SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Dempsey* [2018] QCA 364
PARTIES:	**R** **v** **O'DEMPSEY, Vincent** (appellant)
FILE NO/S:	CA No 137 of 2017 SC No 1046 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 26 May 2017 (Applegarth J)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATES:	25 July 2018; 26 July 2018
JUDGES:	Sofronoff P and Gotterson JA and Brown 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 and three counts of murder – where the three deceased were a mother and her two young daughters – where the offences the subject of the indictment were alleged to have occurred in January 1974 – where the Crown case was that the appellant's co-accused was worried that the deceased mother had been talking to people about the co-accused's involvement in an arson incident and that the co-offender was worried that this may have resulted in him being implicated in a separate arson incident which resulted in the deaths of 15 people – where the Crown case was that the appellant, as a good friend of the co-accused, was willing to help murder the deceased mother and her two children in order to silence the mother – where the appellant submits that the learned trial judge erred in admitting evidence of the appellant's co-accused's motive to kill the deceased mother – whether the decision of the learned trial judge to admit evidence relating to motive involved an error of law, resulted in a miscarriage of justice or was not subject to appropriate directions to the jury CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – PARTICULAR GROUNDS –

IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the learned trial judge admitted evidence, in the form of written statements and a transcript, of the dead husband/father of the three deceased pursuant to s 93B of the *Evidence Act* 1977 (Qld) – where the appellant submits that this evidence should not have been admitted – where the appellant submits that the learned trial judge failed to assess and apply s 93B of the *Evidence Act* 1977 (Qld) to the reliability of each representation – where the written statements were given over two weeks after the disappearance of the three deceased and so, the appellant submits, could not have satisfied the requirement that they were "made when or shortly after the asserted fact happened" – where the appellant submits that the context of the making of the statements, being while the witness assisted police in locating his family, was not a reasonable basis upon which to conclude the statements were reliable – whether the learned trial judge erred in admitting the written statements and transcript into evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the appellant submits that the learned trial judge failed to properly direct the jury as to the effect of delay on the reliability of the evidence of the woman with whom the three deceased's husband/father lived at the time of their disappearance – where the evidence of the witness was led to exclude the possibility that the husband/father had killed his wife/daughters – whether the learned trial judge failed to address the matter of the reliability of the witness in summing up

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the Crown case was a circumstantial case that relied on an array of facts from which the appellant's guilt should be drawn – where the appellant submits that a *Shepherd* direction ought to have been given to the jury – whether this was a case in which there were any "intermediate facts which constituted indispensable links in a chain of reasoning towards an inference of guilt" such that a *Shepherd* direction ought to have been given

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where the appellant submits that the cumulative effect of the summing up was that it favoured the prosecution, undermined the defence case and "traversed the proper boundaries of judicial direction" – whether the summing up was unfair, lacking in judicial balance and so partaking of partiality as to render the trial a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – where confessional evidence was given by a number of witnesses in the trial – where the appellant, by leave, advanced a ground that the learned trial judge erred in directing the jury to consider the whole of the evidence suggestive of guilt in assessing whether each confession was made and whether it was true – where the appellant submits that the jury's assessment of each of the confessions should have been limited to the circumstances of the making of each individual confession, rather than as part of the broader prosecution case – where the admissions made by the appellant to the relevant witnesses were made years apart and where none of the witnesses were said to have known each other – whether it was impermissible for the jury to consider all of the evidence in the case in deciding whether a doubt had raised about the making of the admissions to the witnesses

Criminal Code (Qld), s 668D, s 668E
Evidence Act 1977 (Qld), s 93B

Attorney-General (NSW) v Jackson (1906) 3 CLR 730; [1906] HCA 90, cited
Broadhurst v The Queen [1964] AC 441, cited
Burns v The Queen (1975) 132 CLR 258; [1975] HCA 21, distinguished
De Gruchy v The Queen (2002) 211 CLR 85; [2002] HCA 33, discussed
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, applied
Doney v The Queen (1990) 171 CLR 207; [1990] HCA 51, cited
Edwards The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, cited
Green v The Queen (1971) 126 CLR 28; [1971] HCA 55, cited
Grey v The Queen (2001) 75 ALJR 1708; [2001] HCA 65, cited
Harriman v The Queen (1989) 167 CLR 590; [1989] HCA 50, cited
Mraz v The Queen (1955) 93 CLR 493; [1955] HCA 59, cited
R v Bennetts [2018] QCA 99, cited
R v Grimaldi [2011] QCA 114, cited
R v Kyriakou (1987) 29 A Crim R 50, cited
R v O'Donoghue (1988) 34 A Crim R 397, cited
R v Storey (1978) 140 CLR 364; [1978] HCA 39, cited
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, distinguished
Sio v The Queen (2016) 259 CLR 47; [2016] HCA 32, applied
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: J A Greggery QC, with P Morreau, for the appellant
M R Byrne QC, with D L Meredith, for the respondent

SOLICITORS: Jasper Fogerty Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** On 11 December 2015 an indictment was presented charging the appellant and Garry Reginald Dubois jointly with depriving Barbara McCulkin and her two daughters, Vicki, aged 13 and Leanne, aged 11, of their liberty, with the rape of the two girls and with the murder of all three of them. Before the matter came to trial, a judge ordered that the appellant and Dubois be tried separately and ordered a stay of the rape counts against the appellant. On 26 May 2017 a jury convicted the appellant of all charges.

[2] He now appeals against those convictions on the following grounds:

1. The trial judge erred in admitting evidence of Dubois' motive;
2. The trial judge failed to provide adequate directions to the jury as to motive;
3. The trial judge erroneously admitted the evidence of Billy McCulkin pursuant to s 93B of the *Evidence Act* 1977 in the appellant's trial;
(Grounds 4 and 5 were abandoned);
6. The trial judge's directions on delay failed to adequately warn the jury of the impacts of delay on the appellant's ability to defend himself;
7. The trial judge's directions failed to properly identify the indispensable facts the jury was required to be satisfied of beyond reasonable doubt;
8. The trial judge's directions as to assessment of witnesses' evidence and fact finding went beyond the bounds of permissible directions;
9. The trial judge erred in directing the jury to consider the whole of the evidence suggestive of guilt in assessing whether each confession was made and that it was true.

[3] Although there was objection to the admissibility of some of the evidence, the truth of most of it was not challenged. It is therefore possible to relate the facts of the case while reserving consideration about controversial factual issues.

The appellant and his associates

[4] In January 1974 Garry Dubois, whose nickname was "Shorty", Peter Hall, Keith Meredith and Tommy Hamilton were a gang of small time criminals. They were a close-knit group. Hall said that it was their practice to drive around Brisbane in order to find places that they could break into to steal things. Hall had been a friend of Meredith's since they were both teenagers. Hall and Hamilton had also been friends since childhood. Hall was in a relationship with Hamilton's sister, Carolyn Scully, who had a daughter, Kerri-Ann Scully. Years later, Kerri-Ann Scully would herself enter into a relationship with the appellant. Later still, she would become an important prosecution witness at his trial. One of Dubois' former girlfriends, Deidre Richards, was living with Carolyn Scully at this time. Dubois later married a school friend of Deidre Richards, one Jan Stubbs. Deidre Richards married a man named Lawrence and, together, she and her husband lived in the appellant's house for some time. Dubois himself had a daughter, Deeja Dubois, who was Kerri-Ann Scully's half-sister.

[5] Dubois and the appellant were also friends and, it seems, close ones. In January 1974 the appellant owned a very distinctive car of which he was known to be very proud, a bright orange Valiant Charger.

[6] Billy and Barbara McCulkin and their two daughters lived at No. 6 Dorchester Street, Highgate Hill. Billy had a criminal history of break and enter offences. Until January 1974 he and the appellant were friends. At one point in the late 1960's or early 1970's, the appellant had stayed at the McCulkin home for about six weeks until he was able to arrange his own accommodation. Billy had even persuaded his own employer to give the appellant a job. Billy's sister, Eileen, gave evidence that she had seen the appellant and Dubois at Billy's house a number of times. Hall also knew Billy McCulkin slightly. Dubois had introduced them. Dubois had also introduced Hall to the appellant. Billy knew Keith Meredith and Tommy Hamilton. A man named John Stuart had also been a friend of Billy's. In 1973, while Barbara was working at a milk bar, the appellant would, from time to time, visit her there and, sometimes, pick her up in his car after work. Billy's sister, Estelle, gave evidence that she had encountered the appellant at Barbara's house when Billy was absent. Much later, the appellant told Kerri-Ann Scully that he had been sleeping with Barbara at that time.

[7] In this way, all these people were associated with each other.

[8] Hamilton had died before the appellant's trial. Billy was also dead by then but he had given police two statements and had also given oral evidence at an inquest in 1980. His statements and the transcript of his evidence at the inquest were tendered at the trial pursuant to s 93B of the *Evidence Act* 1977.

The Torino job

[9] In early 1973 Dubois came to his three accomplices with a proposal. He told them that they had been commissioned to burn down a nightclub in Fortitude Valley called "Torino's" for which they were to be paid $500. Hall understood that it was "an insurance job". Accordingly, one night they forced entry into the empty club premises. Dubois, Hall and Hamilton went inside and doused the club with petrol while Meredith stood watch. They poured a trail of petrol towards the back door and set fire to it. The result was a massive explosion of petrol fumes. They were never suspected or charged.

[10] Two weeks or so after the fire at Torino's, on 8 March 1973, arsonists burnt down the Whiskey Au Go Go night club which was also in Fortitude Valley. Fifteen people were killed in that fire which was, and remains, notorious in Queensland. There was an intense police hunt for the criminals who were responsible. Billy was brought in by police for questioning but released. A close friend of Barbara's, Ellen Gilbert, gave evidence that Barbara had fled the family home just after the Whiskey Au Go Go arson and had come to live with Ms Gilbert. Barbara had billeted her two daughters with friends. Within a week police had arrested and charged two men with murder: James Finch and Billy's friend, John Stuart. On the evening of the day after those arrests, Ms Gilbert answered her phone to hear Billy asking to speak to his wife. After speaking to her husband, Barbara called a cab and went home.

