SUPREME COURT OF QUEENSLAND

CITATION:	*R v Frank* [2010] QCA 150
PARTIES:	**R** **v** **FRANK, Yasmin Eileen** (appellant)
FILE NO/S:	CA No 240 of 2009 SC No 48 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	18 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2010
JUDGES:	McMurdo P, Muir JA and Cullinane J Separate reasons for each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is allowed.** **2. The guilty verdict for murder is set aside.** **3. A re-trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – appellant convicted of murder – deceased killed by single stab to the collar bone area – no evidence that appellant said anything evincing intent – pathologist evidence supported use of significant force – evidence that appellant was angry with deceased – whether jury entitled to conclude that only rational inference from evidence as a whole was that the appellant had intention to injure deceased in a way likely to cause grievous bodily harm – whether verdict unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – transcript of appellants interview with police tendered as evidence – appellant denied arguing with deceased and denied injuring him – falsity of statements in police interview conceded by defence – prosecution suggested lies were to cover up appellant's aggression –

defence did not seek jury direction on lies – whether judge erred in failing to direct the jury as to the use to be made of lies – whether non-direction resulted in a miscarriage of justice

Criminal Code 1899 (Qld), s 668E(1)

Cutter v R (1997) 94 A Crim R 152; [1997] HCA 7, distinguished
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, applied
Knight v The Queen (1992) 175 CLR 495; [1992] HCA 56, distinguished
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Baira [2009] QCA 332, distinguished
R v Mitchell [2007] QCA 267, (2007) 174 A Crim R 52, distinguished
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, applied

COUNSEL: R East for the appellant
M Cowen for the respondent

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

[1] **McMURDO P:** The appellant, Yasmin Eileen Frank, pleaded not guilty in the Cairns Supreme Court on 27 July 2009 to murdering Martin Zdrilich on 20 February 2007. After a three day trial, she was convicted of murder. She appeals against her conviction on three grounds. The first is that it was "unsafe and unsatisfactory". The second is that the primary judge erred in his directions to the jury on the element of intention. The third is that his Honour erred in failing to direct the jury as to the use they might make of lies told by the appellant. The appellant was represented at trial by a barrister of less than two years experience, instructed by the Aboriginal and Torres Strait Islander Legal Service. The appellant's counsel, who was not trial counsel, contends that the appeal should be allowed, the conviction for murder quashed and instead a conviction for manslaughter entered; her sentence should be remitted to the Trial Division of the Supreme Court at Cairns.

[2] Before turning directly to these grounds of appeal, it is necessary to set out the relevant aspects of counsel's addresses, the evidence at trial and the judge's summing-up.

The trial proceedings

The prosecutor's opening address

[3] The prosecutor in his opening address to the jury summarised the evidence of the witnesses he intended to call. He explained that the appellant in an interview with police gave an account of her movements on the day of the killing, adding:

> "… She, however, denied that there'd been any trouble and, in particular, she denied that there'd been any trouble with neighbours at those units. She also denied having had any contact with [the deceased] and she denied injuring him. She denied that she'd been attacked and said she'd suffered no injury consequently."

[4] The prosecutor concluded his opening address with the following observations:

> "… when you've heard all the evidence you're going to hear in this case, you'll be satisfied that the [appellant] had a knife with her that night; that she was aggressive and argumentative and, the prosecution would submit, looking for a fight. There was no reasonable justification for her to use a weapon, and the prosecution would submit that [the deceased] did nothing to warrant being so violently attacked. Furthermore, [the deceased] posed no threat to her, and any physical force that may have come from him was moderate in the circumstances. Furthermore, the prosecution would submit although she'd been drinking, she knew what she was doing and she was aware of what she had done. The prosecution would submit that when she stabbed [the deceased], she meant to do him serious harm but she just didn't care. And the prosecution would submit to you that when you've heard all that evidence, you'll the find charge of murder and that your proper verdict will be one of guilty" (errors as in the transcript).

The evidence

[5] The following summary of the evidence at trial, taken from the appellant's outline of argument, is accurate and is accepted by the respondent.

