SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lentini* [2018] QCA 299
PARTIES:	**R** **v** **LENTINI, Wendy Jayne** (appellant/applicant)
FILE NO/S:	CA No 58 of 2018 DC No 306 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Application for Extension of Time (Sentence)
ORIGINATING COURT:	District Court at Ipswich – Date of Conviction: 27 February 2018; Date of Sentence: 27 March 2018 (Lynch QC DCJ)
DELIVERED ON:	2 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2018
JUDGES:	Sofronoff P and Philippides JA and Henry J
ORDERS:	**1. Appeal dismissed.** **2. Application for an extension of time within which to apply for leave to appeal against sentence granted.** **3. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted on one count of dishonestly gaining a pecuniary benefit of a value of more than $5,000 – where the appellant feigned symptoms of multiple sclerosis in order to make a claim against an insurance policy – where the sole issue at trial was whether the defence of compulsion per s 31(1)(d) of the *Criminal Code* applied – where the defence case at trial was that the appellant's husband was domestically violent and had forced her to participate in the fraudulent scheme – where the defence called evidence at trial from a psychiatrist who gave expert opinion evidence as to the appellant's mental state – where the psychiatrist opined that it was more probable than not that the appellant was suffering from battered woman syndrome at the time of offending – where the prosecution sought to attack the expert evidence of the psychiatrist by establishing that the psychiatrist's opinion depended upon the truth of what the appellant had told her, but that the appellant was not a truthful witness, and that the psychiatrist had not

been given information, in the form of contemporaneous doctor's notes and video recordings of police interviews, that might have borne upon her opinion – where the appellant submits that, in order to make such submissions to the jury, the prosecution ought to have taken the psychiatrist, in cross-examination, to the particular parts of documents or videos that the prosecutor was going to use to challenge her conclusions, but failed to do so – where a request for directions adverting to these matters was sought but refused – whether the learned trial judge erred in failing to give the directions sought or, alternatively, whether the prosecutor acted contrary to the rule in *Browne v Dunn* (1893) 6 R 67

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the appellant submits that the learned trial judge erred in failing to direct the jury adequately about the expert evidence – where the expert evidence of the psychiatrist called on behalf of the defence was the only expert evidence given as to the appellant's mental state – where the prosecution challenged both the evidence of the psychiatrist and the validity of her conclusions – where the appellant submits that the jury should have been directed that they ought to have accepted the psychiatrist's evidence, because there was no contrary expert evidence – whether the jury was entitled to reject the expert evidence of the psychiatrist because of its defective foundation

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where the applicant was sentenced to five years imprisonment, to be suspended after 18 months – where a co-offender involved in the fraudulent scheme was sentenced to five years imprisonment to be suspended forthwith – where the applicant submits that the learned sentencing judge placed overt weight on the fact that duress had been excluded by the jury and had placed insufficient weight on the applicant's undertaking to cooperate with authorities – where the appellant also submits that there is a lack of parity between the sentenced imposed on the applicant and her co-offender – whether the learned sentencing judge failed to properly take into account these factors in exercising the sentencing discretion

Criminal Code (Qld), s 31(1)(d)

Browne v Dunn (1893) 6 R 67, distinguished
Makita (Aust) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305, cited
R v Brown (1986) 43 SASR 33, cited
R v Smith [2005] 2 Qd R 69; [2005] QCA 1, cited
R v Taiapa (2008) 186 A Crim R 252; [2008] QCA 204, cited
R v Turner [1975] QB 834, cited

Taiapa v The Queen (2009) 240 CLR 95; [2009] HCA 53, cited

COUNSEL: S C Holt QC, with A J Kimmins, for the appellant/applicant
D Balic for the respondent

SOLICITORS: Moloney MacCallum Abdelshahied Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** On 1 May 2012 Carmello Lentini committed suicide. Before he died, as a final act of vindictiveness against his wife, he sent a letter to the insurance broker with whom he had dealt, telling him that his wife, the appellant, had defrauded her insurer.

[2] The story that emerged, and which was not in controversy at the trial, was that Ann, the wife of his friend Michael Gilmont, was suffering from multiple sclerosis. This is a degenerative neurological disease for which there is no cure. Ann Gilmont had an insurance policy that covered her against permanent debilitating injury or illness. She made a claim against that policy and, in due course, she was paid a substantial sum of money by her insurer.

[3] It occurred to Carmello and Gilmont that it would be easy to repeat this process with a policy issued in favour of the appellant who would pretend to suffer from symptoms of multiple sclerosis. Ann could tutor the appellant about what these symptoms were and she could then report them to her general practitioner. Ann would impersonate the appellant at an MRI scan that was ordered. There would be an insurance payout and they would split the money.

[4] They put this plan into action. The policy was applied for and issued. The appellant attended upon her doctor and successfully duped her. As the plotters had expected, on 12 June 2001, the GP referred the appellant for an MRI scan. Ann underwent the scan posing as the appellant.

[5] Equipped with the false scans and her GP's diagnosis, the appellant falsely claimed to her insurer that she was suffering from multiple sclerosis. Believing her false claim to be true, her insurer paid her $300,000.[1]

[6] About half of that money was paid to Gilmont as his share. The balance was paid into the bank account of the appellant and her husband in January 2002.

[7] Ten years later Carmello killed himself after having sent an email to his broker implicating the appellant. Police began investigating. On 26 June 2013 they interviewed the appellant in the company of her two lawyers.

