SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chenery* [2011] QCA 271
PARTIES:	**R** **v** **CHENERY, Jamie David** (appellant)
FILE NO/S:	CA No 111 of 2010 SC No 581 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	7 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2011
JUDGES:	Muir and White JJA, and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of murder after a trial – where the jury rejected the partial defence of diminished responsibility – where the appellant contended that the verdict was unsafe and unsatisfactory because contrary to the medical opinion offered in the trial – whether the jury's decision not to acquit the appellant of murder on account of diminished responsibility was reasonably open on the evidence *Criminal Code Act* 1899 (Qld), s 304A(1), s 668E *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 DAY* [2010] QCA 369, cited *R v Sheppard* [2005] QCA 38, cited
COUNSEL:	C Reid for the appellant A W Moynihan SC for the respondent

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

[1] **MUIR JA**: I agree that the appeal should be dismissed for the reasons given by White JA.

[2] **WHITE JA**: The appellant was convicted of murder after a trial in the Supreme Court at Townsville. He had advanced a partial defence of diminished responsibility which the jury rejected. He contends that "the verdict was unsafe and unsatisfactory"[1] because the verdict is said to be contrary to the medical opinion offered in the trial. The issue for the appeal is whether it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that the appellant was guilty of murder.[2]

Background

[3] The deceased, Vanora Leigh Miller, died in hospital in Townsville on 29 September 2008 as a result of sustaining serious head trauma inflicted on her by the appellant on the evening of 27 September 2008. She was a 35 year old married woman, separated from her husband with two young daughters who lived with their father in Mackay. At the time of her death she was employed as a concrete truck driver in Townsville.

[4] In February 2008 the deceased returned to Townsville to live from Mackay and rented a house from an old friend. Shortly after, she placed an advertisement in the local newspaper for a boarder to help pay the rent. The appellant responded and moved into the house. Within a short time they commenced an intimate relationship of some volatility marked by verbal arguments, and, at least one serious physical fight about a week earlier in which both had participated. The altercation left the deceased with a lump on her head and bruise marks around her neck, as described by the deceased's sister. The appellant had packed his belongings and threatened to leave regularly but they tended to seek to resolve their differences.

[5] The appellant was about the same age as the deceased in his mid-30s. In 1996, as a consequence of a severe assault, he lost an eye and sustained a major head injury, particularly to his frontal lobe area. A consequence was an impairment in his impulse control. He had mood swings with a tendency to violent outbursts. He had difficulty in sustaining employment and a history of not being compliant with medication due to the consequences of his frontal lobe injury.

[6] Both the deceased and the appellant drank alcohol to excess. The deceased had an ante-mortem blood alcohol reading of 0.184 which, in the opinion of the forensic pathologist, meant that she was moderately intoxicated.[3] The morning following the assaults which led to the death, the appellant returned a blood alcohol reading of 0.067. A forensic medical officer who had examined the appellant estimated that he would have had a blood alcohol concentration of between 0.167 to 0.367 with a likely average of 0.267 at about 11.30 pm the evening before when he was taken

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1 The statutory test in s 668E of the *Criminal Code* is "unreasonable"; *MFA v The Queen* (2002) 213 CLR 606 at 620, [2002] HCA 53 at [46]; *R v Sheppard* [2005] QCA 38 at [34]-[35].

2 *M v The Queen* (1994) 181 CLR 487 at 494, [1994] HCA 63.

3 AR 107.

into custody. That officer estimated that for most people such a concentration would amount to gross intoxication.

[7] On the evening of 27 September neighbours who heard loud arguments between the appellant and the deceased. At the time of the argument the appellant sent a text message to an acquaintance from whom he was hoping to rent a room at the time of the argument. She gave evidence of their subsequent telephone conversation at the time of the assaults. The appellant gave evidence and called three witnesses about his mental condition.