> "The appellant, a 23 year old Indigenous woman, spent much of the day and the evening of 20 February 2007 drinking alcohol with three female companions. At about 10 pm they were drinking, listening to music, laughing and talking together outside a friend's unit in suburban Cairns. Their noise disturbed the deceased, who lived in the adjoining unit. He called on them, in a reasonable way, to quieten down.
>
> Peace did not reign long. Each of her three drinking companions gave evidence as to what happened next. As might be expected their accounts differed, no doubt in part to their intoxication.
>
> The deceased called on them again to be quiet. It was said that his manner was 'agro' and 'wild'. He threatened to call the police if they did not leave. Apparently upset by that comment, the appellant got up and confronted the deceased.
>
> Two of the women gave evidence of seeing a physical altercation break out between the deceased and the appellant. They gave evidence of the deceased slapping and kicking the appellant, who on at least one occasion ended up on the ground.
>
> … [T]he appellant had taken a steak knife from a table where they had been seated. The appellant either took it or had it on her when she confronted the deceased.

> The deceased died from a single 6-7 cm stab wound behind the left collarbone, which punctured his left lung.
>
> There was evidence that the appellant was intoxicated at the time. She was variously described as being 'off her face' and 'a little bit pretty drunk'. While the Crown did not challenge that the appellant was intoxicated to some extent, it relied on evidence of her post-offence conduct as suggesting she was in control of herself."

[6] It is necessary to expand on some aspects of this factual summary.

[7] One of the appellant's companions, Vivian Accoom, gave evidence including the following. The appellant was "off her face" from drinking and smoking marijuana that night. Before the appellant had the altercation with the deceased, the appellant put a steak knife from the table in her pocket. Ms Accoom did not see much of the actual altercation between the protagonists. The appellant was not "agro" towards the deceased and was talking normally to him but he was "agro" to her. When Ms Accoom and the appellant left the scene, the appellant was panicking, worried and very scared.

[8] Another of the appellant's companions, Amanda Daphney, gave evidence which included the following. The appellant and the deceased were both "a bit angry" when speaking prior to their "little fight". Ms Daphney thought the deceased kicked the appellant when she was on the ground. She saw the appellant with the knife which the appellant took from the table and put between her legs before the appellant's altercation with the deceased. She heard the deceased yell: "Somebody get an ambulance." Ms Daphney then walked away because the deceased had told them to be quiet or he would call the police. She met up again with the appellant later. The appellant seemed frightened.

[9] Another of the appellant's companions, Tracy Ann Murgha, described events in this way:

> "Well, we started to talk and still drink again and so [the deceased] went back inside again, and we just said it more got louder and louder, so he kept on until the third time he come out, that's when [the appellant] got real ostropogus and wild. So she - she got real ostropogus and wild, so he come out the third time and he said, 'That's it.' And he said, 'I'm calling the cops now, youse all have to leave now.' So she - because she – [the appellant] didn't like it, so she went next-door to him. She the only one approach him all night out of four of us - out of three of us there, Vivian, Amanda and me, she the only one that approached him. And the third time she went there, so he got his right hand and he - he slapped her, he slapped her in the face and neck and she - she wanted to fist fight him, but he pushed her back and she tripped and she said, 'Why are you pushing me for, you old cunt? We're not here to cause trouble.' And she got up and she went back to him again and he went back, took about two or three steps back to his door, where his door - where he lived and she went - went to him to - to him and - he stand up there and she wanted to fight him, to fist fight him, and them two just slapping each other, so he pushed her back, she tripped again and then, yeah, she fall back and she got back up again and that's when I seen her with the - with her hand, like jabbing someone.

> She was jabbing someone?-- Yeah. She had her right hand here and her left hand here and she was going like a jab stab in the guts.
>
> All right. Just so that we're clear about that, you're indicating around the stomach, around the guts, as you put it ?-- Yeah, I seen it from my own eyes.
>
> With left - with left and right hands?-- Yeah, with left and right hand.
>
> Okay. And what happened then?-- And what happened then, when he - when she - when - he, he went and pushed her again and she tripped and she fell down, so he kicked her in the guts and the chest. She said you - she's singing out, 'You're kicking me, you old cunt, you're kicking me and' – 'in the chest and in the guts', she's singing out to us, and so she - he moved - he moved back and when he was actually standing back about two steps back away from her, she's still on the ground, going like that, and sore guts after kicking her in the chest, then she stayed on the ground and then suddenly he just said, 'Oh.' He put his hand down, I seen his hand about - on both side and then he went... He felt wet and he said, 'I'm bleeding. I've been stabbed, I've been stabbed.' And then that's when he called out his missus, 'Call an ambulance I've been stabbed, the police. I've been stabbed by one of - one of these people here - one of the people' " (errors as in the transcript).

