by the evidence constituted a fundamental defect in the trial which excluded the application of the proviso.

2. Whether the failure to adduce evidence of the deceased's psychological condition gave rise to a miscarriage of justice and thereby also excluded the application of the proviso.

3. Whether the Court of Criminal Appeal erred in the application the proviso in the circumstances of this case.

Part III: Section 78B of the Judiciary Act

30 This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

Part IV: Statement of contested material facts

4. 1 The general factual background was uncontested.

4. 2 It was accepted that the deceased was killed in the kitchen of the appellant's home on the evening of 22 March 2003. It was also accepted that he was struck in the head repeatedly with a blunt implement (SU at 35.25). And it was further accepted that there were only two people in the kitchen at the time he was killed.

4. 3 The only factual issue was who struck the blows, the appellant or Ms Quinn.

4. 4 The appellant pleaded guilty to disposing of the body with intent to pervert the course of justice.

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

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PART VI: Statement of Argument

Ground 2 The alternative case: Directions on joint criminal enterprise and self defence

6. 1 The alternative case put by the Crown was that if it was accepted that the appellant struck the deceased with the baseball bat and Ms Quinn struck the deceased with the axe, the appellant would still be liable as they were acting in a joint enterprise to kill the deceased (SU at 39.31). The evidentiary basis for this alternative scenario was a combination of Ms Quinn's evidence that the appellant struck the deceased with the baseball bat and C's evidence that Ms Quinn had admitted striking the deceased with the axe.

20 6. 2 C testified that Ms Quinn told her that the deceased and the appellant fought, the deceased overpowered the appellant, she did not know what to do so she struck the deceased with the axe: "*I didn't know what to do because I thought he was going to kill Coop and so that's where it ended.*" (T176.59).

6. 3 The CCA held that there was no evidence to support a case of joint criminal enterprise because C's account indicated only that Ms Quinn had gone to the appellant's assistance, not that there was any preconcert or agreement to kill the deceased, therefore the alternative case of joint criminal enterprise should not have been put (CCA at [72]).

6. 4 Contrary to the appellant's contention, the misdirection did not give rise to the
30 possibility that the appellant might have been convicted on the basis of joint enterprise, in fact, it had the opposite effect, for it undermined any possibility of joint

enterprise because the trial judge directed that if there was any possibility that C's evidence was correct then there was no joint enterprise.

6. 5 The trial judge directed the jury that if there was a reasonable possibility that Ms Quinn had made the admission to C and that it was a truthful and accurate account of what happened then the Crown would ***not*** have established that there was a joint criminal enterprise to kill the deceased because it would not have excluded that Ms Quinn was acting in defence of another: "*Accordingly, if 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 kill or 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.*" (SU at 98.10).

6. 6 This direction did not raise the possibility that the appellant was convicted on the basis of joint criminal enterprise, it foreclosed it. Contrary to the appellant's submission that this deprived the defence case of any efficacy (AWS at [3.4]) this was the defence case, albeit for a different reason. The defence case was that if there was any possibility that C's account was correct then the appellant was not guilty because the Crown would not have disproved that Ms Quinn struck the fatal blows. The direction given was that if there was any possibility that C's account was correct the appellant was not guilty because Ms Quinn would not have acted in a joint enterprise but in defence of another. On either account, if the jury believed there was any *possibility* that C's account might be correct, then the appellant was not guilty.

6. 7 As the appellant points out, the directions entwined joint criminal enterprise and defence of another, but paradoxically, by making joint criminal enterprise and defence of another mutually exclusive, that is, either Ms Quinn was acting in a joint enterprise or acting in defence of another, his Honour effectively excluded joint enterprise because C's account was the only basis for joint enterprise and it was that Ms Quinn went to the aid of the appellant because she thought the deceased was going to kill him.