Evidence at trial

[8] Although the appellant was the second last witness in the trial – Dr Barbara Maguire, a clinical psychiatrist was the final witness - it is appropriate to have his account in mind when considering the unchallenged evidence of the other witnesses.

(i) The appellant's evidence

[9] On 27 September 2008 the appellant was at home all day. The deceased's shift at work finished at 11.00 am. By the time she came home with "a couple of bottles of bourbon"[4] at about 12.00 or 1.00 pm she had already started drinking. Although invited to do so, the appellant did not immediately join her. Later in the afternoon the appellant asked her to turn down her music because it disturbed the neighbours. The appellant had started drinking alcohol in the late afternoon. According to the appellant "everything was okay".[5] He was sitting at the dining table and the deceased was listening to her music. They were both drinking. After showering, the deceased said she was going to order some takeaway food for dinner. The appellant responded that he would make something for himself later. That response upset her. She threw the telephone book at him. Later the appellant offered to get the deceased some seafood from the shop across the road but she became angry and accused him of having an affair with the woman who worked in the shop. She threw her drink in his face. This "blinded" the appellant. While he was making his way to the kitchen sink to wash his eye the deceased threatened to kill him. When he asked if they could discuss matters she said there was nothing to talk about "you're dead".[6] When he attempted to take out his telephone she threw her glass and smashed it on his right foot.

[10] The appellant had earlier, during a tumultuous period in the relationship, asked a woman who worked at a local hotel, Simone Brown, if she had a room for rent. She did and had mentioned a price but when the relationship with the deceased had settled down the appellant did nothing about it. After the deceased and the appellant started fighting the appellant telephoned her and asked her if she still had the room for rent. The deceased snatched the telephone from him and spoke to Ms Brown. The appellant went into his bedroom and started packing his bag. After the appellant regained his telephone Ms Brown offered to come and collect him.

[11] The deceased accused the appellant of having a sexual relationship with Ms Brown. As he tried to get to the front door she blocked his path, slapped his face over and over again and then slammed him up against a wall. She prevented him leaving through the back door and the front door so he returned to his bedroom and sat on

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4 AR 220.
5 AR 221.
6 AR 222.

the edge of the bed. The deceased started kicking him and said "I'm going to gouge your eye out. I'm going to blind you for the rest of your fucking life".[7] The appellant got up from the bed and tried to pass her. He described the deceased lunging at him with her hand towards his eye, "I don't know what happened after that".[8] The appellant said he vaguely remembered opening the front door to the police.

[12] In cross-examination it was adduced that the appellant was 170 centimetres tall, "a fair bit taller" than the deceased and that she was slightly built. He agreed that between 4 and 5 o'clock he had climbed up a ladder on the outside of the house. He said he was pretending to the deceased that he had scaled the wall and was trying to entertain her – to make her laugh. He agreed that had he been apprehensive about his physical safety from the deceased he could have left then. The appellant said that he had never experienced blackouts during periods of activity before. He agreed that he was on a disability pension and had bought a new pair of training shoes recently. He was unable to offer any explanation for putting them in the washing machine late at night alongside his t-shirt, socks and shorts, particularly as he had packed up all his clothes and was planning to leave. Nor was he able to recall the "romantic" text messages that he had sent to Ms Brown.

(ii) The neighbours' evidence

[13] Ms Kym Short lived two houses away from the deceased. Between 4 and 5 o'clock on the afternoon of 27 September 2008 she was watering her garden at the back of her house when her attention was drawn to the appellant on a ladder propped under the windows at the back of the house. She heard him yelling out and attempting to get in one of the windows. He seemed quite drunk. She heard nothing more that evening.