[8] The appellant told the police officers interviewing her that she had been diagnosed with multiple sclerosis in 2001. She described her attendance upon the GP, undergoing the MRI scan and the resulting diagnosis and claim. She maintained that she was still suffering from the disease and described several of its symptoms that were vexing her. She described these in some detail. She referred to the various medicines that she had been prescribed and the treatments that she had undergone to battle the

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1 And an additional $258 by way of a returned monthly payment of premium.

disease. She gave explanations about why she was no longer taking some of these medicines.

[9] Police asked her what had happened to the money. She said that about $105,000 had "paid the house". She did not reveal that in fact they had purchased a house and land using the money and, of course, police assumed that she had had the benefit of the full $300,000. A substantial amount of the rest, she told them, was used to pay lawyers who had been retained to defend Carmello against criminal charges that had been brought against him.

[10] The appellant explained that Carmello had been a domineering and aggressive man. She said, "He's threatened me a lot. He was physically aggressive." She believed that he "used to do collections and that had a lot to do with … drugs". He was associated with an outlaw motorcycle gang and certain known criminals, whom she named. She said that two or three weeks before his death, in the course of a violent argument, he had "bit my face, and choked me, and kicked … me". She said that he had tried to kill her. He told her that he had killed other people.

[11] She described what was to be their final argument. The appellant's daughter found her at home bleeding and rang an ambulance and police. She was removed from the home and, shortly afterwards, was located in a safe house. She told police that she never saw her husband. She returned home "when he hung himself".

[12] Having conducted the interview thus far, police then disclosed that, in an email that he had sent to her insurance broker, Carmello had implicated the appellant in a fraud on her insurer. The email was read to her as follows:

> "Hi Martin. I'd like to tell you that Wendy Jayne Lentini has ripped your insurance company off for $300,000 for a [false] claim of M-S. The person she used is named Ann Gilmont, she had the M-S and Wendy paid her husband was a P-I and told her how to rip off, rip off the fraud. If you [check] things out you will find Wendy paid Michael Gilmont $100,000 for [their] share of the deal, it's not that hard to trace the money. I will be happy to stand up in court to give you the proof if you go back through your files you'll be able to trace the money trail. My phone number is … will be happy to tell you more.
>
> Kind regards, Kemmy Lentini"

[13] The appellant said that she knew all about the accusation because Carmello had made similar false allegations to other people. She told police that the allegations were:

> "… not true. They're definitely not true."

[14] One of the appellant's solicitors who was present reinforced her denial by pointing out, undoubtedly in accordance with his instructions, that:

> "We believe there's an abundance of that evidence to show that he falsely attempted to incriminate his wife Wendy, who's present here in this interview, in respect of ownership, illegal ownership of firearms, um illegal ownership of firearms, um illegal ownership of drugs, and I'm not sure that, whether that was Wendy or his

> daughter, who he also had a, a pathological … attitude towards. He attempted to kill Wendy …
>
> … that email is basically just part of a pattern of behaviour of falsehood and lies to harm and damage Wendy Lentini, his wife Wendy Lentini."

[15] Police continued their investigations. They obtained the MRI scans purporting to be of the appellant and genuine scans of Ann's. They obtained the Gilmonts' bank statements that showed a deposit of unsourced income of $136,000 on 31 March 2002. Ann Gilmont, by then separated from her husband, then confessed. She implicated herself, her husband, Carmello and the appellant in the fraud. She explained how the plan had been carried out.

[16] Armed with this information, police served a forensic procedure application on the appellant seeking to compel her to undergo an MRI scan. Following the service of this application, the appellant requested a second interview with police.

[17] On 11 May 2015 the same police officers interviewed the appellant again and the same solicitors accompanied her. This time, a "support person", one Christine Brooks, also attended. The appellant described how the diagnosis of multiple sclerosis had come about:

> "LENTINI: Ann Gilmont at the time had multiple sclerosis, and she was a very good friend of my husband's. And a-, ah she, my husband at the time was going through a lot of Court cases and had lots of fines and, and he looked like he was doing a fair s-, stretch of time. So her and him got together, 'cause we look alike, asked me, i-, if I would help them, 'cause she needed financial support too, asked me if I would help them out by posting as ah, as her, and I didn't want to do it but um I had petrol poured over me and threatened, 'cause it was of, in a domestic violence situation, so was my children. I still wouldn't do it. But they used my Medicare card. I did not go for an M-R-I. He took her, and I did not go and see I-, Edwards, she posed as me. [INDISTINCT], and that's all I've got to say. And I couldn't do anything about that because I was threatened. And he said that he knew a lot of Police, and he was working with one in particular, I can't remember his name, and he was a Police informant, and he said, wherever I go the Police will help him find me, and the children.
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> …
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> SOLICITOR: And what would happen –
>
> LENTINI: So—
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> SOLICITOR: With you if they found you? If he found you?
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> LENTINI: What would he do? He was gonna kill me and the children. This is true."

[18] The appellant also told police that her husband had threatened to set fire to her:

"SCON COOPER: You mentioned before about the um, sorry have a drink, you're right. You mentioned before about him pouring petrol on you. Tell me about that incident. When it occurred.

LENTINI: That's happened a couple of times.

SCON COOPER: [INDISTINCT]

LENTINI: The first time was over this. Um about 2000, 2001 and oh grabbed me by the hair, poured petrol over me, it was like that [INDISTINCT], ah 'cause I wanted to leave. He said, [INDISTINCT], you can't, I can't, you'll never leave me because I've got friends in the Police Force. I said, how can you have friends when you're in so much trouble? And I said to him, you're nothing but a criminal, and that was the worst thing I could have said, so he poured petrol all over me.