[10] The pathologist's evidence included the following. The stab wound passed through the deceased's skin behind the collar bone into the soft tissues. It cut through part of the left subclavian, behind the ribs, basically downwards, entering the top part of the left lung and continuing forwards towards the left nipple. The wound was about six to seven centimetres deep. The knife had been deflected somewhat by the collar bone and that was responsible for the direction of the wound. The deceased had a blood alcohol level of .077 which meant that he was just over the legal limit for driving and mildly intoxicated at the time of his death. Although the deceased suffered from coronary arthrosclerosis and emphysema, the substantial cause of his death was the stab wound to the left lung. The injury to the deceased suggested the use of "quite a bit of force initially, but because it's hit the collar bone, it's probably deflected some of the force away from the soft tissues, so that you really don't need much force to go into that soft tissue behind the collar bone." In cross-examination, he agreed that it was difficult to reconstruct how the wound actually occurred. There was no sign of any injury on either side of the deceased's abdomen.

[11] On 21 February 2007, the day after the killing, police interviewed the appellant from 3.20pm to 4.55pm.[1] Prior to the interview, her blood alcohol reading was zero. She told police that on the previous night she had consumed two casks of white wine and a dozen vodka cruisers. She described her mood as "good" and agreed that she was a "happy drunk". She stated that it was normal for her drink the amount she consumed that night.

[12] Police asked her for her version of what happened. She responded as follows. She and her girlfriends did not have arguments with anyone that night. Nobody was hurt. She knew nothing about the stab wound to the chest of the deceased whom

[1] The video recording of the interview is exhibit 8 and the transcript of the interview is exhibit 8A.

she described as "a good fella". When asked if she had any information about how the deceased died, she answered:

> "No, 'cause I don't know anything, I said if knew, I would tell youse but I don't know nothing.
>
> POLICE: Alright. Is there anything, if you did know something, is there anything stopping you from…telling [us]
>
> APPELLANT: No, no, nothing. Nothing's stopping me, 'cause I don't know anything" (errors as in the transcript).

[13] She told police that she had no bruises and was not injured in any way so there was no need for her to see a doctor. Police put to her that she was the person who stabbed the deceased. She responded: "I did not stab him. I'm not violent, I didn't stab him. I did not, I'm telling the truth, honestly, I don't know anything, I don't know nothing about it."

[14] The appellant did not give or call evidence.

Counsel's closing addresses

[15] Prior to counsel's closing addresses, the judge discussed with them the issues for the jury's consideration. Defence counsel stated that his case was not that told by the appellant to police in her record of interview. The defence would concede that the appellant was not truthful in that interview. The issues of intent and provocation were relevant to whether the appellant was not guilty of murder but guilty of manslaughter. The judge stated that he would direct the jury as to self-defence even though defence counsel indicated that he would not address the jury on it. The prosecutor stated that he would address the jury on provocation and intoxication and made a brief passing reference to self-defence. There was no discussion as to how the jury should be directed about the appellant's plainly untrue statements to police that she was not involved in and knew nothing of the altercation with the deceased resulting in his stabbing and death.

