SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dubois* [2018] QCA 363
PARTIES:	**R** **v** **DUBOIS, Garry Reginald** (appellant)
FILE NO/S:	CA No 337 of 2016 SC No 1046 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 28 November 2016 (Applegarth J)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2018
JUDGES:	Sofronoff P and Gotterson JA and Ryan J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of one count of deprivation of liberty, three counts of murder and two counts of rape – where the offending the subject of the indictment occurred over 40 years ago – where many witnesses were deceased at the time of trial – where the learned trial judge admitted the evidence of a witness, pursuant to s 93B *Evidence Act* 1977 (Qld), relating to a conversation in the course of which the witness was told by a now-deceased individual that the appellant, along with his co-accused, was responsible for the rape and deaths of the three deceased – where the witness was told this information in the course of a night of drinking and cannabis use – where the appellant submits that the evidence of this witness ought not have been admitted by the learned trial judge – whether the representation made to the witness was made in circumstances making it highly probable the representation is reliable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – VERDICT AGAINST EVIDENCE OR WEIGHT OF EVIDENCE – where the appellant submits that the evidence of one particular witness, who was a friend of the appellant and the appellant's co-offender, could not reasonably have been accepted as truthful

by the jury – where the witness had denied any knowledge of the disappearance of the three deceased for decades, including under oath, but had decided to offer information that implicated the appellant in May 2014 – where the appellant further submits that the witness could not remember certain details and was inconsistent in his recollection – where the appellant submits that nothing in the evidence of the witness was anything that he could not have learned from the questions put to him by police – where the appellant submits that nothing was clearly corroborative of the evidence of the witness – whether the matters raised by the appellant justify appellate interference with the findings of the jury

Evidence Act 1977 (Qld), s 93B

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Noble [2002] 1 Qd R 432; [2000] QCA 523, applied
Sio v The Queen (2016) 259 CLR 47; [2016] HCA 32, applied
Willis v The Queen (2016) 261 A Crim R 151; [2016] VSCA 176, applied

COUNSEL: M J Copley QC, with K E McMahon, for the appellant
M R Byrne QC, with D L Meredith, for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** Almost 45 years ago, Mrs Barbara McCulkin and her two daughters, Vicki Maree, aged 13, and Barbara Leanne, aged 12, disappeared without a trace. In 2015 the appellant, Garry Reginald Dubois, was charged with their kidnapping,[1] murder and with the rape of the two girls. A jury found him guilty of manslaughter, of rape and of kidnapping. He now appeals against these convictions.

[2] In the 1960s and 1970s Peter Hall was a professional criminal operating in Brisbane. He was mutual friends with Vincent O'Dempsey, Keith Meredith, Tommy Hamilton and the appellant. O'Dempsey was somewhat better off than the others. He ran a "massage parlour" in Lutwyche. He drove a brand new Valiant Charger painted bright orange with black racing stripes.

[3] O'Dempsey and the appellant were occasional visitors to the McCulkin home. Barbara McCulkin was married to Robert William McCulkin, known as Billy. Billy's sister, Eileen, had seen O'Dempsey and Dubois at the McCulkin home on a number of occasions. She had also seen O'Dempsey there on his own. Keith Meredith had also seen the appellant at the McCulkin home on one occasion.

[4] The McCulkins lived next door to Peter Nisbet. Their two houses were built very closely together. Mrs McCulkin had confided in Nisbet that her husband used to beat her. At about 2 am one morning, Nisbet noticed that a light had come on in Mrs McCulkin's bedroom. Concerned for her safety, he went next door to check on

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1 Deprivation of liberty under s 355 of the *Criminal Code* (Qld).

her. There he found her with two men. One of these was introduced to him as O'Dempsey. When giving evidence he could no longer remember the name of the other man. He had on a number occasions seen an orange Charger parked on the street outside the McCulkin home. Mrs McCulkin told him that it belonged to O'Dempsey.

[5] Hall, Meredith, Hamilton and the appellant used to drive around scouting for places to break and enter. Hall knew of Billy, although he was not personally acquainted with him. Hall had a criminal history in Queensland and in New South Wales. He had served terms of imprisonment in both States. He had gone with Hamilton and Meredith to New Zealand to pursue a career in breaking and entering. He was jailed there for three months. He then went to New South Wales where he was jailed for malicious wounding with intent to do grievous bodily harm for which he received a sentence of 10 and a half years.

[6] In the early part of 1973, the appellant told Hall, Meredith and Hamilton that O'Dempsey had commissioned him to burn down the Torino Nightclub in the Valley. He said it was an "insurance job". Hall's evidence was:

> "We arrived. We broke in through the back entrance, went inside, checked no-one was there. We took petrol with us, several plastic large containers, poured the petrol around everywhere, ran a petrol trail out the back door, and checked that there was no-one outside, out the front, set fire to the trail and away we went except …
>
> …
>
> That was me, Shorty, Tommy and Keithy.
>
> … I'm afraid we didn't realise that petrol evaporated into fumes like that, and it exploded instead of just burning.
>
> … It blew the front of the building out as we crossed the road."

[7] The appellant's nickname is "Shorty".

[8] A short time later, on 8 March 1973, arsonists set fire to the Whiskey Au Go Go Nightclub. Fifteen people died in the fire. Very quickly, two men, John Stuart and James Finch, were arrested and charged with arson and murder. They were both convicted in late 1973.[2]

[9] In his evidence, Hall said that he and his co-conspirators were afraid that, if they were suspected of committing the Torino arson, they might also be blamed for the Whiskey Au Go Go fire and the 15 murders. He said:

> "We all had the same thought that if they contributed [sic] the Torino to us, they might try and link us with the other one."

