SUPREME COURT OF QUEENSLAND

CITATION:	*R v PAO* [2012] QCA 8
PARTIES:	**R** **v** **PAO** (appellant)
FILE NO/S:	CA No 80 of 2011 SC No 17 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mt Isa
DELIVERED ON:	10 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF SUMMING UP AS A WHOLE – where the appellant was convicted after trial of murdering her baby daughter – where the appellant argued the trial judge did not sufficiently assist the jury as to the real issues raised on the evidence so that the jury was unable to discharge its duty – where the appellant further argued the judge's directions confused the element of intent in the murder charge and the defence of accident denying the appellant the opportunity to have the jury consider accident in relation to manslaughter – whether the trial judge's directions sufficiently dealt with the real issues in the trial CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where there was evidence in the trial of the appellant acting in strange and socially unacceptable ways; self-harming whilst pregnant with the deceased; and unlawful drug use – where the appellant contended the trial judge erred in not giving warnings to the jury about general propensity and evidence of

bad character – whether the trial judge erred by failing to direct in such terms – whether there was a miscarriage of justice

Criminal Code 1899 (Qld), s 23, s 304A

BRS v The Queen (1997) 191 CLR 275; [1997] HCA 47, cited
Hargraves and Stoten v The Queen (2011) 85 ALJR 1254; [2011] HCA 44, applied
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, distinguished
R v Self [2001] QCA 338, cited
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, cited

COUNSEL: A W Collins for the appellant (pro bono)
R G Martin SC for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant pleaded not guilty on 21 March 2011 in the Supreme Court at Mt Isa to murdering her baby daughter at Mt Isa on 7 April 2007. She was convicted after a four day trial. She has appealed against her conviction on two grounds. The first is that the judge erred in not sufficiently assisting the jury as to the real issues raised on the evidence so that the jury was unable to discharge its duty, particularly concerning the directions on intent and accident (s 23 *Criminal Code* 1899 (Qld)). The second is that the judge erred in not giving warnings to the jury about general propensity and evidence of bad character.

[2] Before returning to these grounds of appeal, it is necessary to review the evidence at trial and relevant aspects of the judge's directions.

The evidence at trial

[3] The evidence at trial included the following. The deceased was born in the Mt Isa base hospital on 3 April 2007 and died at 5.00 pm on 7 April 2007. Dr Rebecca Williams conducted a post mortem examination in Brisbane on 12 April 2007. There were no bruises or signs of external injury. There were signs of haemorrhage through the lungs. Dr Williams was unable to determine the cause of death. Possibilities included sudden infant death syndrome; smothering by placing something over the mouth and nose so that she could not breathe; compression to the neck to block off the airways in the neck (strangulation or asphyxiation); or a sleeping accident whereby the baby was covered by a bed sheet or bedding, was unable to breathe and died from asphyxia. The description the appellant gave police of her treatment of the deceased could have caused the death by asphyxiation or suffocation if her hand was held over the baby's mouth and nose for at least a minute. There were areas of microscopic haemorrhage to the soft tissue on the neck. These could have been caused by blunt trauma or in a car accident, like a whiplash injury. These injuries did not contribute to the death.

[4] The appellant's mother gave evidence that the appellant was born in November 1972. The appellant had a son, A, aged 16 and a son, D, aged nine. In 2007, D was living with his father, MS. In April 2007, the appellant's mother lived in Mt Isa in a three bedroom house where she occupied one room, the appellant another, and A the other. The deceased was born on 3 April 2007. The appellant came home from hospital after two days. The baby was bottle fed, sometimes by the appellant and sometimes by the appellant's mother. The appellant seemed stressed, but "okay". The baby slept in a crib in the appellant's room. She cried "a bit".