[16] The prosecutor's closing address to the jury included the following:

> "… Now, you may think of, you know, fictional stories or cinema movies or television programs where there is a sub - plot with someone intending to kill someone. That's crystal clear, isn't it, we're all aware of that kind of situation where someone wants to bring the life of someone to an end? We've seen it in fiction and we also hear about it going on in our society. That's a murder. That's the killing with intent to bring about someone's death.
>
> But murder can also be committed in another way and it's when you intend to cause some grievous bodily harm to someone – and that's a really serious injury. His Honour will give you directions on these matters again during the course of his summing up to you and he's already indicated at the outset some of these points are made. So, murder is that intent to kill someone which is perhaps the gravest, the most serious and most reprehensible kind of murder, but murder can also be brought about when you have the intent to cause grievous

> bodily harm to someone and, in doing so, that person suffers the injury that kills them. And you might think one is more culpable, more serious, more reprehensible than the other but they both come within our definition of murder.
>
> That intent, ladies and gentlemen, doesn't have to be a long standing intent. As you've heard in the facts of this case, there was perhaps just a casual awareness of [the deceased's] existence by the accused. She hasn't gone around for months and years pondering how to get rid of him, bearing some resentment towards him. But in those moments, when they were together that night, it's the Crown's submission, you can see by her actions and her behaviour she evidenced that intent to cause him serious injury, really serious injury indeed, to cause him grievous bodily harm. It can be a momentary intent like that, that is sufficient for the intent for our purposes. And I'd submit to you that, really, the circumstances that you've heard about with this incident brewing away, bubbling up and coming to that flash point is such an example and such a situation where you can see that momentary intent. Momentary though it was, it was certainly serious and it was put into effect."

[17] The prosecutor, in addressing the jury on intoxication, reminded them that the appellant told police that although she had been drinking, she was aware of what she was doing. He suggested that was "perhaps the only truthful thing she said". Later he added:

> "Ladies and gentlemen, in her interview with the police that you listened to this morning - it went on for some one and a half hours or so - she was quite comprehensive in describing where she'd been and what she'd done. She had no difficulty in telling you every little incident during the course of the day other than talking about what occurred outside that pensioner unit of Bill Carroll that evening. And you may find that her denials of any involvement or any fight, disturbance or conflict with any of the neighbours are utterly and completely unconvincing.
>
> The police officer did his best. As you saw he wasn't trying to trick her or anything. He went around it about two or three times and suggested to her that she may have missed something out and there had been an incident, giving her two or three opportunities to tell the full truth. She didn't. She could've then said that something had gone on. She was invited time and time again. She could've said, had she had a complaint about the way [the deceased] had behaved, if he was being violent and aggressive to her, she could've said. But she didn't. And the reason, ladies and gentlemen, is that, I submit to you, she had no excuse for her behaviour other than her own aggression."

[18] The prosecutor concluded his address in this way:

> "Ladies and gentlemen, the evidence is clear: It's she who stabbed [the deceased]. And I'd suggest to you the evidence is also clear she did that, although having had something to drink she did that with an

> intent to cause him grievous bodily harm. And at the end when she'd done what she'd done, all she wanted to do was go off and buy more drink, forget about him. Ladies and gentlemen, I'd suggest the proper verdict that you will reach when you consider all the evidence in this case is one of guilty, and guilty to the charge of murder. …"

[19] Defence counsel's address included the following. He told the jury that murder involved "an intention to either kill or to do grievous bodily harm or a very, very serious injury".

[20] He reminded the jury that the appellant in her interview with police distanced herself from the killing, denying that she was responsible. He continued:

> "… How do you resolve that? Well, it's up to you to consider whether what she was saying in the interview was right, it's against all the other evidence you've heard. And you might consider that quite simply she wasn't telling the police the truth - it's really that simple - and it's up to you to consider whether that was the case.
>
> Why would she have done that, if you come to that conclusion? Is there anything sinister? Was she in the interview thinking about this thing here, Volume 1 of our Criminal Code, which takes us years to study about whether she can find a technical way of getting out of it? I don't think so. Could it be simply - and it's a matter for you - a young girl who was, after an incredibly horrific event, woken up? She was arrested, she was put in a police cell. And this is not being critical of the police, this is a standard investigation, in the afternoon she was interviewed and for the first time, the time you saw it on the video screen, where it was really the first time she was told. Some people, in situations like that, would it be quite simple for them to try and get out of it by saying, 'Oh, I dunno, it wasn't me'? You might find that quite a logical thing for someone to do and out of just sheer fear of, really, the results and ramifications of what's occurred. In hindsight, she may have done something very different but I'm sure everyone on that night, in hindsight, would've done something different."

