SUPREME COURT OF QUEENSLAND

CITATION:	*R v Huebner; R v Maher* [2004] QCA 98
PARTIES:	**R** **v** **HUEBNER, Sven** (appellant) **R** **v** **MAHER, Amy Louise** (appellant)
FILE NO/S:	CA No 291 of 2003 CA No 301 of 2003 SC No 17 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2004
JUDGES:	McMurdo P and McPherson and Williams JJA Separate reasons for judgment of each member of the Court, Williams and McPherson JJA agreeing as to the orders made, McMurdo P dissenting in part
ORDERS:	**1. In the appeal by Huebner – CA No 291 of 2003:** **(a) appeal allowed** **(b) quash the conviction for murder** **(c) substitute a verdict of guilty of manslaughter** **(d) remit the question of sentence for the offence of manslaughter to the Trial Division** **2. In the appeal by Maher – CA No 301 of 2003:** **(a) appeal allowed** **(b) quash the conviction for murder** **(c) order that there be a re-trial for the offence of manslaughter** **(d) the appellant is remanded in custody for re-trial**
CATCHWORDS:	EVIDENCE – ADMISSIBILITY AND RELEVANCY – SIMILAR FACTS – TO PROVE INTENTION – where appellants convicted of murder – where evidence was admitted at trial by a witness who had been assaulted by appellants under similar circumstances to that of victim –

where learned trial judge in summing-up indicated that evidence could be used to prove intent – whether evidence admissible – whether evidence probative of motive or intent with respect to killing of victim – whether learned trial judge gave adequate warning as to the limited use that could be made of similar fact evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – WHERE GROUNDS FOR INTERFERENCE WITH VERDICT – PARTICULAR CASES – WHERE APPEAL ALLOWED – whether learned trial judge's comments in relation to the evidence in his summing-up were speculative – whether verdicts unsafe and unsatisfactory – whether re-trial for murder should be ordered

BRS v R (1997) 191 CLR 275, cited
Gipp v R (1998) 194 CLR 106, cited
Pfennig v R (1995) 182 CLR 461, applied
R v O'Keefe [2000] 1 Qd R 564; [1999] QCA 50; CA No 332 of 1998, 5 March 1999, cited
R v Olney [1996] 1 Qd R 187, distinguished

COUNSEL: P J Callaghan for the appellant in CA No 291 of 2003
B W Walker SC, with F H Martin, for the appellant in CA No 301 of 2003
A J Rafter SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant in CA No 291 of 2003
Ryan & Bosscher for the appellant in CA No 301 of 2003
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I have benefited from reading the reasons for judgment of Williams JA in which the facts and issues are set out. I will only repeat or add to these where needed to explain my own reasons for agreeing with Williams JA that in Huebner's case the appeal should be allowed and the conviction for murder quashed and an acquittal directed; a verdict of guilty of manslaughter should be substituted and the matter remitted to the primary judge for sentence. In Maher's case I have reached a different conclusion to Williams JA: in my view, her appeal should be allowed, her conviction for murder quashed and an acquittal directed on both murder and manslaughter.

Melissa Gazsik's evidence

[2] The evidence of Melissa Gazsik is central to the prosecution case and to all grounds of appeal and for that reason I will refer to it in some detail. She knew each appellant from university where they were all students and had a particularly close relationship with Huebner. In May 2000, she was upset at recently breaking up with her boyfriend and was stressed about her approaching university examinations. Huebner told her that he and Maher had a surprise planned to cheer her up and so they arranged that when she finished lectures at 3.00pm on 29 May she would go

with Huebner on his motorbike to meet Amy for the surprise. He drove her to a parkland area near Birkdale, arriving there at about 3.30 pm.

[3] Maher gave her a hug. Huebner immediately grabbed her from behind, put his arm around her in a headlock and started to apply pressure to her throat. She was a little scared and said, "Look, Sven, this isn't funny. Stop it." He increased the pressure on her neck. She struggled, punched his leg with her right hand, and tried to free herself but he was much stronger. She thought she scratched his face and pulled off his necklace in her continued struggle. She lost her balance and fell down amongst some gum tree roots where she cut her face. Huebner straddled her from behind and again applied pressure using his thumb and forefinger on either side of her pharynx. She continued to struggle and kicked him with her legs to get out of his grip and roll away; he continued to apply pressure to her throat; sometimes she struggled out of his pressure grip and was able to breathe. Huebner asked Maher to come over and help him by sitting on Ms Gazsik's legs. Maher did not immediately assist Huebner but eventually came over and sat on Ms Gazsik's legs as he requested. Huebner again placed his thumb and forefinger on either side of Ms Gazsik's windpipe and was cutting off her air supply. During the struggle the one thing Ms Gazsik clearly remembered was Huebner saying, "Why won't she die?" whilst he held her throat. In cross-examination she said that she was sure he used these words rather than "Why won't she go out?" but agreed that at the committal proceedings she conceded the possibility that he used those words; she then conceded that, because of the circumstances, her memory may not be accurate and it was possible Huebner did say "Why won't she go out?"

[4] When she could struggle no longer, she was unable to breathe and passed out for an unknown time. She regained consciousness and she coughed up a little bit of blood. Huebner had his hand on her windpipe but was not applying pressure; he and Maher were still sitting on her legs. Huebner said something like, "Oh well, this is useless." Maher went to a backpack and removed two velcro straps whilst Huebner continued to sit on and restrain Ms Gazsik. Huebner made her kneel in front of a gum tree and told her to put her hands behind her back. He secured her wrists and elbows with the velcro strap and said to Maher something like, "See, velcro works better than knots or ropes."

[5] At some point, Huebner gagged her by placing a plastic bag or bags tied to form a golf-sized ball inside her mouth and securing this with another piece of unknown material tied around her mouth. She was then unable to breathe other than through her nose. Maher brought back two velcro strips and bound her legs at the shins or ankles and around her thighs. Huebner, with the help of Maher, then picked her up and carried her to the other side of the gum tree where they laid her down, facing away from the tree. Huebner said something to the effect of, "Lie there and be quiet and don't struggle." She tried to ask Maher for help but could not make herself understood because of the gag. Maher joked around, saying, "I can't understand what you're saying, Melissa, don't bother" and then later, "Look, just lie there and be quiet and do what he says and you'll be alright." She lay on the ground for a time and saw Huebner and Maher look through her bag and purse, including her credit cards; they commented, "Well, we can't use this" and "This will be very useful."

[6] It was now quite dark. She was unsure how long she remained in this position but it could have been about 45 minutes. She recalled them discussing how Maher could go to the toilet and that they consumed snacks and drinks. Her arms became very

sore from the bindings and she was shivering from cold and shock. She communicated this to Huebner who removed the bindings, telling her to keep her arms behind her back. Later, Huebner and Maher both put their jackets on her and then lay on her to warm her.

[7] They then removed the bonds from her legs and assisted her to another area five metres away where there was a white sheet on the ground and a rope strung up between two trees about a metre off the ground. Huebner made her sit facing away from the rope and attempted to put the noose over her neck. She resisted; he said, "Look, just do what I'll tell you and it will be OK." He put the noose over her neck and she felt tension being placed on the noose. She heard Huebner pull on one of the ropes, saying in a stern but not raised voice something to the effect of, "These ropes are attached to pulleys. If I pull them tighter, you'll die. So don't try to run away or scream or do anything like that." She decided to comply. Maher was not more than half a metre away, just sitting and watching; she was close enough to hear the conversation. In essence, he said, "If you try to run away or if you try to scream, I'll pull this tighter." In cross-examination, she said that although Huebner tightened the noose a little, it was not tight enough to make her experience any pain or discomfort.

[8] The gag was removed from her mouth not long after the noose was placed around her neck. Once the noose was secured and the pulleys tightened a little, Huebner offered her orange juice from the backpack. She was concerned that they were trying to poison her, so Maher took the container from Huebner and drank some first. Ms Gazsik then drank a little juice. After what seemed like 15 or 20 minutes, Huebner said, "We love you. We didn't really want to do this to you … we wanted to show you to get your priorities right. We'll be in deep trouble if you tell anybody what we've done. We love you very much. We wouldn't want to hurt you if it wasn't necessary." Maher put her hand on her legs, stroked her legs as a friend, comforted and hugged her and nodded and agreed with Huebner's statements. Ms Gazsik then broke down and cried and, in her words, confessed her "entire life sins" telling them that she was now a changed woman and had her priorities right; she told them anything they wanted to hear.

[9] Huebner also put his hand on her leg and comforted her. All three were crying and talking. At one stage Huebner kissed her on the lips. Huebner and Maher comforted, hugged and stroked each other. Huebner asked whether she would like to engage in a threesome but she declined saying, "You did this to show me who I really am and that's not who I really am"; they nodded and accepted this. Maher gave her a yellow teddy bear with "Melissa" embroidered on it together with a card on which was written something to the effect of, "We love you and will always be there for you". They were interrupted by a noise in the bush; Huebner and Maher packed up and all three left the area. She believed Huebner and Maher had no malicious intent but acted out of love or concern for her.

[10] She originally had arranged for her father to pick her up from Ipswich Railway Station after the "surprise" arranged by Huebner and Maher, planning to catch a train home. She phoned her father from Huebner's house to let him know that Huebner would drive her home. She showered and changed at Huebner's home, all three went to "McDonalds" together and Huebner drove her home. She visited her doctor the next day and he noted bruises and minor injuries consistent with her frightening experience, including petechial lesions around the eyes, which can be

associated with asphyxiation or strangulation. She made no complaint to police until 8 January 2002.

The other prosecution evidence

[11] The learned primary judge identified in his summing-up the circumstantial facts relied upon by the prosecution to establish the case of murder against each appellant. The first was "the evidence of the scream and chase up Murton Avenue late on the Saturday night, the female person being chased carrying a largish piece of white cloth or blanket" and that the only bedding washed by Maher at 107 Murton Avenue was a blue blanket.

[12] Williams JA has set out the relevant portions of this evidence in his reasons for judgment.[1] This evidence was so divergent, vague and unreliable that it could not be safely concluded that whatever the witnesses heard or saw had any connection with events concerning the appellants and the deceased in or around 107 Murton Avenue on the evening of 18 August or the early hours of 19 August 2001. If this evidence is looked at as one strand in a rope of circumstantial evidence, it is such a thin and frayed strand that it contributes nothing to the strength of the rope; although admissible it had very little persuasive weight and established nothing of significance.

[13] The second matter referred to in the summing-up is the evidence of Ms Gazsik. The prosecution contended that whilst Ms Gazsik cooperated and so was not seriously hurt, the jury could draw the inference that, in the absence of such cooperation from the deceased, Huebner escalated his violence, killing her. I will deal with this aspect of the evidence more fully later in these reasons when I consider the admissibility of Ms Gazsik's evidence.

[14] The third fact was the deceased's pre-arranged visit to Huebner at 107 Murton Avenue, Holland Park, that Saturday afternoon drawn from emails between the appellant and the deceased. These emails suggested that the deceased was looking forward to meeting Huebner and participating in "stuff" and that Huebner and the deceased were deliberately vague and secretive in their emails about what constituted "stuff".

[15] The fourth circumstance was the presence of a small quantity of blood on a rug in the room at 107 Murton Avenue where Huebner's computer was located. This blood was consistent with the blood of the deceased as the major component mixed with Huebner's blood as the minor component. No traces of Maher's blood were located. Maher and Huebner had minor injuries, (scratches and bruises), which may have been caused either in a struggle on 18 August or when bushwalking with the deceased on 15 August.