[5] On 7 April, the appellant's mother fed the baby at about 10.00 am. D was also in the house that day. The appellant's mother and A left the house at about 2.00 or 2.30 pm and returned at about 3.30 pm. Some time later, the appellant came out of her room and reported something wrong with the baby in the crib. The appellant's mother rushed to the crib and picked up the baby who appeared lifeless and grey. She could not detect a breath or pulse. She dialled 000 and began CPR. The appellant appeared to be in shock. Her mother asked her what had happened but got no response. The appellant's mother desperately tried to resuscitate the baby but to no avail. The ambulance arrived and MS came over shortly afterwards.

[6] In cross-examination she agreed the appellant's behaviour prior to the deceased's birth was very strange, necessitating police and ambulance intervention and a hospital admission. On 9 December 2006, the appellant cut her feet under a lawnmower in circumstances where there was no need for her to be using the mower. On 18 March 2007, she tried to stab herself with screwdrivers and then to cut herself. The appellant's mother had to enlist A's help to intervene and called the ambulance. From that time, the appellant's mother had care of A. The appellant spoke as if there was someone there when there was not. She seemed to constantly have voices in her head. The appellant's mother did not see her take drugs, but because of her daughter's behaviour the mother apprehended she took amphetamines and methylamphetamines. In the mornings the appellant would be her usual stressed, "spaced out" self but in the afternoons she would be "totally screaming and yelling". She often seemed to be ruled by voices in her head and reported that they were telling her to do different things. Child Safety Services became involved because of the impending birth of the deceased. After the birth, the appellant appeared "besotted" by the baby and she saw nothing untoward in their interaction. The appellant was not neglecting the baby. The appellant's mother told police that the appellant assisted with CPR on the baby while waiting for the ambulance.

[7] Kerry Williams, a clinical nurse consultant with the Mt Isa Integrated Mental Health Service, reviewed the appellant on 5 April prior to her discharge with the baby because of her psychiatric history. He found the appellant was:

> "[P]erfectly okay. She was looking forward to going home to be with her son and her new baby. She said she had a lot of support from her Mum who is going to look after her and the baby, and so no signs there whatever of depression, no evidence of mental illness and wasn't suicide. Cognition, fine – knew exactly where she was. She was grossly intact. That means she knows exactly what she is doing and is fully oriented." (errors as in the original)

[8] He saw the appellant again on 7 April after the baby had died and later conducted another mental state examination. He found no mental illness or psychosis; the

appellant did not want to self-harm. There was a slight tinge of depression but it was not a major depression or a major grief reaction. She was not hearing voices.

[9] MS gave evidence which included the following. He and the appellant lived together and had a child, D. They separated in about 2005 or 2006 but occasionally saw each other. She became pregnant with the deceased and she told him he was the father. He saw her from time to time during the pregnancy but she was in Cairns for some of that period. He visited her in hospital after the birth and knew that she was discharged home.

[10] On 7 April she and the baby visited him in the caravan park where he was living. She kept asking whether everything was going to be alright. Later that day she telephoned him and repeatedly asked whether everything was going to be alright. She seemed scared. He became angry as he could not make sense of what she was saying and hung up. She wanted drugs, amphetamines he thought. He told her that she must forget the drugs because of the baby. When he heard there were ambulances at the appellant's home, he and his friend, DP, went there. The appellant kept saying, "I thought you'd come back." He followed the ambulance to the hospital. When he learned of the baby's death he became distressed and was himself hospitalised.

[11] The next morning the appellant visited him at the caravan park to collect some clothes. She again asked for drugs. He told her "to fuck off". Before or around the time of the baby's funeral, he asked the appellant if she did anything wrong. She denied doing anything wrong. On the morning of the funeral, he again asked her if she had done anything wrong to the baby. She replied "Yeah, I smothered her." He said to the appellant's mother, "Look, you hear what your daughter said?" He again collapsed and was taken to hospital.

[12] Some days after the funeral, the appellant once more asked him for drugs. He told her that he wanted to get the truth out of her; if she had done something wrong she should not take drugs, but if she had done nothing wrong, she could. He asked whether she needed to see a solicitor. DP arrived and all three drove to a chemist because the appellant wanted needles. When they arrived, she did not want anything and they drove away. He again told the appellant that if she had done something wrong she should not take the drugs but if she had done nothing wrong she could have them. She said she had done something wrong and she needed to see a solicitor. She said that she had smothered the deceased. She did not say why but said something about a voice in her head. He told DP in the presence of the appellant that she had admitted to killing the deceased. She then made those admissions to DP. MS told her to go to make them to police. She said she would do that and something about seeing her mother.