[21] Later, he told the jury that if they accepted evidence of witnesses that the appellant was physically responsible for killing the deceased, the next question for them was:

> "… did she intend to kill him or do grievous bodily harm? …I don't really like saying grievous bodily harm, it's got this big technical meaning but it's a very, very serious injury - grievous bodily harm puts you in hospital, basically - to the point where you'd die if you didn't get treatment, things of that nature, and his Honour will probably talk to you a little bit more about that. And that intention is - there's a couple of aspects to that.
>
> Could I say a general intention, was there even an intention to do anything in relation to this, putting aside even the intoxication? If you don't find on what you've heard, assuming you don't accept her record of interview, that she had any intention really to do anything

> maybe other than just to get away, then there was no intention. Secondly, you may find that her level of intoxication as part of this big mix of intention was enough to cause her not to know either, then again she doesn't have an intention. If you find that she doesn't have an intention, though, but you find in relation to Question 1 that she did cause the killing, that doesn't put her out the front door, she doesn't walk out of here a free woman. You can find her not guilty of murder, but she's then guilty of manslaughter, which is the killing without the intention. And that's certainly no soft option, all it is is the difference between the intention aspect of it."

The judge's directions to the jury

[22] The judge commenced his jury directions by explaining that, although the appellant was charged with murder, "the charge of murder admits two verdicts. The principal verdict of course is murder … and the other one is manslaughter."

[23] His Honour directed the jury that when drawing conclusions from facts:

> "… they must be reasonable conclusions. You are not allowed to have flights of fancy. So, each conclusion you draw on the circumstances as you find them to be, first of all it must be a logical, reasonable connection between the conclusion you draw and the circumstances.
>
> And secondly, and importantly, if you bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt must be the only rational conclusion that you could draw. If there is another rational conclusion which is consistent with innocence, it would mean that the prosecution has not proven its case beyond reasonable doubt. So, if there are two reasonable conclusions you can draw, one's consistent with guilt but the other consistent with innocence, then the [appellant] is entitled to the benefit of that doubt. Okay? It's a bit like, I suppose for those of you who follow football, rugby, they say ref's call, benefit of the doubt, that sort of thing. That's fine in a football match but in a criminal trial, your conclusion about guilt has to be the only rational conclusion that's available."

[24] The judge explained that an element of murder was that "at the time of the killing the [appellant] did so with the intention of either killing [the deceased] or doing him grievous bodily harm." Later, his Honour continued:

> "The final element for murder which the prosecution must prove beyond reasonable doubt is that the defendant at the time of the killing had the intention either to kill or to do grievous bodily harm. The prosecution seeks to convince you that he had such an intention because she was angry, she had armed herself with a knife, that she deliberately went over and confronted the deceased man and she struck him with the knife using moderate force, *at the very least that striking was likely to do grievous bodily harm*. The defence contends that these events happened very quickly, that the striking was an

> instinctive lashing out by the [appellant] and that she had no time to think. And, further, that the [appellant] was so intoxicated that she could not have or did not have that specific intention to cause death or grievous bodily harm. Now, the fact that a person is intoxicated is not of itself an excuse for criminal behaviour but it is relevant to the question of whether a person in fact formed a specific intention, if such an intention is an element of the offence. Here, of course, the intention to either to kill or to do grievous bodily harm is a necessary, specific element, so I need to explain that intoxication is relevant to the issue of this particular intention that you have to decide upon" *(my emphasis).*

[25] After giving directions about intoxication, his Honour continued:

> "But then having decided what evidence you accept, the question you ask of yourself is simply this: Am I satisfied beyond reasonable doubt that the [appellant] did intend either to kill or to do grievous bodily harm? Your answer will determine the decision of whether the [appellant] is guilty of the offence of murder. If you find that she did have that relevant intention having regard to all the circumstances, the possession of the knife, the confrontation, the state of her intoxication, then - and if you have decided already that the elements of manslaughter are there, then your proper verdict would be guilty of murder. If you are not satisfied beyond reasonable doubt of her having that relevant intention, then your proper verdict would be not guilty of murder and the verdict of manslaughter would still be open to you.
>
> If you are not satisfied beyond a reasonable doubt of her having that relevant intention, then your proper verdict would be not guilty of murder, and the verdict of manslaughter would still be open to you."