[16] The fifth matter relied upon by the prosecution was the conduct of Huebner and Maher in covering their tracks, namely leaving the deceased's vehicle at a shopping centre where she had borrowed a video, with her belongings displayed inside; disposing of the deceased's clothing, jewellery, purse and keys; purchasing chips early on Sunday morning from a service station; brazenly participating with the deceased's family and friends in organised searches as if concerned; Huebner's fabricated and misleading trail in computer files, including an email to the deceased about her sunglasses when he knew that she was dead; Huebner and Maher's

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[1] His honour’s reasons paras [69] to [77]

carefree participation in a Sunday lunch and their later attendance at a memorial service for the deceased. The falseness of this behaviour and of statements to police was established when Huebner pleaded guilty to manslaughter and later gave evidence accepting his responsibility for the death.

[17] In relation to Maher, additional facts relied upon were Maher's assistance of Huebner in Ms Gazsik's account and Maher's statement to police that Huebner passionately kissed the deceased in the computer room which, the prosecution contended, triggered a jealous response in Maher, causing her to assist Huebner in the murder.

[18] The learned primary judge told the jury that the prosecution contention was that the aggregation of those circumstances had the result that the only inference reasonably open in Huebner's case was that when he killed the deceased, as he admitted, he intended to kill her or to do her some grievous bodily harm. The prosecution contention in respect of Maher was that those circumstances established that the only inference reasonably open was that she also caused the death of, or assisted Huebner in killing, the deceased with that intent.

[19] In terms of s 8 of the *Criminal Code*, his Honour told the jury that they could only convict the appellants of murder on this basis if they were satisfied that Maher and Huebner formed a common intention to prosecute an unlawful purpose together, for example, an unlawful attack on the deceased or to deprive her of her liberty, then if murder, (killing with an intention to kill or do grievous bodily harm), was likely to be committed as a result of carrying out that plan, the appellants were guilty of murder. If the jury were not satisfied that murder was the likely or probable result of carrying out the plan in its original or escalating form as appreciated by Maher and Huebner but that a killing was, then they could convict only of manslaughter.

[20] Other relevant evidence was that the deceased was a fit and healthy young woman and the evidence did not suggest she died from natural causes. Like Ms Gazsik, she knew Huebner and Maher from university where they were all students and she had a very close platonic relationship with Huebner. She visited the appellants' residence on the evening of 18 August by an arrangement easily ascertainable from her emails and they were the last people to have seen her alive. According to the appellants, she had a blue blanket over her whilst watching TV at their place; Maher later washed the blanket. The deceased's naked body was found in bushland in the Mackenzie area on 17 November 2001 in such a decomposed state that it was impossible for pathologists to determine the cause of death. Knotted rope and two pieces of plastic wrap, more like heat shrink wrap used to wrap cartons than domestic cling wrap, were found nearby. For present purposes, I will treat Huebner's evidence exculpating Maher from all involvement in the killing as rejected by the jury.

Was Ms Gazsik's evidence admissible?

[21] Ms Gazsik's evidence was propensity evidence and such evidence is not ordinarily admissible in a criminal trial unless it is so probative or cogent that, if accepted, it bears no reasonable explanation other than inculpating the accused in the charged offence; it must be so objectively improbable that the evidence has some innocent explanation that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the charged offence. If there is a rational or reasonable view of the evidence that is consistent with the innocence of the accused,

then the evidence should not be admitted because its probative force will not outweigh its prejudicial effect: *Pfennig v R*.[2] The application of these principles to factual situations is often, as here, difficult.

[22] In pleading not guilty to murder, the appellants put every element of that crime in issue,[3] including whether each appellant was responsible for the act or acts causing the death and whether each appellant intended to kill the deceased at the time of doing that act. The prosecution case was that the only murderous intention was to kill or do grievous bodily harm,[4] not any of the extended intentions defined in s 302(1)(b)-(e) *Criminal Code*. The prosecution also relied on s 7 and s 8 *Criminal Code*.

[23] There are three bases on which Ms Gazsik's evidence was said to be admissible. The first is that, in combination with other evidence, it provides a convincing explanation as to how the deceased met her death in the company of the appellants, the last people to see her alive, and identifies the appellant Huebner as her killer. Ms Gazsik's evidence described an occasion 15 months before the deceased's death when Huebner, with some limited assistance from Maher, forced Ms Gazsik who, like the deceased, was a fellow university student and particularly friendly with Huebner, to participate in violent conduct involving the use of a rope and plastic. Such dangerous conduct had the potential to cause Ms Gazsik serious injury or death.

[24] There were obvious differences between the Gazsik episode and whatever occurred between the appellants and the deceased. The email evidence suggests that something unusual, slightly clandestine and pleasurable was contemplated by the deceased and Huebner when she visited the Murton Avenue home, whereas in Ms Gaszik's case the events were a complete and unpleasant surprise to her. A major and obvious difference between the events described in evidence by Ms Gazsik and the episode with the deceased is that Ms Gazsik was released without any serious physical injuries whilst the deceased died as a result. Those differences do not mean that Ms Gazsik's evidence was inadmissible if it otherwise met the stringent test for admissibility laid down in *Pfennig*: cf, for example, the facts in *Pfennig* and *R v McGrane*.[5]

[25] Ms Gazsik's evidence was, despite these differences, compelling enough in its striking similarities to the known facts surrounding the deceased's death to be admissible as a piece of probative and persuasive circumstantial evidence identifying in context Huebner as the killer. Ms Gazsik's evidence, combined with the evidence of opportunity, the mix of Huebner's and the deceased's blood at the house, his subsequent dishonest conduct and statements, and the finding of rope and plastic near the body in bushland, convincingly supported the conclusion that the only rational view of Ms Gazsik's evidence was that Huebner was responsible for the deceased's death, and that she did not die in some unconnected way.

[26] The prosecution contends that Ms Gazsik's evidence was also admissible as showing the relationship between Maher and Huebner relevant to the question of Maher's aiding Huebner or perhaps her involvement in a plan with him under s 8

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[2] (1995) 182 CLR 461, Mason CJ, Deane, Dawson JJ at 481-483.

[3] *R v Sims* [1946] KB 531, 539

[4] Section 302(1)(a) *Criminal Code*.

[5] [2002] QCA 173; CA No 1 of 2002, 17 May 2002.

Criminal Code. Relationship evidence is often led to show the relationship between the victim and the accused, even if such evidence is also propensity evidence. Evidence of this type requires a careful warning to the jury as to its limited relevance and use. Evidence of the relationship between two or more accused is in a quite different category and where such evidence is propensity evidence it will only be admissible if it meets the *Pfennig* test. It follows that Ms Gazsik's evidence will only be admissible on this basis if the only reasonable view of all the evidence against her is such as to exclude any rational view of Ms Gazsik's evidence consistent with innocence.

[27] The evidence of opportunity without more is not compelling; there is no evidence Maher was actually present when Huebner did the dangerous act or acts leading to the deceased's death, let alone that she assisted him or planned with him the attack; she admitted to police only some consensual wrestling, tickling and "general mucking around" and nothing in Huebner's testimony implicated her. Whilst she and Maher were always to surprise Ms Gazsik, the email arrangements seem only to have been between the deceased and Huebner, and did not involve Maher. Unlike Huebner's, her blood was not found at 107 Murton Avenue and her minor injuries were as consistent with occurring on the bush walk on 15 August as on 18 August in a struggle with the deceased.

[28] Her subsequent dishonest conduct and statements and her assistance to Huebner in disposing of the body and evidence are as consistent with the actions of the older Huebner's younger submissive partner[6] helping him after the event as with aiding him in the killing or planning with him an unlawful attack on the deceased. Such dishonest subsequent behaviour and statements are plainly a relevant circumstantial fact in cases of murder; see, for example *R v Olney*.[7] What was present in *Olney* and absent in Maher's case was the additional evidence of Olney's admission that he had twice struck the deceased with a hard object, with no exculpatory evidence that the deceased had a fragile skull. Provided the jury were warned in accordance with *Edwards v The Queen*[8] and *R v Wehlow*,[9] the jury in *Olney* were clearly entitled to use his subsequent conduct and admissions as evidence of involvement both in the killing and as to murderous intent. Subsequent conduct alone is not, however, normally sufficient to establish murder or manslaughter where there is another plausible explanation for that behaviour.

[29] The prosecution also emphasised at trial the prospect of Maher's jealous reaction to the passionate kiss between Huebner and the deceased. I cannot see this strengthens the prosecution case; Huebner also kissed Ms Gazsik on the lips and there is no suggestion that affected Maher's subsequent conduct towards Ms Gazsik.

[30] Ms Gazsik's evidence as to the relationship between the appellants, when combined with all the evidence against Maher, including the finding of the rope and plastic near the body in bushland, opportunity, her subsequent dishonesty and the evidence of the passionate kiss between the deceased and Huebner, does not exclude the reasonable hypothesis that on this occasion Huebner's fatal interaction with the deceased was neither assisted nor planned by Maher. To conclude otherwise is to reason that because she assisted and planned with Huebner in Ms Gazsik's case, she

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6 He was 32 years old and she had just turned 20 at the date of the killing.
7 [1996] 1 QdR 187.
8 (1993) 178 CLR 193, 208.
9 [2001] QCA 193; CA No 210 of 2000, 25 May 2001.

must also have done so in this case, the very type of reasoning prohibited by law; there is simply insufficient evidence of her aiding Huebner or planning with him an attack on the deceased to demonstrate her criminal responsibility for the killing and that remains so even when Ms Gazsik's evidence as to Maher's relationship with Huebner is added to that body of evidence. In other words, I am unconvinced that the only rational view of all the evidence, including Ms Gazsik's evidence, was that Maher either assisted in, aided or encouraged Huebner's killing of the deceased, (s 7 *Criminal Code*), or that she was part of some unlawful and dangerous plan with Huebner to attack the deceased, (s 8 *Criminal Code*). The application of *Pfennig* to Ms Gazsik's evidence in Maher's case means that Ms Gazsik's evidence was not admissible to show Maher's relationship with Huebner, relevant to s 7 and s 8 *Criminal Code*.

[31] The third basis on which the prosecution contends that Ms Gazsik's evidence was admissible was to show an intention to kill or do grievous bodily harm and to negate a claim of death by misadventure. A close look at Ms Gazsik's evidence does not support that contention. Her father knew she was with Maher and Huebner who had a surprise for her; Ms Gazsik, who was best placed to truly comprehend the situation, understood that Maher and Huebner did not have a malicious intent but behaved in this peculiar way to shock her into realising she should not be unhappy and that life was good. They gave her a drink; Huebner did not tighten the noose around her neck to a level of discomfort or pain; they subsequently released her without serious physical injury and presented her with the "Melissa" teddy bear and pre-inscribed card. She said that Huebner made statements suggesting an intention to kill but she expressed some uncertainty about these and, in context, they were finally more consistent with frightening her than with a murderous intention, especially as she was released unharmed and given the pre-selected gift and pre-inscribed card. The facts suggest that the appellants' intention in Ms Gazsik's case was not to kill or do her grievous bodily harm but to frighten or shock her out of her sadness; it can, then, hardly support an intention to kill or do grievous bodily harm to the deceased.