[13] In cross-examination he denied supplying the appellant with amphetamines. He pretended to have some to "find out the truth about what she'd done to my girl". He did not know the appellant had self-harmed during the pregnancy; he believed her injuries were from falling over. During their relationship the appellant often did crazy, abnormal things. Her odd behaviour was mostly when she was not taking drugs. On one occasion, when A and D were both in the house, she locked herself in her room and "penetrated herself" while claiming to be having sex with three or four non-existent people. On another occasion when he knew she had not taken drugs, her mother walked in and she "started losing the plot". He ended up having to slap her. On another occasion when drugs were not involved, she went out

wearing only a see-through nightie. He denied that the appellant told him that the deceased was not his child and that SR was the father. He denied that he then swore at the appellant and told her that he did not want to see her again.

[14] Early on 7 April, the appellant came to him for drugs. He told her to forget about drugs and to think about their little girl. When he went to her place after hearing the ambulance, he asked her what was going on. She said, "I thought she'd come back, I thought she'd come back." He saw the appellant at the hospital later that day and she appeared to be in shock. The next morning she came to his caravan to get some clothes and she asked him for drugs. He told her he did not want anything to do with the drugs or with her. In his statement to police, he said he had supplied her with drugs but this was wrong and he had told the police it was wrong. He denied doing a deal with the police to keep his driver's licence. The appellant told him "that she suffocated the baby". The appellant's mother was nearby. He agreed that he initiated the appellant's response by asking, "Tell me, did you cause that baby to die?" She nodded her head and said, "Yes, I did … the baby died in my arms". He asked her if she suffocated the baby and she denied this. He asked her why she suffocated the baby. She said she did not know and something about a voice in her head. She admitted to him that she suffocated the baby but after speaking to her mother, she said she did not. On one occasion she said she did not know why she suffocated the baby. On another occasion, she said "the voices told me". On another occasion, she said, "I don't think I did anything wrong." MS agreed that he had convictions for offences of dishonesty.

[15] DP gave the following evidence. He was a friend of MS and knew the appellant. He noticed a change in the appellant during her pregnancy. Sometimes she behaved oddly, running up to people, pulling up in the car, kissing people in a way that just did not seem right. He also recounted the incident when her foot was injured by a mower.

[16] He and MS visited the appellant in hospital after the birth of the deceased. She acted quite affectionately towards the baby. On 7 April, he was at the caravan park with MS. The appellant telephoned MS and he heard them argue. Later, someone telephoned him and told him about ambulances at the appellant's house and he and MS went there. The appellant was "a bit distressed" and "pacing around". She appeared concerned about the baby's welfare. DP and MS then went to the hospital where they saw the appellant. At first she seemed calm but when she began to talk she "lost it". He asked her what happened. She said, "Maybe the crib was too small." She cried and said she did not know. She also said that it was hard without MS.

[17] A couple of days after the deceased's funeral he was with MS in the car when the appellant phoned. He did not really hear but he thought she wanted to "score some drugs". They gave her a lift to an ATM. MS asked him to go for a walk for five minutes or so and he went around the block. When he returned, MS told the appellant, "Tell him what you just told me." MS seemed very upset whilst the appellant appeared quite calm. She turned to MS and said, "Something in my head told me to do it. … I don't remember – I keep forgetting – I know, look, I'm going to go away for a long time. Look after [MS] and [D] for me." She also said, "Something told me in my head to do it, a voice." She may have said that voices told her to do it. He told her that he understood that she was not "right in the head, sort of thing". MS agreed that he had prior convictions for drug offences.