[26] Before the jury retired to consider their verdict, the judge explained that when they returned with a verdict his associate would ask whether they found the appellant guilty or not guilty of murder. If the answer was "guilty" there would be no further question. If it was "not guilty", the associate would ask how they found the appellant, guilty or not guilty of the offence of manslaughter. The speaker would respond either "guilty" or "not guilty".

[27] No re-directions relevant to the grounds of appeal were sought by counsel. The jury retired to consider their verdict at 10.15 am and returned with their verdict of guilty of murder at 11.41 am.

Was the jury verdict unreasonable or unsupported having regard to the evidence?

[28] The appellant's first contention is that the jury verdict is "unsafe and unsatisfactory", that is, it was "unreasonable, or cannot be supported having regard to the evidence".[2]

[29] The appellant's submissions on this ground are as follows. The question of intention was the crucial issue at the trial. The prosecution case was not that the

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[2] *Criminal Code*, s 668E(1).

appellant intended to kill the deceased, but rather that she intended to do him grievous bodily harm. The inference that the appellant intended to do the deceased grievous bodily harm was *a* rational inference which was open on the evidence. An equally rational inference open on the evidence was one consistent with innocence, namely, that the appellant lashed out with the knife in anger killing the deceased but without forming a specific intention to do him grievous bodily harm. There was no evidence that in stabbing the deceased she said anything evincing an intent of any kind. The death was caused by a single blow which may not have involved a great deal of force. The collar bone area where the knife entered the deceased's body was not an area normally associated with fatal or life threatening injuries. The stabbing could have occurred during a physical altercation between the deceased and the appellant without any intent to seriously injure the deceased. This rational inference could not have been rejected by a jury acting reasonably. The verdict of guilty of murder was unreasonable: *Knight v The Queen*;[3] and *Cutter v R.*[4] The appeal should be allowed, the conviction for murder set aside and instead a conviction of guilty of manslaughter substituted.

[30] The respondent contends that there was ample persuasive evidence to allow the jury to conclude beyond reasonable doubt that the appellant stabbed the deceased intending to do him grievous bodily harm.

Conclusion on this ground of appeal

[31] Whether the appellant intended to cause grievous bodily harm to the deceased when she stabbed him was the central question for the jury. The judge correctly directed the jury as to the meaning of grievous bodily harm, namely, any bodily injury of such a nature that if left untreated would endanger or be likely to endanger life or cause or be likely to cause permanent injury to health. The intention in this case (to do grievous bodily harm) differed from the intention in both *Knight* and *Cutter*. They were charged with attempted murder so that the relevant intention in their cases was an intention to kill. An intention to do a bodily injury which if left untreated would be likely to endanger life or to cause permanent injury to health is a much lower threshold for the prosecution to reach than an intention to kill.

[32] I turn now to the evidence in the present case which supported the inference that the appellant intended to do grievous bodily harm to the deceased when she stabbed him. The pathologist's evidence was that the fatal six to seven centimetre deep wound was caused by a knife deflected by the collarbone into the soft tissue and that the injury suggested "quite a bit of force initially". Other evidence strongly supported the inference that the appellant was angry with the deceased and was aggressive towards him at the time she stabbed him. She had taken a knife from the table not long before their fatal altercation. Contrary to the contention of the appellant's counsel, a knife wound in the vicinity of the collar bone seems to me to be likely to endanger life or cause permanent injury to life. The jury were entitled to conclude that the only rational inference from that evidence in combination was that the appellant, in using the knife during her altercation with the deceased, formed the intention, although a drunken momentary intention, to injure him a way that was likely to, at least, cause permanent injury to his health.

[33] The ultimate question for this Court's determination of this ground of appeal is whether, on the whole of the evidence, it was open to the jury to be satisfied beyond

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3 (1992) 175 CLR 495, Mason CJ, Dawson, Toohey JJ, 503-504; [1992] HCA 56.