[10] Stuart had been an acquaintance of Billy's. According to Ellen Ashford, who had worked with Mrs McCulkin at the Milky Way Bar in Adelaide Street, he had stayed with the family in the McCulkin home and, from time to time, he would call in at the Milky Way Bar to talk to Mrs McCulkin.

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2 See *R v Stuart and Finch* [1974] Qd R 297.

[11] On the day after the Whiskey Au Go Go fire, Mrs McCulkin purchased a newspaper at her local shop. Cheryl Keane's mother ran the shop at that time. She told Cheryl Keane that, upon seeing the front page headline about the Whiskey Au Go Go fire, Mrs McCulkin looked shocked and said, "Oh my God, they've done it."

[12] In the week after the Whiskey Au Go Go fire, but in the days before Stuart and Finch were arrested, Mrs McCulkin left the family home and went to stay with Mrs Ashford. After Stuart was arrested she received a phone call from Billy and returned home.

[13] Before she disappeared, Mrs McCulkin confided to Nisbet that if the police had asked her husband Billy the right questions, then they may get additional information about the Whiskey Au Go Go and Torino fire bombings. Billy had indeed been questioned by police in relation to those matters. Ms Estelle Long, with whom he was then living, gave evidence to that effect at the trial. Mrs McCulkin had also told Nisbet that Stuart and Finch had been fitted up with the charges and that more people were involved. She had added that she could get Billy five years if she wanted to talk. Nisbet had informed police about her statements in 1974.

[14] These representations made by Mrs McCulkin to Nisbet explained something that the appellant said to his brother Paul some years later. An inquest into the deaths of the McCulkins was held in 1980. As a consequence of that inquest, an arrest warrant was issued for the appellant. His brother, Paul, became aware that police were looking for the appellant. Paul rang his mother. The appellant happened to be at her house and they spoke. It will be necessary to refer to other aspects of this conversation later. Paul said:

> "…he said Vince O'Dempsey did it, and he said she had – Barbara McCulkin had information on O'Dempsey that he felt could have got him 20 years, and this is how he dealt with it. And I said, well …
>
> … he said she was blackmailing him."

[15] This, then, was the situation in which Mrs McCulkin and her daughters were living in January 1974.

[16] Juneen Gayton's tenth birthday was 16 January 1974. She gave evidence at the trial. She and her family lived across the street from the McCulkins. It was the summer holidays and she and her sister, Janet, played every day in the street with Vicki and Leanne McCulkin. In the early evening of her birthday, Juneen was on the veranda of her home looking for the sisters to come over to her house to help her celebrate her birthday. She saw a Valiant Charger pull up. Two men got out. She recalls that one of them was carrying a half carton of XXXX beers. She described these as "tallies" which, in the slang of the time, meant 750ml bottles.

[17] Juneen became impatient. At about 6.30 in the evening her older sister, Janet, crossed the street and stood outside the McCulkin house and whistled loudly. This was Janet's practice when she wished to get the attention of the McCulkin girls. Vicki came out. Janet asked her who the two men were. Vicki said that they were Vince and Shorty, friends of her dad's. Janet also gave evidence at the trial. She said that she recalled that the man called Vince was then inside the house and Shorty was patting one of the McCulkin cats in the front yard.

[18] On 16 January 1974, according to the evidence of Peter Hall, the appellant arrived at Hall's house driving O'Dempsey's Charger. He had just driven his wife back to his mother's house. He was living there at the time. He told Hall that he and O'Dempsey were going to the McCulkins "to have sex with the girls". He invited Hall to come with them. Hall declined. The date of this conversation can be fixed by reference to events that occurred that night and on the next day.

[19] Bruce White was a Queensland police officer in 1976 and had been part of the investigation into the disappearance of the McCulkins. On 29 February 1976 he spoke to the appellant. He later recorded the terms of their conversation as follows:

> "I said on the night in question, I received information that you were present, and in fact, identified to a number of friends of the McCulkin girls. He replied it is possible. I said on the 17th of April last year I spoke to a man named Vincent O'Dempsey regarding this matter. Do you know that man? He replied yes, he is a good mate of mine. I said he agreed that it was possible that you were both present at the time. Would you agree with that? He replied, look, I could have been. I'm in Vince's company a lot, or I was then and the information you – and if the information you have is right and I was identified, then I must have been there."

[20] The four girls then went to the Gayton house and celebrated Juneen's birthday. Later that night, Leanne left and went home and then, sometime afterwards, Vicki also went home. They were never seen again.

[21] On the next day, as was their habit, Juneen and Janet went across the street to see the McCulkin girls. They found nobody at home. The house was locked up.

[22] On Friday 18 January 1974 Billy McCulkin finished work and made his way to his wife's home. He had just been paid and wanted to give her some money. He found the house locked up and empty. He knocked but got no answer. The woman who ran the nearby corner shop had seen nothing. He saw Janet Gayton and asked her whether she knew anything. She could not help him. He broke a small window pane on the front door and entered the house. He found the two cats locked in the bathroom. His wife's purse was on top of the refrigerator. His wife's electric sewing machine was switched on. There was a dress on it in a position to be worked on. He found six tall bottles of beer in the refrigerator. His wife did not normally buy beer. There was nothing missing.

[23] His wife's engagement ring was also in the house. She took it off to do housework but usually wore it when she went out. It was a ring that had some sentimental value for her because it had been her mother's engagement ring which had been reset for her by Billy.

[24] He found two envelopes in the letterbox. They contained cheques made out to his wife.

[25] Billy began to ring mutual acquaintances and other friends of his wife in an effort to find her but with no success.

[26] At that stage he believed that his wife and children had simply run away from him. Nevertheless, he continued his searches. He called hospitals to check whether they had been admitted. Early on the following morning he reported their disappearance to police.

[27] On Saturday, 19 January 1974, he contacted a friend called Norman Wild. Billy had no licence or car. He asked Wild to drive him around to look for his wife. They visited various people in their unsuccessful efforts to find Billy's family.

