SUPREME COURT OF QUEENSLAND

CITATION:	*R v Surrey* [2005] QCA 4
PARTIES:	**R** **v** **SURREY, John Arthur Powys** (appellant)
FILE NO/S:	CA No 324 of 2003 SC No 352 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 September 2004
JUDGES:	McPherson and Jerrard JJA and Jones J Separate reasons for judgement of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – JOINT TRIAL OF SEVERAL COUNTS – where appellant convicted of two counts of murder and one count of interfering with a corpse – where all counts tried on same indictment – where there was no application by counsel for reconsideration of the joinder – whether trial judge should have made a late order separating the trials to avoid a miscarriage of justice resulting from the combination of directions given CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER THE JURY WOULD HAVE RETURNED THE SAME VERDICT – MISDIRECTION AND NON-DIRECTION – where trial judge gave "micro-*Weissensteiner*" direction on the appellant's silence in court – whether such a direction caused a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER THE JURY WOULD HAVE RETURNED THE SAME VERDICT – MISDIRECTION AND NON-DIRECTION – where trial judge gave *Edwards* direction regarding the jury's conclusion on whether deliberate lies had been told which showed a consciousness of guilt – whether such a direction was defective – whether such a direction caused a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – TESTS – WHETHER THE JURY WOULD HAVE RETURNED THE SAME VERDICT – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where witness gave identification evidence regarding security photographs – whether the witness' opinion that the person in the photograph was the appellant was inadmissible as evidence

Criminal Code 1899 (Qld), s 567

Azzopardi v R (2001) 205 CLR 50, applied
Edwards v R (1993) 178 CLR 193, applied
Peacock v R (1911) 13 CLR 619, cited
R v Collins; ex parte Attorney-General [1996] 1 Qd R 631, followed
R v Cranston [1988] 1 Qd R 159, cited
R v DAH [2004] QCA 419; CA No 153 of 2004, 5 November 2004, followed
R v Griffith [1997] 2 Qd R 524, cited
R v Nicholson; ex parte DPP (Cth); R v Hyde-Harris; ex parte DPP (Cth) [2004] QCA 393; CA No 214 of 2004, CA No 215 of 2004, CA No 225 of 2004, CA No 226 of 2004, 22 October 2004, cited
R v OGD (1997) 45 NSWLR 744, distinguished
Smith v R (2001) 206 CLR 650, cited
Weissensteiner v R (1993) 178 CLR 217, applied

COUNSEL: M J Byrne QC, with A W Moynihan, for the appellant
S G Bain for the respondent

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

[1] **McPHERSON JA:** These are appeals against convictions on counts of having murdered Peter Doorne on a date between 12 and 16 December 2000 (count 1) and Kenneth Hoffman on about 19 January 2001 (count 3). There is no doubt that the appellant killed Hoffman. Having been found in possession of parts of his body, he admitted having done so but claimed it was an act of self-defence. The jury in reaching their verdict on that count were entitled to reject self-defence for the

compelling reason that the victim was found to have suffered a total of 18 stab wounds to his upper torso, of which five were sustained on the back. As well, there was the appellant's admission that he had cut up the body with a hacksaw and disposed of parts of it in the Brisbane River and in a creek some considerable distance away. As Jerrard JA in his reasons observes, such actions scarcely accord with the behaviour of someone who has committed no more than a justifiable homicide.

[2] On the count of murdering Doorne only a few weeks before, the strength of the Crown case turned ultimately on the similarity of the two killings and the appellant's actions and methods of disposing of the body in each instance. In the case of Doorne, it was necessary to prove that the appellant caused the death of the victim, as well as the fact that it was intentional. But the discovery later of traces of the deceased's DNA in the boot of the taxi, in which the appellant had transported the suitcase inferentially containing the victim's body parts, taken together with other circumstantial and incriminating evidence, provided sufficient and indeed eloquent proof of that element of the offence in count 1.

[3] If it is necessary to justify the alleged "micro" *Weissensteiner* direction to the jury in this case, it was surely to be found in the fact that people do not, without explanation, commonly cut up and carry human remains around in suitcases unless they have done something so terrible that they wish to conceal it from scrutiny. The strength of the inference resulting from such conduct is, however, such that it may be doubted whether it was really necessary to call the jury's attention, as prosecuting counsel did, to the appellant's failure to give evidence explaining his behaviour in that respect. There is a risk that, in matters like these (of which another example is consciousness of guilt arising from telling lies), lawyers are once again indulging their weakness for converting matters or inferences of fact into propositions of law. In this instance, the circumstantial evidence against the appellant of having committed the murders charged was so overwhelming it did not require the assistance of artificial reasoning in order to enable the jury to arrive at the conclusion they did.

[4] Given that it was not submitted on appeal that the two murder charges were improperly joined in the same indictment, there is in my opinion no substance in the submission that the trial judge should, without any request to do so from counsel, spontaneously have directed that those counts be severed and separately tried. At the stage at which we are being asked to consider that question, it falls to be determined not according to whether the discretion ought to have been exercised; but, as matters now stand, whether any failure to do so resulted in a substantial miscarriage of justice: see *R v Cranston* [1988] 1 Qd R 159, 166. For the reasons given by Jerrard JA, with which I agree, concerning both this and the other grounds, the appeal has not been made out, and should be dismissed.

[5] **JERRARD JA:** On 17 September 2003 John Surrey was convicted by a jury of two counts of murder and one count of interfering with a corpse. He had pleaded guilty at the start of the trial to a second count of improper interference with a corpse, and after the convictions by a jury, he pleaded guilty to a further count of assault and one of attempting to escape. He was sentenced to life imprisonment on the murder

convictions and to lesser terms on the others. He had appealed against all three convictions by the jury.