6. 8 The appellant contends that these directions made the appellant's liability dependant on Ms Quinn's state of mind instead of what was agreed upon or in the

contemplation of the appellant. The passages said to illustrate this, quoted at AWS [35], were where his Honour outlined the Crown's submission that the jury may accept Ms Quinn's evidence that the appellant struck the deceased with the baseball bat, and also accept C's evidence that Ms Quinn struck the deceased with the axe although reject that she had done so in defence of the appellant and in that way find that the appellant was guilty on the basis of joint criminal enterprise (SU at 97.27) but in the directions of law which followed that outline his Honour correctly directed that in order to find the appellant guilty on the basis of joint criminal enterprise the Crown had to prove that the appellant and Ms Quinn had made an arrangement that the deceased be killed: "*So in order to establish that the accused was party to a joint criminal enterprise the Crown has to prove that there was in existence at the relevant time an arrangement or understanding that amounted to an agreement between himself and Ms Quinn to cause the death of [the deceased] with the intention of killing him or inflicting upon him grievous bodily harm.*"(SU at 97.47). The problem was that there was no evidence of such an arrangement. C's evidence was that Ms Quinn went to the appellant's aid because she thought the deceased was going to kill him. Ms Quinn's evidence was that she did not strike the deceased at all. There was no other evidence from which an agreement to kill the deceased could be inferred. As the trial judge directed, this agreement depended on C's evidence.

6.9 The trial judge told the jury that if there was any possibility that C's account was correct and Ms Quinn acted to defend the appellant then there would be no joint criminal enterprise because Ms Quinn would have been acting in defence of another: "*Accordingly, if 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 kill or inflict grievous bodily harm upon the deceased , because it ill not have excluded the fact which it must, that Ms Quinn was acting in defence of another.*" (SU at 98.10). That was the correct distinction consistent with C's evidence; either Ms Quinn acted to defend the appellant (as C recounted) or she acted in pursuance of a joint criminal enterprise (of which there was no evidence) (CCA at [84]). The verdict reflected the simple fact that the jury did not accept that there was any possibility that C's account was correct.

6\. 10 Such directions may not be appropriate in every case for, in theory, joint criminal enterprise and defence of another are not mutually exclusive. There could have been an agreement to kill the deceased and, when things got out of hand, Ms Quinn might have intervened, in part, to assist the appellant. As a matter of law, the two possibilities could co-exist. However, the trial judge told the jury they could not, and it was only if they were satisfied that there was no possibility that C's version was correct, that is, that there was no possibility that Ms Quinn acted in defence of the appellant that joint enterprise arose. To have raised joint enterprise in those circumstances was to exclude it.

10 6. 11 It was for this reason that, even if the directions were said to be confusing or misleading, they did not have the significant impact on the defence case the appellant asserts, nor warrant the exclusion of the proviso.

Ground 1 Exclusion of the proviso

6\. 12 The appellant submits that the CCA made a number of errors in relation to the proviso. Firstly, that the proviso was not open at all because the misdirection on joint criminal enterprise was so significant that it precluded its application (AWS at [42]). Secondly, the failure to adduce additional evidence of the deceased's psychological condition (matters a. – f. listed at AWS [41]), the natural limitations of assessing the credibility of important witnesses (matter g.) and the reduced weight to be accorded

20 the verdict of guilty in light of the misdirection of law (matter h.) meant that the proviso should not have been applied (AWS at [41]). It is not entirely clear whether the appellant contends that the combination of matters a. – h. meant that the proviso was excluded or that the Court did not properly consider whether the appellant had "lost a real chance" of acquittal (AWS at [42]) or both. Thirdly, the CCA erred in the application of the proviso by determining merely that it was "relatively likely" that the appellant was guilty and not that guilt was established beyond reasonable doubt (AWS at [40]).

6\. 13 The subclauses of s 6(1) of the *Criminal Appeal Act* have been referred to, for ease of reference, as three grounds or limbs by which an appeal shall be allowed subject to

30 the proviso, namely, unreasonable verdict, wrong decision on a question of law, and thirdly, on any other ground whatsoever a miscarriage of justice. The appellant does not appear to distinguish between the different limbs in relation to the asserted errors in the present case. The misdirection on joint criminal enterprise was a wrong

decision on a question of law falling within the second limb. On the other hand, the failure to adduce evidence of the deceased's psychological condition was an irregularity falling within the third limb, namely that on any other ground there was a miscarriage of justice. On that ground, it was not sufficient to show that the there was no good reason not to adduce the evidence, it was necessary to establish that the failure had resulted in a miscarriage of justice. The fact that such a miscarriage had occurred was the circumstance to which the proviso applied, not the basis for its exclusion.