[28] During the day he saw Janet Gayton again in Dorchester Street. She told them that the family had not been home since Wednesday. Billy asked whether anybody else had been there at the time. She told him that Vince and Shorty had been there. He knew both of them. Wild drove Billy to the appellant's home at Kedron. The appellant was at home. He denied being at the McCulkin home on Wednesday and said that, to the best of his knowledge, O'Dempsey had not been either. Billy told him that the girl who lived across the road had said that he and O'Dempsey had been there. The appellant replied, "I don't even know your wife."

[29] Billy, determined to find O'Dempsey, drove to the massage parlour at which O'Dempsey worked. He saw the Charger parked there. O'Dempsey was there and Billy spoke to him. Together they went back to the appellant's home. The appellant and O'Dempsey both denied that they had been at the McCulkin home.

[30] Billy kept returning to the house to see if his family had returned. He and Wild went to the Federal Hotel on Leichardt Street in the city. By chance he saw O'Dempsey's Charger driving past. He and Wild immediately followed. They intercepted O'Dempsey's car outside the Arnott biscuit factory which then stood on Coronation Drive. The appellant was in the car with some other men but not O'Dempsey. The appellant spoke to them angrily. He said that the girl across the street had definitely identified the appellant at the house on Wednesday night. He said that he was going to the police.

[31] In the meantime, on the morning of 17 January 1974 Peter Hall and Keith Meredith had been looking for their friend, the appellant. They looked for him at the appellant's home and were told by the appellant's mother that he had not been home the previous night. Hall and Meredith continued their search. They went to the usual places that they all frequented. Finally they gave up. On the next morning they found him at home.

[32] As I have said, Mrs McCulkin and her daughters were never seen again. The Crown called numerous witnesses to prove facts from which the jury could infer that they were dead. Mrs McCulkin's brother, Graeme Ogden, had last spoken to her in June 1973 and never again after that. Her other brother, Neville Ogden, had last seen her at their father's funeral on 22 June 1972. He too never saw her again. Mrs McCulkin's employer at the Milky Way Bar, Joseph Toth, had employed her for three years. In early January 1974 he went to see Mrs McCulkin to offer her a job in a new business. He never saw her again. The owner of the house which Mrs McCulkin rented, Wallace Munro, last saw Mrs McCulkin on 13 January 1974 when she made a rent payment.

[33] Claire Gillespie, a police officer, checked records available to police for indications of a person's activity. She had checked Centrelink, Medicare, the Australian Health Commission, the Department of Immigration, the Electoral Commission, banks and other financial institutions and similar entities. All of her searches were negative. They showed no activity by Mrs McCulkin or her daughters after January 1974.

[34] That Mrs McCulkin and her daughters had died was not seriously contested at the trial and there was ample evidence upon which the jury could be satisfied that Mrs McCulkin and her daughters had died.

[35] As I have said, on the morning after the appellant had invited Hall to go to the McCulkin home for drinks and for "sex with the girls", Hall and Meredith were not able to find him. On the next day Hall found him at home. Hall said that the appellant appeared to be distressed. He was not himself. Hall recalls that Tommy Hamilton was with him. Later that same day, or perhaps on the morning after, Hall and the appellant spoke in a car parked outside the appellant's home. The appellant said that he and O'Dempsey had gone to the McCulkin house. They had a few drinks there and then they had decided to go for a drive in O'Dempsey's car. They took Mrs McCulkin and her daughters to "somewhere at bushland". The appellant tied up the girls. O'Dempsey then took Mrs McCulkin into the darkness. The appellant told Hall that "there was gurgling sounds, and he seemed to be gone for what seemed like a long period of time". The appellant said he thought that O'Dempsey had strangled Mrs McCulkin. The sounds had stopped and O'Dempsey came back. He raped one of the girls. He told the appellant to rape the other one "which he had trouble doing". Hall continued:

> "As he explained to me, he said he didn't feel real good at the time, but he eventually complied, and after that was over, O'Dempsey killed one and asked him to kill the other. He said he couldn't do it, so O'Dempsey killed the second one."

[36] Hall said that the appellant told him that they waited until dawn and then buried the bodies. He said the appellant told him that "once the sun come up and he looked at them, he said it was a horrific sight". Then they drove back to Brisbane.

[37] In 2014 police asked Hall for information about the disappearance of the McCulkins but he said that he knew nothing about the matter. In March 2014 he was summoned to give evidence at a hearing before the Crime and Misconduct Commission. Under oath he denied having any knowledge about their disappearance.

[38] On 6 May 2014 police spoke to him again. They served him with a summons to appear once more before the Commission. On the next day Hall signed a statement in which he related what he claimed the appellant had told him. On 23 February 2015 he was recalled before the Commission. He confirmed the truth of that statement. The Attorney-General of Queensland gave him an indemnity against any prosecution.

[39] As I have said, the appellant's brother Paul, rang his mother and found the appellant was there. At that time Paul knew that police were looking for the appellant for the inquest. He asked him whether he was involved in the disappearance. The appellant told him that he was not involved and that he had not been there. He said he had nothing to do with it. He told Paul that O'Dempsey had murdered Mrs McCulkin because she was blackmailing him. He said that O'Dempsey had told him, "the kids weren't meant to be there".

[40] For a period the appellant lived in a town called Howard near Hervey Bay. His neighbour during that time was Trevor McGrath. One night McGrath and his wife had an argument. McGrath took a six pack of beer and visited his neighbour, the

appellant, and they sat together drinking beer. The conversation turned to the appellant's past. He explained he had been a debt collector. He told McGrath that he had been in prison. He said that he had been charged with murder but had been released because of insufficient evidence. He did not reveal who had been killed. He told McGrath that "they review it every five years". He said "they'd never find the bodies".