[14] Brett Kujawski lived next door to the appellant and the deceased with his wife. The deceased's house was a high-set Queenslander and his home was two-storied such that the two houses' living quarters were up high and opposite each other, about four metres apart. He and his wife had heard arguments between the appellant and the deceased in the past with the deceased's voice usually loudest. In the earlier part of the evening of 27 September he heard the appellant's voice but he did not hear the deceased's. About 9 o'clock he heard the appellant yelling out very loudly, "You've blinded me. Why have you blinded me?"[9] Mr Kujawski then went downstairs with his infant son. About that time heard "thumping noises" which he described as either "a loud stomping noise" or a "slamming of a – a large door".[10] He heard the appellant calling out again "Why have you blinded me?"[11]

[15] At about 10.30 pm he heard a loud noise coming from next door such that he paused his television and went outside to investigate. He heard a slapping noise which sounded like a hand on skin. Whilst he was downstairs inside he heard a regular thumping noise that went for a few minutes, stopped and then started again. This occurred over a half hour period. The noises appeared to be coming from the lounge room next door. At about 11 o'clock he went outside and looked towards the next door house. It was lit up but he could not see inside. He did see the

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7 AR 224.
8 AR 224.
9 AR 46.
10 AR 47.
11 AR 47.

silhouette of a person standing at one of the back windows where there was a sink. He could hear water running. He thought the silhouette was the appellant. He called emergency services at 11.10 pm for police.

[16] Nikkie Hunter-Kujawski lived with her husband and infant son next to the appellant and the deceased. At about 6.30 pm she heard the appellant yelling out. Whilst they were having dinner just after 9.00 pm she again heard the appellant speaking very loudly to the deceased. She heard the appellant say:

> "If you can give it, you can take it. Get up, just get the fuck up, Vanora. If you're going to treat me like a dog, there's going to be consequences. You can't keep treating people like dogs."[12]

Ms Hunter-Kujawski then heard "a series of loud noises like heavy objects being thrown".[13] She also heard the sound of doors slamming and heavy thuds and some sounds like a slapping or clapping. About 10 o'clock she was outside bringing in washing and heard the appellant cry out: "Why, why, why did you do it? I could have gone blind. I can't see, I can't fucking see". "Jamie was crying."[14] She did not hear the deceased's voice. She heard pacing associated with footfalls at a slow steady pace and "a meaty-sounding kick". She next heard a person exhale as though winded. The pacing and kicking continued making "A nice, solid thud".[15] She heard the kicking probably four or five times.

[17] Ms Hunter-Kujawski returned inside. At about 10.30 pm she heard a series of "really loud thumping sounds, really dull, loud thumps"[16], four or five in number. She went outside and heard a number of slapping sounds like skin on skin followed by "a two step" and a kicking sound like "a big meaty kick, a solid kick"[17] four or five times. She heard the appellant say words like "If you – get up. Get up, Vanora. You're a coward, V. Just get the fuck up. Do you want to live or die?" and "I could kill you."[18] Ms Hunter-Kujawski heard a mobile telephone ring for quite some time. She returned inside, spoke to her husband and heard the sound of someone crying and someone vomiting next door. She heard the sound of splashing water and saw a silhouette against the window but was unable to discern whether it was a male or female. She heard the same mobile phone ring tone. This time the appellant answered. She described his manner of answering:

> "It was quite – quite a happy, cheerful greeting, and I heard him – I heard as he was sort of saying, 'Hello' I could hear the steps – oh, walk away from me and I could hear him chuckling and laughing on the phone."[19]

Her husband called the police.

[18] Ms Hunter-Kujawski ran outside again near the side fence. She heard the appellant say "die" and then heard a heavy thump. She then heard him repeat "die" twice more with a forceful voice, each followed by a heavy thump. She heard a sound of breathing which she thought was the deceased. She was employed as a paramedic

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12 AR 56.
13 AR 56.
14 AR 57.
15 AR 57.
16 AR 58.
17 AR 59.
18 AR 59.
19 AR 60.

and described the breathing as Cheyne-Stokes breathing. Breathing of that kind is irregular without set pattern, deep and sighing, and is associated with a head injury.