[6] Those convictions were for having murdered Peter Doorne at Brisbane on a date unknown between 12 December 2000 and 16 December 2000, murdering Kenneth Hoffman on or about 19 January 2001 at Brisbane, and improperly interfering with the dead body of Mr Doorne on dates unknown between 12 December 2000 and 16 December 2000. His plea of guilty before the trial was to a charge of improperly interfering with Mr Hoffman's body on dates unknown between 19 January 2001 and 27 January 2001. His grounds of appeal complain that the two counts of murder, and the count of interfering with Mr Doorne's body, should not have been joined on the one indictment, or that if properly joined ought to have been severed by the learned trial judge before the learned judge commenced giving directions to the jury, and that the judge should then have ordered separate trials in respect of the "Doorne" counts and the charge of murdering Kenneth Hoffman. His grounds of appeal also contend that the learned trial judge misdirected the jury in giving what the learned judge described as a micro-*Weissensteiner* direction[1] in respect of the count of murdering Peter Doorne, which direction the appellant contends was both unjustified on the Crown case, and inadequate in any event. The appellant also contends that the giving of that *Weissensteiner* direction on that count of murder, when coupled with the giving of an *Edwards*[2] direction in respect of the count of the murder of Kenneth Hoffman, resulted in directions being given which required the jurors to act in inconsistent ways when assessing each murder count, and embarrassed Mr Surrey in his defence on all counts.

[7] The appellant also complains in any event that the *Edwards* direction, in respect of Mr Surrey's answers to questions about his possession of a knife block (that direction being given on the count of murdering Mr Hoffman), was not justified by the evidence, and was a direction which, in the submission of Mr Byrne QC, Mr Surrey's Senior Counsel, was yet another example of "over-cooking" a strong Crown case regarding the murder of Mr Hoffman. The first example of such "over-cooking" was giving the micro-*Weissensteiner* direction on the count of murdering Mr Doorne. The appellant's last ground of appeal is a complaint that the evidence of a Walter Burton, purporting to identify Mr Surrey as the person shown in photographs taken by a security video, was inadmissible.

The Evidence

[8] In December 2000 Mr Surrey was living in Unit 7 No 52 Wandoo Street in Fortitude Valley Brisbane, and Mr Hoffman was living in Unit 5. Both men knew Mr Doorne, who was last seen alive on the night of 13 December 2000, in Unit 7. Units 5 and 7 are adjoining, on the second floor of a block of units on the corner of Wandoo and Doggett Streets in the Valley. Mr Doorne had left medication for asthma, and a duffel bag with other possessions of his, in Unit 5 on the evening of 13 December 2000, when drinking there with Mr Hoffman, Elaine Butterworth, and John Lee. Late in that afternoon, because Mr Hoffman was getting tired, the three others had gone into Mr Surrey's unit, leaving Mr Doorne's possessions in Mr Hoffman's. Ms Butterworth and Mr Lee returned to Mr Hoffman's unit after some 15 minutes while Mr Doorne, who was affected by alcohol, stayed in Mr Surrey's

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1 The learned judge gave that description at AR 620, referring thereby to the judgments in *Weissensteiner v R* (1993) 178 CLR 217 and *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50

2 The reference is to *Edwards v R* (1993) 178 CLR 193

unit. Mr Surrey was in residence during the relatively brief visit by Ms Butterworth and Mr Lee. Neither of the latter two persons, who were friends of Mr Doorne's and with whom he had spent most days and some nights of the preceding few weeks, ever saw him alive again and on the Crown case, nor did anyone else. Mr Doorne's medication and duffel bag thereafter remained unclaimed in Mr Hoffman's unit.

[9] Ms Butterworth's evidence included a description of how all others had assumed Mr Doorne might be asleep in Mr Surrey's unit, when she and Mr Lee left the premises around 9.00 a.m. the next morning without knocking on Mr Surrey's door, and how over the ensuing days they had made enquiries about him. She described Mr Hoffman recounting how he had asked Mr Surrey if he knew where Mr Doorne was. The answer relayed by Mr Hoffman was that Mr Surrey said Mr Doorne had slept the night there and left next morning.

The case against Mr Surrey on the charge of murdering Mr Hoffman

[10] Ms Butterworth and Mr Lee continued to visit the premises at 52 Wandoo Street, visiting Mr Hoffman, whom they last saw alive on the day of 18 January 2001, that being the date on which Ms Butterworth and Mr Lee travelled by bus to Oakey at 6.00 p.m. that evening. Mr Hoffman had last been seen alive by anyone late that day. Ms Butterworth and Mr Lee returned to Brisbane on 23 January 2001, on a bus which left Oakey at 3.15 p.m. and arrived in Brisbane around 6.00 p.m. They went to Mr Hoffman's unit, knocked and received no reply. Ms Butterworth and Mr Lee, who are people who lack a fixed place of abode, walked around the city most of the remaining night, in the expectation and hope that Mr Hoffman would return to his residence. They could not raise him the next day, and on 27 January 2001 contacted police in response to reports they saw on the TV about what police had discovered that day at 52 Wandoo Street. The police had been called to that address because other unit dwellers were complaining of a foul stench, and the presence of a considerable number of maggots in an adjoining unit. Mr Surrey refused to let police enter Unit 7, explaining the overwhelming and unpleasant odour which emanated from it as due to a refrigeration problem and rotten meat. While the police were considering their next move Mr Surrey was seen leaving his unit carrying a suitcase, and, the police having decided that the stench was that of a dead body, was intercepted and the suitcase opened. It contained what proved to be Mr Hoffman's upper torso, with 18 stab wounds to it, 13 to the front and five to the back. The torso was wrapped in a piece of carpet, which piece was in a significant number of ways consistent with its being cut from the carpet in Mr Surrey's unit.