6. 14 The appellant submits that there is statutory support for the view that some wrong decisions on a question of law by their nature preclude the operation of the proviso yet s 6(1) draws no such distinction between types or categories of error and provides no indication that some categories are by their nature excluded from the terms of the section and thereby circumvent the proviso altogether. On the contrary, section 6(1) provides that establishing a wrong decision on a question of law or a miscarriage of justice are the conditions to which the proviso applies.[1]

6. 15 It is now well established, from the decision of this Court in ***Weiss*** and the many cases that have followed, that to raise a preliminary definitional question as to whether a particular error falls into a category which, by its nature, excludes the proviso distracts attention from the statutory task which is to determine whether no substantial miscarriage of justice has actually occurred.

6. 16 The appellant raises such preliminary definitional issues in relation to the misdirection on joint criminal enterprise because such error is said to constitute such a departure from the presuppositions of a trial as not to constitute a trial at all, "analogous" to conducting a trial for an offence not known to law[2] (AWS at [45]). There may be cases where the nature of the error deprives the proceedings from even basic legitimacy, such as conducting a trial for an offence not known at law, or significant denial of procedural fairness, where it cannot be said that no substantial miscarriage of justice has actually occurred, but no single criterion can be formulated to identify the category of error by which the proviso is excluded.[3] Nor is the formulation and application of such criteria relevant to the task required by s 6(1).

[1] ***Weiss v The Queen*** (2005) 224 CLR 300 at [36].
[2] ***Handlen v The Queen*** (2011) 283 ALR 427 at [47].
[3] ***Weiss v The Queen*** (2005) 224 CLR 300 at [45].

6.17 The misdirection on joint criminal enterprise in the present case did not so deprive the proceedings of the attributes of a trial as to be no trial at all. For the reasons given at [6.1] – [6.11] above, the directions had limited prejudicial impact in the particular context of this trial. The misdirection did not preclude the CCA from engaging in the proviso task nor compel the conclusion that no substantial miscarriage of justice had occurred.

6.18 The appellant submits that the failure to adduce the evidence of the deceased's mental condition also excluded the proviso for it constituted a miscarriage of justice because the appellant lost a real chance of acquittal. This submission seems to elide "miscarriage of justice" within the third limb and "no substantial miscarriage" within the proviso.

6.19 The appellant appears to contend that the failure to adduce evidence of the deceased's mental condition, in combination with the misdirection, meant that he had "lost a real chance" of acquittal (AWS at [42]) such that the proviso should not have been applied. Whether or not the failure to adduce the evidence of the appellant's mental condition was an error which deprived the appellant of a real chance of acquittal was a matter which had to be established to show that there had been a miscarriage of justice. It did not mean that the proviso did not apply or preclude a finding that no substantial miscarriage of justice had actually occurred.[4] To equate having lost a chance of acquittal with a substantial miscarriage of justice would render the phrase "no substantial miscarriage of justice has actually occurred" within the proviso as mere ornamentation[5], in effect, surplusage. The combination of these two errors did not produce that result, they were matters which had to be taken into consideration, as the CCA did, in determining whether no substantial miscarriage had actually occurred.

6.20 The net effect of these submissions is that the proviso is to be excluded from all but minor errors falling within the second limb because, on the appellant's view, the proviso does not apply to the first limb of unreasonable verdict, it does not apply to wrong decisions on a question of law because in such cases the appellant has not had a trial according to law, and it does not apply where the error gives rise to a miscarriage of justice because in such cases it cannot not be said that no substantial miscarriage of justice had actually occurred. What remains is a vestigial operation,

[4] ***Weiss v The Queen*** (2005) 224 CLR 300 at [36]
[5] ***Weiss v The Queen*** (2005) 224 CLR 300 at [18]

presumably in relation to wrong decisions on a question of law which are minor and involve no significant departure from the proper conduct of the trial.

6. 21 This represents a return to a pre-***Weiss*** position bearing some similarity to the views expressed by McHugh J in ***TKWJ***[6] where his Honour held that the proviso was excluded from the third limb because where there has been a miscarriage of justice there is no scope for the operation of the proviso: "*Current authority indicates that the proviso has no application in many cases falling with the miscarriage of justice ground in s 6(1)... .... It also suggests that in many cases there is no difference between a miscarriage of justice and the "substantial miscarriage of justice" to*
10 *which the proviso refers.*" (AWS at [45] footnote 10).