UNIDENTIFIED SPEAKER: [INDISTINCT]

LENTINI: And then I had to quickly change my mind and say, I, I love you, and just the whole lot, please don't leave me, please, I have children. We can work it out. I had to change to be talking like that, which made me sick. A-, and um, 'cause he had a bonfire going, and he grabbed my hair and he pulled me over to the, the bonfire, 'cause it was, he was burning cartons, and um the kids were, Kemmy was a baby and the girls were little, and I didn't say anything, and a-, he just grabbed my hair and said, you, language, you shut your eff'n mouth and you say nothing to nobody and I'll get away with it because I've got friends of Police in high places, [INDISTINCT], 'cause I'm an informant, and I've done a lot of things for the Police, and I've got a lot on 'em and they will never do anything, [INDISTINCT] you'll never ever be helped by the Police. So I believed it. [INDISTINCT]"

[19] She also said that her husband had raped her frequently. In a rage he would also grab his young son's throat, kicking him and throwing him to the ground.

[20] She denied that she had used any of the money.

[21] Police had also found that, within days after the insurance company paid out on the policy, some land had been purchased in the appellant's name. There was no mortgage registered on the title. Police established by handwriting analysis that it was the appellant who had signed the necessary release forms that had allowed the payment out of the money.

[22] The appellant was charged on indictment with dishonestly gaining a pecuniary benefit for herself and others in respect of property of a value of more than $5,000. She pleaded not guilty. At her trial she invoked s 31(1)(d) of the *Criminal Code* which provides, relevantly:

"31(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say –

(a) …

(b) …

(c) …

(d) when:

(i) the person does … the act in order to save … herself or another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and

(ii) the person doing the act or making the omission reasonably believes … she or the other person is unable otherwise to escape the carrying out of the threat; and

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

[23] The central issue for the jury was the appellant's state of mind; it was whether the Crown could satisfy the jury beyond a reasonable doubt that the appellant had not done the acts that constituted the offence "in order to save herself" from harm threatened to her and to her children by Carmello or could satisfy the jury that the appellant did not reasonably believe that she was unable to escape those threats in any other way than by committing the fraud.

[24] The burden of excluding the operation of s 31(1)(d) lay upon the Crown but the appellant led two categories of evidence to show that she did the fraudulent acts for the purpose of saving herself and because there was no other way of saving herself. First, there was the appellant's own evidence. Second, the appellant called expert psychiatric evidence. It is convenient to deal with that expert evidence first.

[25] Dr Joan Lawrence is a highly esteemed forensic psychiatrist who has practiced in her field for decades. Her expertise is unimpeachable. Dr Lawrence had a lengthy consultation with the appellant during the course of which the appellant told her about Carmello's violence, including sexual violence, and the emotional abuse and control to which he had subjected her over many years. In her evidence Dr Lawrence explained that some women who are subjected to these kinds of experiences begin to exhibit "a pattern of different behaviours" over time. The husband tends to control the woman and isolate her from those who might support her. The woman becomes more and more reliant upon him for direction and control. She begins to behave in a way that Dr Lawrence described as exhibiting "learned helplessness". She loses her sense of being a person in her own right and her capacity to make independent decisions diminishes. She feels trapped and helpless. Leaving the relationship becomes difficult or impossible. Dr Lawrence described this state as "battered woman syndrome". Dr Lawrence said that this is not a psychiatric condition of the kind recognised and described in the Diagnostic and Statistical Manual but that it is nevertheless a pattern of behaviour associated with the influences that she had listed and it was recognised as such in her profession.

[26] Dr Lawrence also diagnosed the appellant as suffering from post-traumatic stress disorder and a depressive disorder. These two disorders were part of the battered woman syndrome.

[27] Dr Lawrence was of the opinion that when the appellant committed the fraud it was more probable than not that she was suffering from battered woman syndrome.

[28] In examination in chief of Dr Lawrence the appellant's counsel asked her whether the appellant had spoken to her about her "problems or otherwise with police". Dr Lawrence said that the appellant had told her that she was unable to trust police. She had questioned the appellant about this because, in her opinion, it might be relevant to the charge. Dr Lawrence said:

> "It was partly based on the fact that, in terms of being placed in the safe house, her husband had found out about the address of it and had contacted her. And that's the one thing the safe house is supposed – not to be able to do – that they feel safe. So her safety had been threatened yet again and she attributed that to the fact that it must have come through the police – from the police because they were the only ones that knew it and she knew that there's a record made and even though she couldn't say it was a specific person who would have told her husband, that he does have contacts in the police or had had them and the friends – they'd had some friends who – both of whom had been serving police officers at some time or other and he was in touch with the[m]. So I – she had assumed that Kemi had somehow been in touch with these people. They had been able to look up the paperwork somewhere along the line and find out here [sic] whereabouts and pass that on. So that's why she – well, one reason why she couldn't. And the other was the fact that they had this couple that they knew and that she knew and they were both associated with the police and she knew have – as she said, her husband's early dealings as a standover man, hit man, for some of the Valley nightclubs and whatever, brothels, and the contact with the Bellino family and that sort of thing. So she – and she believed or she said that she – he had told her that he, sometimes, gathered information in his role – security role – and had passed that information onto the police himself for the benefit of the police and not the person that he knew.'

[29] In cross examination Dr Lawrence affirmed that the appellant had given her to understand that the basis for her mistrust of police lay in Carmello's ability to discover her whereabouts at the women's shelter. This had demonstrated Carmello's intimacy with police.