[18] Paramedic, Mr Millwood, saw the appellant on 18 March at her home. She was obviously pregnant and had blood coming from her left wrist and blood on her feet. She was acting in a bizarre way. She would not answer many questions. He put her into the ambulance. She was staring and mumbling in a strange fashion. She denied that she had taken drugs or alcohol. She became sexually aroused and was aggressive. She continually put downward pressure on her abdomen, saying things like, "I'm going to kill this fucking beast." He tried to pull her arms away from her stomach. She was taken on a stretcher to the hospital. She was lashing out and said, "I want to stick a fucking knife into my belly."

[19] Heidi Slykerman was a nurse at the Mt Isa hospital on 3 December 2006 when the appellant attended to have a laceration to her foot re-dressed. Nurse Slykerman was also working there on the afternoon of 18 March 2007 when the appellant was admitted. She was acting "crazy" and was screaming and kicking. Nurse Slykerman had to hold her on the bed for her own safety. She had cut her left foot and left forearm. Nurse Slykerman gave her a sedative but it took an hour to take full effect. The appellant was obviously pregnant and "really big". She was aggressive. She said, "I want to get a big knife and stick it into my pregnant belly." She looked at the appellant's abdomen and saw about 15 pinpricks all over the top of her belly towards her chest. The appellant was incoherent and it was impossible to have a sensible conversation with her. Nurse Slykerman considered that she may have been under the influence of a drug. The appellant refused to have her injuries stitched.

[20] A senior social worker, Mr Wilson, part of the Integrated Mental Health Service at Mt Isa, saw the appellant on 18 March at about 5.00 pm in the hospital emergency department as "a sort of mental health triage". He considered she did not have a psychiatric illness requiring involuntary treatment or immediate referral to a consultant psychiatrist. She had "a lot of social issues in her life … [and] was responding to those". She told him that her injuries were self-inflicted. She had an argument with her partner or ex-partner, MS, about the baby she was carrying. MS had told her that when the baby was born he would take the child away and claim custody. Her urine tests later gave positive results for cannabis and amphetamines but she declined a referral to a drug service for counselling for substance abuse. He spoke with the triage nurse who put in a notification of a risk to the unborn child. Mr Wilson formed the opinion that the appellant was not suffering psychiatric problems and she was discharged to return home with her mother. The appellant's records indicated that she was seen by members of the Mt Isa Integrated Mental Health Service five or six times between 2001 and 2007. In January 2001, Dr Burton a medical practitioner training in psychiatry, assisted in the appellant's psychiatric assessment. Mr Wilson thought the appellant may have been depressed and Dr Burton considered she may have depression and psychotic symptoms.

[21] Mr Nolan, a paramedic, attended at the appellant's home on 7 April and assisted in attempts to resuscitate the deceased. He cleared the airway, intubated the baby and administered medication. He detected a very irregular heartbeat and a slight pulse and started CPR.

[22] Other paramedics described the appellant's demeanour on 7 April as devoid of emotion, both at the scene and in the ambulance travelling to hospital. By the time the deceased reached the hospital, there was no pulse and resuscitation attempts were ultimately abandoned.

[23] Police officer Lea spoke to the appellant at the hospital on 7 April. The appellant became very upset and could not continue the conversation. She told police she fed the deceased, burped her and put her in the cot. The appellant's mother was most concerned about the appellant's state of mind and arrangements were made for psychiatrist Dr O'Rourke to examine her.

[24] Dr O'Rourke was Director of the Integrated Mental Health Service for Mt Isa and its head psychiatrist on 7 April. At about 9.00 pm, he conducted a 45 minute mental status assessment of the appellant. Nurse Williams and the appellant's mother were present. The appellant did not have any symptoms of post-natal depression. She was tired but was sleeping except for feeding the baby. He found nothing to suggest she was having visual or auditory hallucinations or experiencing delusions. She said she had not used any illicit substances over the course of the pregnancy nor subsequent to the birth. His rapport with her seemed appropriate; she did not appear guarded or suspicious. She maintained appropriate eye contact and her speech flow was within the normal range. There were no indications of ideological thinking or formal thought disorder. She was oriented as to time, place and person. She seemed to have an attachment to the deceased and to be experiencing a sense of loss following the death.