[11] The trial of Stuart and Finch was held in October 1973 and both men were convicted of murder.[1]

[12] As it happened, also in late 1973, Billy and Barbara McCulkin separated. They had married in 1960. Billy had started an affair with Estelle Long and began to live

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1 *Cf. R v Stuart and Finch* [1974] Qd R 297; *R v Stuart* (1974) 48 ALJR 517.

with her. He was then working as a dogman for a large Brisbane construction company but, despite the separation, he continued to give Barbara some financial support.

The events of early 1974

[13] Barbara's immediate next-door neighbour was Peter Nisbet. She told him that Billy occasionally assaulted her and Nisbet became solicitous for her well-being. They would talk from time to time and Barbara confided in him. She told Nisbet that Stuart and Finch may not have been solely responsible for the Whiskey Au Go Go arson and that if police had asked Billy the right questions then they may have discovered that others had been involved. She told him that Stuart and Finch had not been the primary movers in the fire. She said that they had merely been "an easy get for the cops".

[14] Barbara had introduced Nisbet to the appellant at her home. From time to time Nisbet had seen the appellant's orange Charger parked outside her house or nearby.

[15] Barbara's two daughters were also talking about arson. Allan Evans had been in Leanne McCulkin's class in Grade 6 at Yeronga State School. In his evidence he recalled that one day Leanne was tearful and had told him that Stuart and Finch had had nothing to do with the Whiskey Au Go Go fire and that her father had been involved. Her sister Vicki had said much the same thing to her friend Janet Gayton who lived across the street at No. 7 Dorchester Street.

[16] At work, Barbara told Ellen Gilbert that one day she would tell her "something funny" about the Torino's fire.

[17] Peter Hall said that he and his three friends had also been discussing the Whiskey Au Go Go fire. He, Dubois, Meredith and Hamilton were frightened that if police learned about their responsibility for the Torino's arson, they might well blame them for the Whiskey Au Go Go murders.

The disappearances

[18] In early December 1973 Barbara had been admitted to hospital to undergo cosmetic surgery to her belly and breasts. By then Billy was living with Ms Long but after Barbara's return home from hospital, Billy stayed with her and the children "off and on" for a few days. He said that when he finally left them on 15 January 1974 to return to live with Ms Long, his wife and daughters were all in good spirits and happy.

[19] On the next day, Wednesday 16 January, Billy was working at a building site at 444 Queen Street in Brisbane's central business district. He noticed his wife in a passing bus and signalled to her that he might come over that night. He did not do so because he went drinking with friends instead. Later that evening, Estelle Long joined Billy and his friends, and she and Billy went home together. The next day, Thursday 17 January, Billy went to work as usual and finished his day in the same way, drinking with friends and then joining Ms Long before going home.

[20] On Friday 18 January Billy finished work and went to see his wife in Highgate Hill. He had wanted to give her $60 on Wednesday night and he was now going to do so.

[21] Billy did not drive. He took a bus and arrived at Highgate Hill at about 6 pm. He found the house empty and locked. The storekeeper at the nearby corner store could not tell him anything useful. He went back to the house and sat on the front steps. At about nightfall he saw a young girl, Janet Gayton, who lived across the street and with whom his daughters often played. She told him that she had not seen Vicki or Leanne that day and that they had been absent on the previous day as well. Worried, Billy broke a pane of glass on the front door and went into the house.

[22] He found the light switched on in the living room. The light was also switched on in the kitchen but the bulb had blown. The children's two Siamese cats had been locked in the bathroom. Barbara's sewing machine was in the living room, switched on and with a partially completed dress attached to its workings. Barbara's purse was on top of the refrigerator. There were six bottles of beer inside the fridge. Barbara was not a beer drinker. All of the girls' clothing and all of Barbara's clothing seemed to be there except for a pair of Barbara's pink slippers with floral designs. The beds were made and had not been slept in. The letterbox contained two envelopes, one containing a cheque for $210 and the other a cheque for $170 payable to Barbara.

[23] Billy caught a taxi to the home of a mutual friend of his and his wife's. They knew nothing about his family's whereabouts. He went to Wynnum where his sister Eileen lived with Mr Ron Crouch. They offered to return to Highgate Hill with him. Together they made inquiries at a local skating rink that was often frequented by the girls. They inquired at the home of Barbara's brother, Graham Ogden. He knew nothing about his sister's whereabouts.

[24] Billy knew that the appellant conducted a massage parlour at Lutwyche. He rang the parlour and a woman named Cheryl Evans, who also called herself Cheryl Pritchard or Dianne Pritchard, answered his call but she had no information. Pritchard was the appellant's partner. That night, in company with Ms Long, Billy made further fruitless inquiries of neighbours, of Barbara's former employer and of Barbara's former co-worker, Ellen Gilbert. He checked hospitals. At about 4.30 am on Saturday 19 January he and Ms Long went home to sleep. At 6 pm on that day Billy resumed his search. Ms Long drove him back to Highgate Hill where they found the house still empty. Ms Long then took Billy to the home of a friend of his, Norman Wild, and left to go to work.

[25] Wild agreed to drive Billy on his search. They returned to Dorchester Street where Billy found his sister and Mr Crouch. Billy went across the street and spoke to young Janet Gayton again. In January 1974 Janet was 13 years old. The 16th of January had been her sister Juneen's tenth birthday. There was to be a party at their house and Vicki and Leanne had both been invited. A little while before the party was to begin at 6 pm, Janet and Juneen went over to the McCulkin house. Janet saw a man in the front yard of No.6. He was playing with a stray cat. She had never seen him before. One of the McCulkin girls told her that this was "Shorty". There was another man inside the house in the kitchen. Janet knew him as "Vince". Janet had seen him at the house previously. The McCulkin girls told her that these men were friends of their father. "Shorty" was in fact Dubois. "Vince" was the appellant.

[26] On Saturday 19 January, Janet told Billy that she had seen Vince and Shorty at No. 6 Dorchester Street on the previous Wednesday evening. They had arrived in Vince's orange car. One of them brought a half-carton of beer with him.

The appellant denies he was at Dorchester Street

[27] Wild drove Billy out to Lutwyche to the appellant's massage parlour. On the way Billy noticed the appellant's distinctive orange Valiant Charger parked on the side of Lutwyche Road. He got out and saw the appellant. They had the following conversation:

> "I said to him, "Do you know where Barbara is?" And he said, "No." And I said, "Well, you were over there yesterday." And he didn't say that he had been there but he didn't say that he hadn't been there. He hummed and harred.
>
> …
>
> And I said, "The girl across the road said you were there and Dubois was there." And he said, "Have you seen Dubois?" I said, "I've just come from his place." And he said, "Well, hop in the car and I'll give you a lift back out there and we'll talk to him again." I said, "No. I've got a lift across the road, thanks.""

[28] By the time Wild had driven Billy to Dubois' house, the appellant had beaten him there. Wild waited in the car while Billy went inside and had the following conversation with the appellant:

> "What were you doing there?" And he said, "I wasn't there." I said, "Hang on a minute." I said, "Five minutes ago, you inferred that you were there" and he said, "No, well, I wasn't." I said, "If they've run away or anything like that, just let me know and, you know, as long as they're safe I'm not worried if they've gone anywhere. If they need any help well, I'll help them."
>
> ...
>
> And they both said, "No, no, we don't know where they are"."

[29] Billy told them that if anything had happened to his family and if he found those responsible he would blow their heads off.

The appellant's sudden departure six days after the disappearances

[30] In 1974 Adrian Burton was the owner, with his father, of a block of eight units at Rosalie. He had rented unit No. 8 to the appellant. On Tuesday 22 January 1974 Mr Burton attended at the unit block to collect rent from his tenants. He noticed the appellant and "three gentlemen with him" leaving the premises carrying dark garbage bags. After he had collected the rent due from seven of his eight tenants he found that the appellant had vacated unit No. 8. The unit was empty of the appellant's belongings. The appellant had given no notice of quitting the place. Dubois had asked Hall and Keith Meredith to help the appellant move out of his unit and they had done so. Hall said the appellant had been living there with Dianne Pritchard. She was present when they moved the appellant's things out. She was "drunk, I think she was a bit upset". Hall and Meredith took the pair's belongings to Pritchard's "aunt or her mother's place". Dianne's stepmother, Muriel Pritchard,

said that in 1974 Dianne Pritchard and the appellant had come to her house and left ports.

[31] In late 1973 Ernest Watkins was living at the Vogue Private Hotel in Cordelia Street, South Brisbane. Dianne Pritchard was then employed at the "Elizabethan Health Studio". She told Watkins that she wanted to get a massage parlour of her own. She found that the "Polonia Health Studio" on Lutwyche Road was available. Watkins agreed to take a lease of those premises and agreed to allow Pritchard to operate the "Polonia Massage Parlour" there. He received rent of $160 per week from Pritchard. Watkins knew the appellant as Pritchard's "constant companion and associate".

[32] Watkins said that on 22 January 1974 Pritchard arrived at the Vogue Private Hotel and recovered some of her belongings that she had stored there. She said nothing about leaving but he never saw her again. Two days later, on 24 January, he phoned the massage parlour and received no answer. He went to the premises and found them unattended. He went to the appellant's unit at Rosalie, where he knew the appellant lived with Pritchard, and found that they had both left.

[33] In the middle of 1973 the appellant and Paul Meade had agreed to buy some land together in Warwick. Mr Meade agreed to pay the purchase price of $23,580 and the appellant agreed to pay him a half share from time to time as he had money available. On 22 January 1974 the appellant contacted Mr Meade and said that he wanted to withdraw from their agreement. He asked Mr Meade to reimburse him for the contributions to the purchase price that he had made. Mr Meade agreed to pay him $1,000 in cash by giving it to Pritchard at the British Empire Hotel and, at the appellant's request, to make out a cheque for the balance in favour of Muriel Pritchard. He posted the cheque. Muriel Pritchard deposited the cheque into her own account and later paid the money to her step-daughter.