[32] The prosecution contends, however, that Ms Gazsik's evidence shows that the appellants' intention was that if Ms Gazsik had not cooperated, Huebner would have killed her with Maher's assistance and that Ms Gazsik's evidence can therefore be used to infer that in this case the deceased did not cooperate and was intentionally killed by Huebner with Maher's assistance or planning. The difficulty with that hypothesis is that Ms Gazsik's evidence remains inadmissible as to intention unless, as explained in *Pfennig*,[10] there is no rational view of it, when combined with the other evidence, consistent with the innocence of the accused. As I have explained, the most rational, indeed probable, view of Ms Gazsik's evidence was that the appellants did not intend to kill or do her grievous bodily harm but were trying to shock her out of her unhappiness. In other words, when Ms Gazsik's evidence is combined with the other evidence in the case, the rational possibility that Huebner killed the deceased in a dangerous repetition of the Ms Gazsik-type conduct, this time with the deceased, without any intention to kill or do grievous bodily harm, cannot be excluded. Adopting the *Pfennig* test, Ms Gazsik's evidence was not admissible as evidence of an intention to kill or do grievous bodily harm.

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[10] Above, 483.

[33] It follows that, in my view, Ms Gazsik's evidence was only admissible on the limited basis of Huebner's disposition on another occasion to forcefully place a female student and close friend in a life threatening situation, involving rope and plastic. This provided an important link in a strong circumstantial case against him of manslaughter and identified him as the killer. The evidence was not admissible to establish an intention to kill or do grievous bodily harm and nor was it admissible against Maher to show that she aided, assisted or encouraged Huebner or was part of an unlawful and dangerous plan with Huebner to attack the deceased. The jury were not directed as to the limited use that could be made of Ms Gazsik's evidence[11] and the absence of that direction is an error of law, itself warranting a new trial in this case. Had that direction been given, it would have highlighted the weakness in the prosecution case on murder against both appellants and in the case of manslaughter against Maher. A review of the admissible evidence does not support the conclusion that the appellants intended to cause death or grievous bodily harm; the prosecution has not excluded the rational possibility, indeed likelihood, that Huebner dealt with the deceased in a dangerous manner and so caused her death, but without intending to do grievous bodily harm or to kill. The admissible evidence does not establish to the requisite standard of proof that Maher aided, assisted or encouraged Huebner nor that they planned an unlawful and potentially dangerous attack on the deceased.

[34] As a result, the verdicts of guilty of murder in each case are unsafe and unsatisfactory and the appeals must be allowed, the verdicts of murder quashed and verdicts of acquittal of murder entered. Whilst there is a convincing prosecution case against Huebner for manslaughter, the matter is beyond all doubt because he has pleaded guilty to it. In Huebner's case, a verdict of guilty of manslaughter should be substituted and the question of his sentence should be remitted to the Trial Division.

[35] Maher is in a different category. Huebner has now given an account to the court which does not implicate her in any way. Although a jury would be entitled to reject his evidence, it does not strengthen the prosecution case against her. Because of the limited use to be made of Ms Gazsik's evidence, there is simply no evidence of any s 8 *Criminal Code* plan or s 7 *Criminal Code* assistance on her part. Opportunity and her subsequent dishonest conduct and statements, without more, are not enough to exclude the reasonable hypothesis that her involvement was only subsequent to the death, as the older Huebner's younger submissive partner[12] helping him only after the unintended killing. The evidence against Maher at its highest is only capable of supporting a very convincing prosecution case for the offence of accessory after the fact to manslaughter, punishable by a maximum term of two years imprisonment (see s 10 and s 544 *Criminal Code*). A conviction for that offence was not open on the indictment presented in this case. I would further direct that in Maher's case a verdict of acquittal be entered for manslaughter. It is a matter for the prosecuting authorities whether, bearing in mind the time she has now spent in custody, they wish to pursue her on any lesser charge.

[36] I propose the following orders:

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11 See *BRS v The Queen* (1997) 191 CLR 275, 305, 329 and *Gipp v the Queen* (1998) 194 CLR 106, 132.

12 See fn 6.

1. In Huebner's appeal, CA No 291 of 2003, allow the appeal, quash the conviction, direct a judgment and verdict of acquittal be entered for murder, substitute a verdict of guilty of manslaughter and remit the question of sentence for the offence of manslaughter to the Trial Division.

2. In Maher's appeal, CA No 301 of 2003, allow the appeal, quash the conviction for murder and direct that a judgment and verdict of acquittal be entered for murder and manslaughter.

[37] **McPHERSON JA:** I agree with what Williams JA has written. The appeals must be allowed to the extent stated in his Honour’s reasons.

[38] There were major gaps in the proof of the Crown case of murder against the two appellants based on the evidence at the trial. The killing of Linda Roberts was sufficiently proved by the appellant Huebner’s own testimony. Whatever else the jury might have thought of it, his evidence at the trial established that her death was caused by his agency or instrumentality, and his plea of guilty to manslaughter in Court was a solemn and formal public admission to that effect.

[39] There was, however, no evidence at all to show that he or, for that matter, the appellant Maher, intended to kill or do grievous bodily harm to the deceased. Even if the Gaszik incident was admissible on that issue (and I agree with Williams JA that it was not), it could show no more than that the appellants had treated Linda Roberts in August 2001 in the same way as they had Ms Melissa Gaszik in May 2000. There is no basis for inferring that on that occasion they meant to kill their victim (which in fact they did not do), and certainly none that is capable of supporting any such inference beyond reasonable doubt.

[40] It follows that, even if the assumption could be made that something like the same conduct was repeated in August 2001, it cannot be relied on to justify the conclusion that an intention to kill or do grievous bodily harm accompanied the conduct towards Linda Roberts. For the purpose of proving a case of murder against them or either of them, it would not have been sufficient to say that, in the light of their experience with Ms Gaszik, they ought to have known they were taking a risk with her life. It might possibly have made it manslaughter, which Huebner himself admitted by his plea at the trial. It could not have made it murder.

[41] For that reason among others, the attempt to use s 8 of the Code to convict one or both of the appellants on the murder charge was also fatally flawed. Section 8 is designed to make a person criminally responsible for criminal conduct constituting an offence that someone else has committed or carried out. If both have committed it, there is no occasion to invoke s 8. It is in substance an application or extension to the field of criminal responsibility of the rule of civil law that each partner or participant in a joint action or enterprise is liable for wrongs done by the other while acting within the scope of that enterprise. Before that can happen under s 8, there must first be proof of an “offence”, which means conduct which, accompanied if necessary by other requisite circumstances such as a particular state of mind, renders the person doing it liable to punishment: *R v Barlow* (1997) 188 CLR 1, 9. Here, therefore, at least one of the two appellants must have been guilty of murder before the other could be made criminally responsible for it by the operation of s 8. If the Crown failed, as in my opinion it did, to prove a murderous intention against either one of the appellants, neither of them could be made criminally responsible

under s 8 for murdering the person killed. Expressing it in another way, Maher's criminal responsibility under s 8 for the murder of Linda Roberts depended on proof at the joint trial that Huebner had killed her with the necessary intention. For the reasons already given, the necessary evidence to that effect was lacking.

[42] The question that remains is whether on the evidence admissible against Maher, it is open to a jury properly instructed to return a verdict of manslaughter against her. To invoke s 8 for this purpose, it would be necessary to prove that she together with Huebner formed a common intention to carry out "an unlawful purpose", and that the death by manslaughter or unlawful killing of Linda Roberts was a probable consequence of carrying it out. The first question is what, consistently with the evidence, that unlawful purpose could have been. It is not enough to say that they intended to deprive her of her liberty; for that, it sufficiently appears, was something she was consenting to. Nor is it permissible to speak of the possibility of "escalating" violence or the like (of which there was no evidence) in the course of carrying out the common intention or plan. If the violence or some such other conduct "escalated" beyond what had been jointly planned or intended, the appellant Maher would not under s 8 bear criminal responsibility for its unplanned and improbable consequences unless she actively participated in engaging in it herself. See *R v Richie* [1998] QCA 188. In that event, s 8 would cease to be relevant.

[43] The same would, I think, apply to criminal responsibility as a party under s 7(1)(b) or s 7(1)(c) of the Code. In practical terms the only way in which, as I see it, the Crown could, without proving her actual participation in the fatal acts themselves, establish her criminal responsibility for the offence of manslaughter by Huebner is by showing at least that she assisted or enabled him to do an act that caused the victim's death. The direct evidence does not go as far as that.

[44] I therefore have some hesitation in agreeing that there is evidence against Maher that justifies an order for a new trial on a charge of manslaughter. It may, however, be open to a properly instructed jury to reach such a verdict and to do so beyond reasonable doubt. It would, as Williams JA suggests, be open to the jury to draw inferences about her guilt from her actions after the event in assisting the processes of concealing the killing and diverting subsequent police inquiries away from herself as well as Huebner.

[45] I agree with the orders proposed for disposing of the appeals.

[46] **WILLIAMS JA:** After a nine day trial the jury convicted the appellants, Huebner and Maher, of the murder of Linda Roberts. Each has appealed against conviction; essentially each contends that the verdict was unsafe and unsatisfactory, there should have been a ruling of no case to answer (at least on murder), and evidence from the witness Melissa Gaszik was wrongly admitted.

[47] The deceased Roberts visited the appellants at the home in which they were then residing at 107 Murton Avenue, Holland Park, on the afternoon of Saturday, 18 August 2001. She was not seen alive after that. Until day four of the trial all statements made by each appellant was to the effect that the deceased left that house at about 11.30pm that night, and neither was in any way involved in her death. The naked body of the deceased was found in bushland at Mackenzie on 17 November 2001; it was badly decomposed and nearby was a rope noose and some plastic. The

state of the body was such that it was impossible for pathologists to determine the cause of death.

[48] Pleas of not guilty to the charge of murder were entered on 10 June 2003 and that was followed by a pre-trial hearing pursuant to s 592A of the Criminal Code. Relevantly for present purposes a ruling was made on 20 June 2003 that the evidence of Gaszik was admissible in the trial of the appellants for the murder of Roberts.

[49] Given the arguments addressed to this court it is important to consider the prosecution case as outlined to the jury at the outset of the trial. The Crown prosecutor in referring to the visit by the deceased to the house at 107 Murton Avenue on 18 August, suggested that there was "an element of pressure" put on the deceased by Huebner for her to make that visit. He then said: "Well, we now know, but she [the deceased] did not, what it means to be a friend and guest of Huebner and Maher. Indeed, it remained unknown until later in 2001 when a young QUT student [Gaszik] came forward to police and told of an ordeal she had undergone in May of 2000." The Crown prosecutor then outlined evidence Gaszik would give of that "ordeal" at the hands of Huebner and Maher, which relevantly involved tightening a noose around her neck with some type of pulley mechanism until her level of consciousness was affected. It was immediately after referring to that evidence of the Gaszik incident that the Crown prosecutor referred to the finding of the body of Linda Roberts with "a rope noose and plastic bags" nearby. The prosecution opening also contained reference to blood (identified by DNA testing to be that of the deceased) on a curtain, on a door, on a rug on the floor, and on a carpet tile in the house at 107 Murton Avenue.

[50] Evidence was outlined of persons living in Murton Avenue hearing a woman scream and seeing a "woman being chased by a man" in Murton Avenue on the night of 18 August. It was said that that evidence would also indicate that the woman "appeared to be carrying something". In that context the opening contained a reference to the fact that when police went to the house in Murton Avenue the following day they noticed a blue blanket on the clothesline.