[25] He ordered a urinary drug screen which returned a positive finding of amphetamines. He did not find any major psychotic or major mood disorder. There may have been some substance use and a personality disorder. She agreed to be admitted to hospital. He did not notice any indicia of intoxication or of withdrawing from illicit substances. Amphetamines often cause restlessness, confusion, perception of time and hyperactivity.

[26] He agreed that sometimes patients heard voices but did not divulge this to their psychiatrist. A psychiatrist is skilled to develop a rapport with patients to detect this. A common response in such a patient is to state "I'm not allowed to talk about it." He could not completely rule out the possibility that she was not reporting the hearing of voices, but he found nothing to make him suspicious. If she were hearing voices telling her to do things, this would constitute an abnormality of mind. In his opinion, none of the three capacities listed under s 304A *Criminal Code* were impaired. He found no evidence of psychosis.

[27] She was discharged from hospital on 8 April to hospital-provided accommodation where she remained until 18 April. He reviewed her on 17 April. She was displaying appropriate grief symptoms. There was no indication of either a significant depressive disorder or a psychotic disorder.

[28] The appellant provided the following information in her interview with police on 19 November 2007. On 7 April, she told MS that he was not the father of the child and told him who was. He was angry and abusive and she became distressed. She took ecstasy tablets which she found in a cupboard. She became "paranoid" about the baby, picked her up and panicked. The feelings were coming back to her about harming the baby. She began to cry. She telephoned MS and asked why he had not come around. She was scared because she had taken ecstasy and did not know what was going to happen. She thought that if MS came over everything would be alright. She took the baby into the room and put her hand over the baby's mouth. She "was very gentle". She was crying and looked up at the ceiling. When she thought the baby had lost her breath, she put her down in the crib. She did not know whether she was still breathing; it was "very hard to say". She could not say how

long she held her hand over the baby's mouth and nose but she did not think it was for very long. She was rocking backwards and forwards with the baby, probably for about two or three minutes. Something in her head was telling her to grab the baby's head and twist it. She then grabbed the baby's head and went to twist it. She could not understand what was going on. She was in a state of confusion and very distraught. She had inflicted pain on herself before but never on anyone else. She walked out of the room and told her mother to "go check [the baby]. I think I've killed [her]." She said she was not suffocating the baby; she thought the baby would have been able to breathe through her nose. She "knew that what [she] was doing would not harm her enough for her not to be with [her] after that day." She did not believe that what she was doing would kill the baby. She said, "I didn't want to kill her, I don't know, no, I don't know, I don't, I don't know… I wanted her back. I wanted her back."

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

The judge's directions to the jury

[30] The judge began his directions to the jury at about 9.00 am on the fourth day of the trial. He commenced with general directions as to what constituted evidence and the requirement for unanimity. He explained the appellant was charged with murder but the jury were required to consider both murder and manslaughter. The onus of proof was on the prosecution to prove the appellant's guilt beyond reasonable doubt. The fact that she had not given evidence did not add to or strengthen the prosecution case and no adverse inference could be drawn from that fact.

[31] The judge explained the elements of the offence of murder, defining "grievous bodily harm". The prosecution case was that the appellant suffocated the deceased. It was sufficient if the prosecution established that this was a substantial cause of the death. His Honour explained that the element of intention in the offence of murder was:

> "… that she intended to kill the deceased or to do grievous bodily harm to the deceased at the time she killed her. No other intention would be sufficient. It would have to be one or other of those intentions for her to be guilty of murder. If you thought that she intended to do some sort of unspecified harm or didn't intend any particular result then that would not be sufficient. I'll have something in a moment more to say about intention."