[41] The result of the coronial inquest into the disappearance of the McCulkins in 1980 was that a warrant was issued for the arrest of the appellant. He was located in South Australia and arrested. John Attwood, a South Australian police officer, arrested the appellant and took him to court for extradition proceedings. During the course of that process he had a conversation with the appellant which he later recorded in writing. His evidence was, relevantly:

> "He said, that is, Gary Dubois, fucking hell, man, this is stupid. Murder. I don't believe it. I said, what do you mean. He said, what's the use. No one can help me. I said, you know what you are saying and who you are saying it to, so remember anything you do say may be taken down and later used as evidence; do you understand that? He said, man, I know all about that. Talking to you lot is not as – is not – is not me, I think it is.
>
> Yeah?---But grow a bit of dope and make a few bob, but that's all. I'm –I'm guilty by association. That's it because I know O'Dempsey. That's it. I hardly knew them. I said, do you want to talk to me about it, and he said, if I blab I'm dead, and I'm dead if I don't. Man. I'll be an old man when I get out. I'll cop the dope charge.
>
> Fair enough. But man, they throw away the key for murder. I'm guilty because I know him. He's mad. You know. Fucking crims. They know I'm staunch and not an imbecile, and if I stay staunch I will be an imbecile. Christ, Joh's mob throw away the key for murder. I said there is a lot of difference between a charge for drugs and a charge for murder. He said difference; fucking life man. If I talk I'm dead. I've got to cop it. I'll have to live with him in jail and he'll get me there if I talk. I said yeah, but is there more than one jail in Queensland. He said sure, but it won't make any difference. I said what will you do. He said it's hopeless; I can't say anything. …
>
> … if I blab I'm dead, and I'll be an old man in jail if I don't. …
>
> … I'm dead if I say anything. He's fucking mad, you know. I think he likes doing it. He's a mad fucking dog. Man, Jesus Christ, I'll never see Jan and the kids – and the kid again."

[42] Another criminal working in Brisbane at the time was Douglas Meredith. He knew the appellant and Billy McCulkin. He also knew Keith Meredith, Peter Hall and Tommy Hamilton. He knew Vince O'Dempsey. In 1974 he was living in Newcastle. He had become aware of the disappearance of the McCulkins by reason of publicity in the media. Hall came down to stay with him in Newcastle. Together they returned to Brisbane. Meredith lived in a house at Bardon. One day in 1974 Hall, Hamilton and a man named Peter Burns were drinking beer and smoking cannabis at the Meredith home. They had been drinking and smoking all day.

Hamilton was not a heavy cannabis smoker. The other two smoked far more than Hamilton. Very late that night, after hours of drinking and smoking, Meredith made a joke at O'Dempsey's expense. They all knew that O'Dempsey was very health conscious. Meredith said that on one occasion when they were fishing on a boat near Port Stephens, O'Dempsey removed his shirt. He checked the time at which he removed his shirt so that he could be sure only to expose himself to the sun for a limited period. O'Dempsey was colour blind and Meredith joked that O'Dempsey had to use a clock to time his exposure to the sun because he would be unable to tell whether he was red or green. The effect of the marijuana made them laugh uproariously at this joke. Hamilton did not laugh. Meredith said that Hamilton said, "What are you doing mucking around with him? He's not a, you know, joke. You know what he is. They murdered the McCulkins."

[43] Meredith's evidence went on:

> "He told me – this is what is completely in my head. I can't say the exact words. It's 40-odd years ago. He said Vince O'Dempsey murdered them and they raped the children and ---
>
> Who's they?---Him and Garry Dubois.
>
> Right. Did he use Garry Dubois' name or---?---Shorty.
>
> Shorty. Right. So Vince O'Dempsey has murdered them and what did Shorty do?---Raped the - and they raped the children.
>
> Now---?---And he told them.
>
> Now---?---Shorty, Garry Dubois, when they come – when he came back from whatever happened.
>
> Right. Let's be clear. What did Tom Hamilton say he knew this?---Because Garry Dubois told him.
>
> And when did he tell him?---He told him some time after the murders, when it had finished.
>
> Right. Now, did you---?---I don't know exactly when it happened after it, but it way after they'd done it."

[44] The defence case was that no confessional statements had been made to Hall and that Hall had made up his evidence by reference to what he had been "fed" by police. The defence case was also that the appellant had not told McGrath that the bodies would never be found. It was put to Attwood that he had had no conversation with the appellant of the kind that he had related.

[45] The attack upon Meredith's evidence emphasised the state of intoxication of the three men. By the time of trial, Hamilton and Burns were dead.

[46] Part of that cross-examination is as follows:

> "You did say you're not sure of the exact words?---No.
>
> So you can't say particular words that Tom Hamilton used?---No. No. It's very hard to.
>
> All right?---For a lot of ---

So the best you can – sorry?---No. It's very hard, but I know exactly what they meant.

All right. The best you can do is give the understanding that you had ---?---Yes.

--- of the words he used?---That's right.

All right. And you said before, as I tried to note it down, "They murdered the McCulkins". Then you said Vince O'Dempsey murdered them?---I know what ---

They raped the children?---I know what you mean by saying that. But he did say that it was actually O'Dempsey that killed them.

Okay?---That's what I understand it to be even today.

All right. Well, it might show the importance of ---?---Yes.

---the actual words that were used?---I know what you mean. Yes.

And what they meant. So you say, do you, that rather than saying – Tom Hamilton saying they murdered the McCulkins; he actually said Vince O'Dempsey murdered the McCulkins?---He definitely said that.

Okay?---Yes.

You went on to say that he said they raped the children?---Yes.

And used Shorty's name?---Yes.

Do you remember in what context?---No. I – what do you mean?

Well---?---In his name?