[11] In an interview held late that night with detectives, Mr Surrey admitted having killed Mr Hoffman eight days earlier on Friday 19 January 2001, saying he had done so in self-defence. He described having been drinking with Mr Hoffman, John Lee, the latter's "girlfriend or wife whatever" (Ms Butterworth) on the afternoon of 19 January 2001, with a degree of to-ing and fro-ing between the two units, and having fallen asleep in his. When he awoke at about 5.00 pm, he thought that most of $2,000.00 or so he had in cash in his unit was missing. He had then gone to Hoffman's unit, entered it, and demanded to know where his money was. An argument ensured, Mr Hoffman reached behind him and pulled a knife out of a knife block (a wooden container holding knives), and in the ensuing struggle Mr Surrey obtained possession of the knife and stabbed Mr Hoffman. Mr Surrey explicitly admitted only two knife blows, but said that he may have stabbed Mr

Hoffman "a few times",[3] because he was really angry. He admitted having cut up the body with a hacksaw and disposed already of parts of it, in the Brisbane River and in a creek area at Cannon Hill.

[12] The Crown case was that his claim of having consumed alcohol with Mr Hoffman, John Lee and Ms Butterworth on 19 January and being angered by an apparent theft by one or more of them, was quite untrue, because the latter two persons, who both gave evidence, were shown to have been in Oakey on that date. The Crown likewise contended that Mr Surrey had lied when answering questions about a knife block observed in his unit on 27 January 2001. He claimed to have thrown away approximately one month earlier a knife block which he had admittedly possessed, and to have obtained the one seen in his flat from Mr Hoffman's flat. He did not specify how or when or why he had acquired Mr Hoffman's. Those asserted lies – about the circumstances occurring in the unit on the day of and prior to Mr Hoffman's death, and (by implication) the claim that he had not been in possession of a knife block in his own unit that day – were the subject of the directions as to lies and consciousness of guilt about which the appellant complained.

[13] Identification of Mr Surrey as the person who caused Mr Hoffman's death was not in issue at the trial, nor was the fact that Mr Surrey had dismembered Mr Hoffman and, in the days after his death, carried away some of his body parts. The Crown led evidence from a Lindsay Rubie, a taxi driver, who had collected a fare from McWhirters in the Valley on either 24 or 25 January 2001, and who took the passenger to Cannon Hill. Mr Rubie described that person as a man in perhaps his mid 40s, well built, of medium height, with "straggly type shoulder length hair" and a full beard and moustache. That description fitted Mr Surrey. The man was carrying two luggage items, one being described as a golf bag or backpack, and the other as a suitcase or luggage carrier. Mr Rubie was shown a luggage carrier photographed in Mr Surrey's unit on 27 January 2001, and thought it identical to the one the man in his cab had carried. Mr Rubie recalled that both items of luggage were quite heavy, and that they smelt. He later discovered a number of maggots in the boot of his taxi where that luggage had been.

[14] It was not admitted that Mr Surrey was the passenger, but Mr Rubie identified Mr Surrey on a photo board, and the accuracy of that identification was not in issue on the appeal. The neighbours who had called the police on 27 January, complaining about the smell, had noticed Mr Surrey some three or four days earlier walking away from the unit and across the street, while carrying a very large suitcase which he could barely manage. He was seen to get into a cab. It was open to the jurors to conclude that Mr Surrey used a taxi or taxis to carry away part of Mr Hoffman's body, and that conduct is relevant to proof that Mr Surrey also killed Mr Doorne and also disposed of his body; and to the propriety of joining counts for doing that on the indictment charging the murder of Mr Hoffman.

The case against Mr Surrey for murdering Mr Doorne

[15] The evidence critical to establishing both the allegations that Mr Surrey had killed Mr Doorne, and had interfered with his body, came from Barry Montgomery, a taxi driver who collected and dropped off a fare between 11.35 am and 11.48 am on 15 December 2000. The passenger was collected from 52 Wandoo Street, and

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[3] At AR 810

resembled Mr Surrey in appearance, being described by Mr Montgomery as a tallish man, "quite a bulky sort of a fellow", with a beard and bushy hair. The taxi was called to the pick up address from Mr Surrey's phone, and the caller gave Mr Surrey's name. Mr Montgomery noticed that the trousers the man was wearing appeared to be smeared by something leaving a rusty, brownish colour, and the man's hands were similarly discoloured. He was carrying a large suitcase which was put in the boot of the taxi, and a backpack which was carried in the car. Mr Montgomery noticed that the suitcase was "very very heavy," and stained, and that when removed from the ground it left a wet residual mark there. A substance appeared to be oozing from it. This led Mr Montgomery to ask his passenger:

> "What have you got in there, mate? It's heavy, is it your mother-in-law?"

The reply was a grunt.

[16] Mr Montgomery dropped his passenger off in Alfred Street in the Valley, and then saw that there was some staining and a moist area on the carpet in his taxi boot. At his insistence the passenger wiped the substance, and Mr Montgomery, whose suspicions were aroused, contacted his base by radio and described what had happened. A backpack was located in Mr Surrey's unit on 27 January 2001, and the investigating police subsequently obtained DNA profiles from each of Mr Doorne's parents, and a DNA profile from Mr Doorne's nail clipper. That nine loci DNA profile was described by the relevant expert witness as deriving from epithelial cells within the reaches of the nail clipper itself; it matched typing that could have been passed down from Mr Doorne's parents to the person who had donated those cells to the nail clippers. The expert evidence was that that DNA profile from those nail clippers was consistent with it being inherited from Mr Doorne's parents, as it was between 450 million and 500 million times more likely to be from the male progeny of those two persons nominated as Mr Doorne's parents (Murray and Catherine Doorne) than it was from a person randomly selected in the population.

[17] That DNA profile thus obtained, and demonstrated as inherited from Mr Doorne's identified parents, matched DNA profiles obtained from large, blood-like, stains on the floor and strap of the backpack recovered from Mr Surrey's unit. That backpack, when opened, had a particularly malodorous stench. A similar DNA matching profile was recovered from the carpet on the floor of Mr Montgomery's taxi, from an area with blood like stains approximately 12 cm x 12 cm in size. The DNA profiling of three areas of that carpet staining gave the same result, matching that in the backpack and that on the nail clipper.