(iii) Simone Brown's evidence

[19] Simone Brown worked, at the time of the events the subject of the trial, as a bar attendant in Townsville. She had met the appellant about a month before. He was discussing accommodation with her and she had a room available. Shortly after 10.00 pm on 27 September she received a text message from the appellant's mobile phone: "Can you offer me a room?" She telephoned him at 10.14 pm. He answered his mobile phone. His voice appeared normal to her. She could hear a lot of female yelling and banging noises in the background. She heard the female on the telephone yelling and screaming and abusing her using vulgar language. The appellant regained the telephone and said to Ms Brown "See what I have to put up with? She just keeps – you know, going off".[20] Ms Brown heard a loud noise closer to the phone and asked him what it was. The appellant answered, "Oh, she just threw my work boots at me" and added "And that's what I have to put up with"[21] The telephone call ended abruptly but before it did she could hear "banging type noise".

[20] The appellant telephoned her at 10.43 pm and asked her "about coming over to stay over and that for the room".[22] In answer to the question whether he was calm during this telephone conversation she said he was:

> "He wasn't yelling or – it was more like half sort of disbelief like, you know, 'This is what I have to put up with. Like I don't know why' and … half-chuckling".[23]

[21] Ms Brown arranged to pick the appellant up that night. She did not hear the female voice this time. At 11.25 pm she sent him a text message to say that she was five minutes away but when she arrived at the house police were there.

(iv) Scientific evidence

[22] Sergeant Allan Bartulovich, a scientific officer, found a number of items of clothing belonging to the appellant in the washing machine about 8.00 am the following morning, 28 September, after he had conducted his investigations upstairs commencing at about 1.00 am. They were a pair of sports shoes, a pair of board shorts, a blue and white flannelette shirt and a pair of socks. The clothes were wet/damp and had the aroma of being washed in washing powder. On subsequent DNA analysis the shoes were stained with blood consistent with that of the deceased. The examination of the crime scene included the presumptive presence of blood in the sink in the kitchen, the deceased's blood on the mat in the bathroom and blood mixed with water in the hand basin.

The medical evidence

[23] The appellant called three witnesses, Dr Charles Stones, a psychiatrist and Mr Steven Bell, a psychologist, who had treated the appellant for some of the psychiatric/psychological consequences of the brain injury which he sustained in the 1996 assault. He also called Dr Barbara Maguire, a psychiatrist.

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20 AR 163.
21 AR 165.
22 AR 164.
23 AR 165.

(i) Dr Stones

[24] Dr Stones had treated the appellant for about a year from February 2002 to May 2003. His treatment had followed that of Dr Allan, a consultant psychiatrist at the Townsville Hospital who had been unable to give evidence in the trial, but whose notes were read by Dr Stones without objection. The appellant had sustained a major head injury particularly to the frontal lobe of his brain. Dr Stones explained to the jury that an injury to the frontal lobe

> "… impairs what we call executive thinking which means logical thinking in a train really. To do a task which requires several different components is very difficult for people with frontal lobe damage, an inability to think ahead really and a tendency to impulsivity to act on the spur of the moment."[24]

A CAT scan showed a glyosis (scar tissue) in the frontal lobe. An electroencephalogram measuring brain waves was abnormal in the frontal lobe.

[25] Dr Allan had written:

> "Following the injuries [the appellant] noticed a large number of changes … He seemed to have violent swings in his mood going from quiet happy-go-luck[y] to Mr Bad. He was very explosive and his reaction was to get angry or to punch and kick. He felt anxious and depressed at times saying he could not face people and would always – was always wanting people to leave him alone. He felt unable to cope with work and looked forward to be able to just get away. He finds the usual day to day contact with people very frustrating."[25]

Dr Allan expressed concern about the appellant being placed under pressure. On 11 June 1997 he wrote:

> "He does, however, remain at risk because of his injuries. Under extreme pressure and provocation his impulse control would remain impaired. He would have no opportunity to be able to walk away possibly."[26]

Dr Allan had also concluded that the appellant had post traumatic stress disorder and depression as a consequence of the injuries sustained in the assault.