Yeah. In what context did he use Shorty's name?---As the one that told him about the events that happened on the night that they were murdered.

Is it the case that you couldn't tell from what you were told by Mr Hamilton whether he was told by Shorty that Shorty was present as opposed to having been told about what happened to the McCulkins?---I can't say that for sure because all I can tell you is what I know was said to me. I don't know who told Tom Hamilton. I've got no idea."

[47] Meredith accepted that at the committal there had been the following exchange:

"All right. The information he gave you about what happened didn't suggest whether Shorty was even present or whether it was something that Shorty was relating as hearsay.

I don't know.

Correct?

Exactly. I wouldn't have a clue."

[48] In re-examination the prosecutor sought to clarify the witnesses evidence:

"Please. Now listen to my question?---All right.

> And don't answer till it's finished, please?---Right.
>
> All right. Now, you said before, "I know what I took it to mean"?---Yes.
>
> Right. And you also said, "I wasn't there when Hamilton was told anything about this"?---That's right.
>
> Now, he's told you a version of events, that's correct?---That's right.
>
> Now, when you say you don't know what he was told ---?---That's right.
>
> --- is that because you weren't there?---Because I wasn't there.
>
> Right. Now, I want to concentrate – and this is – I want you to concentrate on what you were told by Mr Hamilton; not what he might have been told, but what you were told. Right?---Can I say this: we never used to speak like this."

[49] The final exchange was as follows:

> "So when did he place it. He puts it afterwards but how closely afterwards?---After – some time after they'd come back after the murders had been committed.
>
> Right?---That's what I took it to mean.
>
> Now, you've recounted earlier that Tom Hamilton told you ---?---Yes.
>
> --- that, whatever the word was, Vince or O'Dempsey murdered them and they raped them?---Yes.
>
> And who is he reporting as saying that to him? Who is he saying told him that?---Who was he saying ---
>
> Yes. See?---Yep.
>
> You've got to be careful and listen very carefully. Who was Mr Hamilton saying told him that O'Dempsey killed them and they raped them?---Mr Dubois.
>
> Right. And was there any mention by Mr Hamilton of anyone else in this conversation?---Anyone else involved?
>
> Yes?---No."

[50] The defence attack upon Hall's evidence also emphasised his contradictory statements to police and to the Commission and the long delay before he volunteered the different version he offered at the trial.

[51] Hall admitted that he had lied under oath at the Commission hearing. He explained that "if you lived like I did back then, there was a code you didn't break. You never gave people up …".

[52] He explained:

> "I spoke with my wife about it. I hadn't told her what – about what I'd known. Yeah. I'm just not the same person that I was four years [sic, forty?] ago."

[53] The appellant neither gave nor called evidence.

[54] The appellant relies upon two grounds of appeal. The first is that the verdicts were unreasonable and cannot be supported by the evidence. The second is that Applegarth J erred in admitting the evidence of the representations made to Douglas Meredith by Thomas Hamilton.

[55] It is convenient to deal with the second ground first.

[56] As I have said, the events in this case took place over 40 years ago. Many of the witnesses are dead. As a result, much of the evidence that was given was admitted pursuant to s 93B of the *Evidence Act* 1977 (Qld). In particular, the evidence of Billy McCulkin was led in the form of various statements that he had given to police and by the transcript of the evidence he gave at the inquest that was held on 13 February 1980. No objection is now taken to that evidence. However, it is now submitted that the evidence of Hamilton's representations to Meredith about what Dubois had told him ought not have been admitted. Section 93B of the *Evidence Act* provides:

> "93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable
>
> (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—
>
> (a) made a representation about the asserted fact; and
>
> (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
>
> (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—
>
> (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or
>
> (b) made in circumstances making it highly probable the representation is reliable; or
>
> (c) at the time it was made, against the interests of the person who made it.
>
> (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—
>
> (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;

(b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.

(4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.

(5) In this section—

prescribed criminal proceeding means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.

representation includes—

(a) an express or implied representation, whether oral or written; and

(b) a representation to be inferred from conduct; and

(c) a representation not intended by the person making it to be communicated to or seen by another person; and

(d) a representation that for any reason is not communicated".

[57] In order to admit evidence pursuant to s 93B, in the circumstances of the present case the prosecution had to establish that:

1. there was a person who had personal knowledge of "an asserted fact";
2. that person is dead;
3. a person who heard the representation is available to give evidence;
4. the representation was made to the second-mentioned person, the witness who was called at the trial, in circumstances making it highly probable the representation is reliable.

[58] In this case Hamilton was the person with personal knowledge of an asserted fact. The asserted fact was what Dubois had said to him. The fact that the appellant had said those things was asserted by the Crown as relevant to the appellant's guilt because it was a confessional statement.

[59] The only issue in this appeal is whether Hamilton's representation was made in circumstances making it highly probable that Hamilton's representation was reliable. Meredith's reliability is not in issue on this limited question of admissibility.

[60] Section 93B has analogues in evidence statutes in other States. The New South Wales equivalent is s 65 of the *Evidence Act* 1995 (NSW). Under s 65 the hearsay rule does not apply to evidence of a previous representation given by a person who heard the representation being made if, relevantly, the representation was "made in circumstances that make it likely that the representation is reliable". The High

Court considered s 65 in *Sio v The Queen*.[3] The Court observed that the provision was concerned to relax the exclusionary effect of the hearsay rule in relation to an assertion of a fact by a person who had personal knowledge of that fact. The provision proceeds on the assumption that the asserted fact is relevant to the case of the party seeking to adduce evidence of the representation. The provision directs attention to the particular representation which asserts the relevant fact. The question is whether the representation was made in circumstances that make it, in Queensland, "highly probable that the representation is reliable".[4]