[34] The appellant's activities on 22 January 1974 were not yet over. On the same day he approached a used car dealer, Ross Stephens, and offered to sell him his Charger. Mr Stephens paid $2,900 for the car straight away. He resold it two days later to a man named John Johnston for $3,545.

[35] The appellant and Pritchard moved to Hawks Nest, a small locality north of Newcastle.

[36] Dubois also left town. According to Hall, after Hall and Meredith helped the appellant vacate his unit at Rosalie, Dubois "disappeared for a while". In fact, he had gone to live on a property in the Lockyer Valley owned by an old friend, John Osborne. Dubois, Hall and Osborne had been friends when they were teenagers living in Chermside. Mr Osborne said that one day, before the 1974 Brisbane floods, Dubois suddenly appeared, unannounced, walking up Mr Osborne's driveway in the Lockyer Valley. He remained for about six months. Hall did not know where he had gone and only learned where he was when Osborne called him to say that the floodwaters had left him and Dubois stranded on the property. Hall and Meredith used a rubber dinghy to bring them necessary supplies.

The appellant's false denial to police that he was there

[37] In 1975 Senior Constable Bruce White was one of the team of officers inquiring into the McCulkin disappearances. He located the appellant in Sydney and interviewed him.

[38] The following exchange took place between them:

> "We have been informed that you were in company at the time with a man named Shorty.
>
> I was not.
>
> Do you know a man named Shorty?
>
> I don't think so.
>
> Do you know a man named Garry Dubois?
>
> Yes, I know him. Isn't his name –
>
> Isn't his nickname Shorty?
>
> Yes.
>
> You – were you with him on the night of the 16th of January?
>
> I don't know. I see a lot of him.
>
> …
>
> My information is that on the night of the 16th January '74, you were seen at the home of the McCulkin family at 6 Dorchester Street, Highgate Hill. Is that true?
>
> No, it's not.
>
> You're quite sure about that?
>
> Yes, positive.
>
> We have information that two girls who know you – that you were standing in the kitchen of the house, talking to Mrs McCulkin on that night.
>
> Who are the girls?
>
> They are playmates of Vicki and Barbara from across the street.
>
> The kids from across the street know me. If they said I was there, then it is possible.
>
> Were you with Shorty Dubois?
>
> I'm not saying.
>
> Our information is that Shorty was playing with the family cat in the front yard of the house.
>
> Anything is possible."

The appellant admits murdering the McCulkins to Kerri-Ann Scully

[39] Hall's partner at the time, Carolyn Scully, had a daughter, Kerri-Ann, who was born on 14 July 1981. Kerri-Ann could recall the appellant being "around when I was growing up a little bit" at her mother's house. The appellant and her mother were "seeing each other". Kerri-Ann grew up and became a heroin addict. In the middle

of 2011, Kerri-Ann had young children and needed financial help. She called the appellant who was then living in Warwick. The appellant gave her some money. Kerri-Ann and her children then began living with the appellant in his house at Warwick. The appellant, she said, had "lots of books". He bragged to her that he had "been in lots of newspapers" and that he had been written about in a book. He gave Kerri-Ann $20 to go and buy a copy of a book called "Shotgun and Standover". Kerri-Ann said:

> "We went home, we were laying in bed, and he's like, "Yeah, I'll show you what they have to say about me." And he was really proud of it. Went through him being charged for the McCulkin murders.
>
> Yes?---And let off and ---
>
> Did he say anything about what had happened at the ---?---Yeah, right at the end, he said, "I'm good for it, but they'll never get me for it"."

[40] A little later he said to her, "I did it and the cunts still couldn't get me for it."

[41] Kerri-Ann's evidence that she lived for a time with the appellant in his home near Warwick was not challenged. When police arrested the appellant, they searched his house. They found a copy of the book that she had referred to, "Shotgun and Standover" written by James Morton and Russell Robinson. It contained a sensationalised account of various crimes and criminals in Australia. Relevantly, at page 254, the authors wrote about the fire at Torino's nightclub and the involvement of Tommy Hamilton and his associates in that crime. The book was tested for fingerprints. Over a dozen fingerprints were found. With a single exception, all of them they were the appellant's. The exception was the right thumbprint of Kerri-Ann Scully at the bottom of page 254.

The appellant admits murdering the McCulkins to Warren McDonald

[42] Julie Fenton began a relationship with the appellant in about 1996. She was then 25 or 26 years old. The appellant was "fifty-nine-ish". She moved in with him and later married him. Together they pursued a business opportunity – the commercial production of marijuana. They planted a crop and, over a period of three months, with the help of about ten other people, tended to its cultivation near Warwick. For reasons of security, the appellant prohibited anyone leaving the crop until it had been harvested. However, it was necessary for the appellant to leave the crop site in order to get necessary supplies. The appellant used Warren McDonald as his driver on these trips.

[43] McDonald was in his early twenties when he met the appellant. The appellant became a mentor to him. He introduced McDonald to Dubois. The appellant refused to use his own car because he was concerned that it might have had listening devices planted in it. He used McDonald's car, he said, because it was "cool" and because McDonald did not have a criminal record.

[44] On one of the appellant's trips away from the crop, as McDonald drove the appellant gave him some avuncular advice. He said, "You need a notch on your gun. When I was your age, I had several notches on my gun." McDonald asked, "What do you mean?" The appellant replied, "Well, you need a kill."

[45] He told McDonald that he had killed the McCulkins. He said, "Shorty was nothing but a rapist." McDonald said, "Aren't you afraid of getting caught?" The appellant replied, "They'll never catch me because they'll never find the bodies."

[46] The appellant told McDonald that, "They're putting a lot of pressure on me over McCulkin … But I'll never get in, because they'll never find the bodies. I'll never get hit." He added, "If you want to live a long and healthy life, never repeat a word to get yourself or anyone else into trouble."

[47] In 2014 the Crime and Corruption Commission served a summons on McDonald to give evidence in camera about the McCulkin disappearances. The appellant's house was also searched at that time by authorities. McDonald encountered the appellant on a Warwick street and asked him whether it was true that his house had been raided. The appellant said that it was true, that he had "10 police in my house" and that they had "turned it upside down" but that they had "got nothing". He said that the Commission was "rounding everybody up". He told McDonald to "keep your mouth shut or else".

The appellant admits murdering the McCulkins to MQS

[48] In 2016 MQS was in prison on remand awaiting trial on fraud charges. He occupied the cell next door to the appellant who was also on remand on charges of murdering the McCulkins. They became friendly. MQS said that at first he knew only that the appellant had been charged with murder but knew none of the details. He was from Melbourne and had not heard about the arson at Torino's nightclub, at the Whiskey Au Go Go or anything about the disappearance of the McCulkins. It was rumoured in the prison community that the appellant was "a kid killer". One day a group of prisoners attempted to attack the appellant and MQS managed to obstruct them, getting himself beaten in the process. The appellant was grateful and began to confide in MQS, who encouraged him to do so. MQS secretly began to take notes. After he had compiled sufficient content he contacted authorities and offered to become an informant. His offer was accepted.

[49] The appellant knew that MQS was seeking bail. On 31 December 2016 the appellant asked MQS to do a job for him upon his release on bail. He was to contact one of the appellant's former girlfriends, Robyn Haines. He told MQS that Haines lived in Toowoomba and that she worked for Telstra. He gave MQS her phone number. He instructed him to be sure to use a public phone box to call her. He gave him a password to use so that Haines would know that he was communicating an authentic message from the appellant. He was to tell her that Warren McDonald had given a statement to police implicating the appellant. The appellant told MQS that McDonald had furnished police with "an addendum statement". McDonald had indeed given an addendum statement to police on 8 December 2016. MQS was to instruct Haines to tell police, if asked, that in her view McDonald was not a person whom the appellant would trust. She was not to reveal that she and the appellant had ever had a sexual relationship. During a recorded conversation on 10 February 2017 the appellant told MQS that McDonald's statements "gives them a motive" and that his addendum statement was given "just to provide motive".

[50] On 2 January 2017 the appellant and MQS spoke again. MQS said, "You don't have to answer me … You don't have to tell me anything." The appellant's response was: "In those days, when you got paid to do a job, you did the job." The appellant said, "Yeah, well, I wasn't going to go down for a bunch of them."

[51] MQS said, "It's just the story about the two kids. That's what's getting around the jail." The appellant said, "I never laid a hand on them. Now, let's not say any more from that."

[52] MQS said, "Fair enough, you trusted me." The appellant said that "she" had to be dealt with. MQS understood him to be referring to "the mother of the two kids…. It was no one else. That's who he was …talking about."

[53] Police had fitted MQS with a recording device. During the recorded conversation there was the following exchange:

> "Vince – They will (ui) That silly Sheila…that was in the paper…claiming to be my fiancé, that's crap…
>
> MQS – claiming to be your fiancé.
>
> Vince – Yeah the one (ui) you know
>
> MQS – Oh yeah the one you told me about the other day…Oh…Scully yeah yeah. Fuckin mate.
>
> Vince – (ui) she's gonner get (ui)…fuckin off.
>
> MQS – (ui) Whose this Scully? Fuckin hell Vince…
>
> Vince – (ui)
>
> MQS – Fuckin hell mate.
>
> MQS – She's (ui) she's
>
> Vince – it's only the two witnesses …(ui)
>
> MQS – yeah two witnesses…Yeah you told me Pete…(UI)
>
> Vince – (ui)
>
> MQS Oh – you're giving me goose bumps mate…
>
> Vince – Yeah (ui)
>
> (ui) Gee…Oh well – You gotta do what you gotta do I suppose…like I said it's none of my business but…I'll do what I said I would do for ya."

[54] There was evidence that "fucking off" in this context meant "murdered". At that point in time there were "only the two witnesses", Scully and McDonald, who were expected to give evidence of the appellant's admissions.