[26] Dr Stones said:

> "I think [the appellant] was given to – was certainly given to having a short temper – an impulsive temper. He didn't – he wasn't able to sort of stand back from a situation and construct a plan of how to deal with it. I – I – you know, it was – as it's been called before, fight or flight, you know, when you have to run away as he did from the dentist or – or be aggressive, not – not necessarily physically aggressive, but verbally aggressive, you know … When faced with a difficult problem."[27]

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24 AR 186.
25 AR 188.
26 AR 189.
27 AR 195.

(ii) Stephen Bell

[27] The appellant was a patient of Mr Bell who was employed as a psychologist by Queensland Health at Townsville between 1996 and 1997 when he was experiencing symptoms of anger management and grief and loss. The latter concerned the loss of a family member as well as the loss of his eye. Mr Bell had referred the appellant to Dr Allan. Mr Bell concluded, after assessment, that the appellant had sustained a reduction in intellectual functioning as a result of the assault and some change in his behaviour specifically around his ability to manage anger and to have relationships with other people. When Mr Bell assessed the appellant he was experiencing rapid and extreme mood swings, had poor anger control, physically and verbally expressed anger to such an extent that it was affecting his relationships.[28] He was seen to be engaging in risk-taking behaviour, increasing impulsivity and outbursts of rage.[29]

[28] The appellant undertook cognitive behavioural therapy with Mr Bell focussing on anger management and grief and loss counselling. At the end of 1997 he was thought to be managing well but would require continuing counselling and support outside public health.

(iii) Dr Barbara Maguire

[29] Dr Maguire saw the appellant for a medico-legal report on 26 November 2009. She had access to his medical history and notes. She confirmed from the documentation that the appellant had suffered a left frontal lobe injury as a consequence of the assault and, although there had been some improvement after his treatment in the public health sector, he would not return to "normal" after such a serious injury. Dr Maguire explained:

> "The frontal lobe is responsible for the executive functions of the brain. It has some role to play in storage and retrieval of memory and regulation of impulses which are secondary to stimuli."[30]

She noted that people who have experienced frontal lobe injury

> "… undergo some coarsening of their personality. They experience impulsivity. They have an incapacity to anticipate the consequences of their actions, callous indifference sometime[s] to the feelings of others, lack of empathy."[31]

In response to the question whether that conduct could be controlled, she answered:

> "… it depends on the severity of the injury. I suppose in [the appellant's] case the fact that there was some improvement with learning of strategies to control impulses and anger indicates that he had some capacity for control. But certainly I believe his … capacity was impaired."[32]

In response to the question, "Are you able to determine to what degree it was impaired?" Dr Maguire answered,

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28 AR 199.
29 AR 199.
30 AR 238.
31 AR 239.
32 AR 239.

> "To try and put a figure on it I think would be too arbitrary and would imply a certainty that … doesn't exist."[33]

In response to the pivotal issue in the trial "Are you able to say whether it was a minor amount, a significant amount, substantial, insubstantial?" Dr Maguire answered, "It certainly would be a – moderate to significant I would think."[34]

[30] Dr Maguire was asked to assume that the perceived threat was the loss of the appellant's remaining eye which might have brought about an initial loss of control, then,

> "[o]nce that initial stimulus or that initial event ceased, any subsequent loss of control, would that need to be related to the same initial event?"