[18] The neighbours who had called police on 27 January 2001 had also noticed a stench some four to five weeks earlier, that had appeared to be coming up through the drain. On 29 December 2000 an amateur fisherman noticed a suitcase, a knife, a hacksaw, a belt, a set of clothes, some carpet or carpet underlay, and a wallet, at Hilliard's Creek, a small creek at Wellington Point on the edge of Moreton Bay. A subsequent search of the area in August 2001 located dentures identical with ones Mr Doorne had worn, and the clothes seen there in late December 2000 were proven (by the evidence of the person who washed them) to be ones Mr Doorne had worn. A clock radio was also found there, identical to one that Mr Surrey had possessed; the wallet seen there on 29 December contained identification documents of Mr Doorne's. Two pieces of carpet seen at that spot, and subsequently recovered, matched in all ways the piece of carpet in which Mr Hoffman's torso had been

wrapped on 27 January 2001 in the suitcase Mr Surrey was carrying; and indeed appeared to have been actually cut from it. When police inspected that area at Hilliard's Creek in August 2001, the suitcase had gone. It had probably been picked up in the "Clean up Australia" campaign in March 2001. It had been noticed there in early February 2001 and had been found on examination then to contain only mud.

[19] In either late December 2000 or early 2001, a woman then living in Fernbourne Road, near the Wellington Point railway station and leading down to Hilliard's Creek, had noticed a person walking down that road carrying a suitcase. That neighbour became aware of the significance of that observation when she saw police searching the area in Hilliard's Creek in August 2001. The man seen carrying the suitcase was described by her as doing so at least six months before the witness spoke to police in August 2001, perhaps late in the prior year, and the man was bearded and aged anywhere between 45 and 60. She had observed that the suitcase appeared to be very heavy, and the man was carrying a small backpack. She saw him later that afternoon without the suitcase, and again the next day walking back down towards the Creek.

[20] The fact that the jury could conclude Mr Doorne had not been seen alive since 13 December 2000, that his medication and some possessions were thereafter left unclaimed in Mr Hoffman's unit, and that his dentures, clothes, and a wallet with his identification papers were located at Hilliard's Creek in late December 2000, would justify the inference that his belongings were scattered and disposed by another person or persons in December 2000 and so treated because he was dead; and that those involved in disposing of his belongings were involved in his death. However it occurred, if that death was by the agency of another or others, that person or persons had to have access to Mr Doorne before he died, and he was last seen alive in Mr Surrey's unit.

[21] The fact that Mr Surrey's clock radio was found at Hilliard's Creek, and of Mr Surrey's possession of carpet matching that found near Mr Doorne's clothes, dentures, and personal papers, potentially identifies Mr Surrey as a person involved in disposing of Mr Doorne's belongings. The further fact that a bearded male person resembling Mr Surrey carried a backpack and heavy suitcase away from Mr Surrey's residence, which suitcase leaked from it a fluid containing Mr Doorne's DNA, and the fact that Mr Surrey was subsequently located in possession of a backpack containing within it staining carrying Mr Doorne's DNA, leaves open what would be the otherwise extraordinary conclusion that Mr Surrey carried parts of Mr Doorne's body away from Mr Surrey's residence in that suitcase and backpack on 15 December 2000. That conclusion is made more acceptable by the fact that a bearded male person was seen carrying a backpack and heavy suitcase along a road towards Hilliard's Creek, possibly around the very time that Mr Doorne disappeared; and inescapable by the fact that Mr Surrey was caught carrying a part of Mr Hoffman's body away in a suitcase in late January 2001, when that body part was wrapped in a piece of carpet matching that found at Hilliard's Creek, and from which that found at Hilliard's Creek had apparently been cut, it all having originated in carpet in Mr Surrey's residence. That Mr Surrey had also dismembered Mr Doorne's body is an equally likely conclusion, derived from the presence of the hacksaw found at Hilliard's Creek and the admission of the use of the hacksaw to dismember Mr Hoffman. Accordingly, the evidence relevant to Mr Hoffman's torso being discovered in a suitcase Mr Surrey carried could properly be

led on the charge that Mr Surrey had murdered Mr Doorne. It was obviously very prejudicial, but was admissible because of its probative force in identifying what Mr Surrey had done to Mr Doorne and his body. It had no other prejudicial effect.

[22] The available conclusion that Mr Surrey used similar methods to cut up and carry away two separate bodies is a matter germane to joinder of the charges of murder of both people and interference with their corpses. Proof that Mr Hoffman's torso was being carried by the appellant in a suitcase, wrapped in that particular carpet, is relevant to proof that it was the appellant who carried Mr Doorne's body away in a suitcase and backpack. It identifies Mr Surrey as the person who did that; he lived in the same residence in which both victims were last seen. There being no evidence that Mr Hoffman resembled Mr Surrey in appearance, the odds of another male person, who resembled Mr Surrey in appearance, and who independently disposed of Mr Doorne by carrying his body parts away in a suitcase and backpack, who used public transport to carry those body parts to a creek area, and who had access to the building Mr Surrey lived in and to the carpet in Mr Surrey's room, and who used a backpack Mr Surrey later possessed, are fanciful and can be discounted. Evidence from which the jury could safely conclude that it was Mr Surrey who disposed of Mr Doorne's body and his belongings is plainly relevant to proof that Mr Surrey unlawfully killed Mr Doorne. It is not overwhelming evidence that he murdered Mr Doorne or that it was murder and not manslaughter, but in the absence of any other explanation for why Mr Surrey was disposing of Mr Doorne's body and belongings, the inference was reasonably open to the jury that it was because Mr Surrey had murdered Mr Doorne, and was concealing the fact of Mr Doorne's death for that reason.