[61] Once the particular representation has been identified, the circumstances in which it was made have to be considered in order to determine whether the conditions of admissibility are met. That process must be observed in relation to each relevant fact sought to be proved by that means.[5]

[62] Their Honours said:

> "It is no light thing to admit a hearsay statement inculpating an accused. Where s 65 is successfully invoked by the prosecution, the accused will have no opportunity to cross-examine the maker of the statement with a view to undermining the inculpatory assertion. …
>
> The serious consequences of the successful invocation of s 65(2)(d) emphasise the need for compliance with the conditions of admissibility prescribed by the section. The focus demanded by the language of s 65 is inconsistent with the impressionistic evaluation involved in the compendious approach adopted by the Court of Criminal Appeal."[6]

[63] In this case the particular representation relied upon by the Crown was identified at the pre-trial application. Applegarth J, who heard the application, identified the representation as follows:

> "The McCulkins are dead. Shorty and Vince did it. They raped the two girls. Vince killed all of them. Shorty came back after it happened and told me what they had done."[7]

[64] The identification of the representation in those terms was based upon the evidence led in support of the application before his Honour. There is no challenge to the accuracy of that identification. Nor is it challenged that the asserted fact contained within the representation is constituted by the appellant's admission that he and O'Dempsey raped the daughters and that O'Dempsey killed all three victims.

[65] The point relied upon by the appellant before Applegarth J and on this appeal was that both Douglas Meredith, the witness, and Hamilton, the representor, had been drinking and smoking cannabis all day. This was, so the appellant submits, no more than "the recollections of an inebriated dead man [Hamilton] as perceived by another inebriated man [Douglas Meredith] who could only relate the general effect of what the first fellow said as corroboration for Hall's evidence".

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3 (2016) 259 CLR 47.
4 *supra*, [55], per French CJ, Bell, Gageler, Keane and Gordon JJ.
5 *supra*, [57].
6 *supra*, [60] and [61].
7 *R v Dubois (No 6)* [2016] QSC 324 at [5].

[66] In permitting the evidence to be led, Applegarth J found that:

> "[22] … The evidence does not suggest that they were rolling drunk. I proceed on the basis that each of them was affected by their consumption of alcohol over a number of hours and that Mr Hamilton may have been disinhibited by what he had consumed. He was not so affected by alcohol as to make no sense or appear very drunk."

[67] His Honour also found that Hamilton had no apparent reason falsely to implicate O'Dempsey or falsely to implicate his close friend, the appellant, in the disappearance and murders of the McCulkins and the rape of the two girls. Meredith was then on amicable terms with O'Dempsey. They had shared a house for some time in New South Wales. Hamilton was then very close to the appellant. The terms and the circumstances in which the disclosures were made by Hamilton to Meredith did not, his Honour found, include any circumstances suggestive of ill-will towards to the appellant nor did they suggest any reason to implicate him falsely in the crimes.

[68] His Honour also made the following further findings:

> "[24] An important circumstance is that the words were not said in jest. They were said in the context of a warning to friends not to joke about O'Dempsey.
>
> [25] Another circumstance which supports the conclusion that each representation was made in circumstances making it highly probable the representation is reliable is the subject matter. Each representation was not about some inconsequential or trivial subject matter. Mr Hamilton was serious (indeed agitated or angry) and the matter about which he spoke was serious. The representation was that one of Mr Hamilton's best friends, the applicant, had told him of his involvement in serious crimes. Mr Hamilton, the applicant, Mr Meredith and others were part of a tightly-knit group and had been involved in criminal activities. They trusted each other, it seems, and the circumstance of trust and friendship which existed between Mr Hamilton and Mr Meredith makes it probable that Mr Hamilton felt able to tell Mr Meredith the truth, confident that Mr Meredith would not report such an allegation to the police.
>
> [26] In summary, the seriousness of the subject matter, the seriousness of Mr Hamilton in giving the warning which he did to Mr Meredith and Mr Burns, Mr Hamilton's close association with the applicant and others and the absence of any apparent ill-will towards the applicant or reason to falsely implicate him, all suggest that Mr Hamilton was likely to accurately report what he had been told by the applicant in order to warn his friends why they should not "muck around" and joke about O'Dempsey. Each representation was said to friends for their protection. It was said in circumstances that were likely to result in Mr Meredith and Mr Burns keeping the information disclosed to themselves. The circumstances in

> which the representations were made do not disclose why Mr Hamilton would falsely implicate his friend, the applicant."

[69] The appellant's concentration upon the state of intoxication of the witness, Meredith, and the representor, Hamilton, is misconceived, in my respectful opinion. It seeks to isolate a single circumstance and, based upon that circumstance, to impugn the reliability of the representation. However, there are other circumstances that had to be considered in addition to this single factor. These were the factors that his Honour identified. First, Hamilton was not joking. He was deadly serious. He had a serious thing to say. He was speaking about a hideous multiple murder and rape and he was revealing facts about a very dangerous man in order to protect his two listeners. He was warning them.

[70] Moreover, he was warning them by telling them something that, like anyone who heard it, they would remember for the rest of their lives. He was repeating an admission made by one of two murderers about how a mother of two daughters had been killed and how her daughters were then each raped and murdered in turn.

[71] It is those circumstances that led his Honour to conclude that Hamilton made his representation in circumstances that made it highly probable that his representation was reliable.

[72] Accordingly, his Honour found that the requirement in s 93B(2)(b) was satisfied.

[73] The appellant's complaint that the witness could only give "the general effect of what the first fellow said" is also without substance. The asserted fact sought to be proved by Meredith's hearsay evidence is the content of yet another statement, that of Dubois. It is notorious that witnesses struggle to give verbatim evidence about the content of conversations. An inability to give verbatim repetition of a conversation neither renders evidence of what a witness understood had been said inadmissible nor implausible.