6. 22 The appellant's submission that the CCA omitted to consider adequately, or at all (AWS at [42]), the misdirection on joint enterprise and the failure to adduce additional evidence of the deceased's mental condition (matters a. – f. listed at AWS [41]) is plainly unfounded for the issue of joint criminal enterprise was considered at length (CCA at [59] – [72]) and the CCA upheld the ground of appeal that joint criminal enterprise had no application on the facts of this case (CCA at [72] - [73]). The Court also reviewed the evidence in relation to the failure to adduce evidence of the deceased's mental condition in considerable detail (CCA at [104] – [177]) and accepted the appellant's submission (CCA at [177] – [201]) that there was no
20 reasonable explanation for the failure to tender the Mid Western Area Health Service records and for not cross-examining Mrs Muldoon, the deceased's grandmother, about the deceased's violent and erratic behaviour (CCA at [202]). However, the Court concluded that, in the particular circumstances of this case, no miscarriage of justice was established (CCA at [208]).

<u>Ground 3 No miscarriage of justice for not adducing evidence of the deceased's psychological condition</u>

6. 23 The appellant submits that this conclusion was wrong because the material would have shown that the deceased suffered a psychotic illness which made him paranoid and dangerous when intoxicated and that would have materially advanced the
30 defence case (AWS at [48]).

[6] ***TKWJ v The Queen*** (2002) 212 CLR 124 at [71] – [73].

6.24 It is not clear that the evidence of the deceased's drug and alcohol problems and his disordered and paranoid thinking would have "materially advanced", or even have had much relevance to, the defence case that Ms Quinn struck all the blows.

6.25 As the appellant acknowledges, even without the Area Health Service Records there was evidence that the deceased was a heavy user of drugs and alcohol and prone to violent and irrational behaviour when intoxicated (AWS at [23]).

6.26 It was not in dispute that the deceased was very intoxicated on the afternoon of his death and that he behaved strangely. It was also accepted that this strange behaviour prompted the fight with the appellant.

10 6.27 Ms Quinn said that even before the cask of wine was delivered the deceased was acting strangely, not making much sense and she asked him if he wanted to lie down and rest (T350.40). The taxi driver who delivered the cask of wine knew the deceased and said he "*appeared to be off his head on a mixture of drugs and alcohol.*" (CCA at [97]). There was also evidence from a school acquaintance of the deceased, Mr Selmes, and a friend, Mr Harvey, that the deceased could become "pretty irrational", "pretty paranoid" (CCA at [94]), and "agitated and aggressive" (CCA at [92]) when drunk. There was also evidence from Mr Harvey that the deceased had told him that he had been diagnosed with schizophrenia (CCA at [94]).

6.28 The evidence not adduced indicated that the deceased was a heavy user of drugs and 20 alcohol and suffered from unclear and disorganised thinking. He did not harbour ideas of harm to himself or others (CCA at [108]) and was not considered as a person experiencing a possible or definite psychotic illness (CCA at [115]). His problems seemed to vacillate according to his drug and alcohol consumption and the less he consumed the more settled and lucid he became (CCA at [116] – [119]). These notations were of no, or very limited, relevance to the issue of whether Ms Quinn or the appellant struck the deceased with the axe.

6.29 The appellant relied on the notation to the effect that the Probation Officer expressed some concern as to the deceased's mental/psychotic state but the Registered Nurse informed the probation officer that she saw no signs of psychosis and no justification 30 to continue seeing him as he was not unwell (CCA at [120]). There was also a reference to the deceased having been charged with a break in offence where he was found sitting on the lounge in a house he had entered because voices told him to do so (CCA at [121]).

6.30 The appellant places considerable reliance on the notation that the deceased's grandmother, Mrs Muldoon, had been in contact with the Service and expressed some concern about the deceased's condition. She was reported as having said that she was a little afraid of him due to his violent and erratic behaviour at times (CCA at [120]) whereas in evidence Mrs Muldoon denied that there was anything wrong with him, she said she did not see him abuse alcohol or drugs, not in front of her anyway, and that he had never been to a psychiatric hospital (CCA at [101] – [102]). She said his admission to the hospital was for a stomach ache. In conference with defence counsel, Mrs Muldoon clarified that she had not said that she was afraid of the deceased but afraid for him (CCA at [139]).

6.31 This evidence may have provided some confirmation of the deceased's condition and refuted the impression it involved a stomach ache. It may have shown that his grandmother was underestimating his problems although that was fairly evident anyway. On the Crown case, it was apparent that the deceased behaved strangely and provoked the fight with the appellant by suggesting he was a child molester

6.32 The deceased was killed by being struck repeatedly with a blunt implement. The defence case was the appellant did not strike him at all. The appellant did not give or call evidence. The defence case was based on C's evidence that the deceased fought with the appellant and overpowered him. It is not clear that further material about the deceased's psychological issues would have materially advanced that case. The deceased's physical condition was of more probative significance in that scenario than his psychological state. Even if the additional evidence could be said to have assisted in establishing that the deceased's psychological state made it more likely that he started the fight for no good reason, a matter not really in dispute, that provided little assistance as to what happened next.