[23] Evidence of Mr Doorne's death by murder was not obviously probative of anything relevant on Mr Surrey's trial for killing Mr Hoffman. The prosecution contended that the fact of murdering Mr Doorne established a motive for Mr Surrey killing Mr Hoffman, namely to stop Mr Hoffman pressing Mr Surrey with questions about Mr Doorne's whereabouts or fate. I respectfully consider that is a rather speculative argument as to motive. No motive was established for Mr Doorne's death, and no reason for Mr Surrey to believe Mr Hoffman could cause Mr Surrey trouble about Mr Doorne's disappearance. Dismissing then the Crown contention that Mr Doorne's murder established a motive for Mr Hoffman's murder, the conclusion that Mr Surrey murdered Mr Doorne, or unlawfully killed him, is not probative as to whether Mr Surrey killed Mr Hoffman only in self-defence, or in response to provocation, as claimed by Mr Surrey. That claim fell to be considered in the light of there being 18 separate stab wounds to the torso, which number seem entirely inconsistent with self-defence, and in light of the established untruth about John Lee and Ms Butterworth having been present on 19 January 2001 to steal Mr Surrey's money. That claim of a mixture of provocation and self-defence also necessarily fell to be considered in light of the attempt to conceal that death and body parts.

[24] One of the written submissions of the appellant's Senior Counsel conceded that the Crown case against Mr Surrey for the murder of Mr Hoffman was a strong one, and Mr Byrne's oral argument contained the concession that it was an "incredibly strong" case for murder. Nevertheless, Mr Byrne QC submitted, Mr Surrey had not had a fair trial, by reason of the matters enumerated in the various grounds of appeal, and because the Crown wrongly had argued to the jury that the circumstances of Mr Doorne's death had provided a motive for Mr Surrey killing Mr Hoffman, making it likely murder was committed. Mr Byrne QC did not

challenge the conclusion that the striking similarity between Mr Surrey's conduct in killing Mr Hoffman and disposing of his body, and his conduct in disposing of Mr Doorne's body, made the evidence that Mr Surrey had killed Mr Hoffman admissible to prove that he had killed Mr Doorne. Rather, he contended that as the trial had unfolded, it had proven unfair to Mr Surrey. I turn now to considering those grounds of appeal.

Joinder

[25] Mr Byrne QC did not contend that there was error in the order originally made permitting joinder of the three trial counts. That joinder was ordered under s 567 of the *Criminal Code*, which relevantly provides:

> "(1) Except as otherwise expressly provided, an indictment must charge 1 offence only and not 2 or more offences.
>
> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose."

In *R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631 at 636, McPherson JA and Lee J wrote that it has long been accepted that the basic criterion for the joinder of counts under s 567(2) is the existence of some connection or nexus between them, each limb of the subsection being illustrative of the circumstances giving rise to that nexus.[4] It has long been held that two offences of the same or similar character are sufficient to constitute a "series" for the purposes of that section,[5] and here the joinder of the murder charges was permissible because those were a series of offences of the same character, with an obvious nexus, namely the killing of each of two other men in the same building, dismembering their bodies with a hacksaw, disposing of them in the manner described, and using pieces of the same carpet coming from a unit within the residence to do so. The charge of unlawful interference with Mr Doorne's body was founded on the same facts.

[26] Mr Byrne QC did not submit that the two counts of murder, and of disposing of Mr Doorne's body, were not prima facie properly heard together, or that evidence which was inadmissible in the charges involving Mr Doorne's death had been heard by the jury determining that count; or that the joinder of the counts, resulting in the jury considering the charge relating to Mr Hoffman's death hearing the evidence concerning Mr Doorne's, had itself deprived Mr Surrey of having the jury give unprejudiced consideration to a defence fairly open to him, and thereby caused a miscarriage of justice. Instead, Mr Byrne QC submitted that at the stage of the trial reached when Mr Surrey had elected not to give evidence or call witnesses, and when the learned trial judge had determined that it was appropriate to give a "micro-*Weissensteiner*" direction on the charge of murdering Mr Doorne, and an *Edwards* direction on the charge of murdering Mr Hoffman, the learned trial judge should have reconsidered the earlier ruling that the charges were properly joined. This was argued to be an obligation placed on the trial judge even though there was no application by counsel for reconsideration of the joinder, or for an order separating

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4 Their Honours cited *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, 39; *R v Kray* [1970] 1 QB 125, 130-131; *R v Clayton-Wright* [1948] 2 All ER 763, 765; *R v Cranston* [1988] 1 Qd R 159, 164

5 See for example *R v Kray*

the trials. The reason advanced on appeal for the obligation on the trial judge to make a late order separating the trials was because the judge should have realised the combination of the directions to be given would cause a miscarriage of justice, perhaps having particular effect on the charges about Mr Doorne's death. Mr Byrne QC submitted, independently of that argument, that in any event each of the *Weissensteiner* and *Edwards* directions had been inappropriate or defective.

The micro-*Weissensteiner* direction

[27] It is logical to start with those contentions first. Dealing with the complaint about the *Weissensteiner* direction, it was given in the following terms:

> "Now, the Crown invites you, - on the evidence that the pieces of carpet are one and the same, and the evidence as to the DNA profiles on the backpack and the taxi boot carpet being the same as that of the nail clippings from Mr Doorne's belongings – to infer that Mr Doorne was dismembered and his remains carried away and left at Hilliard's Creek. Mr Meredith said to you that Mr Surrey hadn't offered any other explanation for the carpet or the DNA residue on his backpack or the taxi.
>
> Do remember this: Mr Surrey is not obliged to give evidence or to contradict any part of the Crown case. And there might be plenty of reasons for a person not to want to give evidence: a lack of confidence in their own ability to perform as a witness; or wanting to preserve the right of last address, which you get when you don't give evidence; or a view that the prosecution hasn't made its case out, because an accused person is entitled to sit back and require the prosecution to prove its case beyond a reasonable doubt; or a view that an explanation has already been given to the police in any event; or simply just a clear exercise of a right not to give evidence.
>
> All that it means is that there is no other explanation on these points about the DNA evidence or the carpet, and in the absence of any such explanation you might feel you can more readily draw the inference that the Crown invites. But like everything else, it's a matter for you whether you think of that approach as appropriate because how you approach the evidence is entirely up to you, as I keep telling you."