[74] In *R v Noble*[8] the trial judge had insisted the witness give his evidence about a conversation in direct speech. The trial judge said to counsel:

> "Can we have it in direct speech? Can you explain to him what direct speech is, please? You have got to say [the complainant] said, "I did this" or "I was going to do"."

[75] The witness remarked:

> "I think you are confusing me is what you are doing."

[76] In the Court of Appeal Pincus JA said:

> "[18] Without giving any more detail, the point may be summarised by saying that the witness appeared to find the requirement that he translate what he was intending to say into direct speech created difficulties for him; but the judge continued to insist that he make the attempt. We were referred to no authority with respect to the correctness of the judge's actions.

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8 [2002] 1 Qd R 432; [2000] QCA 523.

The discussion in *Wigmore on Evidence*, Chadbourn Revision, para 2097 includes the following:

> "The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his 'understanding' or 'impression' as to the net meaning of the words heard".

The most recent reference to the point I have been able to find, as regards evidence in a criminal case, is *Godinho* (1911) 7 Crim App R 12 at 14. There, Hamilton J expressed himself as disapproving an old authority, which was relied on to show that a confession must be given in the accused's very words.

[19] In this case, both the judge and the Crown have suggested that the witness should have been "prepared" by solicitors. If the proposed witness is a person not used to translating conversations from their substance into direct speech, the process might be arduous. Further, such preparation is open to the criticism that it is a mere incitement to perjury. If a witness in truth remembers only the effect of a conversation, but not the words spoken, it is a dubious compliance with the witness' oath or affirmation if the evidence is given as if he or she remembered the words spoken. If the "preparing" lawyer trains the witness to use particular expressions, differing from those the witness has in mind, the line dividing impropriety from proper practice will perhaps be crossed.

[20] There is, in my respectful opinion, no rule that a witness who does not claim to remember the words spoken in a conversation must attempt to give it in direct speech, manufacturing a conversation from a recollection of its effect. Of course, the ideal is that the exact words be given, but it is so unlikely that Barry could have remembered anything other than the substance of the conversations that the judge plainly erred in attempting to have him give evidence using direct speech. The erroneous idea that people can accurately recall conversations in direct speech, long after their occurrence, appears to have been encouraged by practices observed by some magistrates and police, in days gone by. That it is erroneous can be easily demonstrated, if one tries to perform this feat oneself."

[77] McMurdo P and McKenzie J agreed with the reasons of Pincus JA. So do I. The witness in the appellant's trial echoed the complaint of the witness in *R v Noble*:

> "Can I say this. We never used to speak like this."

[78] As his Honour correctly said, there is no ambiguity about the representation. The asserted fact is clearly present within it: namely the appellant's admissions.

[79] This is an appeal against a finding of fact made by Applegarth J. In *Willis v The Queen*[9] Weinberg and Beach JJA said:

> "[95] Although there is comparatively little authority directly in point, the better view seems to be that this Court ought not conclude that a trial judge who has conducted a voir dire has made a factual error of a vitiating kind unless satisfied that the finding below was not reasonably open.
>
> [96] *In Attorney General (NSW) v Jackson*, Griffith CJ, when considering the admissibility of a deposition made by a witness who had since died, stated that it was up to the trial judge to determine the questions of fact, and that an appeal court would not interfere with such a finding unless the evidence showed the decision to be manifestly not warranted.
>
> [97] In *R v Kyriakou*, the New South Wales Court of Criminal Appeal was required to determine whether the trial judge had erred in admitting evidence of an alleged confession which the accused claimed had been involuntary. Yeldham J observed:
>
> > This court does not sit in judgment from factual findings made by trial judges on the voir dire. If there is no evidence to support a finding, or if a judge has applied wrong principles, or if the evidence is all one way, then this court, in order to prevent injustice, will intervene...
>
> [98] In *Heiss v The Queen*, the Northern Territory Court of Criminal Appeal accepted that this passage correctly stated the law.
>
> [99] In Canada, in *R v Ewert*, the British Columbia Court of Appeal said that an appeal court would only interfere with a finding of fact made on a voir dire if the particular finding was unreasonable or unsupported by the evidence. To the same effect was the decision of the Supreme Court of Canada in *R v L* (D O), where it was said that appellate courts must show due deference to findings of fact made by trial judges after voir dire hearings."
>
> (footnotes omitted)

[80] Priest JA, who dissented in the result, agreed with Weinberg and Beach JJA about the applicable principles. I too respectfully agree with the reasons of Weinberg and Beach JJA on this point.

[81] The findings made by Applegarth J were neither unreasonable nor unsupported by the evidence. Indeed, in my respectful opinion, his conclusions were right. For this reason I would reject this ground of appeal.

[82] The appellant also appeals on the ground that the verdicts of the jury were unreasonable and cannot be supported by the evidence.

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9 [2016] VSCA 176.

[83] As always when this ground is raised, the starting point is to bring to mind that an appellate court:

> "... must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."[10]

[84] An appellate court might intervene to overturn a jury's verdict:

> "If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."[11]

[85] Brennan J said:

> "Words in a printed transcript may tell one story to the critical legal mind and another to those who test a story for truth or falsehood according to a broad experience of life. Inconsistencies which loom large when painted with the colours of advocacy may be insignificant minutiae once a witness convinces a jury that he or she is honestly attempting to tell the truth. It is the sad but salutary experience of every counsel for the defence that the prosecution's "weak point" is often brushed aside dismissively by a jury satisfied of the honesty of the prosecution witness."[12]

[86] In this appeal, the main thrust of the appellant's attack was upon the credibility of Peter Hall. The appellant points to six aspects of Hall's evidence that, he submits, rendered Hall somebody that could not reasonably have been accepted as truthful in his evidence by the jury. He had denied for decades that he had any knowledge about the disappearance of the McCulkin family, including under oath when questioned by the Commission. Then, in May 2014, he decided to offer the information that implicated the appellant. In re-examination he was asked whether anything had happened between the time when he had last denied any knowledge and the time when he first volunteered his evidence implicating the appellant:

> "Right. Had anything happened in the meantime? --- I spoke with my wife about it. I hadn't told her what – about what I'd known. Yeah. I'm just not the same person that I was four years ago." [*semble*, forty?]