4 (1997) 94 A Crim R 152, Brennan CJ and Dawson J, 157-158; [1997] HCA 7.

reasonable doubt that the appellant was guilty: *M v The Queen*[5]*; MFA v The Queen.*[6] After reviewing all the relevant evidence, I am persuaded that a properly instructed jury could be satisfied beyond reasonable doubt that the only rational inference was that the appellant intended to do grievous bodily harm to the deceased when she stabbed him. It follows that this ground of appeal fails.

Did the judge's omission to direct the jury about the appellant's lies cause a miscarriage of justice?

[34] The appellant's third contention is that the primary judge erred in not giving directions to the jury in terms of either *Edwards v The Queen*[7] or *Zoneff v The Queen*[8] as to the use to be made of her lies in her interview with police.

[35] The respondent contends that no jury directions in terms of either *Edwards* or *Zoneff* were required; this case is comparable to *R v Baira*[9] in that any such directions would not have served the appellant's interests; defence counsel's decision not to ask for such a direction was a legitimate forensic approach; no miscarriage of justice has arisen.

Conclusion on this ground of appeal

[36] It is true that defence counsel at trial did not seek from the judge any jury direction as to the appellant's plainly false denials in her record of interview. It follows that this ground of appeal can only succeed if the judge's failure to so direct the jury has resulted in a miscarriage of justice.

[37] In *Edwards*, Deane, Dawson and Gaudron JJ stated:

> "…Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. … And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it …and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in *Reg. v. Lucas (Ruth)*, because of 'a 'realisation of guilt and a fear of the truth'.
>
> Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt. … . A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters."[10]

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5 (1994) 181 CLR 487, 493-495; [1994] HCA 63.
6 (2002) 213 CLR 606, [25], [59]; [2002] HCA 53.
7 (1993) 178 CLR 193; [1993] HCA 63.
8 (2000) 200 CLR 234; [2000] HCA 28.
9 [2009] QCA 332.
10 Above, 210-211.

[38] In the later case of *Zoneff v The Queen*, Gleeson CJ, Gaudron, Gummow and Callinan JJ noted :

> "There may be cases in which the risk of misunderstanding on the part of a jury as to the use to which they may put lies might be such that a judge should give an *Edwards*-type direction notwithstanding that the prosecutor has not put that a lie has been told out of consciousness of guilt. As a general rule, however, an *Edwards*-type direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because, in the language of Deane, Dawson and Gaudron JJ in *Edwards*, 'the accused knew that the truth ... would implicate him in [*the commission of*] the offence' and if, in fact, the lie in question is capable of bearing that character. …
>
> Moreover, if there is a risk of confusion or doubt as to the way in which the prosecution puts its case, the trial judge should inquire of the prosecution whether it contends that lies may constitute evidence of consciousness of guilt and, if so, he or she should require identification of the lie or lies in issue and the basis on which they are said to be capable of implicating the accused in the commission of the offence charged."[11]

[39] Their Honours discussed the distinction between lies told by an accused person which are relied upon by the prosecution as evidence of consciousness of guilt as discussed in *Edwards*, and those going merely to credibility. They determined that in *Zoneff*, an *Edwards*-type direction:

> "… could have had the effect of raising an issue or issues upon which the parties were not joined, and of highlighting issues of credibility so as to give them an undeserved prominence in the jury's mind to the prejudice of the appellant.
>
> …
>
> A direction which might have appropriately been given and which would have allayed any concerns which the trial judge may have had, … is one in these terms:
>
> > 'You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.'
>
> A direction in such terms may well be adaptable to other cases in which there is a risk of a misunderstanding about the significance of

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11 (2000) 200 CLR 234, 244; [2000] HCA 28.

> possible lies even though the prosecution has not suggested that the accused told certain lies because he or she knew the truth would implicate him or her in the commission of the offence."[12]

[40] The uncontradicted evidence, both as opened by the prosecutor and as given at trial, clearly established the falsity of the appellant's claims to police that she did not stab the deceased. Defence counsel accepted this in his closing jury address and suggested that the appellant may have lied to police out of fear. The prosecutor urged the jury to reject the appellant's version to police and to conclude that, despite her intoxication, she formed a momentary intention to do the deceased grievous bodily harm when she stabbed him. He then contended that she did not take up the opportunity offered to her by police in the record of interview to assert that the deceased had behaved in any violent or aggressive way towards her because "she had no excuse for her behaviour other than her own aggression".