[51] It was opened that the deceased drove her Nissan Pulsar motor vehicle to the house at Murton Avenue on 18 August. That vehicle was located by the deceased's father on 20 August parked in the Wishart Shopping Centre. The prosecutor said that other evidence would establish that the vehicle had been there since the early morning of 19 August. The jury was told that some of the deceased's blood was located on a mattress found in the boot of that vehicle. Significantly the jury was then told by the prosecutor: "It's eventually going to be a matter for you whether you connect the blood at Murton Avenue to the blood on the boot and in the boot of the car or whether they come from unrelated incidents."

[52] For present purposes it is sufficient to say that the balance of the opening significantly concentrated on what was described as a "cover up" by each appellant of their involvement in the death of the deceased. Reference was made to various statements by each appellant to the police to the effect that the deceased had left the home driving her own car, to each participating with relatives of the deceased in the search for her, to the washing of the blue blanket ("a blue blanket which may or may not be what was seen by [the witness Mr Peea] or for some other reason had to be washed") and other conduct of each said to indicate consciousness of guilt.

[53] The opening concluded with these observations to the jury by the prosecutor: “It is not a case that can be presented to you on a platter. This requires some thinking and some consideration – a close consideration of the evidence. The picture may well emerge in this way, that when you know about what happened to Melissa Gaszik and you can put a number of other pieces of evidence into a connected and comprehensible pattern that it was Huebner and it was Maher who were responsible for the killing of Linda Roberts.”

[54] It can therefore be said that the Crown case was not specific as to where the killing occurred; it could have been in the house at Murton Avenue where the deceased’s blood was found, or it could have been at the place in the bush where her body and the noose were located. It was clear, however, that the prosecution case was that the death was occasioned in the course of activity similar to that which had occurred in the incident involving the witness Gaszik.

[55] By lunch time on day three of the trial some 20 prosecution witnesses had been called and the jury had viewed a number of locations relevant to the evidence. At that time the first significant change in the direction of the trial occurred. Counsel for Maher made the following formal admission: “Amy Maher instructs me to admit the following fact, or facts: Linda Roberts’ car, the Nissan Pulsar, registration number 292-FZL, was driven by Sven Huebner with herself . . . Amy Maher being in the passenger front seat of the said vehicle when the said vehicle was left at the Wishart Shopping Village between the hours of approximately 1.30 a.m. and 2.30 a.m. on the morning of 19 August 2001”. That was the first direct evidence associating either of the accused persons with that vehicle after Roberts (dead or alive) left the house at Murton Avenue. The admission was contrary to all Maher’s statements to investigating police officers that Roberts had driven off in her vehicle at about 11.30pm.

[56] Then on the morning of the next day, day four of the trial, counsel for Huebner asked that his client be re-arraigned. On that occurring Huebner pleaded guilty to the manslaughter of Linda Roberts. The prosecution did not accept that plea in discharge of the indictment alleging murder. Though that plea was entered there was then nothing before the jury to indicate in what circumstances Linda Roberts met her death which meant that Huebner was guilty of her manslaughter. It was subsequent to that (days five and six of the trial) that Gaszik gave evidence.

[57] The incident involving Gaszik occurred on 29 May 2000. She had commenced studying at the University of Technology the previous year and had met both appellants who were also students there. The three were in a regular group of friends at the University who socialised together. In about April 2000 Gaszik broke off a relationship with another male student and that was an upsetting experience for her. She had discussed that with each of the appellants and Huebner told her that he had “a surprise planned for me to cheer me up.” On the afternoon in question she went with Huebner on his motorbike to a parkland area near Capalaba where Maher was waiting for them. They arrived late afternoon and the incident in question continued well after dark. Shortly after arrival Huebner grabbed Gaszik from behind and started to attempt to strangle her. She struggled to free herself and in the course of doing so fell down, lying on her face. Huebner then straddled her and placed his thumb and forefinger on either side of her windpipe. Huebner asked Maher to come and help him and to sit on Gaszik’s legs so she could not struggle. Maher hesitated and Huebner coaxed her to do so; ultimately Maher sat on Gaszik’s

legs. Gaszik's evidence then was that she could not breathe and she heard Huebner say, "Why won't she die?" She then passed out for a period and on regaining consciousness coughed up a little bit of blood. After that Huebner forced Gaszik to kneel in front of a gum tree with her hands behind her back; Velcro was then used to tie her wrists. Huebner said, "See, velcro works better than knots or ropes". A plastic bag was made into a ball and placed as a gag in her mouth; another piece of material was tied around her face covering her mouth. Thereafter Huebner picked Gaszik up with the help of Maher and carried her to an area a short distance away. Then Huebner looked through Gaszik's purse, making comment on her property. Huebner and Maher had some snacks and Amy went to the toilet. At about that time Gaszik complained that the bindings on her arms were hurting and Huebner removed them. She was shivering with cold; first Amy and then Huebner, lay on top of her for a period to make her warm. Then she was taken some short distance away where there was a single white flat bedsheet on the ground and a rope strung between two trees. Huebner placed a noose over Gaszik's neck and told her to "do what I'll tell you and it will be okay". Gaszik felt tension being placed on the noose and her evidence was that it sounded as though the ropes were attached on pulleys. She heard Huebner say that if he pulled them tighter "You will die". In the course of that episode she was offered some orange juice. Huebner said, inter alia: "We love you. . . . We wanted to teach you a lesson . . . We wanted to show you to get your priorities right . . . We wouldn't want to hurt you if it wasn't necessary." Gaszik broke down and began to cry and said she was "really sorry". Then Huebner and Maher began stroking Gaszik's leg and hugging her apparently in an effort to comfort her. Huebner kissed Gaszik on the lips and then Huebner and Maher started kissing it was at that stage that according to Gaszik Huebner suggested they engage "in a threesome". Gaszik said "No" to that. Maher produced a yellow teddy bear with the name "Melissa" embroidered on the front of it and gave it to Gaszik. There was a card attached to it reading: "We love you and we'll always be there for you." After that Maher and Gaszik walked for about 15 minutes or so to reach Huebner's parents' house where Gaszik showered and was given a change of clothing – she had wet herself during the struggle. She was then driven back to her house by Huebner. The following day she was examined by her general practitioner, Dr Andrew. His evidence was that on his examination he noticed three bruises to the right forearm, a smaller bruise on the left forearm, a linear abrasion to the left side of the jaw, and petechial lesions around the eyes which were usually found in association with asphyxiation or strangulation. He also noted a complaint of a sore right shoulder joint. Gaszik agreed that she made no complaint to the police until 8 January 2002.

[58] It was not until day seven when Huebner gave evidence that the circumstances of the death underlying his plea of guilty to manslaughter were revealed. Initially there was playful, consensual wrestling between he and the deceased in the course of which each sustained a minor abrasion which bled. His evidence was that later on he was demonstrating bondage techniques to Roberts who was a fully consenting party to rope being placed around her neck. He briefly left her tied up in the computer room and somehow she fell forward and strangled herself in the noose. He and Maher panicked on finding her dead; they made unsuccessful attempts to revive her. The body was then placed in the bathtub for a period of time before Huebner removed the deceased's clothes and, for some reason not made entirely clear, he cut the top of her right leg with a knife causing blood to collect in the tub. Thereafter he placed the body in a suitcase and transported it in the deceased's

vehicle to the bushland area where it was subsequently found; Maher was then with him. After that he and Maher disposed of clothing and jewellery of the deceased and left the car at the Wishart Shopping Centre. Thereafter to cover up his role in her death he told lies to the police and relatives of the deceased.

[59] Huebner accepted Gaszik's account of the incident with her save that he denied saying "Why won't she die" and denied suggesting a "threesome". His explanation for what he did was that Gaszik was depressed and needed cheering up. As he put it: "My intention was to bring Melissa to a state where I guess her core values were – were clear to her. . . . she'd always have something upon which to stand to say, 'Well, I've gotten through that' . . . So that's the intention I had."

[60] Huebner's evidence was, of course, admissible against Maher, but Maher herself did not give evidence.

[61] Because of the references to these matters in the final address of the prosecutor and in the summing up it is necessary to refer to the evidence of communications between the deceased and Huebner leading to her visit to 107 Murton Avenue on the afternoon of 18 August, and also to the evidence of a scream being heard some time during the evening of 18 August.

[62] The evidence relating to the background of the deceased's visit to 107 Murton Avenue on 18 August is principally to be found in Huebner's record of interview with investigating police, his evidence at trial, and in the extracts from the exchange of emails between he and the deceased (exhibit 50). Generally the evidence suggests that, though they had initially met much earlier, over the three or four years prior to 18 August 2001 there was regular, almost daily, contact between Huebner and the deceased, mainly by telephone or email. The emails from the deceased are particularly instructive. That of 18 June 2001 clearly indicates that she was interested in "stalking". That is confirmed by the email of 18 June which indicated she considered it "fun to stalk Darren cause he's not that bright and if he caught us, he'd believe that were (sic) only doing it for a short while." The following email of 19 June asked Huebner when he wanted "to do it" and asked could "we use your night goggles?"; that was a reference to a set of night vision goggles which Huebner had acquired. From those emails the clear inference can be drawn that the deceased was interested in using those night goggles as part of the game of stalking.

[63] The email from the deceased to Huebner of 1 August suggests that the following Saturday "would be perfect . . . anytime before about 4." It is not clear what she was referring to, but clearly she was indicating willingness to make some assignation with Huebner on that Saturday (presumably 4 August). That seems to be confirmed by a slightly later email on that same date: "Well i will come over on Satruday (sic) after i have been to gym." Therein there is also a reference to "Darren". Then on 2 August the deceased said she was "curious as to what you want to talk to me about".

[64] An email from the deceased of Tuesday, 7 August, refers to the things "we talked about on Saturday", so one can readily infer that there was a meeting as arranged on the previous Saturday. Further, the deceased indicated there was something about a "secret" discussed. Then by 9 August 2001 the deceased was saying in an email to Huebner: "In my diary i have saturday the 18 August booked in the afternoon for you to do that stuff". There is nothing in the emails to indicate what was meant by

her reference to "stuff", but Huebner said in his evidence-in-chief at trial that it was a reference to "ropes and things" in the context of bondage. Certainly it has to be conceded that the meaning he attributed to the expression was not inconsistent with the general thrust of the emails.

[65] There was evidence at trial, and indeed it appears to have been generally accepted, that Huebner, Maher and the deceased, together with others, went bushwalking in the region of Natural Arch on Wednesday 15 August, which was the Exhibition public holiday in Brisbane.

[66] Against the background that as early as 9 August the deceased had indicated in an email that she intended seeing Huebner on Saturday 18 August, an email containing the following extracts was sent by her to Huebner on 17 August 2001:

> ". . . Although (sic) we had a day off during the week and not to mention that I have a crusty job. I can't wait to relax for a while. . . .
>
> I have a bottle of Kaluha that i guess i can demolish over the weekend if i get too lonely. I will try some of these chips if i am hungry when i come over on Saturday night . . .
>
> . . . Have you got any blankets in case i fall asleep? . . .
>
> I should have fun catching up with Denise on Sunday. I just hope im in the mood for it. If I have time on the way home i am going to call in and see Michelle as well.
>
> I forget (sic) to take the pill this morning and maybe yesterday . . . I thought i took it, but i feel pains coming on which is great cause i haven't had a period still since April. It's not good that i forgot though cause a baby right now would stress me out . . . Decisions . . . and i really don't think i want a baby. . . . Maybe a baby would be fun to have in say another 6 years or so . . . But what if the baby is ulgy (sic)? . . .
>
> I'll bring over my peroxide tomorrow night and show you how cool my belly ring is when I mix it with peroxide . . . (excited???)"