6.33 The evidence was that the appellant was a much bigger man than the deceased. J said that the appellant punched the deceased in the face and he was not resisting, he was asking the appellant to stop. That evidence was unchallenged. J was challenged about some of his estimations of times and specific suggestions were put to him about the events later that night after the killing and the next day (T 126 – 9) but his evidence of seeing the appellant punch the deceased and the deceased asking him to stop was not challenged.

The application of the proviso

6. 34 As the trial judge stated, the issue was a narrow one (SU at 3.35). Either the appellant or Ms Quinn struck the deceased. Ms Quinn said it was the appellant. C said Ms Quinn admitted doing it.

6. 35 The assessment of the evidence by the CCA did not depend merely on the relative credibility of Ms Quinn and C. The deficiencies in C's evidence arose not from matters discernible only from the jury's advantage in seeing and hearing the witnesses, they were inherent in the account itself and apparent from the written record.

10 6. 36 Firstly, C's evidence was intrinsically contradictory. C said Ms Quinn confessed to striking the deceased. She also said the appellant admitted killing him.

6. 37 C's evidence was that when she was driving the appellant and Kevin Denne back to the appellant's house the appellant explained to her what had happened: "*Uncle Coop asked me drive them to the bottle-o, I took them there and he then explained to me that somebody – he didn't mention names- had come around to the house, threatened the kids lives and he'd put a stop to it.*" (T148.15). This was largely unchallenged. It was put to C that what the appellant said was that someone had come to the house and threatened the children and there was a fight (T170.45 – 171.5). It was also suggested to C that she did not remember the precise words used

20 but it was never put that the words were not spoken. Defence counsel put to C that her memory of the conversation was better at the time she made her statement (in which she had given the account of the admission) than it was at the time of giving evidence and C agreed (T175.1). In re-examination, C said that her answer about her memory being better at the time she made her statement also applied to her evidence of the appellant's admission (T190.15). This left the jury in the position that C's evidence implicated both Ms Quinn and the appellant.

6. 38 C's evidence also contradicted the defence case on the issue of whether all the blows were struck with an axe. C said that when they disposed of the body the appellant had a bag which had two handles poking out, "*one looked like a baseball handle, had*

30 *red rubber around, the other was a wooden handle... ... ...I thought it was a baseball bat and an axe*" (T153.20). She did not look in the bag but that is what they looked like. The appellant told her the bag had to be destroyed because it had DNA on it (T164.5). That evidence was unchallenged. This contradicted the defence case, based

on C's evidence, that Ms Quinn struck all the blows with the axe and supported Ms Quinn's evidence that the appellant used a baseball bat and an axe.

6. 39 Secondly, C's evidence about Ms Quinn's confession was equivocal. As the appellant points out, C said she was sure Ms Quinn had said she hit the deceased (CCA at [44]) and in cross examination agreed that she told police that Ms Quinn had said she hit him with the axe and did not seem upset or worried in saying this (T181.5). C said the statement was correct to the best of her recollection. This went a long way to redress the evidence that C had been given in examination in chief that she was not sure whether Ms Quinn said she hit the deceased or the appellant hit him with the axe: "*I'm not sure whether it was, she said that she hit him or whether it was my uncle that hit him*" (T157.45). C said she was very disturbed by these events. She broke down a couple of times in the witness box. She said when Ms Quinn told her what happened she was "really freaked out": "*I was really freaked out, I was going home, I left.*" (T157.55). Although C eventually confirmed the account she had given in her statement her uncertainty on the issue had been expressed and was before the jury.

6. 40 Therefore, this was not a case where the unreasonableness of the verdict depended on the assessment of the credibility of one witness over another without the benefit of having seen either. The evidence of C was not opposed to that of Ms Quinn, in fact, in some very significant respects C supported Ms Quinn's account. The assessment of the degree to which she supported that evidence was made simpler by the fact that C's evidence of the appellant's admission and of seeing both a baseball bat and an axe was unchallenged.