[30] Dr Lawrence acknowledged in cross-examination that her opinions were based upon the accuracy of the history that the appellant had given her and upon the accuracy of the appellant's report of her symptoms.

[31] If the jury were to accept it, Dr Lawrence's evidence established that, by reason of suffering from battered woman syndrome, the appellant had a propensity to do as she was told by her husband. It also established that she had a reasonable basis for excluding police as an avenue for assistance in her predicament. However, Dr Lawrence could not and did not set out to prove the appellant's actual state of mind when doing the fraudulent acts, the doing of which the appellant admitted.

[32] The appellant's own testimony furnished evidence of her actual state of mind. She said that after marrying her husband she had been subjected to increasing levels of

physical, emotional and verbal abuse by him. The abuse included beatings, a rape at gunpoint and sexual violation by the use of his fist and objects. She said that she had had her teeth broken on a number of occasions and once had her ankle broken. She said that on three separate occasions he had poured petrol over her and had threatened to light it. On one of these occasions he used the threat of that kind of immolation to induce her to commit the fraud the subject of the charge against her. In addition, he had beaten or threatened to beat their children in revenge for what he perceived were her faults or wrongdoings.

[33] She said that she believed that she could not ask police to protect her because Carmello had told her, and she had believed, that police who would instead protect him. She believed that her husband was a police informant. She believed that his crony in this offence, Gilmont, had himself once been a detective in the Queensland Police Force.

[34] She said that on one occasion, when police had come to the house on a "raid" to investigate her husband's criminal activities, one Detective Sergeant Kajewski had told her that in his opinion her husband was "dangerous" but that he, Kajewski, could help her. She said that she believed that if she had taken Kajewski up on his offer of assistance then "[w]e would be dead".

[35] She described how the plan to commit insurance fraud had come about. Her husband had suggested that she obtain an insurance policy to give him financial cover to enable him to look after the children in the event that something should happen to her. She agreed to do this and obtained the policy. The cover was for $300,000 in order to provide $100,000 in respect of each of their three children. Some time later he told her that he and Gilmont had been talking and agreed that it would be easy for the appellant to claim to suffer from MS and obtain a payout. Ann Gilmont would pose as the appellant for that purpose. The appellant said that she was "horrified". Initially, she said, she refused. Sometime later, he raised the proposition again and again she refused. He persisted, saying that he needed money to pay legal fees in relation to a charge he was facing. She said that he grabbed her by the throat, threw her down and started choking her. He dragged her to the shed and poured petrol over her. He then "played with a lighter" and said he could kill her. He said he could kill the children too. He said that he had killed people before.

[36] The appellant said that she had never been so frightened. She had wet herself. She agreed to help so that he would not kill her.

[37] Carmello arranged for Ann Gilmont to brief the appellant about the symptoms of MS. He took her to her doctor and sat with her while she described her symptoms. Her GP referred her for an MRI scan. She said that it was Carmello who drove Ann to undertake the scan which, of course, returned a positive result of MS. Ann had said in evidence that the appellant had driven her. In due course the appellant signed a number of documents to make her claim and to receive the insurance money.

[38] The evidence about the Carmello's violence towards the appellant and her children was strong and there was no evidence to contradict it. Although some witnesses who were close to the family, and who had been called by the Crown, said that they had seen no evidence of such violence, that proved nothing other than that if there

was violence, they had not seen it. Her daughters, her sister in law and a female friend corroborated the appellant's evidence about violence to a large extent.

[39] The Crown did not assert that the appellant had not been exposed to violence at the hands of her husband, it challenged the degree of violence and, of greatest significance, the Crown disputed whether that violence was operative within the terms of s 31 of the *Criminal Code*.

[40] It is convenient to discuss the three sub-paragraphs of s 31(1)(d), ignoring the effect of the burden of proof.

[41] Section 31(1)(d)(i) addresses the appellant's subjective purpose in doing the acts that constitute the offence. For the provision to be engaged, the appellant's purpose must have been to save herself or her children from Carmello's threats. It did not matter that his threats were to do harm in the future rather than immediately but it was necessary that the threat be operative in overpowering the appellant's will at the time she did the fraudulent acts.[2]

[42] Section 31(1)(d)(ii) requires that the appellant reasonably believed that commission of the offence was the only way in which she could escape his threats. There are three aspects to this requirement.

[43] In the first place, the appellant must have subjectively held the relevant belief.

[44] In the second place, that belief must have been a reasonable one. What is reasonable depends upon the situation of the appellant herself. The reasonableness of her belief is to be judged according to what the appellant knew to be the facts, or reasonably believed to be the facts, at the time. Her grounds of belief might be mistaken but, provided that the appellant's belief in the existence of those grounds was itself reasonable in the circumstances, and provided that those grounds reasonably supported her mistaken belief, the provision will be engaged.[3] If that were not the meaning of s 31(1)(d)(ii), then in any case s 24 of the *Criminal Code* would achieve the same result.

[45] In the third place, in the context of the defence of compulsion, it has been said that the ordinary way in which a citizen renders criminal intimidation ineffective is to report the intimidators to police and, under ordinary circumstances, reporting such matters to police must be assumed to be an effective means to neutralise intimidation. If that were not so, society would be at the mercy of criminals who could force pawns to do their criminal work by means of intimidation.[4] For this reason it was not enough to engage the provision that the appellant reasonably believed that that commission of the offence was one of several ways to escape the threat. She must have believed that it was the only way.[5]

[46] Finally, s 31(1)(d)(iii) requires that the commission of the offence be reasonably proportionate to the harm threatened. This was not in issue in this appeal and it is not necessary to consider it.