His Honour then explained that:

> "… the killing must be unlawful, that is not authorised, justified or excused by law.
>
> Here the relevant consideration is accident and for the prosecution to exclude accident you have to be satisfied beyond a reasonable doubt, firstly, that the action of the [appellant], which caused the death, was a conscious and willed action. That it was her conscious and willed act.
>
> In this case what's alleged again, I say, is the suffocating of the child. The prosecution would have to satisfy you that her action in suffocating the child, if you found that to be the case, was a willed and conscious act and not just something that happened

> independently of her will or in a way which did not involve a conscious and willed act.
>
> And, secondly, they would have to satisfy you that an ordinary person in the position of the [appellant] would have foreseen death as a possible consequence of what she did."

[32] His Honour went on to summarise the elements of murder:

> "So there are those four elements; that she killed the deceased, that she intended to kill the deceased or do grievous bodily harm, that her action which caused the death of the deceased was a conscious and willed act on her part, and that an ordinary person in her position would have foreseen death as a possible consequence of what she did."

[33] The judge next turned to intoxication and its relevance to the element of intention in the charge of murder:

> "… our Criminal Code provides this in relation to the question of intention: 'When an intention to cause a specific result is an element of an offence intoxication or stupefaction,' which is the term used in relation to drugs, 'whether complete or partial and whether intentional or unintentional may be regarded for the purposes of ascertaining whether such an intention in fact existed'. …
>
> Now, let me just say a little bit more about that subject. Here there is some evidence of the [appellant's] consumption of drugs, well, close to the relevant time, prior to the time at which it is alleged she caused the death of the deceased. It comes from a couple of sources. On her own account in the interview about taking an ecstasy tablet, I think, and then, of course, there's the evidence of the sample of her blood which was taken at the hospital and in which methylamphetamine traces were found in her blood.
>
> Now, as you will appreciate, murder is a case involving a specific intent. When such an intention is an element of an offence then, as I have just told you, intoxication or stupefaction, whether complete or impartial and whether intentional or unintentional may be regarded for the purposes of ascertaining whether such an intention in fact existed.
>
> If because of the evidence as to the effect of the intoxication or stupefaction or, for that matter, otherwise, the evidence otherwise, you are not satisfied beyond a reasonable doubt that the [appellant] did in fact form the necessary intent you must find her not guilty of murder.
>
> The evidence that a person was intoxicated or affected by drugs will not itself entitle a person to a verdict of not guilty of murder because a person when intoxicated may form the necessary intent and one who has formed the intent doesn't escape responsibility because intoxication or stupefaction has diminished that person's power to resist the temptation to carry it out. It is a matter of common experience that you see people when drunk or affected by drugs do something stupid, something that they probably would not have done

> if they had not been so affected but doing it nonetheless intentionally.
>
> What you have to consider is whether, having regard to the effect of the intoxication or stupefaction, you are not satisfied beyond a reasonable doubt that the [appellant] did in fact form the necessary intent. If you are not so satisfied you must find her not guilty of murder.
>
> It is for the prosecution to satisfy you beyond a reasonable doubt that although affected by drugs the [appellant] did in fact have the requisite intention. If the prosecution, as I have said, fails to satisfy you beyond a reasonable doubt of that you must find her not guilty of murder.
>
> Now, lest there be any misunderstanding about this let me make it clear. You, of course, consider all of the evidence placed before you on the question of intention, including evidence of the [appellant's] somewhat bizarre behaviour that has been placed before you, both on earlier occasions and at that time, and thereafter for that matter, and the account she gave the police, so all of that evidence is evidence that you must consider on the question of whether you have been satisfied beyond a reasonable doubt that the [appellant] had the necessary intention.
>
> I have specifically dealt with the question of intoxication or stupefaction because our law provides specifically in relation to that but you do not confine your attention simply to that, you look at the evidence as a whole."

[34] The judge then dealt with the elements of the offence of manslaughter:

> "… the elements of that are, again, you would have to be satisfied beyond a reasonable doubt that the [appellant] caused the death of the deceased and that she did so unlawfully, and the prosecution would satisfy you that it was unlawful if you were satisfied beyond a reasonable doubt that an ordinary person in her position would have foreseen death as a possible consequence of what she did. So the two elements here, the causation of death, firstly, and, secondly, in circumstances where an ordinary person in her position would have foreseen death as a possible consequence of what she did.
>
> When we say "a possible consequence" we mean a real possibility, not a fanciful or remote one."