[41] The prosecution, in inviting the jury to find the appellant lied to police to cover up her own aggression, came close to inviting them to infer she was guilty because of those lies. But he did not, in terms, rely on the appellant's false denials as establishing guilt or consciousness of guilt. The appellant's untruthful statements to police, were, however, a significant part of the evidence at trial. Unfortunately, counsel did not follow the High Court's recommendation in *Zoneff*[13] and discuss the directions to be given to the jury as to lies prior to the commencement of addresses. The jury should have received some guidance from the judge as to how to use the complainant's untruthful statements.

[42] This case differs in significant ways from *Baira*. It is true that the issue for the jury in *Baira*, as here, was whether the appellant's killing of the deceased was intentional. It is also true that Baira, like the present appellant, originally denied to police that he fought the deceased or was in the deceased's room at the time of the killing. But, Baira, unlike the present appellant, later in his interview with police, revoked his initial denials and gave a self-serving version of events surrounding the killing. Unlike in the present case, the trial judge and counsel at Baira's trial discussed whether the judge should give a *Zoneff*-type direction but defence counsel did not want such a direction. Defence counsel's forensic decision not to seek a *Zoneff*-type direction in *Baira* was clearly because he thought Baira's interests were best served if the jury's attention was not diverted from his submission that the appellant was intoxicated and answering foolishly during the police interview.[14] The present appellant, unlike *Baira*, was not intoxicated during her interview with police. Furthermore, defence counsel in the present case was relatively inexperienced. The transcript does not suggest that he turned his mind to the question of a *Zoneff*-type direction. In the present circumstances, I would be reluctant to infer that his failure to ask for such a direction was for forensic advantage rather than mere inadvertence or inexperience.

[43] At the minimum, the judge in the present case should have given the jury a direction of the kind referred to in *Zoneff*, with appropriate adaptations. In the absence of such a direction, there was a danger that the jury may have relied on the appellant's lies to police to strengthen the prosecution case as to intent. The jury should have directed the jury along the following lines: "You must not reason that, simply

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12 Above, 245.
13 Above, 244.
14 [2009] QCA 332, [39].

because the appellant was untruthful to police, she was guilty. First, you must be sure that she was deliberately untruthful and that she was not giving a false account because her memory of the events was affected by her intoxication the previous night. Second, if you are satisfied that she was deliberately lying, there may have been many reasons why she lied. You should not reason that, because she lied, she is guilty. As her counsel suggested, she may have been afraid and panicked."

[44] The absence of an authoritative judicial direction of this kind was a concerning omission in this trial. It means that, although the prosecutor did not in terms make such a submission, there was a real risk that the jury may have treated the appellant's lies as evidence supporting her forming an intention to do grievous bodily harm to the deceased when she stabbed him, that is, as evidence of her guilt of murder: cf *R v Mitchell* [2007] QCA 267.

[45] Despite the considerable strength of the prosecution case, whether the appellant was guilty of murder or manslaughter was an issue on which different reasonable juries could reach different reasonable conclusions. It follows that, in my opinion, the absence of an appropriate direction as to the appellant's lies has deprived the appellant of a chance of an acquittal and so has resulted in a miscarriage of justice. It follows that the appeal against conviction must be allowed.

Were the judge's directions to the jury on intention inadequate?

[46] The appellant's final contention is that the judge's directions to the jury on intention were inadequate. Those directions, set out at [24] of these reasons, were flawed insofar as they contained the italicised passage. So much is conceded by counsel for the respondent who describes that part of the judge's jury summation as "unfortunate". As the appeal against conviction must be granted on another basis, it is unnecessary to determine whether this error amounted to a miscarriage of justice when the judge's jury directions are considered as a whole.

ORDERS:

1. The appeal against conviction is allowed.

2. The guilty verdict for murder is set aside.

3. A re-trial is ordered.

[47] **MUIR JA:** I agree with the orders proposed by McMurdo P and her reasons.

[48] **CULLINANE J:** I have read the draft reasons of the President in this matter. I agree with the reasons and the orders proposed.