Grounds 1 and 2

[55] The Crown's case was that Dubois was concerned that Barbara's gossip about the Torino and Whisky Au Go Go fires might result in the police implicating him and his "Clockwork Orange Gang" in setting a fire that killed 15 people. She needed to be silenced and Dubois was motivated to kill her for that reason. The appellant, as a good friend, was willing to help him to murder her. Barbara's daughters were innocent bystanders caught up by their presence during their mother's abduction.

[56] The appellant submits that Applegarth J "erred" in admitting "evidence of Dubois' motive" to kill Barbara McCulkin. The appellant also submits that his Honour "failed" to give adequate directions about motive.

[57] The parties did not identify the objectionable evidence in their written outlines. At the Court's direction, a written schedule of the relevant evidence was submitted. The evidence that the appellant submitted should not have been led was the following:

1. Barbara's statement to Nisbet about her husband's knowledge concerning the participants in the Whiskey Au Go Go arson;
2. Barbara's statement to Ellen Gilbert that one day she would tell her "something funny" about the Torino's fire;
3. Leanne's statement to Allan Evans that Stuart and Finch were innocent and that her father had "something to do" with the Whiskey Au Go Go arson;
4. Vicki's statement to Janet Gayton that Stuart had had nothing to do with the Whiskey Au Go Go arson;
5. Hall's and Meredith's evidence that they, together with Dubois and Hamilton, had burnt Torino's nightclub and were afraid of being implicated in the Whiskey Au Go Go arson.

[58] The evidence about motive to which the appellant refers was the subject of a pre-trial ruling.[2] The appellant's argument to Applegarth J was that the evidence as to this motive was "weak". Applegarth J held that it was not for the trial judge to determine whether the jury would accept the evidence or whether it ought to do so.[3] His Honour referred to the proposition that even weak evidence, if it was relevant, had to go to the jury "unless it is so prejudicial" that it ought to be excluded for that reason.[4] No such argument had been made to his Honour and since the evidence did not implicate the appellant in either arson it could not have been prejudicial to him in the accepted sense.

[59] On this appeal the appellant advances two submissions to support his first ground of appeal. First, he repeats his submission that the evidence about the first motive was so weak that it should have been excluded. I would respectfully adopt Applegarth J's correct reasons for rejecting that submission. It was not for a trial judge to determine whether the jury will or ought to accept evidence or inferences that the prosecution invites a jury to draw from the evidence. Once there is evidence capable of supporting the inference contended for by the prosecution, and provided the inference is relevant to the issues the jury has to determine, then the evidence must be admitted unless there is some reason to exclude it.

[60] The appellant now raises an argument that was not raised before Applegarth J. He submits that Applegarth J ought to have exercised his discretion to exclude the evidence because its prejudicial effect outweighed its probative value. Because no such submission was made to Applegarth J, his Honour did not consider whether or not to exercise his discretion to exclude evidence that was, otherwise, relevant and admissible.

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2 *R v O'Dempsey (No 2)* [2017] QSC 101.
3 *Doney v The Queen* (1990) 171 CLR 207.
4 citing *R v Festa* (2001) 208 CLR 593 at [51].

[61] It is too often forgotten in appeals in criminal cases that the right of appeal under the *Criminal Code* is not one that permits a general inquiry into the conduct of a trial in order to find some aspect of the conduct of the trial that, even in hindsight, might be judged to involve an error.

[62] Section 668D of the Code provides that a person convicted on indictment may appeal to the Court on any ground that involves a question of law alone. With leave of the Court, such a person may appeal on a ground that involves a question of fact alone, or a question of mixed law or on any other ground which appears to the Court to be a sufficient ground of appeal. The requirement for leave to appeal against conviction has never been enforced in Queensland, at least in modern times, and all appeals against conviction are treated as appeals as of right.

[63] Section 668E limits the bases upon which the Court can allow an appeal. There are four such bases:

1. That the jury's verdict is unreasonable;
2. That the jury's verdict cannot be supported having regard to the evidence;
3. That the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law;
4. That on any ground whatsoever there was a miscarriage of justice.

[64] The subsection expressly provides that "in any other case" the court "shall dismiss the appeal".

[65] In a case like the present, in which the appellant raises as a ground that evidence was wrongly admitted, he must establish one of two things.

[66] First, the appellant might point to a decision of the trial judge to admit the evidence over the objection of the appellant and show that the decision involved an error of law and was, for that reason, wrong. Every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and in which the rules of procedure and evidence are strictly followed.[5] If the decision was wrong, then there has been legal error in the conduct of the trial and the appellant is *prima facie* entitled to have the verdict quashed. However, that is only the *prima facie* position because there remains the question whether, nonetheless, the appellant has lost a real chance of acquittal by reason of that error. Not every departure from the applicable law or procedure results in a miscarriage of justice.[6] If the Crown can demonstrate that the error did not result in a "substantial miscarriage of justice", the so-called proviso, then the Court may dismiss the appeal.

[67] Second, if an appellant is unable to point to a wrong decision on any question of law, he may still be able to succeed if he can demonstrate that there has been a miscarriage of justice. Such cases will arise when, for example, no objection is taken to the admission of evidence at trial but, on appeal, the appellant establishes that the evidence was inadmissible according to law. In such a case the appellant has to do more than demonstrate error as a matter of law. Because the ground of appeal is that there has been a miscarriage of justice for a reason other than "a

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5 *Mraz v The Queen* (1955) 93 CLR 493 at 514 *per* Fullagar J.

6 *R v Storey* (1978) 140 CLR 364 at 376 *per* Barwick CJ; *TKWJ v The Queen* (2002) 212 CLR 124 at [62]-[73] *per* McHugh J; *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38] *per* McHugh and Gummow JJ.

wrong decision of any question of law", it is for the appellant to show two things: that the evidence was inadmissible and that its admission occasioned a miscarriage of justice.

[68] In short, in the former case, the appellant need only establish legal error and it is for the Crown to negative any miscarriage of justice; in the latter case, the appellant needs to establish legal error and also to establish that the error has occasioned a miscarriage of justice.[7]

[69] In this case, the appellant argued below that the evidence of motive was inadmissible because it was "weak". That argument was rightly rejected. The evidence was relevant and admissible unless there was some basis upon which to exclude it despite its relevance.

[70] The arguments about the prejudicial effect of the evidence and the failure of Applegarth J to give the postulated direction were not raised below. There is no "wrong decision" to which the appellant can point. Consequently, the appellant needs to show that the evidence should have been excluded as a matter of principle, and that, alternatively, the direction should have been given, and, as well, that the admission of the evidence or the failure to give the direction resulted in a loss of a chance of acquittal that was fairly open to the appellant or, to put it another way, that the errors "may have affected the verdict".[8]

[71] The appellant has not demonstrated that there has been any miscarriage of justice occasioned by the admission of the disputed evidence or by his Honour's omission to give the proposed direction. Indeed, the appellant did not attempt to do so but, instead, submitted:

> "Alternatively, the learned trial judge erred in concluding that the weak probative value was sufficient to admit the evidence over its substantial prejudicial effect.
>
> Together with the later evidence from McDonald that the appellant was in the Clockwork Orange gang, but even without it, given he was associated with such persons, the evidence led to show motive was extremely prejudicial. This body of prejudicial evidence required substantial directions against its misuse but the prejudice was not taken into account in the pre-trial ruling. The difficulty created by the admission of the evidence of Dubois' motive and O'Dempsey's association with Dubois is highlighted by the directions given to the jury in respect of impermissible propensity reasoning from the association with Dubois and the permissible reasoning of the appellant's motive to assist Dubois in committing murder because of that association."
>
> (footnotes omitted)

[72] Evidence of the relationship between Dubois and the appellant; between Dubois, Hamilton, Hall and Meredith; between the appellant and Billy; between the appellant and Barbara; their personal characters and backgrounds and what they shared in common, was evidence about the circumstances in which Barbara and her

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7 *Dhanhoa*, *supra*, [38] *per* McHugh and Gummow JJ.

8 *Dhanhoa*, *supra*, [38] and see footnote (56) at pages 28-29.

daughters were living when they disappeared. These facts were essential parts of the narrative.[9] The jury could not possibly have understood the frenetic circumstances of the last year of the lives of Barbara, Leanne and Vicki McCulkin if they did not know that these people existed, who they were and what they represented to Barbara McCulkin.

[73] Moreover, it was the Crown case that Dubois was the initiator of the killings. The learned judge could hardly have ruled out evidence led to prove that Dubois was one of the killers. That meant that the character and antecedents of Dubois, as well as evidence about who were his criminal associates, were essential facts in the Crown case. None of that evidence reflected upon the appellant. There was no suggestion that he was either a thief or an arsonist. However, Dubois' friendship with the appellant, his alleged helper, was a fact that was inherent in the narrative. After all, the Crown case was that the appellant and Dubois were at the McCulkin home on the night of the disappearance. Evidence of their friendship could hardly have been excluded.

[74] To perform its duty, the jury had to be given to understand Barbara's relationship with these people. That relationship included her affair with the appellant, her intimacy with her husband that allowed her to know, or to think that she knew, some facts about his criminal doings and her husband's relationship with the appellant and Dubois as well as Dubois' relationship with his criminal associates.

[75] None of this evidence was the subject of objection below. The objection was limited to the evidence that I have summarised in paragraph 57 above.

[76] Dubois' and the appellant's respective motives to commit murder were, in truth, inferences that might be drawn from evidence that was otherwise relevant and admissible about the circumstances surrounding the disappearance of the McCulkins.