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2 *R v Taiapa* [2008] QCA 204 at [30]-[31] affirmed *Taiapa v The Queen* (2009) 240 CLR 95.

3 *Taiapa v The Queen*, *supra*, at [26]-[29].

4 *R v Brown* (1986) 43 SASR 33 at 40 per King CJ, cited with approval in *Taiapa v The Queen* (2009) 240 CLR 95 at [31].

5 *R v Smith* [2005] 2 Qd R 69 at [35].

[47] The appellant's first ground of appeal is that prosecutor breached the rule in *Browne v Dunn*[6] when cross-examining Dr Lawrence.

[48] In his address to the jury, the prosecutor, Mr Needham, said that the evidence of Dr Lawrence was the "lynchpin" of the defence. That much was common ground. The prosecution could not challenge Dr Lawrence's expertise. Her reasoning process, from the premises to her ultimate conclusions, could also not be attacked. That left only one thing: an attack upon the validity of her premises.

[49] In attacking the expert evidence, Mr Needham sought to establish two things. First, he sought to establish that Dr Lawrence's opinion depended upon the truth of what the appellant had told her but that the appellant could not be accepted as a truthful witness or, as he put it, "you can't take her word for anything".

[50] Second, he sought to show that Dr Lawrence had not been given information that might have borne upon her opinion, namely, access to contemporaneous doctor's notes and the video recordings of the two police interviews.

[51] After Mr Needham had finished his address referring to these matters, the appellant's counsel, Mr Kimmins, submitted to the learned trial judge as follows:

> "Can I just raise two things about my learned friend's address and your Honour to consider making comment thereto. When he was making submissions so far as Dr Lawrence's evidence was concerned – and there were two areas where he indicated that he had not elicited from Dr Lawrence that she had not listened to the interviews was the first one and, secondly, had not read any medical notes of Mrs Lentini from the Laidley Medical Centre and indicated that she wasn't in full possession of all the facts. My respectful submission is that your Honour indicates to the jury that my learned friend had all of those things available to him and it was up to him whether he wished to ask the doctor to look at various parts of the notes or the interviews themselves and comment in front of the jury. It's too late now to say, "Well, Dr Lawrence, the expert, didn't have all the material. So what do you think, ladies and gentlemen?"

[52] The appellant now repeats that, in order to justify making those submissions to the jury, the prosecutor should have directed Dr Lawrence's attention to the particular parts of any documents that he was going to use to challenge her conclusions. It is now submitted that Mr Needham should have asked her whether the content of those documents altered her opinion. It is submitted that Lynch QC DCJ should have given the directions that were sought. The appellant relies upon *Browne v Dunn*[7] to support that submission.

[53] Lynch QC DCJ declined to give the direction and, in my respectful opinion, his Honour was right to do so.

[54] In this case the expert evidence was opinion evidence. An expert giving opinion evidence must identify the assumptions of fact upon which the opinion is based so that, knowing those facts, the jury can assess the value of the opinion. If the expert has been misinformed about the facts or has omitted to take relevant facts into

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6 (1893) 6 R 67.

7 *supra*.

consideration, the opinion is likely to be valueless.[8] The facts must be placed before the jury by evidence and the relationship between those facts and the conclusion must be stated in the expert evidence. Before such an opinion can be accepted and acted upon, the jury must be satisfied that the facts upon which it is based bear a sufficient relationship to the facts as found by the jury. Some conflicts will render the expert evidence of no value but there need not be a perfect coincidence of facts and even broad differences may not affect the force of the expert's opinion.[9] It is entirely for the jury to resolve conflicts between the facts assumed by the expert and the proven facts.[10] It is for the jury to decide the degree of divergence between these two sets of facts that it will tolerate before it will reject the expert's opinion. It is for the jury to determine the effect upon the weight to be given to expert evidence of any degree of conflict between those two sets of facts. In summary, as is the case with all evidence, it is a matter entirely for the jury to decide whether to accept the evidence, what weight to give it and how to apply it.

[55] In a criminal trial, the jury is the constitutional arbiter of fact. The task of the expert, therefore, is to furnish the jury with the necessary scientific criteria for testing the accuracy of the jury's own conclusions to enable it to make its own independent judgment by the application of those criteria to the facts that it finds.[11] A jury is not bound to accept an expert opinion as conclusive even if there is no contrary evidence because such a requirement would constitute an impermissible encroachment upon the jury's function - and duty - to find the facts.[12] Of course, as with all evidence, a jury's acceptance and rejection of expert evidence must be rational.

[56] Because the accuracy of the factual foundation for an expert opinion is crucial, it is both usual and legitimate for an expert opinion to be attacked by seeking to demonstrate that the facts that support it should not be accepted or that the expert's conclusions should be doubted because the expert was denied access to material information that might have affected the factual assumptions.

[57] That is what Mr Needham attempted to do here. First, he submitted, correctly, that almost all of the facts upon which Dr Lawrence based her opinion were facts that had been offered by the appellant herself but that the appellant's evidence should be disbelieved.

[58] The prosecutor had put to the appellant in cross-examination that she had exaggerated and embellished her description of the violence that she had suffered in order to fit a false story that she was under duress when she committed the offence. Another attack on the appellant's credit lay in the evidence of Christine Brooks. The appellant had attended her 2015 police interview not only in company with her lawyers but also together with her then-supportive friend, now witness for the prosecution, Ms Brooks. According to this witness, during a break in the interview

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8 *R v Turner* [1975] QB 834 at 840 per Lawton J; cited in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [69] per Heydon JA.