Dr Maguire replied,

> "Well, I think it would be fair to assume that the individual would be in a high state of arousal and therefore have a lower threshold to any subsequent stimulus."[35]

[31] Dr Maguire was asked:

> "It would [be] unlikely that the person would appear to be calm, even over the telephone, to another person?"

and answered, "After a bout of extreme … violence? Yes, unlikely."[36]

[32] In respect of the three capacities with which diminished responsibility is concerned, Dr Maguire believed that the appellant understood what he was doing and that he ought not to do the act but "I believe that his capacity to control his actions was impaired but he was not deprived of capacity."[37]

The summing up

[33] The appellant makes no complaint about the summing up of the trial judge. His Honour explained the elements of murder and that the prosecution must prove beyond reasonable doubt that the appellant intended to kill the deceased or to do her some grievous bodily harm. He explained that in this case intoxication may impact upon their consideration of the appellant's intention and explained how that might occur. He explained how the jury might reach a verdict of manslaughter. He also explained self-defence to the jury in both its manifestations, and provocation.

[34] The trial judge then turned to the question of diminished responsibility and instructed on its elements pursuant to s 304A(1) of the *Criminal Code*.[38] He explained that the onus, unlike the other issues in the trial, shifted to the appellant who had to satisfy them, on the balance of probabilities, that the circumstances which would amount to diminished responsibility existed. He discussed the phrase "abnormality of mind" and said:

> "You will take account of the medical evidence and you must consider all the other evidence including the evidence of witnesses as

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33 AR 239.
34 AR 239.
35 AR 242.
36 AR 243.
37 AR 248.
38 AR 290.

> to what they heard or saw or what the accused is said to have been heard to say or do. You are not bound to accept the medical evidence if in your view there's other evidence which conflicts with it and outweighs it but you would not reject expert evidence where there is no evidence to the contrary."[39]

His Honour explained the expression "substantially impairs his capacity":

> "The word 'substantially' does not mean totally. Neither does it mean a slight impairment. It falls between those two extremes and it is a matter which you have to be satisfied of from the evidence. It is one of the components of diminished responsibility in this case that the abnormality of mind arising from the injury alleged substantially impaired [the appellant's] capacity to control his actions."[40]

[35] The trial judge finally explained to the jury, in a helpful summary, how they could approach in a step by step manner the many legal issues before mentioning, in detail, the evidence.

Discussion

[36] The appellant contends that there was no evidence which would cast a doubt upon the correctness of the medical opinion that he was acting under diminished responsibility at the time he killed the deceased. There was no doubt that the appellant had suffered a severe injury to the frontal lobe of his brain in 1996 which impaired his executive functioning. When he was discharged from treatment towards the end of 1997 his management of his anger and emotional control had reportedly improved so that no further treatment was needed in the public health sector. It was recognised that he needed support to re-enter the workforce and needed some continuing grief and loss counselling which would have to be undertaken in the private sector.

[37] The only matter which was truly in contention was the extent of the appellant's capacity to control his actions at the time he assaulted the deceased fatally. Dr Maguire's answer, "moderate to significant" and her refusal to employ the adjective "substantial" meant that the jury needed to scrutinise the evidence from the witnesses who heard and saw the appellant that evening carefully. That evidence included the text message and telephone conversation with Ms Brown at the very time when the assault was occurring. That evidence tended to demonstrate a capacity for executive function. The appellant sounded calm to Ms Brown. He removed his blood stained clothes and shoes and put them through the washing machine cycle. He washed himself. He was seen by police to be calm and articulate when they arrived shortly after he was heard to administer the last blows saying, "Die. Die. Die."

[38] It was for the appellant to prove, on the balance of probabilities, that the diminution in his capacity to control his actions was substantial. There was some evidence to support such a finding but there was also a considerable body of evidence pointing in the other direction. As Fraser JA said in *R v DAY*:[41]

> "The question whether there was a substantial impairment in the appellant's capacity was for the jury to resolve in light of all of the

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39 AR 293.

40 AR 294-295.

41 [2010] QCA 369 at [22].

> evidence and there is no ground for thinking that the jury did not conscientiously attend to that duty."

That is the case here. The jury's decision not to acquit the appellant of murder on account of diminished responsibility was reasonably open on the evidence. The appeal should be dismissed.

[39] **MARTIN J**: I agree, for the reasons given by White JA, that the appeal should be dismissed.