[77] The appellant complains that "[t]his body of prejudicial evidence required substantial directions against misuse".[10] The evidence about the criminal character of some of these people, as well as the appellant himself, was capable of being misused by the jury and so it was, in that sense, prejudicial. But his Honour gave an appropriate direction as follows:

> "I now turn to a different topic. If, in the course of hearing the evidence, you've heard evidence or inferred something adverse about the defendant or about his past, then do not be distracted by that evidence. You may infer that, at certain times, he and others committed crimes such as cultivating a cannabis crop. You may conclude that in 1973, his associate Garry Dubois was involved in the firebombing of the Torino nightclub. For example, it wasn't put to Mr Hall, or to Mr Keith Meredith, during their cross-examination, that Garry Dubois was not involved in the Torino arson. There is no evidence, however, from Hall, Meredith or anyone else, that the defendant was involved in the Torino arson. The evidence of the associations between various individuals, including the defendant and Mr Dubois,

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9 *Harriman v The Queen* (1989) 167 CLR 590 at 595 *per* Brennan J, 609 *per* Toohey J, 630-633 *per* McHugh J.

10 Appellant's Outline [26].

> and between them and Mr McCulkin, of Dubois's association with Mr Hamilton, Mr Hall, Mr Keith Meredith and others is simply part of the narrative.
>
> If you conclude that the defendant was involved in the illegal cultivation of cannabis in the late 1990s, or that some of his associates in the 1960s and early 1970s were involved in certain property offences, you do not, illogically and unfairly, jump to the conclusion that the defendant's likely to have committed the serious offences of deprivation of liberty and murder. They are very different offences, not offences against people, and not the serious offences the defendant faces.
>
> You certainly cannot reason that because the defendant may have associated, in the late 1960s and early 1970s, with Dubois and other individuals who were involved in break and enters and then the arson of the Torino, that he is likely to have committed the serious offences that are charged on the indictment. You certainly cannot reason that because the defendant may have been involved in cannabis cultivation, with Mr McDonald and others, that he was likely to have committed the serious offences that are charged on the indictment. You certainly must not proceed on the basis that because of his past association with Dubois and others, or because of his past commission of drug offences, that he's the sort of person who might, or even would, commit the serious offences against the person that are charged on the indictment, including murder."

[78] Although his Honour furnished the parties with a draft of his proposed summing up, as is not uncommon in Queensland criminal trials, and although there was argument even during the lengthy summing up about various parts of it, the appellant sought no redirection concerning this particular direction. That is understandable because it is impeccable.

[79] The appellant submits that his Honour "did not give the direction recommended by Kirby J in *De Gruchy*".[11]

[80] The paragraph of the judgment of Kirby J to which the appellant refers is the following:

> "(4) Where the prosecution has established strong evidence of a motive, it will often be necessary to warn the jury that they must look at all the circumstances of the case and not be unduly affected by the evidence that the accused had a motive to commit the crime. This is because of the fact that many who have powerful motives to offend never do so. Motivation is simply one item of the evidence in the case that may tend to show that a particular person committed an alleged act. The jury may therefore need to be reminded that allowance should be made for the fact that having a motive, and even expressing it, does not, as such, constitute proof of involvement in a crime."

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11 *De Gruchy v The Queen* (2002) 211 CLR 85 at [57].

[81] In his written outline, in quoting that paragraph, the appellant omitted the first nineteen words of Kirby J's dictum and submitted that Applegarth J "did not give the direction recommended by Kirby J" as set out in the written outline.

[82] This submission is beside the point and misleading. In *De Gruchy* Kirby J did not "recommend" that any particular direction should be given. His Honour was concerned to summarise what he called "a number of general propositions" concerning appropriate directions in cases in which motive was in issue. This qualification was emphasised by his Honour's statement of the first of his general propositions, namely that "[n]o general direction can be formulated to accommodate all the different circumstances that can arise".[12]

[83] In the fourth of his Honour's general propositions, now relied upon by the appellant to show error, the nineteen words omitted in the appellant's written outline show that Kirby J was concerned to state that in cases in which "the prosecution has established strong evidence of motive" there may be a need to ensure that the jury does not reason directly from motive to a guilty verdict.[13] In this case, even the Crown did not suggest at trial that the motive it was putting forward was a strong one.

[84] As to be expected, his Honour directed the jury about motive at a number of points in his elaborate and careful summing up. These directions were not the subject of criticism on appeal and it is not necessary to refer to them except to observe that their presence in the summing up and the absence of any criticism about them conclusively refutes the appellant's general complaint about "the absence of warnings".

[85] The evidence was admissible. It was not prejudicial in the sense that it might have so inflamed the jury against the appellant or distracted them from the real issues in the case that it ought, for those reasons, have been excluded. The learned trial judge gave adequate and substantial directions to the jury about the use of all of this evidence. There was no error in either the admission of the evidence or in his Honour's directions.

[86] Even if the evidence ought not have been admitted, in my view these matters did not give rise to a miscarriage of justice. Although on appeal the question of motive loomed large in the appellant's case as the first ground of appeal, and, consequently, also in the respondent's case, it was actually a minor issue at the trial.

[87] In his opening, the Crown prosecutor, Mr Meredith, said only this:

> "Now it's not suggested that Billy or Barbara McCulkin had anything to do with the Whiskey fire but their knowledge or claimed knowledge may be relevant to her death. It's also not suggested that Garry Dubois had anything to do with the Whiskey fire but the suspected connection between it and the Torino fire would provide a motive for Dubois and O'Dempsey, who was a friend of Dubois, to keep Barbara McCulkin quiet. Now that may not seem much of a motive to kill three people. It isn't. But there's never a good motive for murder.

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12 *De Gruchy*, *supra*, [57].

13 *supra*, [57].

> The prosecution doesn't have to prove a motive and you may reject it as a reason but still be satisfied beyond reasonable doubt as to the guilt of Vincent O'Dempsey and convict him of these charges."

[88] In his closing address, Mr Meredith dealt with the issue in less than a page of transcript in an address that spanned 29 pages. Defence counsel was even more succinct about the Crown's theory of motive. His submission was only this:

> "The Crown, of course – and his Honour will direct you this – that the Crown don't have to establish a motive in a case of murder, and they certainly don't, as a matter of law, have to do that. But as a matter of commonsense, and as a matter of practicality, if you're being asked to say that someone killed someone else, you really want to know why it's said they did it. I mean, it's not suggested, for example, that Mr O'Dempsey is just a crazy man who kills people. It's not suggested that there was any other reason than that really quite silly motive which has been advanced by the Crown."

[89] In truth, as defence counsel submitted to the jury, and as the jury must have appreciated anyway:

> "Now, as I say, the evidence for the Crown case rests principally upon the evidence of McDonald or Scully or MQS, or perhaps more than one of them."

[90] Motive played a very small part in this case. Defence counsel rightly told the jury that the thrust of the Crown case lay in the evidence that the appellant had made admissions that he had killed the McCulkins and in the appellant's post-offence conduct that was capable of amounting to an admission of guilt by conduct. In the circumstances of the evidence in this case and the manner in which the parties conducted the trial, it cannot be said that the appellant lost a "fair chance" of acquittal,[14] or a "real chance"[15] or a "chance that was reasonably open to him".[16] The circumstantial case against him was very strong and the evidence of admissions, if accepted, pointed powerfully to his guilt.

[91] Grounds 1 and 2 should be rejected.

Ground 3

[92] The appellant's third ground of appeal is that his Honour erred in admitting the evidence of Billy McCulkin pursuant to s 93B of the *Evidence Act* 1977.

[93] Billy had given a written statement to police on 5 February 1974 about the disappearance of his wife and daughters. He also furnished a further "addendum" statement. In 1980 Billy gave evidence at an inquest into their disappearance. The Crown sought to tender these statements and a transcript of Billy's evidence at the inquest under s 93B of the *Evidence Act* 1977 in Dubois' trial and Dubois applied to Applegarth J for a ruling that they were inadmissible. His Honour ruled that they be admitted. By agreement between the parties, his Honour's ruling in the application by Dubois was treated as binding upon the parties in the appellant's trial.

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14 *Festa v The Queen* (2001) 208 CLR 593 at [199], [229], [253].
15 *Grey v The Queen* (2001) 75 ALJR 1708 at [54].
16 *De Gruchy v The Queen*, *supra*, at [116].

[94] Section 93B provides as follows:

"**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."

[95] An equivalent of s 93B was considered by the High Court in *Sio v The Queen*.[17] The following propositions emerge from the Court's joint judgment[18] in that case:

1. The provision is concerned to relax the exclusionary effect of the hearsay rule in relation to an assertion of fact by a person who had personal knowledge of that fact;

2. The provision proceeds upon the assumption that the asserted fact is relevant to the case of the party seeking to adduce evidence of the representation that asserts that fact;

3. The provision thus directs attention to the particular representation that asserts the relevant fact;

4. The provision therefore requires the identification of the particular representation that asserts the relevant fact;

5. The circumstances in which that representation was made must then be examined to determine whether the conditions of admissibility have been met;

6. This process must be applied to each relevant representation containing a fact that is sought to be proved by means of the provision;

7. It is impermissible to approach the task on a compendious basis whereby an overall impression is formed about the general reliability about all the statements sought to be tendered;

8. The provision operates upon on the footing that the circumstances in which the representation was made may be seen to be such that the dangers which the hearsay rule seeks to prevent are not present or are negligible in the circumstances;

9. The provision requires that a trial judge be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay character;

10. The circumstances in which a representation was made may include other representations which form part of the context in which the relevant representation was made, such as other statements that are inherently fanciful, preposterous or demonstrably incredible;

11. The trial judge is not required to form an opinion about the reliability of the representor as a witness because the representor will not be a witness; rather, the essential task is to identify the objective circumstances, if any, that warrant a conclusion that the representation is likely to be reliable.

[96] The task imposed by s 93B is, therefore, one that requires the trial judge to make a finding of fact upon which the admissibility of the evidence depends. In this case,

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17 (2016) 259 CLR 47.

18 *supra,* [55]-[71].

the issue for the judge was whether he was satisfied that each representation was made in circumstances making it highly probable that the representation was reliable.