[28] I respectfully observe that there are apparent deficiencies in that direction, despite its manifest common sense. The apparent deficiency lies in the failure to follow the requirements stipulated in the majority joint judgment in the High Court decision in *Azzopardi v R*[6]. That judgment requires (at [51] and [67]) that a trial judge make clear when a defendant does not give evidence that the judge warn the jury that that defendant's silence in court is not evidence against the defendant, does not constitute an admission by the defendant, may not be used to fill gaps in the evidence of the prosecution, and may not be used as a "make-weight". (I respectfully agree with the observation of White J in *R v DAH* [2004] QCA 419 at [86] that "one might question how helpful to a jury is the expression 'make-weight'. It is not in common use and has an unattractive flavour of antiquarianism about it".)

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6 [2001] HCA 25; (2001) 205 CLR 50

In this matter the learned trial judge already had directed the jury earlier, before giving the "micro-*Weissensteiner*" direction,[7] that Mr Surrey's election not to give evidence in no way reduced the burden on the prosecution of proving all the elements of the offence, and that the jury could not treat Mr Surrey's failure to give evidence as itself evidence against Mr Surrey, nor treat it as filling any gaps the jurors might think existed in the prosecution case. The learned judge had also earlier advised[8] the jury that it was the prosecution that had to prove guilt, and that Mr Surrey did not have to prove anything.

[29] However, the learned judge did not repeat the directions to the effect that a defendant's not giving evidence was not an admission, and could not be used to fill gaps in the prosecution case, when giving the "micro-*Weissensteiner*" direction quoted above. The repetition of those directions, or ones to their effect, when giving an instruction to the jury about what could result from a choice not to give evidence, is suggested in the draft directions provided in the *Queensland Supreme and District Courts Bench Book*; this is undoubtedly because the joint judgment in *Azzopardi* at [67] does appear to require that repetition, when giving what is often referred to as a *Weissensteiner* direction, but what should now be described as an *Azzopardi* one.

[30] The most significant omission in the directions given was the comment or direction that if there were facts which explained or contradicted the evidence the prosecution led against Mr Surrey, they were facts which would be within the knowledge only of Mr Surrey, and thus could not be the subject of evidence from any other person or source. The joint judgment in *Azzopardi* reads:

> "[64] There may be cases involving circumstances such that the reasoning in *Weissensteiner* will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be *additional* to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any *additional* fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial."

[31] Their Honours added a little later, at [68], that the cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional, and will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. The directions given by the learned trial judge in the instant appeal did not include the elaboration apparently required by the joint judgment in *Azzopardi*, that the facts which would explain the evidence the prosecution led must be both *additional* to those given by the witnesses called, and (if they exist) peculiarly within the knowledge of the

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7 At AR 637

8 At AR 635

defendant. That joint judgment appears to require an explanation to the jury consistent with the terms of that judgment that the fact a defendant could have contradicted evidence already given would not suffice, mere contradiction not being evidence of any *additional* fact.

[32] The learned judge did not give that elaboration, but in my respectful opinion that did not cause any miscarriage of justice, in the sense of depriving Mr Surrey of any chance of acquittal fairly open to him. Mr Byrne QC submitted that there were no relevant additional facts peculiarly within Mr Surrey's knowledge, and accordingly no direction in terms of *Azzopardi* was appropriate; but I respectfully disagree with that submission. Regarding only the topics the subject of the direction which was given, the prosecution evidence established that there were facts known only to Mr Surrey and which could explain what the prosecution had established, which facts would include why a backpack found in Mr Surrey's unit had Mr Doorne's DNA in stains on its base and strap, why it smelt so strongly, and why Mr Surrey was carrying a suitcase which leaked fluid with Mr Doorne's DNA. Likewise they would include why the two pieces of carpet found at Hilliard's Creek had come from the carpet wrapped around Mr Hoffman's torso, and before that from Mr Surrey's unit. In truth, the inescapable inference from the evidence the prosecution had led, irrespective of or despite any answer or evidence from Mr Surrey, was that Mr Surrey had carried away pieces of Mr Doorne's body in a backpack and suitcase in and after mid December 2000, disposing of Mr Doorne's belongings and in all likelihood at least some of his body parts at Hilliard's Creek. It follows that the limited directions that were given by the learned trial judge about the absence of explanation for the DNA evidence or the evidence about the pieces of carpet were really unnecessary, and irrelevant to the verdict, because the jury could not avoid those conclusions.

[33] The evidence the prosecution had led, not answered by Mr Surrey, would have justified a further and fuller direction, not given by the learned judge, that the absence of any evidence of additional facts providing an innocent explanation for Mr Surrey's having done as described, (carrying away his dismembered parts and his belongings) and which facts only Mr Surrey would know, would strengthen the inference that he had murdered Mr Doorne. Additional facts which only Mr Surrey could know would include how he had come to be in possession of Mr Doorne's body parts and some of Mr Doorne's belongings, whether Mr Surrey had taken part in dismembering Mr Doorne's body, and why he was disposing of it. In the absence of any evidence from Mr Surrey providing an innocent explanation of those matters, the jurors were entitled more safely to draw the obvious conclusion that the only answer was that Mr Surrey had killed Mr Doorne, and that he had sought to conceal his doing that because there was no lawful justification for the killing, which was murder.

[34] If that analysis is correct, it can be seen that the circumstances justifying the fuller directions approved in *Azzopardi* are those existing when the Crown has established a sufficiently strong circumstantial case to satisfy the jury of guilt on the *Peacock* test,[9] namely that the inference of guilt is the only rational inference which can be drawn from the circumstances. In my respectful opinion, those circumstances would include any explanation offered by a defendant, whether to the police, other

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[9] *Peacock v R* (1911) 13 CLR 619 at 634 and 661. In that case Mr Peacock made a statement from the dock which the High Court said the jurors were to consider on its merits (at 641, 674)

witnesses, or the jury. I note that in the two cases considered in *Azzopardi* by the High Court, and in which the *Azzopardi* direction was considered inappropriate, neither was a circumstantial case. To continue, in an appropriately strong circumstantial case where there has been no explanation from the defendant put before a jury[10], then in my respectful opinion it would be better if that point were not made by the trial judge to the jury, and the judge instead simply directed the jury, in a case such as this one, that the issue for them was whether the inference of guilt of murder was the only rational inference from the circumstances established by the evidence that was before them, and restricting their considerations to that evidence, including the evidence of Mr Surrey's possession of Mr Doorne's body parts and belongings, and his disposing of them. I acknowledge that that is not how the law has developed to date in this area.