6. 41 C's account of what happened comprised 3 significant elements; that Ms Quinn struck the deceased because he had overpowered the appellant, she struck the deceased with the axe straight to the face, and blood spurted from the wounds to the ceiling.

6. 42 Each of those elements was contradicted by independent evidence.

6. 43 There was evidence indicating that there had been no serious physical altercation between the appellant and the deceased, much less one in which the appellant was eventually overpowered by the deceased for neither the appellant nor the deceased had any injuries to their bodies indicating they had been in a fight. C and Kevin Denne said that the appellant had no injuries when they saw him other than grazes to

his knuckles. C said the appellant's knuckles were swollen only on one hand (T164.35). This evidence was unchallenged. The forensic pathologist, Dr Little, said the deceased had no bruises or fractures to his face (T308.45), indicating that if he was punched it was not with sufficient force to leave detectable injuries. There was some uncertainty as to whether Dr Little meant there were no injuries indicating he had been struck with an implement (CCA at [253]) although the preceding questions referred to examining his skin and the inside of his nose (T308.55 – 309.15) and the answer about which some uncertainty was expressed related to significant bruising not fractures (T309.25).

10 6. 44 Ms Quinn's son, J, witnessed part of the fight between the appellant and the deceased. He was 9 at the time, 11 at the time of trial. He said he saw the appellant punch the deceased 3 times in the face (Q & A 260), the deceased was not punching back, he was asking the appellant to stop (Q & A 279). J's evidence was unchallenged on this aspect. This was consistent with Ms Quinn's evidence that the appellant was much stronger than the deceased and had punched him once or twice, maybe three times (T328.45). The appellant was a much bigger man than the deceased making it unlikely that the deceased would have overpowered him.

6. 45 The medical evidence also contradicted C's account that Ms Quinn stuck the deceased with the axe and it "*cut him straight down the face*" (T176.53) and that

20 blood spurted from the wound: "*Yeah, she told me the blood was spurting from his head onto the roof.*" (T180.35). The forensic pathologist, Dr Little said there were no injuries to the deceased's face (T307.5) and blood would not have spurted from the wounds: "*No, they're all reasonably small blood vessels and they wouldn't spurt.*" (T304.5). When asked to explain how blood may have come to be on the wall and ceiling Dr Little said a possible explanation might be that where an implement is used to strike a person's head blood may adhere to the implement and when the implement is raised again some of the blood may be flung off (T304.20, 311.5). This may have explained how blood came to be on the walls but it nevertheless contradicted the claim that it had got there by spurting from the wounds.

30 6. 46 The medical evidence supported Ms Quinn's account of how, and in what sequence, the injuries were inflicted. The forensic pathologist, Dr Little, said there were 4 major head injuries. She said injuries 2, 3 and 4 could have been caused by any blunt object, a baseball bat was a possible cause (T297.35). But that was an unlikely cause

for injury 1: "*The shape of injury number 1 would be very difficult to be, to be caused by a baseball bat for example if the shaft of the bat was hit across the skull it wouldn't cause this punched out defect that we had in injury number 1... ... This injury is too small it's only 18 millimetres wide at the front and it's too small for a baseball bat.*" (T 297.50 – 298.10). Dr Little considered that injury 4 was consistent with an axe being used (T298.45).

6. 47 Dr Little said that none of the injuries were consistent with the sharp end of an axe but might have been caused by the flat side of the axe head (T304.52). Dr Little said the flat side of an axe was a possible blunt surface that could have caused injury 4. Injury number 1 may also have been caused by the blunt side of the axe (T310.5). It was even conceded by Dr little that the injuries may not have been caused by any implement at all but may have been caused by the deceased's head hitting a stationary object, such as the floor. Dr Little considered that the fractures were too severe to have been caused by a simple fall but if the velocity at which the head struck the floor was significant enough then it was rare (T312.25), but possible (T310.30), that the injuries might have been caused in that way.