[35] His Honour next gave directions on diminished responsibility under s 304A *Criminal Code*, explaining that the jury would only have to consider this if the prosecution had satisfied them beyond a reasonable doubt that the appellant was otherwise guilty of murder.

[36] The judge added uncontroversial directions as to the use to be made of evidence of motive and how to deal with expert evidence.

[37] His Honour explained that the prosecution relied on the appellant's statements to police in the record of interview and to MS. The jury should consider whether she made those admissions and, if so, whether she was telling the truth when she made them.

[38] Before summarising the evidence, the judge, in the absence of the jury, asked counsel if they requested any redirections on his explanation of the law. Defence counsel asked the judge to explain that the jury must be satisfied not only that the admissions were made but that they were accurate; the appellant might believe them to be true but they may not in fact be true. The judge then directed the jury as follows:

> "Let me just revisit very briefly the matter I last dealt with, that is the question of admissions which the prosecution rely upon. They rely upon what is said to be admissions made to the police in the course of the interview.
>
> Now, what you have to concern yourself with here is did she say those things? Well, you had the opportunity to listen to the tape. And were they true? Did the things she said occurred actually happen in the case of the admissions relied upon to [MS] and also [DP]?
>
> You have to ask yourself this, are they telling the truth considering each one? Is he telling the truth when he says she made this admission? If he is telling the truth, does he have an accurate recall of what she said, and if he does, is what she said the truth? Did it actually happen?"

[39] His Honour next summarised the evidence in considerable detail before précising the competing contentions of counsel in this way.

[40] The prosecutor emphasised the admissions the appellant made to police, MS and DP. She admitted to police that she put her hand over the baby's face and kept it there. The jury could safely act on those admissions. The appellant's motive was to get rid of the baby which she saw as an impediment to her relationship with MS. There was no medical evidence supporting the conclusion that she was acting under an abnormality of mind when she killed the baby. Tragically, she killed her baby intending to do so. Her use of drugs did not mean that she did not form that intention. The evidence of her hostility to the child before the birth supported the conclusion that she intended to kill or do grievous bodily harm to the baby. The jury would return a verdict of guilty of murder. If in any doubt about the question of intent, the jury would find her guilty of manslaughter. The jury would reject the claim of diminished responsibility.

[41] The appellant's counsel emphasised that the onus of proof was on the prosecution and contended that there was a reasonable doubt about the appellant's guilt. It was not possible to be satisfied beyond reasonable doubt that she caused the baby's death. The cause of death was uncertain. If the jury were satisfied beyond reasonable doubt that she caused the death, they would not be satisfied that she had the necessary intent to kill or do grievous bodily harm. The appellant was a seriously disturbed woman with a history of bizarre behaviour. The jury would be reluctant to act upon her statements to police as being a reliable account of her actions. She at all times told police she did not intend to kill the baby. The jury would have a reasonable doubt about whether she intended to kill or do grievous bodily harm to the baby. If the jury were satisfied beyond reasonable doubt that she killed the deceased intending to do so or to do grievous bodily harm, they must then consider diminished responsibility. Despite Dr O'Rourke's evidence, the jury would be satisfied from the evidence of the other witnesses of her abnormal state of mind during her pregnancy. If the jury were satisfied on the balance of probabilities that

she was deprived of one or more of the capacities referred to in s 304A, they would find her guilty of manslaughter only.

[42] The judge concluded by suggesting that the jury approach their task by first considering whether they were satisfied that the appellant caused the death of the deceased. They might next consider whether accident could be excluded. If not, the appellant could not be guilty of murder. The jury might then consider whether she had the necessary intent to kill or do grievous bodily harm. If the jury were satisfied of all those things, then the verdict would be guilty of murder, subject to diminished responsibility. If the jury were satisfied on the balance of probabilities that diminished responsibility reduced murder to manslaughter, then they would find her guilty of manslaughter only. His Honour added:

> "If you were not satisfied of any of the elements of murder, you would then move to consider manslaughter and you would here ask yourself: did the [appellant] cause the death of the deceased? Would an ordinary person in the [appellant's] position have foreseen death as a possible consequence of what she did? If your answer to that was that you're not satisfied beyond a reasonable doubt of those matters, then she would be not guilty of manslaughter. If you were so satisfied, then she would be guilty of manslaughter."