[97] The appellant makes three submissions about the admission into evidence of Billy McCulkin's statement containing the representations relied upon:

(a) Applegarth J failed to "assess and apply the section to the reliability of each representation";

(b) The statements were given over two weeks after the disappearances came to the attention of Billy McCulkin and could not have satisfied the requirement that they were "made when or shortly after the asserted fact happened";

(c) The circumstance that Billy McCulkin made the statements while assisting police in locating his family is not a reasonable basis upon which to conclude that the statements were reliable because not every husband assisting police in such circumstances gives reliable evidence.

[98] The first and second of these submissions contend for an error of law. The third submissions raises an error of fact.

[99] In dealing with the objection to the admission of this evidence, Applegarth J had to deal with Billy McCulkin's 14 page statement to police, a separate single addendum statement and 126 pages of transcript of evidence that Billy gave at the 1980 inquest. It would have been possible for this mass of material to be culled and reduced to segments containing only the relevant representations that contained the facts to be proved. Even so, the resulting document would have had to contain contextual material to make sense of the central representations. Much of what Billy McCulkin said in this material was uncontroversial or harmless to the defence. Understandably, rather than undertaking the unnecessary and oppressive task of redaction, the parties approached the problem of the determination of admissibility in a practical way. The relevant representations were identified and submissions were directed towards these. Consistently with this practical approach, on appeal the appellant confined his objection to Billy's statements concerning his two conversations with the appellant and his evidence about his own actions around the time of the disappearances.

[100] Applegarth J set out the relevant representations in 35 paragraphs.[19] He then directed his attention to the circumstances surrounding the making of the statements.

[101] In relation to eight particular statements, which his Honour set out in a table,[20] Applegarth J set out the particular circumstances put forward by the appellant as undermining their reliability and, having considered each of these individual sets of circumstances, concluded that these were not matters that impinged upon the reliability of the statements.[21] At the pre-trial hearing the appellant had led evidence from Billy McCulkin's second wife, who was still alive. Her evidence was that Billy had confessed to her that he himself had killed Barbara and his daughters. This evidence was said by the appellant to be a circumstance that bore upon the reliability of Billy McCulkin's statements. Applegarth J rejected her evidence

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19 *R v Dubois (No 7)* [2016] QSC 325 at [12] to [47].

20 *supra,* [48].

21 *supra*, [49]-[51].

entirely as lacking any credit[22] and so it became irrelevant as a possible circumstance to be considered.

[102] The appellant also led evidence about the content of police "running sheets" recording interactions between police officers and Billy McCulkin. It was submitted to Applegarth J that these demonstrated that the statements about Billy McCulkin's contacts with Dubois should be excluded. His Honour considered this as a matter that bore upon the admissibility of those particular statements[23] and decided that they had no effect upon the reliability of those statements.[24]

[103] Otherwise, his Honour had regard to the fact that each of the statements was made in circumstances in which an individual whose wife and daughters had disappeared was assisting police to find them and also to find those responsible for their disappearance.[25] Having examined those particular circumstances, his Honour concluded that the statements had been made "in circumstances making them highly likely to be reliable".[26]

[104] He paid particular attention to particular statements made by Billy McCulkin that the appellant challenged for distinct reasons and his Honour dealt expressly with each such individual challenge.[27]

[105] In *Sio* the High Court was at pains to point out that the elements of the provision have to be considered in relation to each statement sought to be proved. The provision would not be satisfied by a global judgment concerning all the statements taken together. This proposition was emphasised because *Sio* was a case in which one particular statement had a distinctly different character from all the others. All of the statements had been made in generally the same circumstances, namely in a situation in which the representor had been arrested as a person suspected of armed robbery and murder in company with another man. After his arrest he made statements to police implicating himself. He had also made a particular statement implicating his accomplice, Sio, who, he said, "gave [him] the knife" and "put [him] up to robbing the brothel".[28] This particular statement was different from the other representations made by this representor. It was a statement that implicated the accused person as an accomplice. In that case one statement was made in circumstances that were not the same as the circumstances in which all the other statements had been made. This particular statement had the added circumstance that it was made by a person who, as an accomplice, might be motivated by a desire to shift blame for the crime onto the accused. It was therefore insufficient to consider all statements together without appreciating that the circumstances of their making differed in this crucial respect.

[106] In this case, Applegarth J made no such error. As I have explained, the relevant statements were identified by his Honour by reference to the facts sought to be proved. His Honour then considered the particular circumstances that bore upon some, but not all, of the statements, namely certain inconsistencies, the evidence of

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22 *supra*, [77], [85], [86].
23 *supra*, [94].
24 *supra*, [102].
25 *supra*, [110].
26 *supra*, [110], [113].
27 *supra*, [48].
28 *Sio*, *supra*, [66].

the ex-wife and the content of the running sheets. His Honour then considered the circumstances that bore upon all the statements made in common. This was in accordance with the requirements of the section and the requirements of authority. His Honour made no error.

[107] The appellant's second submission is that the statements did not satisfy the provision because they were not made shortly after the asserted fact. That is an argument that can be disposed of shortly.

[108] First, as Applegarth J observed, the appellant did not submit to him that he should find that the police statements were *not* made "shortly after the asserted fact happened".[29]

[109] Second, this factor is irrelevant because his Honour found that the statements had been made in circumstances making it highly probable that the representations were reliable and thus satisfied s 93B(2)(b). That rendered it unnecessary, in strict terms, for his Honour to decide whether s 93B(2)(a) had been satisfied although his Honour held that that provision had also been satisfied.

[110] The third submission was that the fact, as his Honour found, that Billy McCulkin made the statements while assisting police in locating his family was not a reasonable basis upon which to conclude that the statements were reliable because not every husband assisting police in such circumstances gives reliable evidence.

[111] That is a challenge to a finding of fact. In *Attorney-General (NSW) v Jackson*,[30] a case concerning whether a trial judge had correctly found the facts that were necessary to justify the admission of depositions as evidence at a trial, Griffith CJ said:

> "It is a settled rule that, when the admissibility of a deposition is in question, all relevant questions of fact must be determined by the presiding Judge, and, although probably his decision on this point is subject to appeal, and would be set aside if it were manifestly not warranted by the evidence, yet, unless it appears that that is the case, his decision is final."

[112] The Court of Appeal does not sit in judgment on factual findings made by trial judges on *voir dire* or on preliminary rulings.[31] Nor is an appeal under s 668D of the *Criminal Code* an appeal by way of rehearing.[32] The Court sits to correct error and, in the case of errors of fact, an appellant must show that there was no evidence to support the finding or that the evidence was all one way.[33] The appellant did not attempt to do this but merely asserted a conclusion. This submission must be rejected.

Ground 6

[113] The appellant submits as his fourth ground of appeal that Applegarth J's directions failed adequately to warn the jury about the "impacts of delay" on the appellant's ability to defend himself. During oral argument, this ground was distilled to a submission about his Honour's treatment of the evidence of Estelle Long.

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29 *supra*, [104].
30 (1906) 3 CLR 730 at 742.
31 *R v Kyriakou* (1987) 29 A Crim R 50 at 57 *per* Yeldham J with whom Carruthers and Grove JJ agreed.
32 *R v O'Donoghue* (1988) 34 A Crim R 397 *per* Hunt J with whom Carruthers and Wood JJ agreed.
33 *R v Bennetts* [2018] QCA 99 at [12] *per* Bowskill J with whom Sofronoff P and Mullins J agreed.

[114] In January 1974 Ms Long and Billy McCulkin were living together in a flat in Annerley. Ms Long had insisted that Billy "stay away from his old associates" and get a job. He did, and took a job as a dogman for a construction company. It was Ms Long's custom to drive him to work each morning. After work, Billy would go home to shower and change and then, perhaps after visiting his wife and children, go to the Federal Hotel in Spring Hill, where Ms Long worked, to take her home. Ms Long recalled that one evening he came to the Federal Hotel and told her that his family was missing. She said that he appeared "terribly upset and worried". After she had finished her shift at work, she drove him to various places searching for his family. Ms Long said that prior to his telling her about his family's disappearance, Billy had not been unexpectedly absent from her.

[115] In cross-examination it emerged that Billy had told Ms Long that he had "knowledge" of the Torino fire and how it happened. He told her that it "was a great fire". Ms Long understood that as "his way of saying he knew more about it than he should have". After the Whiskey Au Go Go fire, Billy told Ms Long that he had been held for questioning overnight by police. He "looked terrible, kind of panicky". The cross-examination established that Ms Long knew that Billy had used her car without her knowledge and that she was not in a position to deny that he might have used her car without her knowledge on other occasions while she was working.

[116] Ms Long first gave a police statement recounting these matters in 2014.

[117] Ms Long's evidence was evidently led, in part, to exclude the possibility that Billy had killed his wife and daughters. It raised that possibility or, perhaps, that likelihood. In his closing address, defence counsel's only submission about Ms Long was that she was not in a position to exclude the rational possibility that Billy had taken some opportunity, about which Ms Long was unaware, to go to his wife's home and murder his family.

[118] The appellant's complaint on appeal was that "the issue of the delay and whether that affects the jury's reliability (*semble*, jury's assessment of her reliability?) was not addressed. That's as high as I can put it."

[119] This ground cannot be accepted. His Honour first dealt accurately and in detail with the content of Ms Long's evidence and emphasised to the jury her inability positively to exclude the possibility that Billy had done away with his family at a time when Ms Long was unaware of his absence. His Honour pointed out that Ms Long had found out that Billy had been seeing another woman behind her back and had used her car to do so. His Honour explained the significance of that to the jury:

> "So, you can tell from that that Mr McCulkin had time, perhaps during the day, to pursue an affair in any event."