9 *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510 per Samuels JA.

10 *Ibid*.

11 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 729-730 per Heydon JA citing *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* [1953] SC 34 at 39-40, 42.

12 *Ibid*.

in which the appellant raised compulsion as an excuse for the first time, she and the appellant went to the toilet. Ms Brooks gave the following evidence:

> "Okay. So talk us through that? What happened there?---Okay. I went into the toilet first, because there's only one toilet, so I went in first. Wendy pushed the door behind me and came in. As she came in, I said, "Are you all right". She said – she looked at me and she said, "Is that a good enough performance?" And laughed and said, "Do you think they'll believe me.""

[59] In cross-examination the following exchange took place:

> "It obviously led to you concluding that she was making stuff up?---Yes.
>
> Right. And that nothing could be clearer in your mind. Nothing could be clearer. She put on a performance, and it – you formed the view from that point on that she was lying?---Yes."

[60] In her own evidence the appellant denied that she had said those things to Ms Brooks.

[61] Second, the prosecutor submitted that Dr Lawrence had not been given relevant materials. One category of such material was the video recordings of the interviews in 2013 and 2015. These, the prosecutor contended, showed the appellant's demeanour in 2013 when she was known to be lying and that would have been invaluable in assessing the reliability of any history that the appellant had given Dr Lawrence and relevant to the formation of her opinions. Dr Lawrence had come to her opinion that the appellant suffered from battered women's syndrome in reliance upon the appellant's statements about the development of her symptomology. However, the prosecutor submitted, the appellant's medical records from the relevant time did not evidence any of the expected developing symptoms but Dr Lawrence had not been given them.

[62] Finally, there was the important issue concerning the reason for the appellant's failure to engage with police instead of committing the offence.

[63] The appellant was cross-examined about the many occasions upon which she had an opportunity to report the matter to police but did not do so. Her reason for not approaching police was her claimed belief that her husband had intimate connections with police and that certain officers would protect him. Dr Lawrence had based her conclusion about the appellant's fear of police upon the appellant's statement that Carmello had tracked her down to a women's refuge by the use of information given to him by police who were helping him. If true, that would have been a good reason for the appellant not to report her husband's threats and demands. Even if that were not true, if the appellant reasonably believed it to be true, it still would have been a reasonable basis for a belief that she could not report Carmello's threats.

[64] The appellant's own evidence at trial falsified her statement to Dr Lawrence. She said that about three weeks before her husband's death Carmello had severely assaulted her and she had then taken refuge in a women's shelter. According to her own evidence, except for going back to the home covertly to remove some animals to safety, she did not return home until after he had killed himself. She had never seen him again and he had not discovered her location. In fact, she had told police the

same thing in her first interview in 2013 but she had obviously forgotten about that when she spoke to Dr Lawrence, who had not been given a transcript of that interview. It was to Dr Lawrence alone that the appellant had given her fabricated story about Carmello tracking her to the safe house with the aid of police.

[65] This falsehood impinged upon a most important matter, namely whether in terms of s 31(1)(d)(ii) the appellant held a reasonable belief that the perpetration of the fraud was the only way in which she could escape Carmello's threats. If the jury was satisfied beyond a reasonable doubt that she did not hold that belief, the defence failed. This falsehood also impinged upon the appellant's credit generally and, therefore, upon the issue of the appellant's state of mind in terms of s 31(1)(d)(i).

[66] The appellant's credit was at the heart of the case because the defence of compulsion was ultimately founded upon her evidence alone. If the jury rejected the appellant as a truthful witness, they could have rejected her claim that she had acted under compulsion. Dr Lawrence's evidence would then have had little value. The factual premises underlying her evidence would have been much diminished or even extinguished. Alternatively, the jury could have accepted Dr Lawrence's diagnoses and still have been satisfied that the appellant was lying to them about why she acted as she did and why she did not report the matter to police. The jury could still have been satisfied that the real reason for the appellant's cooperation in the commission of the offence was not that Carmello had compelled her but that her own greed had compelled her.

[67] In either event, the jury could have been satisfied beyond a reasonable doubt that the appellant did not have the state of mind referred to in ss 31(1)(d)(i) or (ii) or either of them, but, instead, had committed the offence for venal reasons.

[68] The rule in *Browne v Dunn* has nothing to do with the matter. That is a rule about impeaching the credit of a witness. If the jury is going to be asked to conclude that a witness is not speaking the truth, then as a matter both of fairness to the witness as well as by way of necessary assistance to the tribunal of fact, the grounds for disbelief have to be put to the witness. However, Dr Lawrence was not the subject of any attack of this kind. Her credit was not in issue. The prosecutor's attack was upon the factual bases for her conclusions and Dr Lawrence was not asserting the accuracy of her assumptions. Instead, the prosecutor challenged the assumptions underlying the expert evidence by challenging the witnesses who swore to the truth of them. He did not have to put new, alternative, facts to Dr Lawrence. And, as Lynch QC DCJ rightly ruled, he did not have to invite her to give a new opinion based upon facts as they emerged at the trial. It was for defence counsel to do so. If the defence sought to maintain the validity of Dr Lawrence's opinions upon different facts that might emerge in the evidence, or that the jury might find, it was a matter for the defence to lead the resulting opinion. For the prosecution it was sufficient to impugn the evidence as it was. During oral argument on this appeal counsel for the appellant accepted that that was so. Indeed, it is conventional.