[67] It should also be noted at this stage that according to Huebner's evidence there was no sexual relationship between he and the deceased though they talked regularly about "intimate things".

[68] Huebner's and Maher's statements to police indicated that on the evening of 18 March they went with the deceased (in her car with Huebner driving) shortly after dark to a park near Logan Road where the deceased used the night scope, though no-one was actually "stalked". In evidence Huebner admitted that was false; he did not even have the goggles at Murton Avenue that night. That story to the police was part of the concocted events to exculpate the appellants.

[69] Evidence as to the scream came from the witnesses Peea, Bernice Minniecon, Caralee Minniecon-Bero, Jameson, Grewer and Walsh.

[70] Grewer and Walsh lived next door to 107; generally their house was on the southern side of 107. The former saw the deceased arrive at 107 shortly after 3.00pm. They both went to bed about 9.30pm and neither heard anything that night that caused them any concern; in other words, neither heard any scream.

[71] Peea, Bernice Minniecon, and Caralee Minniecon-Bero resided in the house on the corner of Holland Road and Murton Avenue; it adjoined 107 generally to the north. Peea and Bernice Minniecon went to the movies on the evening of 18 August. His evidence was initially that they went to the Balmoral theatre, but ultimately he had to concede that it was the Hawthorne theatre. His evidence was that on returning home Bernice went to bed and he began watching cricket on the TV. He said in chief that around about 10.30pm he heard a "woman's scream", which he described as loud and short. On looking out the window he "saw a woman running along this – that road there on the side of the footpath". He then made it clear that he was referring to Murton Avenue and the woman was on the black bitumen when he saw her. According to his evidence the woman went "On to Holland – Holland Road on to the other side". He described her as young but could not be more specific as to age. When specifically asked whether he saw anyone else on the street or footpath he replied "No-one". In evidence-in-chief when asked whether was she carrying anything he replied: "She had something like a blanket". When the prosecutor then said: "A blanket, right?" he answered "Or towel". He then said it was "white" and "quite big"; she "had it on her shoulder". He said the woman was "just running".

[72] The prosecutor then asked him specifically whether he saw anyone else with the woman and specifically whether he ever saw a man in the street that time; he answered both questions in the negative. That resulted in the prosecutor showing the witness his statement of 21 August 2001 to the police. After reading that statement Peea was again asked: "Did you see a man on the street and on this street, this Murton Avenue, that night?" to which he replied "After her?". When the prosecutor said "Yes" he responded "Yes". Thereafter Peea said the man "was running up the road too"; he was running up Murton Avenue into Holland Road. The description then given by the witness of the man was that he was wearing a cap, wearing dark clothes, and was pretty short. When asked did he know either of them the witness answered "No". When asked whether the man was running slower or faster than the woman he replied: "Slower, I think."

[73] According to the witness he then put his shoes on and went out to follow the people he had seen running in the street. He then gave evidence, the relevance of which is hard to ascertain of a white station wagon coming out of a street on the other side of Holland Road and then travelling towards Logan Road. (Under cross-examination he agreed the person driving the car was not the man he had seen running in the street.) The witness on arriving at the corner of Murton Avenue and Holland Road could not see either the man or the woman who had been previously been running in Murton Avenue. When he came back, presumably on Holland Road, he saw "some families dropping off their kids". In answer to further questions Peea agreed he did not see where the man and woman came from, and was not sure as to "where that scream came from".

[74] Some further points need be noted arising from the cross-examination by counsel of Peea. Firstly, he agreed that in his initial statement to the police he said the scream was heard "between midnight and 1 o'clock a.m. . . . closer to 1 o'clock a.m.". Secondly he agreed with the proposition that he associated the scream with the

direction of Holland Road (to his right) and not to 107 Murton Street (to his left). Thirdly, he agreed he gave somewhat different answers at committal with respect to the blanket or towel. The effect of the cross-examination (matters agreed to by the witness) was that when he initially gave his statement to the police he did not know what the woman was carrying; the police suggested it was a blanket and that was why he put that in his statement.

[75] The evidence from Caralee Minniecon-Bero was that she went to bed early and "around about midnight we heard a really loud, eerie scream." She said it was "coming out of Murton Avenue going down the Holland Park Road". She stayed in bed and was unable to give further relevant evidence.

[76] Somewhat different evidence was given by Bernice Minniecon. She referred to going to the movies with Peea and going to bed shortly after they arrived home. She did not hear any scream, but was awoken by her sisters saying they "had heard screaming, something". She went out into the front yard of their residence and a "bit after that . . . saw four people walking up the road and they walked past the house." There were two boys and two girls; "one of them was holding a – a white blanket or a pillow or something". It was one of the girls holding that object. Under cross-examination she said she did not look at a clock but thought it was around "12-ish" or a bit later.

[77] Finally is there is the evidence of Jameson, who lived on the corner of Holland Road and Reuben Street; the latter ran off Holland Road slightly west of the intersection of Murton Avenue and Holland Road. She was asleep in bed when she "heard two people arguing outside". There was a "lot of yelling and screaming going on". She got up and looked out and "just saw two people and just seemed to be more of a verbal thing than a physical argument, so I went back to bed." She said the two were a male and a female. She put the time at about 11 o'clock. Under cross-examination she agreed that in her statement to the police she had indicated she had the impression that the two persons were "headed along Holland Road in an easterly direction".

[78] In the course of Huebner's record of interview the police put to him that neighbours had heard a disturbance in Murton Avenue on the night of 18 August. Huebner denied that he heard or saw anything like that. He was then specifically asked: "was that you chasing Amy up the street?" and he replied "no, not at all". He denied that Amy screamed or that anything happened "to cause Amy to run up the street". He was then specifically asked: "Was that you chasing Linda up the street?" to which he replied "No".

[79] In evidence-in-chief Huebner denied that either Linda Roberts or Amy Maher screamed that night and he also denied chasing either up Murton Avenue into Holland Road. He maintained those denials under cross-examination. In that context it should also be noted that Huebner's evidence was that the death occurred at about 8.00pm which would have put it much earlier than the scream heard by the witnesses referred above.

[80] It is also necessary to refer to one other matter from the evidence of Huebner. He gave evidence, as did Simone Keppel, that the two had a sexual relationship some 10 years earlier which did involve bondage. Huebner denied placing any material used for tying up Keppel around her neck. He admitted, of course, that he had

placed rope around the neck of Gaszik in the course of the incident involving her. He also gave evidence that he and Maher engaged in bondage in the course of which on at least one occasion he had placed rope around her neck.

[81] The evidence from Huebner, and the admission by Maher, did not materially alter the thrust of the prosecution case. The closing address of the prosecutor mirrored the case as initially opened. It is relevant to note how the case was put in the prosecutor's closing address before considering the summing-up.

[82] It is clear from a perusal of the closing address that the prosecution case of murder against Huebner and Maher depended almost entirely on the jury rationalising from Gaszik's evidence that he intended to kill Roberts, and she, knowing that was his intention, participated in the relevant events. The following relevant passages appear in the course of that address:

> "… if you were informed and alerted and listened to the account of Melissa Gaszik as to what happened to her in May of 2000 you would be alert to what it means when Linda Roberts' naked body was found in bushland and nearby there was a noose and two pieces of plastic. …
>
> The original working hypothesis of the Crown is well worth using as a bit of a guide here, namely, that this is a curious incident of Huebner for his reasons wanting to create the situation where he's got a girl on her knees with a noose on her neck, but unlike Melissa Gaszik, there's no surrender to survive and it escalates just as it did with Melissa Gaszik. But this time – this time the only solution is to kill her and that's why Linda Roberts was killed and that's why her body is naked out in the bush with the noose and plastic. … Where she was killed may never be known, whether she was killed at Murton Avenue or whether she was killed at the bush. …
>
> … I have said that we are really in a position of saying this, that it is not a question of the Crown not knowing what happened or leaving it to you to work it out, not so. I put up the proposition of reason and logic and let me repeat it. It is this: it is not necessary that the deed should be proved by the testimony of a witness actually present; it may be inferred from subsequent conduct or any other circumstances. May I add another piece now to this. It is this, that actual participation may be inferred in this case from what we know of what happened to Melissa Gaszik, right. Actual participation can be inferred, can be understood by having regard to what happened to Melissa Gaszik.
>
> …
>
> So the Crown case in Huebner is as simple as this: when you get the key to the case and that is that in his initial interviews with police he was trying to cover the bases, you get an insight into the real story and when you add in what was found at Mackenzie in November and you add in his participation in an attack on an invited friend, as we know from the Gaszik picture, it emerges here what happened, what happened to Linda Roberts, but we add to that, and this takes you to the intention aspect of it.

This went wrong and what happened was she fought. She fought to leave injuries on him. She fought so that she was injured and was bleeding. … This went wrong and it may well be that it's evidenced by Linda Roberts running in Murton Street being run down by someone behind her, but the scream, the scream of a woman attacked. …

….

Let me now turn to Maher. Allow me to introduce Amy Louise Maher through the words of her young female friend, Melissa Gaszik. Page 383 … 'After Amy brought back another two velcro strips and tied up my legs … this will be very useful, just those sorts of things.' … But then we get this, Amy Louise Maher. 'Was there any other contact … yellow teddy bear with the name Melissa embroidered on the front.' And then she went on of how Huebner left and Amy Maher walked her back to the Huebner household. That's Amy Maher participating in the attack upon an invited female friend. … We can start then with what we know of her and her participation and we can add to that her conduct afterwards, the central role that tells us her desperate wish to protect from those looking for the truth' …

Let me now tell you of what the Crown says is the appropriate approach to Maher. It's this: we cannot only tell from Melissa Gaszik's incident her participation, we get a very clear picture of her role in the participation. And these are the steps in it. There was an unlawful purpose that she and Huebner had which they had planned. Now, unlawful purpose and plan was at the very least that deprivation of liberty, the holding of Melissa Gaszik at the very least.

…

So what the Crown says is we have got an unlawful purpose, a plan to do it and we have got this escalation such that we can say the probable consequence is the killing of Linda Roberts.

. . .

Now, the Crown has charged murder and the verdicts you can remember are guilty of murder against Maher, or not guilty of murder, guilty of manslaughter for Maher. And on the application of the logic so accurate that it can take to manslaughter the Crown says it can also move to murder because there's a fair inference here that by reason of her subsequent conduct she knew precisely what was going on, plus every step she's in step with Huebner, step by step, day in, day out, there in every step. She, Maher, is no stranger to Huebner."

[83] I mention briefly some other aspects of the prosecution's closing address. The prosecutor invited the jury to conclude that Huebner lied in his evidence as to cutting the leg of the deceased. He said that such evidence was not confirmed by the evidence of the Government Medical Officer who did not note any cut in the mummified skin of the leg. It was said: "If there's no cut to be seen in the area he chose to indicate, then his whole story is a nonsense and indicates that he's doing it for some very good other reason."