[35] Applying the law as it currently stands, the fact that the learned trial judge did not give the fuller *Azzopardi* direction which the Crown case would have justified did not deprive Mr Surrey of a chance of acquittal otherwise fairly open to him. The fact that the learned judge did give a "micro-*Weissensteiner*" direction, which may have encouraged the jury to draw a conclusion which was in fact inevitable, did not cause any miscarriage of justice. Nor did the fact that the directions the learned judge gave were not precisely in the terms required by the majority judgment in *Azzopardi*. In *R v DAH* this court doubted that the joint judgment in *Azzopardi* required the mandatory use of a particular verbal formula,[11] and wrote, per White J at [86] that:

> "So long as the essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence, then there is no error."

[36] This Court had earlier expressed conclusions to the same effect in *R v Nicholson; ex parte DPP (Cth)* [2004] QCA 393 as those put so clearly by White J in *R v DAH.* In the instant appeal, the learned trial judge gave all of those directions to the jury, albeit not when giving the *Azzopardi* or micro-*Weissensteiner* direction. The directions the learned judge gave were not unfair to Mr Surrey and were about a topic on which an *Azzopardi* direction was appropriate, and which could have been a much stronger one. I respectfully observe that it would reduce the number of matters about which complaint could be made on appeal, and in any event would be better, if trial judges avoided giving unnecessary "micro-*Weissensteiner*" directions, and gave full *Azzopardi* directions where appropriate, but omitting the "make-weight" observation. It would also probably be safer for trial judges not to refer to the prosecution evidence as being such as "to call for an explanation", although this expression is suggested in the current *Bench Book* direction and impliedly required by the joint judgment in *Azzopardi*, at [67]. Using the term "call for an

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10 An explanation to Police or other witnesses consistent with innocence may have been excluded from evidence as "self serving", in accord with the decisions of this court in *Kochnieff v R* (1987) 33 A Crim R 1 and *R v Callaghan* [1994] 2 Qd R 300

11 In the judgment of McPherson JA at [12], with whom Cullinane J agreed

explanation" has the capacity to reverse the onus of proof. Returning to this matter, the omission to give the fuller direction suggested by the joint judgment in *Azzopardi* and in the *Queensland Supreme and District Courts Bench Book* did not deprive Mr Surrey of any chance of acquittal he would have otherwise had. That ground of appeal should be dismissed.

The Edwards direction

[37] The complaint by Byrne QC regarding the *Edwards* direction on the charge of murdering Mr Hoffman was limited to the written submission that the evidence in relation to Mr Surrey's possession of a knife block, and his answers to questions relating to it, was not capable of providing evidence of a consciousness of guilt by him. It was also submitted in written argument that the direction failed to identify the precise lie told and the basis on which it was said to implicate Mr Surrey in the murder of Mr Hoffman.[12] However, the appellant's counsel had difficulty in identifying on the appeal what it was that Mr Surrey had said about the knife block, or what the asserted error by the trial judge was. That deficiency was helpfully remedied in a supplementary written outline by Ms Bain, counsel for the respondent.

[38] In essence the Crown position was that Mr Surrey had allegedly dishonestly denied having possessed a knife block with knives in it in his unit at the time of Mr Hoffman's death, and had dishonestly suggested Mr Hoffman possessed one. This lie was assertedly advanced to further his claim of self-defence against a knife wielding attack by Mr Hoffman. The Crown relied on oral and film evidence of Mr Surrey having possessed a knife block prior to Mr Hoffman's death, on the fact one was found in his unit on 27 January, and on Mr Surrey's claim that that knife block found in his unit was Mr Hoffman's.

[39] The evidence to which this court was referred on the appeal does not make it clear that there was necessarily any inconsistency between Mr Surrey's possession of a knife block on 27 January 2001, and it having earlier been in Mr Hoffman's possession. In any event this seems a very small point. A far more significant direction – about which no complaint is made – was given concerning Mr Surrey's claim of having been drinking on the day of Mr Hoffman's death with John Lee and his girlfriend, and his claimed belief that some of his money was stolen. That money which Mr Surrey said had been missing turned up in a cupboard in the police search of Mr Hoffman's unit, and had not been taken by anyone. The learned judge correctly explained to the jury that it did not follow that because Mr Surrey was wrong, that it was a lie; and that he might genuinely have been muddled up as to the whereabouts of the money and believed it to be missing. The judge also reminded the jury, concerning the knife block, that the defence submission was that those were pretty common items, so the jury might not be satisfied that any deliberate lie was told about it; and further correctly directed the jury of the necessity to distinguish between what a person said and a finding that a deliberate lie was told; of the necessity to be satisfied that the lie, if a deliberate lie, was connected with the offence charged, and that it was told because Mr Surrey knew the truth would implicate him in the commission of that offence.

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[12] Mr Byrne QC referred to *Zoneff v R* (2000) 200 CLR 234 at [17] and *Edwards v R* (1993) 178 CLR 193 at 210 and 211

[40] I add that the knife found at Hilliard's Creek was described in evidence as fitting neatly into the knife block found in Mr Surrey's unit. The Crown contended to the jury that what it argued was a lie about Mr Surrey's possession or ownership of the knife block might have been told to disguise the use of his own knife on either (or each) of Mr Doorne or Mr Hoffman. The learned judge had reminded the jury that it might be possible that Mr Surrey simply wanted to distance himself in his answers from the ownership of a lot of sharp knives, in case the police thought the worst. It appeared that the learned judge gave the jury careful and full directions in accordance with the decision in *Edwards* on the topic of the knife block, and on Mr Surrey's version of the circumstances before and at the time of Mr Hoffman's death; and the facts established did justify giving those directions. That is, it was open to the jury to conclude deliberate lies were told, including about possession of a knife block with knives, because Mr Surrey knew he could not tell the truth without incriminating himself for murder. That ground of appeal should be dismissed. Nevertheless, the Crown should be on guard against "overcooking" strong cases by over reliance on adding the authority of the judge's directions to the Crown arguments for a conviction.