6. 48 Dr Little said that either injury 1 or injury 4 could have caused death. Both involved very serious fractures to the skull and a lot of force was required: "*Both 1 and 4 would require considerable force. The fractures underneath number 4 are in the very thick part of the skull and they're large fractures so that would've required a lot of force. And similarly number 1, because the fragment of skull was actually displaced downwards, a depressed fracture. That would also require a lot of force.*" (T305.7)

6. 49 Dr Little said injury 4 (to the back of the head) was caused first (T301.40). This was a very serious injury and sufficient to have caused death on its own. Dr Little considered that the deceased was likely to have been rendered unconscious by that blow. She accepted that she could not rule out the possibility that he remained conscious but considered it less likely: "*It's possible. I think overall it's less likely but it is certainly possible.*" (T308.35)

6. 50 The appellant relies on this evidence that injury 1 and 4 could have been caused by any blunt object, including the flat side of an axe, and on the concession that the deceased may not have been unconscious after injury 4 as showing that Dr Little's evidence did not support Ms Quinn's account. This somewhat skews the significance of Dr Little's opinion as to the likely cause of the injuries. The significance was not

that Dr Little provided categorical confirmation that the deceased was struck with a baseball bat, then an axe and was unconscious after being hit with the baseball bat in precisely the way Ms Quinn described. It was that the objective indications were consistent with her account and less consistent with C's account. C's account could not be excluded altogether, no cause could be excluded altogether, even that the deceased had fallen, but the medical indications were that it was less likely. The significance emerged from the combination with the other evidence.

6. 51 There was unchallenged evidence that the appellant had a baseball bat and an axe which he said had to be destroyed because they had DNA on them. In that context, Dr Little's evidence that wounds 2, 3 and 4 were consistent with a blunt implement like a baseball bat, but that wound 1 was not, became very significant. It meant that the wounds were sufficiently different as to indicate that a different type of blunt implement had been used.

6. 52 The concession that injury 4 and 1 could have been caused by the flat side of the axe may have been more significant had C not seen 2 handles sticking out of the bag, just as the possibility that the injuries might have been caused by a fall may have been more significant had there been any evidence of a fall. But the evidence was that a baseball bat and an axe were used, some of that evidence was independent of Ms Quinn, and unchallenged, and Dr Little's opinion about two implements consistent with a baseball bat and an axe provided great support for that version.

6. 53 Dr Little's evidence that the deceased was likely to have lost consciousness after the first blow was also consistent with Ms Quinn's account. Dr Little said that it was a very serious injury and was sufficient to have caused death on its own. Ms Quinn said that after the deceased was struck with the baseball bat he did not get up and when she tried to rouse him he did not respond. While Dr Little could not exclude the possibility that the deceased remained conscious, it was an extraordinary coincidence that, from the medical point of view, the likely scenario was that the deceased was struck with an implement like a baseball bat, which would likely have caused him to lose consciousness, and thereafter he was struck with a different blunt surface, consistent with the blunt side of an axe which coincided with Ms Quinn's account of the sequence of what had occurred.

6. 54 In addition, there was the fact that Dr Little was quite definite that the deceased was not struck in the face with an axe and blood did not spurt from the wounds. That was

a clear contradiction of C's account. When these aspects were considered together, the likelihood that different implements were used, that the deceased lost consciousness after the first blows, that he was not struck in the face and blood did not spurt, it was correct say that the medical evidence provided considerable support for Ms Quinn's account.

6. 55 There was further evidence supporting that account, including admissions by the appellant, his conduct in disposing of the body, his animosity towards the deceased in the past and his threats to kill Ms Quinn, C and Kevin Denne.

6. 56 When Mr Denne saw the body he said "*What the fuck have you done bro*?" to which

10 the appellant replied "*that he threatened his family and my family.*" (TT209. 32). This was similar to the version the appellant had given to C: "*somebody – he didn't mention names – had come around to the house, threatened the kids lives and he'd put a stop to it.*" Certain aspects of Mr Denne's evidence were strongly challenged, such as whether it was Ms Quinn or the appellant who pulled back the blanket to reveal the deceased's face (T236 – 247) but the making of this admission was not.

6. 57 It was significant that at no stage did the appellant suggest, to either C or Mr Denne, that Ms Quinn had killed the deceased.

6. 58 The animosity between the appellant and the deceased stemmed from the fact that they had each been in a relationship with the same woman. Ms Burley began a

20 relationship with the deceased when she was 14 (T51.55). She eventually left the deceased and commenced a relationship with the appellant for some months, then went back to the deceased for about 2 years, then resumed her relationship with the appellant for about 2 years. Ms Burley said that after she left the appellant the first time and resumed her relationship with the deceased the appellant said that "*if he found out that I was running around with [the deceased] again that he'd get {the deceased.*"(T53.13). Ms Burley's mother, Ms McCann said that 5 or 6 years earlier the appellant had said to her "*that he'd get [*the deceased*]. It might take him years but when he did he'd be sorry*" (T55.42). Ms McCann said he was angry but she took the threat with a grain of salt (T57.50) although "*It was enough concern to tell [the*

30 *deceased] to be careful and I mentioned it to his grandmother as well.*" (T58.20).