[84] In that final address reference was also made to the evidence of a scream being heard in Murton Avenue on the night in question. The following passages in the address are worth noting:

> ". . . the incident in Murton Avenue. There was a scream. A scream, it was eerie, of a woman attacked. . . .
>
> There was a woman running and what she had around her may well be the blue blanket that's here in evidence. Seen at night, seen by streetlight. It is the pale blue blanket and it is a blanket that we know is part of the real story because it is something that had to be washed. It alone was what had to be washed. Had to be washed. Had to be washed the Sunday morning or shortly thereafter.
>
> …
>
> There was a woman running and being pursued. I understood my learned friend Mr Weston [counsel for Huebner] was saying, 'Well, it is an absurd proposition to say that Linda Roberts would be tackled by or caught by a much smaller person.' The evidence is that woman who was running was being run down. She may well have been injured by this stage, Linda Roberts, and that's not speculation because her blood is found in the computer room. . . .
>
> But there is more to it. It is the place. This incident, whether it's the one and the same incident that Ms Jameson over on Reuben Street sees is another matter for you, but this is happening at the time and place where we know Linda Roberts' death began, began at the very least. When you add those things altogether, it can't be ignored. There is certainly evidence that gives you a fuller picture that there was also, it seems, an intersection with a group of young people, teenagers walking up the street and one of them carrying something. So it is not crystal clear but it is this, isn't it, it is a combination of things that can't be ignored and it is a combination of things that speaks of this: distress, violence, terror, someone being run down, events that fit into the pattern of the actual participation by Huebner in the killing of Linda Roberts."

[85] In one of her recorded interviews with police Maher was asked questions about the playful wrestling which each accused had told the police took place and that was how the deceased received a cut to the forehead; that could be regarded as an account of events put forward by them to explain the presence of blood in the house. Against that background Maher was asked by the interrogating police officer: "Well, was there anything else that happened in that wrestle that may have become sexual?" The response was that there was "a kiss between Linda and Sven" and in

the next answer Maher described it as a "passionate kiss". When asked how did that make her feel Maher replied, "A little jealous but, yeah, that's okay. They're good friends". The prosecutor referred to that evidence in his final address and went on:

> "A little insight there, isn't there? Little insight. Because it's not just a matter of telling a story, it's not just a matter of describing a bit of playing around; it's a passionate kiss and she describes her emotional response to it. Right. Starting to hit reality now.
>
> Well, that's not going to be allowed to survive terribly long by Amy Louise Maher. On the 22nd you recall during the re-enactment of the wrestle when she was asked, 'And where – were you still seated There … So when the kiss occurred where were you?-- Just here.'
>
> We got the insight the day before. The passionate kiss and the jealous response. So we can add an extra element in the case of Maher. This is an element of a participation in an event that's not a teaching of how to tie a knot. It's a bizarre sexual advance."

[86] It is now appropriate to turn to the summing-up. There is no need to deal with the matters of principle which are normally found in a summing-up; there was no challenge by any party to the general directions. Of significance are those passages in the summing-up dealing with the circumstantial case against each accused, and in particular the use the jury could make of the evidence of Gaszik.

[87] The jury was instructed that the prosecution case on murder with respect to each accused was a circumstantial one. No issue is taken with the description by the learned trial judge of a circumstantial case and what was involved in the drawing of inferences. The summing-up then went on to enumerate the principal circumstances on which the Crown relied. The following were said to be relevant to the case against each accused:

(i) … "the evidence of the scream and chase up Murton Avenue late on the Saturday night, the female person being chased carrying a largish piece of white cloth or blanket; and the circumstance that only the blue blanket was washed at 107 Murton Avenue by Maher …" In that context the learned trial judge said: "Defence counsel reminded you of discrepancies as between the various accounts of all that evidence given by the respective witnesses."

(ii) "… the rather secretive taking of Ms Gaszik, a friend, to the bushland events involving rope, binding, a gag and the noose, with her being restrained, and at least a threat to tighten the noose absent cooperation." The learned trial judge mentioned in dealing with that circumstance that defence counsel mentioned that Gaszik "never believed the accused to have been maliciously driven".

(iii) "… the pre-arrangement that Ms Roberts visit the accused at 107 Murton Avenue on the Saturday afternoon."

(iv) "… the presence of blood in the computer room consistent with Ms Roberts …". In this context the learned trial judge specifically referred to the defence submission that this was "a consequence of the so-called playful wrestling".

(v) "… the subsequent conduct of Huebner with participation on the part of Maher, designed to cover tracks: placing the deceased's vehicle outside the video shop …; disposing of the clothing, jewellery, purse and keys; purchasing the chips early on the Sunday morning from the service station to leave a trail …; deceitfully participating with family and friends in organised searches; Huebner's introducing a misleading trail into the computer; Huebner sending the emails about the sunglasses to Ms Roberts when he knew her to be dead; the accused's pretense in participating with apparent equanimity in the lunching with the Keppels on the Sunday and attending the memorial service."

[88] In that context the learned trial judge then noted the defence submission that all of the particulars in (v) were referable to Huebner's panic and the realisation of his responsibility for the death, but nothing more, and in the case of Maher, her loyal support of Huebner and as the matter developed, her feeling of guilt perhaps about her involvement in the disposal of the body.

[89] The learned trial judge then referred to two additional circumstances which could be regarded as relevant when considering Maher's position.

(vi) "Gaszik's account of Maher's participation in the events involving Gaszik, including Maher laughingly counselling the gagged Gaszik to cooperate with Huebner."

(vii) "Maher's informing the police of a passionate kiss in the computer room between Huebner and Roberts and what Mr Feeney [Crown prosecutor] termed as Maher's jealous response to a bizarre sexual advance."

[90] In dealing with the additional circumstances relevant in the case against Maher the learned trial judge reminded the jury that her counsel referred to the fact that Huebner was in control of proceedings involving Gaszik and that Maher showed apparent concern for Gaszik during the incident; in addition there was "Maher's initial reluctance to sit on Gaszik's legs to restrain her when asked to do so by Huebner".

[91] Importantly the learned trial judge then told the jury that it was the Crown contention that by "aggregating those circumstances the inference to be drawn in the case of Huebner as the only inference reasonably open is that when he admittedly caused the death of Ms Roberts, he intended to kill her or to do her some grievous bodily harm". So far as the case against Maher was concerned the jury was instructed that the "Crown contention is that those circumstances warrant as the only inference reasonably open that she also caused the death and likewise, with that intent".

[92] It seems clear that the case against Maher was left to the jury on the basis of either s 7 (aiding Huebner) or s 8 of the Criminal Code. With the respect to the latter the following was said in the summing up:

> "Take for argument's sake a case where the accused together planned to abduct Ms Roberts, to deprive her of her liberty and in carrying out that plan together or in following through such a plan, which, as

> the accused appreciated, was escalating to more serious dimensions in the face of the resistance of the subject, Huebner murdered her – intending to kill or do grievance bodily harm. Huebner would then plainly be guilty of murder. But in those circumstances the accused Maher would in law be taken to have murdered Ms Roberts only if murdering someone was the kind of offence likely to result from carrying out the plan, the plan to deprive Ms Roberts of her liberty, say, or the plan in its more serious escalating form in the context of resistance."

[93] The jury was then told that two people "may work together to secure an intentional killing". Immediately following that statement the summing-up went on:

> "We have heard that most of the acts done upon Ms Gaszik, in a direct sense, were done by Huebner, but that wouldn't necessarily excuse Maher in so far as any offence was committed in relation to Gaszik from responsibility for that offence, although I stress to you strongly that there is no charged offence involving Gaszik. The only charged offence concerns Ms Roberts. I mention Gaszik and what happened with her only to illustrate how you might reason in relation to what inferentially may have been wrought upon Ms Roberts. Ms Gaszik's evidence was introduced as possibly assisting your determination of what happened to Roberts.
>
> …
>
> Mr Martin [counsel for Maher] made the point that you must not convict the accused just because of what happened to Ms Gaszik. That is quite correct. The Gaszik experience taken alone, of course, could not establish this alleged murder was committed by the accused. The Crown does not ask you to confine your attention to Gaszik. The Gaszik experience is but one of the many circumstances on which the Crown relies. Do not conclude from Gaszik in isolation the accused's guilt of anything in relation to Ms Roberts. But you may properly have regard to the Gaszik incident as one of the circumstances, perhaps a significant circumstance, depending on your view, in the overall case.
>
> …
>
> … Mr Martin rightly pointed out that Maher's merely being present would not be enough, but on Ms Gaszik's evidence, if you accept it, so far as it is relevant to your assessment to the overall assessment of the circumstantial case, Maher went beyond that. She assisted, aided Huebner in what he did to Gaszik by sitting on her legs to help restrain her, by fetching the velcro and by urging Gaszik to lie quietly and to do what Huebner said. If for argument's sake, seeing the Gaszik incident in the context of all of the other circumstances relevantly emerging from the evidence as accepted by you, you were to infer-as you consider, reasonably-that Huebner conducted himself similarly with Roberts, but went to the point of intentionally causing her death, and was aided or assisted or helped in that by Maher, then

> Maher would be liable for that death just as would Huebner, but only provided that, in aiding Huebner, Maher knew that Huebner intended to cause Roberts' death or do her some grievous bodily harm."

[94] A little later on the learned trial judge told the jury that on the "Crown contention, the evidence of Melissa Gaszik aids your determination in this case. The Crown relies on that evidence, if indirectly, as helping explain-by inference-how Ms Roberts came to die when that evidence is seen in the context of all of the circumstances of the case". Thereafter over some three and a half pages in the record book, the learned trial judge details Gaszik's evidence of what had happened to her at the hands of Huebner and Maher in May 2000. Significantly the evidence was set out in great detail, but it is not necessary to quote it here. Immediately after that the learned trial judge said:

> "The Crown submits these events concerning Ms Gaszik help explain what happened about three months later [the learned trial judge corrected that to 15 months later in redirections] to Ms Roberts. Just as the accused acted violently towards their friend Gaszik, the Crown says likewise with their friend Ms Roberts. The Crown stresses Ms Roberts' body being found at the bushland location, naked and with rope nearby, and also plastic. The Crown relies on a sexual overtone to the attack on Ms Gaszik, to be gathered most specifically from the ultimate threesome proposition if you found it was made. You recall Ms Maher's reference during the police interview to the passionate kissing of Ms Roberts at Murton Avenue. The Crown asks you to infer that just as the accused worked together in relation to Ms Gaszik, so they did in relation to Ms Roberts."

[95] Shortly thereafter this passage occurred in the summing-up:

> "We have heard medical evidence that Ms Roberts did not die from blunt trauma to the head or chest, or knife or gunshot attack. The Gaszik attack was bizarre, lurid, extremely unusual. On evidence you may accept as credible, both Ms Gaszik and Ms Roberts were friends of the accused. The accused were the last to see Ms Roberts alive. Ms Roberts' dead body was found naked, with rope and plastic nearby. Ms Roberts' death was not from natural causes. There was blood from Ms Roberts and Huebner at Murton Avenue intermixed. Ms Roberts' jewellery had apparently been thrown away, at a location near to where the body was discovered. …
>
> In all the circumstances, if you accept that sort of evidence and any other relevant evidence upon which you choose to rely, do you infer beyond reasonable doubt, as the only explanation reasonably open, that Roberts was killed by an asphyxiation which proceeded similarly as with Gaszik, but it was in the Roberts' (sic) case carried to completion? Or are any points of similarity between the treatment of Ms Gaszik and any dealing by the accused with Ms Roberts mere coincidence?
>
> There were some differences between the dealings with Gaszik and Roberts and you may have regard to matters like these in assessing the present significance of the Gaszik incident to this case. A

> number of distinctions can possibly be drawn. For example, Gaszik was depressed, Roberts generally carefree. There was a secrecy attending the arrangement with Gaszik not present in the arrangement with Roberts. Gaszik was taken to bushland, whereas Roberts to a suburban home. Gaszik was taken by motorcycle, whereas Roberts drove to the house herself by car. … It falls to you to assess whether those sorts of distinctions distance the Gaszik incident from what we know of this one sufficiently to render Gaszik of no, or of minimal, present relevance. Or, on the other hand, whether they amounted to matters of incidental detail or are otherwise explained."