Joinder revisited

[41] This leads to the issue of the combination of the *Edwards* direction and the *Azzopardi* or *Weissensteiner* direction, resulting from the murder counts being heard together. Mr Byrne QC submitted that the net result was the risk that the jurors might (on the Doorne counts) consider that "We know he tells lies anyway, so what good would it be if he had given evidence because we've been told he is a liar." That was the reason the learned trial judge should, with hindsight, have split the trials. That submission really does no justice to the very careful directions the judge did give the jury about the necessity to consider all counts separately, about the matters to consider when evaluating the Crown's argument that Mr Surrey's lies, if lies, relevant to the Hoffman charge showed a consciousness of guilt of murder, and the learned judge's carefully restricted directions on the availability of the conclusion that Mr Surrey had dismembered and carried away a portion of Mr Doorne's body. The directions which were given did not in any way invite the jurors to reason along the lines submitted by Mr Byrne QC; and in the course of giving the *Edwards* directions, the learned trial judge repeatedly warned the jurors against the notion that they could reason, if they found Mr Surrey had told lies, that he was accordingly guilty or it was easier to infer guilt.

[42] The *Edwards* directions that were given were limited to specific matters relevant to the circumstances of Mr Hoffman's death, and Mr Surrey's defence of self-defence or provocation was clearly before the jury in his interview with police. The lack of any response from him in explanation of the circumstances incriminating him in Mr Doorne's death did not affect the existence or the merits of his defence to the murder of Mr Hoffman. In that regard the situation is different from that prevailing in *R v OGD*[13] where that appellant had been charged with multiple offences and Gleeson CJ, when considering whether a *Jones v Dunkel* direction[14] (as the learned Chief Justice described it) was appropriate, wrote that:

> "It was quite possible that [that appellant] had an answer to one of the charges but not to the others. It was also possible that his answer

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13 (1997) 45 NSWLR 744, at 752

14 (1959) 101 CLR 298

> to one of the charges would have involved him in making admissions in relation to others."

[43] That position does not apply here. Mr Surrey had made an answer to the police to the allegation of murdering Mr Hoffman, and that was put before the jury during the Crown case. The validity of that explanation was unaffected by the absence of explanation for the matters about which the judge gave the jurors the limited *Weissensteiner* directions quoted. That limited direction was as to matters which Mr Byrne QC conceded required explanation by Mr Surrey. I do not accept that the *Edwards* directions which were given would have resulted in the jurors reasoning as Mr Byrne QC suggested, and notionally rejecting in advance any explanation which Mr Surrey had to give. It was not submitted on appeal that Mr Surrey's choice not to give evidence was in any way affected by the joinder of the charges or concern about how evidence in chief or cross-examination on one count might adversely affect him on another count, or that it could have done so. That ground of appeal should be dismissed.

Mr Burton's identification evidence

[44] This leaves only the ground concerning the identification evidence by Walter Burton. That was evidence from Mr Burton which purported to identify Mr Surrey as the person shown in security photographs being dropped off on 15 December 2000 by the taxi driver Mr Montgomery. No objection had been taken at the trial to Mr Burton, who had known Mr Surrey for some 14 years, making that identification. Mr Burton pointed to certain admissible identifying features, such as that the person photographed had his wallet sticking "half out of his pocket", which is how Mr Burton said Mr Surrey normally carried his wallet. Also the man photographed wore sandals, and Mr Burton said that Mr Surrey wore sandals "quite a bit".

[45] Mr Burton's cross-examination was restricted to other issues, and his purported identification of Mr Surrey as the man photographed was unchallenged. Nevertheless, as was submitted on the appeal, Mr Burton's opinion that the person captured on the photograph was Mr Surrey was not admissible. That inadmissibility was established by the decision of the High Court in *Smith v R* [2001] HCA 50; (2001) 206 CLR 650 at [10], [11], and [58]; those judgments emphasise, as does the judgment of this Court in *R v Griffith* [1997] 2 Qd R 524, that the comparison between the person photographed and Mr Surrey was a matter for the jury and not the opinion of a witness.

[46] It was common ground on the appeal that the Crown could have called Mr Burton to give evidence about the manner in which Mr Burton said Mr Surrey was known to carry his wallet, and his usage of sandals. The learned trial judge did direct the jury that whether Mr Burton's identification was correct was a matter for the jury to decide, and gave directions about the matters which both weakened and supported the identification. Those included that the person who rang the cab company which sent Mr Montgomery to the corner of Doggett and Wandoo Streets on 15 December 2000 had used Mr Surrey's phone and Mr Surrey's name. The other circumstances, namely Mr Surrey's general appearance, the address at which the passenger was collected, the circumstances of Mr Doorne's disappearance, Mr Surrey's disposal of Mr Hoffman's body, and the DNA evidence linking Mr Surrey's backpack, Mr Montgomery's cab, and Mr Doorne's body, show that it was unnecessary for the

prosecution to call Mr Burton to make this (inadmissible) identification. The circumstances already did that, and Mr Surrey did not lose any opportunity of acquittal by reason of that identification evidence being led without complaint or challenge at the trial. That ground of appeal should also be dismissed.

[47] In the result all grounds of appeal fail and I would order that the appeals be dismissed.

[48] **JONES J:** I have had the advantage of reading the separate reasons of McPherson and Jerrard JJA. I agree with those reasons and with the order that the appeal should be dismissed.