[120] His Honour then directed the jury:

> "So the context is this: If Wednesday, the 16th of January 1974 was a working night for Ms Long – that is an if – if it was a working night for Ms Long, was there a window of opportunity, a narrow window of opportunity or non-existent window of opportunity, for Mr McCulkin to take the car without her knowing, arrive at 6 Dorchester Street sometime after the defendant and Mr Dubois leave

> – they do not say, and no one else does, that they saw him there that night. So on the assumption that he takes the car without Ms Long knowing it, what window of opportunity is there for him to go to 6 Dorchester Street without anyone seeing her car parked there. He arrives there at some time after the defendant and Mr Dubois leave, and he waits there long enough for Vicki to come home after 10, or after 10.30 perhaps, and then takes his family for a drive and then, on this hypothesis, he kills all three of them, disposes of their bodies and returns the car before Ms Long notices that it is missing.
>
> Now, that is on the assumption – and it is only an assumption – that she was working that night. If she was not working that night then you have a different factual scenario and you are back to her evidence, which you have to carefully assess, that there were no unexpected absences that week at night-time. So that is the more detailed account of Ms Long's evidence about unexpected absences and the like.
>
> Well, that brings me back to the point about which I made yesterday, and that is, to round off the McCulkin hypothesis, that it is not for the Defence to prove the McCulkin hypothesis but it is for the prosecution to persuade you that that hypothesis is just unreasonable or, if it is a reasonable hypothesis, that it is excluded. So it is the prosecution's task to exclude that hypothesis. It is the prosecution's task to exclude any reasonable hypothesis that someone other than the defendant killed Mrs McCulkin and her daughters."

[121] In his written argument the appellant conceded that a *Longman*[34] direction was not required. That concession was correct. The evidence was that Billy McCulkin had confronted the appellant and Dubois on Saturday 19 January 1974 and asked them whether they had been at Barbara's home on the previous Thursday. Earlier on the same day Billy had put to the appellant that one of the neighbour's children had seen him there with Dubois. Both the appellant and Dubois denied to Billy that they had been there. It follows that the question of their presence at the Highgate Hill house had been raised at a time when it was possible for the appellant to determine where he had been on that Thursday night if not at Barbara McCulkin's house. In any case, this was not in issue at the trial because the appellant accepted that he had been there. Consequently, the appellant was in no way disadvantaged in formulating his answer to the charges by the delay from the events until trial.

[122] Otherwise, the submission that the reliability of Ms Long's evidence was not addressed by his Honour in the summing up is not correct and I reject it. Her ability to exclude the possibility that Billy McCulkin had opportunities to visit his wife without Ms Long's knowledge was the substance of the cross-examination, it was the single point made by defence counsel in his final address and it was fairly identified to the jury as an issue and explained by his Honour. It is impossible that the jury could have failed to understand that Ms Long's evidence did not give Billy an unassailable alibi.

Ground 7

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34 *Longman v The Queen* (1989) 168 CLR 79.

[123] By Ground 7 the appellant maintains that Applegarth J should have given a *Shepherd*[35] direction in relation to the evidence of admissions made by the appellant.

[124] *Shepherd v The Queen* is authority for these propositions:

1. If it is necessary for a jury to reach a conclusion of fact as an indispensable, intermediate step in the reasoning process towards an inference of guilt, then that conclusion must be established beyond a reasonable doubt;[36]

2. Whether it is desirable for a trial judge to identify an intermediate conclusion of fact in the summing up in order to instruct them that it must be proved beyond reasonable doubt will depend upon the particular case;[37]

3. Such an instruction will only be possible where the conclusion is a necessary link in a chain of reasoning. Even then, particularly when that is obvious, the instruction may not be helpful;[38]

4. The more facts that are relied upon to found an inference of guilt, the less likely it is that each or any fact will have to be proved beyond a reasonable doubt;[39]

5. The cogency, that is to say the persuasiveness and the conclusiveness, of the inference of guilt in a circumstantial case is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance;[40]

6. In a circumstantial case, an inference of guilt can be drawn without the jury having to be satisfied beyond a reasonable doubt about each fact upon which that case depends;[41]

7. The question for the jury is whether the inference of guilt has been proved beyond a reasonable doubt, not whether any particular fact has been proved beyond a reasonable doubt.[42]

[125] This was a circumstantial case. The Crown relied upon an array of facts from which the appellant's guilt should be drawn. These included the following:

1. The appellant's presence with Dubois at the McCulkin home on the last occasion on which Barbara McCulkin and Leanne and Vicki were seen alive;

2. The appellant's false denial to Billy McCulkin and Bruce White that he had been present;

3. The family's very sudden and unplanned disappearance in unexplained circumstances;

4. The appellant's selling of his car, his interest in land, his vacating his unit without notice, and his sudden departure from Brisbane;

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35 *Shepherd v The Queen* (1990) 170 CLR 573.
36 *Shepherd*, at 585 *per* Dawson J.
37 *ibid*.
38 *ibid*.
39 *Shepherd*, at 593 *per* McHugh J.
40 *ibid*.
41 *Shepherd*, at 578-579 *per* Dawson J.
42 *Shepherd*, at 592 *per* McHugh J.

5. The involvement of Dubois and his associates in the Torino's fire;

6. The occurrence of the Whiskey Au Go Go fire shortly after the Torino's nightclub arson;

7. The trepidation of Dubois and his associates about being implicated in the Whiskey Au Go Go murders;

8. Barbara McCulkin's gossiping about the Torino's nightclub fire;

9. The appellant's admission to Kerri-Ann Scully;

10. The appellant's admission to Warren McDonald;

11. The appellant's statements to MQS;

12. The appellant's instructions to MQS to school Robin Haines about what to tell police about McDonald;

13. The appellant's comment to MQS that Kerri-Ann Scully was "gonner get … fuckin' off".

[126] The appellant's false denials to Billy McCulkin and Bruce White that he had been at the McCulkin house and his sudden flight from Queensland were particularly cogent facts pointing to his guilt.

[127] The appellant's counsel admitted at the trial that the appellant and Dubois had been present at the McCulkin home on the evening of 16 January 1974. The appellant suggested no explanation to the jury for his false denials to Billy McCulkin or White. The defence response was that he had not made the denials. Billy McCulkin and the appellant had been friends to the extent that the family had given him lodging. There had been no falling out between them. Yet, rather than assist his friend to search for his family, as Ms Long did and as Mr Wild did, the appellant falsely denied that he had even seen them. In the absence of an innocent explanation, and none was proffered, this repeated lie was conduct which was inconsistent with innocence and amounted to an implied admission of guilt.[43] If the jury accepted this evidence, the denials were powerful indicators of guilt.

[128] The innocent explanation suggested to account for the appellant's flight from Queensland was that O'Dempsey and Dubois were escaping Billy McCulkin's threat that, "[i]f anything has happened to them" he would "blow the heads off the person whoever done it". The jury might well have thought that the appellant's excuse was peculiarly indicative of the appellant's consciousness of guilt. On the appellant's case, when Billy uttered his threat to kill anyone who had harmed his family, all that was then known to the appellant was that Billy McCulkin's family, that he had deserted, had left home without telling him. On the appellant's case there was no reason for him, or for anybody else, to think on Saturday 19 January, that the three McCulkins had been murdered as distinct from thinking that they had moved away without telling Billy. As late as April 1975, the appellant told Detective Bruce White that, in his opinion, it was possible that the family had left home to avoid Billy McCulkin. Even at the trial itself, the appellant would not accept that they were even dead and required the Crown to prove death. In short, on the appellant's case, the appellant's false denials to Billy and his sudden departure

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43 *Edwards v The Queen* (1993) 178 CLR 193 at 208 *per* Deane, Dawson and Gaudron JJ.

from Brisbane were inexplicable. On the Crown case they constituted evidence of guilt.

[129] Similarly, the appellant's statements to Scully, McDonald and MQS which implicated him in murder were strong evidence of his guilt.

[130] All of this evidence established a powerful circumstantial case against the appellant, particularly in the absence of any contrary evidence.

[131] In this case there were no "intermediate facts which constituted indispensable links in a chain of reasoning towards an inference of guilt".[44] Rather, guilt was to be inferred from a number of circumstances which, taken as a whole, eliminated the hypothesis of innocence.[45] No *Shepherd* direction was called for.

Ground 8

[132] The appellant's final ground of appeal is that the summing up "traversed the proper boundaries of judicial direction" and "favoured the prosecution and served to undermine the defence case". The appellant submits that it was "the cumulative effect of the comments throughout the summing up rather than any specific infringement" that constituted this crossing of boundaries.

[133] The summing up took two days to complete. It had been supplied in draft to counsel in good time for them to consider its contents and to advance submissions about any possible inadequacies in it. During the course of those two days the summing up was interrupted by argument about particular facets of it. At its conclusion, as is invariably the case, the learned trial judge invited counsel to raise any matters for redirection. At no point did defence counsel, a barrister of four decades experience in criminal trials, raise any complaint about lack of balance in the summing up. This omission indicates strongly that defence counsel, hearing the summing up in the course of the whole dynamic of the trial, got no sense that the summing up was balanced against his client's case. Nevertheless, the argument having been made, it is necessary to consider the summing up to determine whether this ground has merit.

[134] A trial judge has an obligation to identify the real factual and legal issues in the case. The jury is therefore entitled to have a compendium of the evidence in the case, of the facts to which that evidence relates and of the applicable law as applied to the evidence and the facts. In a trial that extends over many days and in which many witnesses have been called, a synopsis of this kind, in a sensible order that is suited to the jury's task, is indispensable.

[135] In cases, such as the present, in which the defence calls no evidence, a proper summing up will be inevitably be devoted to the facts led by the Crown to support its case and the summing up can deal with the defence case only by reference to the way in which the defence invites the jury to treat the Crown evidence.

[136] In my respectful opinion, the appellant's particularised complaints are nothing more than cherry picking statements in the summing up without acknowledgement of context.

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44 *Shepherd*, *supra*, at 579 *per* Dawson J.

45 *Shepherd*, *supra*, at 593 *per* McHugh J.

[137] Thus, it was submitted that his Honour directed the jury that the fact that Billy McCulkin's statements were made to police rendered them liable to be taken more seriously and rendered them more reliable.