[96] A little later on the learned trial judge, in dealing with the prosecution case, observed that the prosecution "scenario was that Huebner, for his own purposes, secured the position where Ms Roberts was on her knees with a taut noose around her neck. Unlike Ms Gaszik, Ms Roberts did not … surrender to survive, and the incident escalated to the point of his intentionally killing her."

[97] The importance of those passages, quoted at length, is that they demonstrate the significance and importance attached by the learned trial judge to the evidence of Gaszik, and those passages would have indicated to members of the jury the use they could make of the Gaszik evidence. This is a matter which will be considered further subsequently.

[98] The summing-up also dealt with the relevance of conduct of each accused said to have occurred subsequent to the death of Roberts. In that regard the learned trial judge said:

> "If Huebner consciously misled the police, that could be significant only if he did so out of a realisation that he was guilty of murder – that is, of an intentional killing. … But this could have no significance at all unless you were satisfied Huebner did indeed consciously mislead the authorities because he was aware of his responsibility for an intentional killing, there being no other non incriminating explanation for his doing so. Could it be, for example, that he did so only because concerned or anxious or panicking because he realised he had killed Ms Roberts, though not intending to do so?
>
> You would approach similarly any deceit you find involved in his participating in the subsequent searches organised by Ms Roberts' family and friends. You approach any misleading of the police and family and friends by Maher similarly. … If a consciousness of her complicity in a killing, though not intentional, you could use it to strengthen you in a conclusion she is guilty of manslaughter. But if you conclude there is another non-incriminating explanation, such as a feeling of guilt over her involvement in the disposal of the body only, or other items I mean, or loyal support for her partner Huebner, then you couldn't rely on that evidence against her in that way at all."

[99] The learned trial judge then dealt over some two pages of the record book with the evidence of Huebner as to the events resulting in the death of Linda Roberts. The summing-up went on:

> "The evidence of Huebner becomes part of the overall body of evidence to which you would have regard in determining whether the Crown has, beyond reasonable doubt, established that Huebner intended to kill Ms Roberts or do her grievous bodily harm. The Crown asks you to reject Huebner's account of how Ms Roberts came to die and draw the inference it has urged from the circumstantial case advanced on the evidence otherwise led in the trial."

[100] After referring to the way in which the deceased was left with the rope around her neck and on her knees when Huebner left the room the learned trial judge observed:

> "Then, while he was absent from the computer room, on his account something happened which led in an immediate sense to her death. You may naturally wonder why in those circumstances you would have pleaded guilty to manslaughter? Why, on his account, was not the death in a sense accidental, or at least not in an immediate sense caused by him?"

[101] So far as Maher was concerned this is what was said in the summing-up:

> "On the Huebner account, the accused Maher did not directly cause the death of Ms Roberts and neither did she aid Huebner to bring it about. Accordingly, if you accept the Huebner account, you must find Maher not guilty of murder and not guilty of manslaughter."

[102] Finally it should be noted that in the course of a number of redirections the learned trial judge returned to the Crown theory that there was a plan on the part of both accused "to deprive Ms Roberts of her liberty, to take control of her, to be implemented … by securing her … with the noose taut, connected to the curtain rail". It was then noted that if the deceased consented to all of that conduct there would be no deprivation of liberty. It was also pointed out that the "plan could change in the course of its implementation … to deprive her of her liberty and keep her so deprived and she showed resistance." Following that the jury were told:

> "Now, if both accused were party to such a plan as it developed, and they implemented it together, in other words both playing a part towards its achievement other than by mere presence, we will say for the moment, then each would be liable if the death which ensued, for present purposes in terms of murder, the intentional death, was a likely consequence of the implementation of the plan as it developed."

[103] The questions which must now be considered are was the Gaszik evidence admissible, and, if so, was the jury permitted to make improper use of it. The evidence was held to be admissible on the initial s 592A application on the ground that it was probative on the issues of motive, identification, and the relationship between the accused. After Huebner pleaded guilty to manslaughter, counsel for each appellant asked the learned trial judge to reopen the s 592A application. Argument was heard on the point and the learned trial judge declined to vary the earlier ruling. In the course of argument the learned trial judge observed the Gaszik evidence was "probative of the requisite intent".

[104] A fair reading of the summing up indicates that the jury were directed that the Gaszik evidence was part of the circumstantial case against each accused, and could be considered on the issue of intent. The learned trial judge did inform the jury that the "Crown need not establish any particular motivation even for an intentional killing", but shortly before that reference was made to what the prosecution termed "Maher's jealous response to a bizarre sexual advance". That was a reference to the kiss which Maher referred to in her record of interview with the police. The prosecution appears to have put forward that jealousy as the motivation for Maher's involvement in the events leading to the death of the deceased.

[105] Having considered the evidence, the summing up and the submissions on appeal, I have come to the conclusion that the involvement of each appellant in the Gaszik incident is not probative of motive or intent with respect to the killing of the deceased. The circumstances giving rise to the appellants doing what they did with Gaszik in May 2000 were not replicated in the events leading up to the deceased's visit to 107 Murton Avenue on 18 August 2001. There is no possible way it could logically be said that what happened in the Gaszik incident in May 2000 directly afforded motive for the killing of the deceased in August 2001. The real danger is that the prosecutor's addresses to the jury and the summing up create the aura that the appellants got some sort of thrill out of what they did to Gaszik and their motivation for acting in a similar way to the deceased was to get a similar thrill. Even if it was open to the jury to conclude from the evidence that there was a credible basis for drawing such an inference, it could not without more support a conclusion of murder (intentional killing) as distinct from manslaughter (death by misadventure). Some people do obtain thrills from bondage practices, but that does not mean that death is intended though death may result as a likely consequence of those practices going wrong. To my mind the Gaszik evidence had little or no probative value on the issue of motive, and none whatsoever on the issue of intent.

[106] The question of the admissibility of the Gaszik evidence must be answered on the basis that until Huebner gave evidence there was no direct evidence indicating how the deceased may have met her death. There was evidence that the deceased had visited the residence of the appellants on 18 August and that the appellants were the last known people to have seen her alive. The prosecution also had evidence that a noose and a piece of plastic were found with the body in bushland. What the Gaszik evidence did was provide a critical link between those two planks in the prosecution case. Was it a coincidence that the two people who had last seen the deceased alive had previously placed a somewhat similar type of noose around a young female's throat in a bushland setting? The Gaszik evidence tended to link or identify the appellants with the body in the bush. To be admissible the evidence did not have to go beyond that. It merely provided another link in a possible circumstantial case.

[107] The Gaszik evidence also to some extent showed the relationship between the two appellants in circumstances where a rope noose and plastic was used in an incident involving a young female in bushland. To that extent also the Gaszik evidence was sufficiently probative to possibly establish in the mind of reasonable jurors another link in the circumstantial chain particularly in the case against Maher.

[108] That means that the Gaszik evidence was admissible, but it could not be used as a basis for inferring intent. In ruling that the evidence was probative of the requisite intent to kill, both the judge dealing with the s 592A application and the trial judge

specifically referred to Gaszik's evidence that Huebner said in the course of the incident "Why won't she die?" The making of that statement was disputed by Huebner and it was for the jury to decide who was to be believed. But even if some such statement was made it is not probative of an intent to kill Linda Roberts some 15 months later. Gaszik did not die, but it is clear that if either or both the appellants wanted that to happen that result could easily have been achieved. It has already been noted the circumstances surrounding the relationship between the appellants and Gaszik were quite different to the circumstances surrounding their relationship with Roberts. The emails clearly indicate that the deceased was happy to be a willing participant in unusual (even bizarre) behaviour with at least Huebner. Even if one does not accept Huebner's evidence that her reference to "stuff" was a reference to bondage, she was clearly interested in some sort of night stalking game. It was some nine days before 18 August that the meeting on that day was fixed, so there was no spur of the moment decision to meet on that day. There was clearly no "pressure" on the deceased to visit on that day, contrary to the assertion made by the Crown Prosecutor in his opening address. Given Huebner and the deceased had met the previous Saturday there was nothing in the "pre-arrangement" they meet at Murton Avenue on 18 August which was probative of an intent to kill.

[109] I do not find it necessary in the circumstances to analyse in depth the reasoning in cases such as *Pfennig v R* (1995) 182 CLR 461 and *R v O'Keefe* [2000] 1 Qd R 564. Consideration of what was said in those cases convinces me that the Gaszik incident was not probative on the issue of the intent of the appellants with respect to the death of the deceased. The passages previously quoted from the summing up establish that the jury was invited to infer intent to kill Roberts from the Gaszik evidence. In putting the prosecution case to the jury the learned trial judge clearly indicated that it was the prosecution contention that the jury could conclude from the Gaszik evidence that each appellant intended to kill Roberts. At the very least the learned trial judge had to disabuse the jury as to that. But, as I have already indicated, by the summing up the learned trial judge also invited the jury to infer intent from the Gaszik evidence.

[110] There is another matter relating to the Gaszik evidence which also needs to be addressed. The learned trial judge did instruct the jury, as already quoted: ". . . I stress to you strongly there is no charged offence involving Gaszik. The only charged offence concerns Ms Roberts. I mention Gaszik and what happened with her only to illustrate how you might reason in relation to what inferentially may have been wrought upon Ms Roberts. . . . Mr Martin made the point that you must not convict the accused just because of what happened to Ms Gaszik. That is quite correct. The Gaszik experience taken alone, of course, could not establish this alleged murder was committed by the accused. The Crown does not ask you to confine your attention to Gaszik. The Gaszik experience is but one of the many circumstances on which the Crown relies. Do not conclude from Gaszik in isolation the accused's guilt of anything in relation to Ms Roberts. But you may properly have regard to the Gaszik incident as one of the circumstances, perhaps a significant circumstance, depending on your view in the overall case." They are the only passages which could be regarded as a warning in accordance with *BRS v R* (1997) 191 CLR 275 at 305 and 329 and *Gipp v R* (1998) 194 CLR 106 at 132.

[111] It is of critical importance when similar fact evidence is before the jury for the summing up to contain a clear, precise and strong warning as to the limited use which may be made of it. An inadequate warning was given here. In this case not

only was there an insufficient warning given as to the relevance of the Gaszik evidence (it being capable of being regarded by the jury as propensity evidence) but the learned trial judge also erred in his summing up by indicating it could be used for inferring intent to kill Roberts when that was not an inference reasonably open on the evidence. Those considerations lead to the conclusion that the convictions for murder cannot stand.

[112] In my view there are other major concerns about the adequacy of the summing up and the trial overall. I have quoted at some length in these reasons the evidence in relation to the scream heard in Murton Avenue on the night in question. It is obvious from perusing the opening and closing addresses of the Crown Prosecutor that this was regarded as critical evidence in the Crown case. That evidence, with the associated fact of the woman in the street carrying something, was used to put a sinister, incriminating complexion on the evidence that Maher washed a blue blanket. In his final address the Crown Prosecutor referred to the eerie scream of a woman attacked and made the following statements (fully quoted above): "It is the pale blue blanket and it is a blanket that we know is part of the real story because it is something that had to be washed. . . . The evidence is that woman who was running was being run down. She may well have been injured by this stage, Linda Roberts, and that's not speculation because her blood is found in the computer room. . . . it is a combination of things that can't be ignored and it is a combination of things that speaks of this: distress, violence, terror, someone being run down, events that fit into the pattern of the actual participation by Huebner in the killing of Linda Roberts." On an earlier occasion in that address it was asserted as a fact that it was Linda Roberts who was running in the street.