6. 59 Ms Quinn said that after the killing the applicant said to her "*I've known this fuckwit all my life and I killed him like that, I've only known you five years, imagine what I'll do to you.*" (CCA at [23]). Ms Quinn also said the appellant threatened to kill Kevin

Denne. He asked Mr Denne to help dispose of the body but Mr Denne was "horrified" (T340.50) and did not want any part of it. The appellant said to him "*no, you will help me, you will help me, I don't want to have to dig two holes.*" (T341.5). That was corroborated by Mr Denne who said he told the appellant he did not want to be involved and the appellant said "*If you don't come and help me I'll put you with him*" (T212.25]). When they were burying the body, Mr Denne said "*I was crying and Coop told me to stop my blubbering or he'll put me in there with [the deceased].*" (T218.20). This evidence was unchallenged.

6. 60 C reported that the appellant made a similar threat to her when she said she would not lie to the police and he said that "*whoever tells the police is going to end up in the same place that [the deceased] did*" (CCA at [47]). That evidence was also unchallenged.

6. 61 The jury were warned in the strongest terms that they should not rely on Ms Quinn's evidence unless it was corroborated, indeed they were told it would be "*dangerous for you to be satisfied beyond reasonable doubt of the guilt of the accused on the evidence of Ms Quinn unless you are satisfied that her evidence is supported or confirmed by other evidence which indicates that her evidence is true*" (SU at 43.29).

6. 62 The appellant submits that the CCA's references to the relative unlikelihood of C's account being correct (CCA at [251]) and to the probability that a baseball bat was used (CCA at [255]), meant that the analysis fell "well short" of what was required for no finding was made that guilt was established beyond reasonable doubt (AWS at [40]).

6. 63 The suggestion appears to be that the Court applied the proviso on the basis that the appellant was "likely" or "probably" guilty but not on the basis that his guilt had been proved beyond reasonable doubt.

6. 64 Proof beyond reasonable doubt is perhaps the simplest and most basic concept in the criminal law. It requires no explanation[7]. There is no foundation, on the basis of some unexceptional observations about the lack of credibility of C's account, for the suggestion that the CCA failed to appreciate this most basic concept, particularly as there were repeated references to proof beyond reasonable doubt throughout the reasons for judgement.

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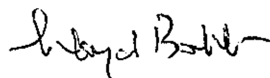
[7] ***Green v The Queen*** (1971) 126 CLR 28.

6. 65 In discussing the task to be undertaken in respect of the proviso the CCA quoted 3 paragraphs from this Court's decision in ***Weiss*** and in each of those 3 paragraphs it was stated that the standard of proof was guilt beyond reasonable doubt (CCA at [250] quoting paragraphs [41], [44] and [45] of ***Weiss***). Earlier in the judgment the Court had quoted two separate passages from the summing up in both of which the trial judge had directed about the need for the defence of defence of another to be excluded beyond reasonable doubt (CCA at [77] and [81]). The Court also quoted from the summing up of Bell J from the trial of Ms Quinn where her Honour directed that the central issue was whether the Crown had proved its case beyond reasonable
10 doubt. The CCA had emphasised that sentence in bold (CCA at [232]). The Court plainly appreciated that the standard of proof in criminal trials was beyond reasonable doubt, and more specifically, that that is the standard in relation to the proviso.

6. 66 The references to the unlikelihood of C's evidence being correct did not represent a fundamental misunderstanding of criminal procedure but were unexceptional expressions denoting that the evidence was not to be believed, was unacceptable, or in more technical terms, had little or no probative force in light of the other evidence, or, in other words, "unlikely".

6. 67 The evidence in this case presented no particular difficulty for an appellate court
20 proceeding on the written record. There were two eye witnesses, one of whom, J, was unchallenged. There was evidence of the making of admissions by the appellant, some of which was also unchallenged. There was the admitted conduct of disposing of the body and there were threats to kill the three participants, the making of which to Mr Denne and C, was also unchallenged, together with medical and other evidence establishing that, of the two people in that kitchen, it was clearly the appellant who struck the deceased. The CCA was correct. No substantial miscarriage of justice had actually occurred.

30 **Dated**: 29 June 2012



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