[69] For these reasons I would reject the first ground of appeal.

[70] The second ground of appeal is that the learned trial judge failed to direct the jury adequately about the expert evidence because he did not tell the jury that, unless the factual foundation for that evidence was not established, Dr Lawrence's evidence should not be rejected because the Crown had not challenged her evidence or her diagnosis and because there was no contrary expert evidence.

[71] For the reasons already given, this ground should also be rejected. Dr Lawrence's evidence and the validity of her conclusions were both challenged. Indeed, that challenge by the prosecution was the subject of the first ground of appeal.

[72] The submission that the jury should have been told that the evidence of Dr Lawrence had to be accepted, because it was the only expert evidence in the case, requires further discussion.

[73] Dr Lawrence was not asked in her evidence in chief to articulate with any precision the essential assumptions of fact upon which she based her evidence. Dr Lawrence had been asked to sit and observe the appellant give evidence and she did so. In examination-in-chief her factual assumptions emerged as follows:

> "All right. You heard her over the last two days, and it probably wouldn't have been word for word what she spoke to you about or – but was it **generally the same type of behaviour** that he-that she told you about during the consultation that she articulated before the jury over the last two days? --- Yes.
>
> Right. **Did that include** emotional trauma?--- Yes.
>
> And physical trauma?--- Yes.
>
> Sexual trauma?--- Yes.
>
> Okay. Threats?--- I – I think she had great difficulty dealing with the questions of the sexual trauma, because I was observing her quite closely during all of this time, of course. But, yes, I think – I wouldn't say her account was different but in my – the situation with me **I think she was able to be a bit more forthcoming about what had happened,** and how she felt about it, and what she – what she – she did to – or at least some of the outcomes of that in the longer term. So I think that **certain things were clearer to me than – in my – my setting** as opposed to – to this setting. But the – whilst there may have been **some things which I was told that didn't come out as strongly**, and maybe there were **things that were said here that I wasn't aware of**, but the picture is the same.
>
> All right. Just in relation to that, did that cause you to doubt any original opinions that you had concluded?--- No."
>
> (Emphasis added)

[74] In response to the next question, Dr Lawrence then gave her opinion that the appellant's conduct was consistent with battered woman syndrome. In the course of her answer, Dr Lawrence said:

> "And the other thing that I think, sort of, became – that I – that I have formulated from – from this was that **in explaining some of the things that I think have been touched on in examination and cross-examination** was why, perhaps, she actually did what she did in terms of this fraud that – that – which had been commit – committed. And, as she has said, she did this at the behest and on the orders, so to speak, of her husband Kemi, and why didn't she report it, particularly after he suicided, which she admitted very clearly, I

> think here as well as to me, it was a relief when he actually did succeed, ultimately – by mistake, I think – in – in killing himself…"

[75] Dr Lawrence was not invited to identify her factual premises with any more precision than that. Dr Lawrence's evidence, as led by the appellant's counsel, left undisclosed what parts of the appellant's evidence was "generally the same type of behaviour" as had been related to her by the appellant and whether, in the jury's eyes, that behaviour was "generally the same" or not. It left undisclosed the matters about which the appellant had been "a bit more forthcoming about what had happened" in her private consultation and which had, evidently, served as part of the basis for the opinion. It left the jury in no position to assess whether the "more forthcoming" parts were acceptable and whether they affected the jury's assessment of the validity of the expert's conclusions. Likewise, the jury was left in the dark about which "things were clearer to [Dr Lawrence] … in my setting… as opposed to … this setting". Nor did the jury know what things "came out more strongly", why Dr Lawrence thought that they came out more strongly, what significance she placed on this factor and what significance the jury should attach to this observation. The "things that were said to her that [Dr Lawrence] wasn't aware of" and "some of the things that … have been touched upon … why … she actually did what she did in terms of the fraud" were never identified.

[76] It may be, as Dr Lawrence said, that these differences were not such as to engender a change of opinion. But that was a judgment for the jury to make and not for the witness and the jury could not possibly have made that judgment having regard to the defective way in which the evidence of factual assumptions was presented.

[77] A witness who expresses an opinion as to the likely or possible state of mind of an accused person must give that opinion upon an assumed state of facts. Often, those facts have been given to the witness by way of instructions. A medical witness, like Dr Lawrence, will usually base her opinion not only upon the content of instructions but also upon the patient's history as related by the patient, which will have to be proved in due course, and upon the expert's own observations, about which the expert herself is competent to give evidence. Whatever their source, those facts must be capable of articulation and they must be articulated. It is not permissible to base an expert opinion upon the evidence generally as recounted by the accused in her evidence.[13] Such a course involves permitting the expert mentally to select, without identifying, some pieces of evidence and reject other pieces of evidence and then apply her own, undisclosed interpretations of what that evidence might mean to her as a matter of fact.[14] Her opinion is then based upon an undisclosed interpretation of evidence. There would be no way for the jury to perform its function of comparing its own findings of fact to the facts assumed by the expert, a task that is fundamental to the jury's task of assessing the weight of expert evidence.[15] The identification of the factual foundation for the expert opinion must be found in the expert's evidence in chief. In criminal trials, in which expert evidence is generally given orally, this may be an involved process but unless it is undertaken the expert opinion will be either inadmissible or of little value.

[78] In this case, the expert opinion was said to have been based originally on unidentified facts communicated in conference, an opinion that was not altered

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13 *Makita*, *supra*, at [70] citing *R v Fowler* (1985) 39 SASR 440 at 443 *per* King CJ.