[113] All of that was a gross overstatement of the evidence. The clearest example of the exaggeration contained in that is the reference to the woman being "run down". There is absolutely nothing in the evidence to support that. Indeed the only person who gave any evidence possible relevant to that was Peea. As noted above, when asked whether the man was running slower or faster than the woman he replied: "Slower, I think."

[114] There is absolutely no evidence identifying the woman running in the street as the deceased. When the police initially asked Huebner about the incident they quite properly framed questions on the basis that the woman could possibly have been either Roberts or Maher. Whilst in the witness box, both in chief and in cross-examination, Huebner was questioned as to whether the woman could have been either Maher or Roberts. When one also puts into the melting pot the evidence of Bernice Minniecon that there was a group of four people (two boys and two girls) in the street with one of the girls holding a "white blanket or pillow or something", one sees that there was no clear basis for the Prosecutor's contention. The repeated erroneous statements in that address could have deflected the jury from their initial task of evaluating the evidence and determining the relevance, if any, to the ultimate question for them to answer.

[115] The credibility of Peea was certainly a significant issue for the jury. He initially in evidence could not recall seeing a man, and it was only after he was shown his original statement that he agreed that there was also a man running in the street. Of perhaps even greater significance is his evidence that it was only after police prompting that he accepted that what the woman was carrying was a blanket, rather than some other unidentified object.

[116] Further, none of the evidence indicated that the scream came from 107 Murton Avenue, and there was also the fact that on the account of all those who heard the scream it occurred some time between 10.30pm and 1.00am, whereas Huebner's evidence was that the deceased met her death at about 8.00pm.

[117] All of those matters clearly necessitated the jury being instructed that they had to scrutinise the evidence carefully before they could conclude that the evidence of the scream (and the object being carried by the woman) was in any way associated with the death of the deceased. Because of the gross overstatement by the Crown Prosecutor in his address to the jury it was incumbent upon the learned trial judge to draw the jury's attention to the serious issues of credibility which had to be addressed before the evidence of the scream could be used as one of the circumstantial links in the case against the appellants. It was totally inadequate for the learned trial judge to merely observe: "Defence counsel reminded you of discrepancies as between the various accounts of all that evidence given by the respective witnesses". That came after the learned trial judge referred to "the chase up Murton Avenue" which tended to give credence to the Crown Prosecutor's contention that the woman was being "run down".

[118] It seems clear that the prosecution used the "scream and chase" as material evidence from which the jury could infer intent to kill and overcome the competing hypothesis of death by misadventure. Because of that the passages quoted from the evidence are of critical importance and ought to have been more fully dealt with by the learned trial judge in his summing up.

[119] This aspect of the case becomes of greater importance once it is accepted that the Gaszik evidence cannot be used to support a finding of intent. Because of the major inconsistencies in the evidence of the six witnesses who gave evidence as to the "scream and chase", and because there is no evidence identifying either Roberts as the woman running or Huebner as the man running, no jury, properly directed, could infer intent to kill from that evidence.

[120] As noted above in the summing up the learned trial judge enumerated five principal circumstances on which the Crown relied in order to establish Huebner was guilty of murder. I have dealt with the evidence of Gaszik and the "evidence of the scream and chase up Murton Avenue", two of the matters so enumerated. The learned trial judge also listed as one of the circumstances "the pre-arrangement that Ms Roberts visited the accused at 107 Murton Avenue on the Saturday afternoon". As already pointed out, on the evidence that arrangement was made more than a week before, and Roberts was clearly a willing party to the visitation. That circumstance therefore must be neutral when one is considering whether her death was the result of misadventure or an intentional act on the part of Huebner. The next circumstance referred to by the learned trial judge was the presence of blood in the computer room. That is consistent with Huebner's account of how the deceased met her death and the disposal of the body. It certainly is a circumstance linking Huebner (and possibly Maher) to the death, but it is hardly probative on the question whether the death was by misadventure or intentionally caused.

[121] The other circumstance which was the subject of detailed evidence, submission, and direction during the trial was the conduct of Huebner and Maher subsequent to the death. Before Huebner's admission as to responsibility for the death, that evidence was of particular significance because it indicated Huebner and Maher went to great

lengths to deflect away from them the police investigation into the disappearance of the deceased. But once it is accepted that the deceased met her death at the hands of Huebner the evidence has little or no probative value on the question whether the death was intentionally caused or was by misadventure. If Huebner (and Maher) acknowledged some responsibility for the unlawful killing of Roberts then the subsequent conduct is explicable on the basis that they were endeavouring to avoid the consequences of that.

[122] In the summing up the learned trial judge referred to two additional circumstances referrable to Maher. Firstly Gaszik's account of Maher's participation in the events involving Gaszik, and secondly Maher's statement to the police of the "passionate kiss". Enough has already been said to dispose of the first matter. Nothing in Gaszik's evidence of the incident involving her could found a conclusion that Maher participated in events with Roberts with an intention that she should be killed.

[123] It is clear from the concluding address of the Prosecutor (quoted above) that the case against Maher was dependent to a large extent on the "passionate kiss" and the "jealous response" to it. Because of that the Prosecutor said "we can add an extra element in the case of Maher. This is an element of participation in an event that's not a teaching of how to tie a knot. It's a bizarre sexual advance." The logic of that escapes me. The point, however, was taken up by the learned trial judge in the summing up (quoted fully above): "The Crown relies on a sexual overtone to the attack on Ms Gaszik, to be gathered most specifically from the ultimate threesome proposition if you found it was made. You recall Ms Maher's reference during the police interview to the passionate kissing of Ms Roberts at Murton Avenue. The Crown asks you to infer that just as the accused worked together in relation to Ms Gaszik, so they did in relation to Ms Roberts." Again I have difficulty in appreciating the reasoning.

[124] Clearly there was some sexual overtone to the visit by the deceased to Murton Avenue on the day in question; her last email is sufficient indication of that. If Huebner and Maher were interested in "threesomes", why would Maher have such a jealous response to the kiss. As already noted the emails from the deceased clearly indicate she was interested in participating in what could only be described as unusual (even bizarre) conduct. The danger is that by inviting the jury to speculate on the significance of specific features of the conduct it heightens the risk of the jury failing to consider logically and dispassionately the evidence as to the critical issue, namely whether there was an intention to kill.

[125] The learned trial judge correctly directed the jury that if they accepted Huebner's evidence in its entirety as to the manner in which Roberts met her death they would have to find Maher not guilty of both murder and manslaughter. But clearly the jury did not accept the entirety of Huebner's evidence. The case against Maher was left to the jury, as already noted, on the basis of either s 7 (aiding Huebner) or s 8 of the Criminal Code. The scenario put to the jury in the summing up as the prosecution case dependent on s 8 was predicated on a plan to deprive Roberts of her liberty and keep her so deprived. It seems that the existence of such a plan was to be established by inference from the Gaszik evidence. Again I have serious doubts as to whether the Gaszik evidence could be used for that purpose. It really seems to be but another instance of propensity reasoning. But even if one accepts that there was evidence establishing such a plan there was nothing, in my view, which would have

entitled a reasonable jury to conclude that intentional death was a probable consequence of the implementation of that plan. The relevant passages in the summing up, quoted above, are extremely vague both as to the evidence establishing such a plan and how the evidence established that it was a probable consequence of the implementation of the plan the death would occur. The statement in the summing up – "or the plan in its more serious escalating form in the context of resistance" – is highly speculative.

[126] But such matters need not be considered further. So far as Maher is concerned it follows from the fact that Huebner's conviction for murder cannot stand, hers must also be set aside. Not only were the verdicts based on an improper use of the Gaszik evidence, but as the foregoing analysis shows they were also unsafe and unsatisfactory.

[127] The question then becomes should there be a re-trial for murder. A jury was entitled to reject Huebner's evidence as a full and complete account of how the deceased met her death. Clearly the jury in this case was not prepared to accept all of it. The evidence is not precise as to where the deceased met her death; it could have occurred in the house in Murton Avenue or at the place in the bush where her body was found. A reasonable jury would have little difficulty in concluding that the noose found near the body was associated with, if not the cause of, her death. A reasonable jury, properly instructed, would have undoubtedly concluded that Huebner was responsible for the death. The critical question is whether or not there is evidence on which a jury acting reasonably could conclude that Huebner intended to kill. Though there are horrifying aspects surrounding the death, and though Huebner's subsequent conduct was callous in the extreme, I have come to the conclusion that there is insufficient evidence available to support a finding that Huebner intended to kill Roberts. Given all of the available evidence the deceased met her death, either at 107 Murton Avenue or in the bush at Mackenzie, when Huebner tied her up, including by putting rope around her neck, in the course of a bizarre bondage episode. Huebner was criminally responsible for the death and is clearly guilty of manslaughter. It does not necessarily mean that he is guilty of manslaughter in the precise circumstances that he recounted in evidence. But nevertheless the offence he committed, given the available evidence, was manslaughter rather than murder.

[128] It is appropriate, before leaving Huebner, to say that no substantive submissions were put before the learned trial judge on the issue of sentence. Given the jury verdict the only sentence which could be imposed according to law was life imprisonment. Since the order of this court will be that a verdict of manslaughter should be substituted for that of murder, the matter of sentencing should be remitted to the Trial Division.

[129] That leaves for consideration the position of Maher. Particularly given what has been said with respect to Huebner, it is clear that no jury, properly instructed, could be satisfied beyond reasonable doubt that she had an intention to kill. The real question is whether or not she should be re-tried for manslaughter. As already pointed out a jury is not bound to accept Huebner's explanation to the manner in which Roberts died, and clearly the jury in this case did not accept that explanation. The fact that on Huebner's precise version Maher would be not guilty of manslaughter does not mean that there is not a case for her to answer on that charge.

[130] There is no doubt that she was present when Roberts arrived at 107 Murton Avenue. On her own statements to the police in the records of interview she was present at all times in the house. She admitted to some jealousy towards Roberts on witnessing the passionate kiss between Huebner and Roberts. She was involved in the disposal of the body, and of the personal effects of the deceased. There is, at least, on her own admissions to police, a tale of lies designed to deflect attention from her with respect to the disappearance of Roberts. Her formal admission as to being in the car owned by Roberts when it was left in the carpark at the shopping centre further implicates her. The Gaszik evidence, given appropriate directions to the jury, could support the inference that her relationship with Huebner was such that she would have been a party to the bondage episode. Maher also had some minor injuries which were consistent with being caused whilst bushwalking on 15 August or during a struggle on 18 August.

[131] All of those matters indicate that the prosecution case against her is somewhat stronger than saying that she was merely present when the death occurred. It follows, in my view, that there is a case for Maher to answer on a charge of manslaughter. There should be a re-trial on that charge.

[132] The orders of the court should therefore be:

(1) In the appeal by Huebner – CA No 291 of 2003

(i) Appeal allowed;

(ii) quash the conviction for murder;

(iii) substitute a verdict of guilty of manslaughter;

(iv) remit the question of sentence for the offence of manslaughter to the Trial Division;

(2) In the appeal by Maher – CA No 301 of 2003

(i) Appeal allowed;

(ii) quash the conviction for murder;

(iii) order that there be a re-trial for the offence of manslaughter.