[87] There is nothing new about a self-confessed criminal becoming a Crown witness and recanting previous assertions of ignorance of incriminating facts and, instead, giving evidence that tends to prove the guilt of an accused. The history of denials by such a witness is a factor for the jury to consider when assessing credit but the

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10 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.
11 *supra*, at 494 per Mason CJ, Deane, Dawson and Toohey JJ.
12 *supra*, at 507-508.

fact that Hall has been a criminal and has changed his story does not justify this Court in rejecting and overturning the jury's verdict. It is the jury that has seen this witness give his evidence and, moreover, has seen him give that evidence in the context of the dynamics of the whole trial. Hall's explanation for his change may well have been given in a manner that revealed it to be pregnant with many powerful emotional connotations that would explain this man's reversal of course. I do not know.

[88] The appellant's second argument is that in his evidence, Hall had said that the appellant had told him that O'Dempsey had instructed him to tie up the girls. However, in the statement he gave police Hall had said that O'Dempsey had tied them up. Hall was cross-examined about this discrepancy. He said that the statement was mistaken. His true recollection was that O'Dempsey had instructed the appellant to tie up the girls. When pressed, he said that he had no doubt about that fact.

[89] Such discrepancies are the small change of a trial. They are useful in arguments to a jury that has to determine the reliability and honesty of a witness. But they are no more than that. It is useless, on appeal, to point to a contradiction in a witness's evidence, which the jury knew all about, and to maintain that it shows that the witness was not to be trusted and then, upon this foundation, to submit that the verdict itself is wrong.

[90] The third argument was that Hall's evidence lacked verisimilitude because he could not remember whether Keith Meredith was present with him to hear the appellant's confession. Meredith said in evidence that he had not been present. Like the second argument, this one is a valid point to be made to a jury; but it is merely one factor among many that the jury had to consider before coming to its decision about whether to believe Hall's evidence. It is nothing more than that.

[91] The fourth argument was that Hall's evidence was wholly unreliable because he could not remember the fact that Billy McCulkin had intercepted the car in which he, the appellant and others were travelling outside the Arnott's biscuit factory. There was no controversy at the trial that that confrontation happened. It had been described by Hall in his statement but, at the trial, he claimed that he could not now recall it. This is an oddity but no more than that. The events happened four decades ago. The presence in his statement of a description of the meeting suggests that he may have recalled it when he gave the statement or that he had not read the statement carefully before signing it. That may reflect upon his credit. Or it may not. It was hardly a momentous factor to be weighed in the case. In any event, it was one of many factors for the jury to consider and not for the Court of Appeal.

[92] The fifth argument is that Hall said nothing in his evidence that he could not have learned from the questions put to him by police. The appellant has submitted a detailed schedule stating various facts as related by Hall in his evidence that the appellant contends he could have inferred from questions put to him by authorities. The respondent has submitted a competing schedule setting out the matters that suggest that some of these facts had not been suggested to Hall by any questioner. With due respect to the hard work involved in preparing these schedules, they are unhelpful. It may be accepted, for the purposes of argument, that Hall said nothing that the authorities did not already know. That may mean that he merely

regurgitated things he told them. It might also mean that the authorities knew a great deal before they spoke to him and that Hall had nothing new to offer them.

[93] The sixth argument was that there was no evidence that was "clearly corroborative of the confession". That is not so. Douglas Meredith's evidence supports it. The representation made to Meredith by Hamilton was on all fours with the statements that Hall attributed to the appellant. With respect to the appellant's knowledge that O'Dempsey had murdered Mrs McCulkin and her daughters, Paul Dubois' evidence also supports that of Hall. So too does the evidence of McGrath. In addition, the jury might have thought that, taken in combination, the evidence of Meredith and Hall showed that the appellant had been horrified and frightened by what he had seen and done and had to tell his best mates, Hall, Hamilton and, according to Hall, Keith Meredith also. These were the cronies who operated together and it was these three that the appellant trusted enough to confide in them.

[94] All of the matters raised by the appellant, taken singly or taken in combination, do not add up to a justification for appellate interference with the findings of the jury. They saw this witness give his evidence. They could judge the quality of that evidence on its own and also in the whole context of the trial. That judgment involved a consideration not only of the content of Hall's evidence but also how his evidence fitted with the rest of the evidence in the trial. They may have considered, for example, that having regard to their opinion of Hall's intelligence and imagination, he could not have made up the statement that he attributed to the appellant that "there was gurgling sounds and [O'Dempsey] seemed to be gone for what seemed like a long period of time". The jury might have thought that it was beyond this man's craft to invent the statement that "once the sun come up and he looked at them, he said it was a horrific sight". The jury might also have thought that it was highly unlikely that, after successfully and truthfully claiming ignorance for forty years, Hall then involved himself in this whole affair by making up a story in order to implicate his old friend in a multiple murder and the rape of two children. The jury might have concluded that, even for Hall, after forty years it was time to tell the truth about what his old friend had done.

[95] In short, none of the points raised by the appellant were capable, singly or together, of requiring the jury to reject Hall's evidence.

[96] In any case, the jury might well have accepted the defence submissions to reject Hall's evidence. Had it done so, the jury still had ample evidence to support a conclusion of guilt.

[97] For these reasons I would reject both grounds of appeal and dismiss the appeal.

[98] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[99] **RYAN J:** I agree with the reasons of Sofronoff P and the order his Honour proposes.