[138] In fact, his Honour did not direct the jury that the fact that Billy's statement was made to police rendered it reliable. The appellant's written outline gives no transcript reference to this alleged direction. Certainly, that feature formed part of his Honour's reasoning for admitting the statements under s 93B of the *Evidence Act* 1977.[46] But it formed no part of the summing up. On the contrary, after relating the content of the statements, his Honour directed the jury as follows:

> "You have to decide whether you accept as reliable the things that appear in Mr McCulkin's witness statement and in his sworn evidence at the inquest. The first statement was made relatively shortly after the events which it says happens.
>
> His evidence at the inquest is many years later, and it is reasonable to infer that he refreshed his memory before giving that evidence by reference to his witness statement. The witness statement was not his first encounter with police. It is apparent from the evidence that he contacted police on the Friday night, and also spoke to police on the Saturday. The witness statement brought his evidence together in one document. It was not a contemporaneous statement, but it was made within a few weeks of the events to which it related. You have to consider whether the passage of time over those few weeks led to his account being inaccurate or misleading.
>
> You have to consider whether he had any reason to mislead or conceal information. No one likes to speak ill of the dead, but let me say this: Mr McCulkin appears to have been a detestable individual in many respects; a wife-basher, a petty criminal, and a philanderer. The critical issue for you is not so much an assessment of Mr McCulkin's character, but the likelihood that he truthfully and accurately told the police what he knew about the disappearance of his family, his searches for them, and his encounters with the defendant and others on Saturday 19 February 1974."

[139] It was then that his Honour correctly put before the jury the questions that they had to consider in assessing that evidence:

> "After that, he hits her in the face, a disgraceful act. Was his violence towards his sister a case of the old adage that the truth hurts? Was his conduct on the night of Friday 18 January 1974, of running around town, seeking out people who might know where his wife and daughters were, the signs of a desperate man who feared that his wife and two daughters had come to harm? After sleeping a few hours, he enlisted Mr Wild and returned to Dorchester Street on the Saturday morning, where he is told by Janet Gayton that Vince and Shorty had been there the previous Wednesday.
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> Is his conduct, including the violence he inflicts on his sister, the actions of someone who is desperately seeking out his missing wife

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46 *Dubois (No 7)*, *supra*, [110].

> and daughters? Did he think they had come to grief? If you conclude that he was desperately trying to find his wife and daughter, and to find out how they went missing, then the issue is whether he was likely to give the police, in the following days, an accurate and reliable account of his movements, who he spoke to, and what they said to him. Did he have any reason at that stage to misstate what he had been told by the defendant or others? Are his reports of those matters to police relatively soon after the event likely to be accurate in the circumstances? Is his evidence about his movements and encounters corroborated by others?
>
> I repeat, in the context of the documentary evidence, in the form of Mr McCulkin's statements, the warning that I gave earlier about the need for caution in deciding whether to accept as reliable things relayed to you as hearsay. Hearsay may be unreliable. If you accept hearsay evidence, then you have to consider and apply caution in deciding the weight that should be given to it."

[140] *Broadhurst v The Queen*[47] the House of Lords characterised a summing up in this way:

> "The Chief Justice indicated his opinions very freely during his summing-up, and they were usually, if not invariably, against the accused. The opinions of the presiding judge on issues of fact can often be of great assistance to the jury. But it is very important that the jury should be told that they are not bound by them nor relieved thereby of the responsibility for forming their own view. Nevertheless, a jury is likely to pay great attention to them: and even in a case where a proper warning is given, an appellate court may still intervene if it considers them far stronger than the facts warrant. ..."

[141] The present is not a case in which Applegarth J expressed any view at all about the facts. Instead, as his Honour was bound to do, he laid out the relevant evidence and instructed the jury about the real issues to which that evidence gave rise.

[142] The appellant contends that his Honour's summing up in relation to the defence theory that Billy McCulkin was the murderer was not balanced because his Honour put to the jury that they had to consider the lack of real opportunity for Billy to do so without Ms Long noticing his absence. The supposed fault in those observations was not developed in writing or orally. That is understandable because the complaint is without merit.

[143] Ms Long had good reason to think about Billy's movements and his opportunity to be absent from her as soon as he told her that his family had disappeared. The family had been observed alive on the evening of 16 January as late as about 10.30pm. They were missing on the very next morning. Consequently, if Billy had taken them away, he must have done so on the night of 16-17 January. The evidence of Ms Long was that in the period preceding his telling her, on the night of Friday, 19 January, that his family had disappeared, he had not been unexpectedly absent. It was Ms Long who drove him to work each morning. In the summer he started work at 4.30 am. To raise this as a real issue, there had to be a possibility on the evidence that Ms Long had not noticed Billy's absence on Wednesday night.

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47 [1964] AC 441 at 464, cited with approval in *R v Grimaldi* [2011] QCA 114 at [15] *per* Chesterman JA.

Nothing like this was put to her in cross-examination and it was not plausible on the evidence.

[144] The appellant also contends that his Honour's summing up about the evidence of admissions was unbalanced.

[145] His Honour summarised the prosecution contentions about the likelihood that the admissions were made to Scully, McDonald and MQS. He then summarised the contrary defence contentions. No complaint was made at trial or on appeal about either of those summaries. His Honour then told the jury expressly that any comment he might make about this topic could safely be ignored by the jury. His Honour then continued:

> "However, you may think that the lack of detail argument cuts both ways. If the defendant was as cautious as Mr McDonald and Ms Julie Fenton suggest, then if he was to say anything about his involvement in the McCulkin murders, it would not include much detail. For example, the circumstances of the killings, the detail of the killings or where the bodies were disposed of. So that's a competing argument. But there is the argument that these confessions lack detail. So a confession that lacks detail has this problem. It's unlike a confession that has a lot of detail that can be verified, or a confession that has a lot of detail that can be falsified. So they're the arguments about detail or the lack of detail in the alleged confessions.
>
> Next, you have to consider the proposition that there were three alleged confessions in 40 years. If the defendant was as cautious as Mr McDonald and Ms Julie Fenton suggest and, say for argument's sake, if you had your doubts about Mr MQS's evidence about a confession, then one has two confessions in 40 years. You may think that shows a cautious approach, to say the least. One in the late 1990s and one in late 2011, early 2012. One to a trusted right-hand man, the other to a woman to whom he may have been engaged, and with whom he was living as husband and wife. So consider those arguments, including the argument that someone who's super cautious would not confess at all at any time in 40 years. And the competing argument that two or three over 40 years is equally consistent with a high degree of caution. Ultimately, you consider those submissions about the confessions in general. You have to, though, return to each alleged confession and assess the credibility and reliability of the witness, and assess the likelihood that the defendant would have made the very limited disclosure he did in the circumstances for the reasons the prosecution submits."

[146] The appellant submitted that "it was unnecessary for his Honour to make any comment" about these matters. That is far from enough to sustain this ground of appeal. It must appear that the summing up was unfair, lacking in judicial balance and so partaking of partiality as to render this trial a miscarriage of justice.[48]

[147] The appellant rightly conceded that the remaining instances of supposed imbalance that were put forward would not, on their own, sustain this ground if the complaint

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48 *Green v The Queen* (1971) 126 CLR 28 at 34 *per* Barwick CJ, McTiernan and Owen JJ.

just considered was rejected. Indeed, I have considered them and they are all without any substance or merit.

[148] I would reject this ground.

Additional Ground

[149] By leave the appellant urged an additional ground. It was that the learned judge erred in directing the jury to consider the whole of the evidence suggestive of guilt in assessing whether each confession was made and whether it was true.

[150] The appellant submitted orally that "the jury ought to have been confined in their assessment of whether each of the confessions was made and were true to the circumstances limited to the making of the confession rather than to the broader prosecution case which might have tended to suggest that he was in a situation where he was likely to make a confession or that he also made a similarly sparse confession to another person which might improve the likelihood that he would do so to Scully, for example."

[151] It was said that the reason why it was impermissible to consider other evidence apart from the immediate circumstances surrounding the making of the confession was "because it distracts them from the central issue of an assessment of the credit or reliability of the circumstances in which it was made".

[152] In *Burns v The Queen*,[49] an authority relied upon by the appellant, Barwick CJ, Gibbs and Mason JJ formulated these propositions:

1. When evidence that an accused person has made a confession is not the only evidence in the case, the jury are entitled to consider the whole of the evidence in deciding whether or not they are satisfied of the guilt of the accused;[50]

2. Any evidence that has been admitted at the trial and is relevant to the question whether the accused made the confession may be considered by the jury in relation to that question;[51]

3. In a case in which the accused's case is that the circumstances pointed inconclusively to his guilt and led police to fabricate the confession, consideration by the jury of those other, inconclusive circumstances may distract the jury from the real question, which is one of credit;[52]

4. It is not possible to lay down a general rule as to whether the jury may consider other evidence pointing to guilt in deciding whether a confession was made and that question depends upon all of the facts of the particular case.[53]

[153] Jacobs J agreed with Barwick CJ, Gibbs and Mason JJ.

[154] In this case the defence argued that the admissions had not been made. The admissions had not been made to police but to lay persons. This was not a case like *Burns* in which it was contended that police had identified a person who could

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49 (1975) 132 CLR 258.
50 *Burns*, *supra*, at 263.
51 *ibid*.
52 *ibid*.
53 *Burns*, *supra*, at 264.

plausibly be suspected of being guilty by reason of other, inconclusive evidence and against whom the police had decided to offer fabricated evidence of a confession. In such a case, reliance upon such other evidence would beg the question whether the confession had been fabricated. That is not this case. Here, the persons to whom the admissions were said to have been made were unknown to each other. The admissions were made years apart. The defence case was an assertion that the appellant was a cautious man who had a propensity not to make disclosures or admissions to anybody. The jury had to consider all of the evidence in the case in deciding whether that proposition was plausible and whether it raised a doubt about the making of the admissions. Nothing in *Burns* supports the impermissibility of such reasoning. Indeed, the second of the propositions stated above is directly against this point.

[155] I would reject this ground.

[156] For these reasons I would dismiss the appeal.

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

[158] **BROWN J:** I agree with the reasons of President Sofronoff and the order proposed by his Honour.