14 *ibid*.

15 *Makita*, *supra*, at [70]-[78].

because it was said to be supported by facts given in evidence and which, while not identified, were asserted to bear a "general" similarity to the unidentified facts that originally supported the opinion. The original facts had not only not been proved, they were not even in evidence. The facts relied upon at trial were unidentified and so the jury could not make any findings about them in order to assess the value of the opinion evidence. Dr Lawrence's evidence of opinion was inadmissible but it was not objected to.

[79] The relevance of these defects in the evidence to the present discussion is that it demonstrates a further error in the appellant's submission that, absent contrary facts being put to Dr Lawrence, her opinion was not just unassailable but, "there [being] no evidence to contradict that evidence, a verdict cannot be given contrary to it".[16] It was an opinion that the jury would have been entitled to reject out of hand because of its defective foundation.

[80] I would dismiss the appeal.

[81] The appellant has also seeks an extension of time within which to seek leave to appeal against her sentence. She was sentenced to imprisonment for five years to be suspended after she has served 18 months. She accepts that the head sentence was not excessive and she accepts that a proper sentence would require her to serve a period of actual custody. She was sentenced on 27 March 2018 and contends that the sentence should be suspended now, having the effect that she will have served a period of seven months of custody. Her co-offender, Ann Dwyer, formerly Gilmont, was sentenced to imprisonment for five years suspended forthwith.

[82] The applicant has no previous criminal history. When the applicant finally admitted to doing the acts constituting the offence, she did not admit her guilt of the offence. She claimed to have acted under duress but the jury found that she was a willing participant in the fraud. Notwithstanding that finding, the evidence showed that the applicant had suffered severely at the hands of a cruel and violent husband. Her co-offender, Ms Dwyer, was also emotionally dependent upon a domineering and manipulative husband who finally abandoned her, leaving her to care for two school age children.

[83] She offered to cooperate by providing evidence in the prosecution of Ann's husband, another participant in the fraud. Ms Dwyer had similarly undertaken to give evidence against the applicant and Michael Gilmont and had in fact given evidence against the applicant in accordance with an undertaking to do so.

[84] Lynch QC DCJ found that both women were unlikely to reoffend and that personal deterrence as a factor could be put to one side.

[85] In these respects, the unfortunate situation of both women was very similar. However, there were also significant differences between them. Ms Dwyer pleaded guilty at an early stage and was sentenced upon that basis. She showed genuine remorse. The applicant did not plead guilty and has shown little remorse.

[86] Ann Dwyer is in fact suffering from multiple sclerosis and her disease has progressed to the point that she is now confined to a wheelchair. She has suffered a stroke. This means that imprisonment would be much harder for her to bear than it

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16 Appellant's outline, paragraph [36] citing *Hone v Western Australia* (2007) 179 A Crim R 138 at [124] per Miller JA.

would be for a person who was not suffering from these disabilities. The expert evidence on sentence showed, and Lynch QC DCJ found, that the applicant was also unhealthy. She is suffering from post-traumatic stress disorder and depression. The applicant will also suffer imprisonment more than would a healthy woman but, in the view of Lynch QC DCJ, not so much as Ann Dwyer.

[87] The applicant got the benefit of land worth over a hundred thousand dollars. Ann Dwyer gained no benefit.

[88] Richards DCJ, who sentenced Ms Dwyer, considered her case to be an exceptional one. It cannot be said that the applicant's case is exceptional in any way. It is just the case of someone who perpetrated a serious fraud, who took her chance at a trial and who has not shown much remorse. She had two factors to mitigate her guilt. The first is her psychological condition. The second is her preparedness to give evidence against Gilmont.

[89] Lynch DCJ took into account these similarities and these dissimilarities between the offenders in arriving at his sentence. He considered that the differences between the two offenders meant that a more severe sentence was warranted in the applicant's case.

[90] The applicant submits that Lynch QC DCJ "placed too great weight on the fact that duress had been excluded by the jury". The weight to be given to a relevant factor is a matter entirely for the sentencing judge. An appellate court will not interfere with the judgment of a sentencing judge about weight unless it can be demonstrated that the weight accorded to a particular factor was unreasonable. No attempt was made to demonstrate that and, as I read the sentencing remarks, the pressure placed upon the applicant by her husband played a significant role in his Honour's decision to suspend her sentence at a point less than one third into her term of imprisonment.

[91] The applicant makes a similar submission about the weight given by his Honour to her cooperation. This submission cannot be sustained either. His Honour expressly took that factor into account as one of the two significant factors (the other being her husband's violence) that warranted a suspension of her sentence after just 18 months. But for those two matters, it is hard to see anything in this case that could have justified doing anything other than leaving the applicant to the ordinary rigours of the parole legislation, which would have left her to apply for parole after serving two and a half years imprisonment instead of being released automatically after serving 18 months in prison.

[92] For these reasons as well, the applicant's submissions about lack of parity in sentencing between her and Ms Dwyer must be rejected for there is no material parity in their respective situations.

[93] The merits of the sentence having been argued and an extension of time not having been opposed, I would grant an extension of time within which to apply for leave to appeal against sentence but refuse leave to appeal.

[94] **PHILIPPIDES JA:** I have had the considerable benefit of reading the reasons of Sofronoff P and agree with the reasons given and the orders proposed.

[95] **HENRY J:** I have read the reasons of Sofronoff P. I agree with those reasons and the orders proposed.