[43] The judge invited the jury to retire and consider their verdicts at 11.48 am. Counsel did not seek any further redirections. The jury returned with their verdict, guilty of murder, at 2.43 pm.

The appellant's contentions as to whether the judge's directions sufficiently dealt with the real issues in the trial

[44] Counsel for the appellant placed reliance on this Court's decision in *R v Mogg*[1] and the observations in the High Court's recent decision of *Hargraves and Stoten v The Queen*.[2] He contended that the judge's directions did not sufficiently assist the jurors as to the real issues raised on the evidence so that the jury was unable to properly discharge its duty. A miscarriage of justice has resulted.

[45] He further contended that the judge's directions as to intention and accident (s 23 *Criminal Code*)[3] were confusing. If the jury was satisfied the appellant intended to kill or do grievous bodily harm to the deceased, s 23 would have no application. The directions confused the element of intent in the murder charge and the defence of accident. The judge should have asked the jury to first consider the charge of manslaughter and whether they were satisfied beyond reasonable doubt that the appellant had unlawfully killed the deceased and the operation of s 23 on the charge of murder. The judge did not direct the jury to the evidence relevant to s 23. Nor did the judge explain to the jury the operation of s 23 in relation to the evidence of the pathologist, Dr Williams,[4] and the appellant's description in her police record of interview[5] of events preceding the death. Only if the jury were satisfied that the death was unlawful was it necessary for them to consider the question of intent in the charge of murder.

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1 (2000) 112 A Crim R 417; [2000] QCA 244.
2 [2011] HCA 44, [42].
3 Set out at [31] of these reasons.
4 Set out at [3] of these reasons.
5 Set out at [28] of these reasons.

[46] Counsel contended that the way in which the judge's directions on murder and accident were intertwined without reference to the relevant evidence on those matters meant that the jury might simply have acted on the appellant's admissions and concluded that she was guilty of murder without considering the question of accident and the evidence relating to it. In real terms, the appellant was denied the opportunity to have the jury consider accident in relation to manslaughter.

Conclusion as to whether the judge's directions sufficiently dealt with the real issues in the trial

[47] The trial judge correctly identified that the issues in the trial were whether the appellant caused the baby's death; whether the death was unlawful in that it was not an accident under s 23; whether the appellant intended to kill or do grievous bodily harm to the deceased in light of the evidence as to her state of intoxication at about the time of the killing; and whether, if otherwise satisfied that she murdered the deceased, she did so whilst acting under diminished responsibility of one of the capacities set out in s 304A. It is not contended that the judge's discrete directions on any of these issues were flawed. After explaining the law, the judge summarised all relevant aspects of the evidence in some detail and explained the competing contentions of counsel.

[48] It is true the judge gave directions on the element of intention, relevant only to the charge of murder, before he gave directions on the element of unlawfulness.[6] Whether the death may have been an accident under s 23 was a question relevant to the element of unlawfulness both on the charge of murder and on the charge of manslaughter. But there was method in this approach. Importantly, at the conclusion of the directions after explaining the law, summarising the evidence and setting out the competing contentions of counsel, the judge suggested the jury begin their deliberations in this way. They might first consider causation and next whether they could exclude accident (s 23). If they could not, the appellant could not be guilty of murder. If they could, they might then consider whether the appellant had the necessary intent to kill or do grievous bodily harm. His Honour explained that only if satisfied of all those things could they convict the appellant of murder. But before doing so, they must then consider whether on the balance of probabilities the appellant was acting under diminished responsibility; if so, the appellant would be guilty of manslaughter, not murder. His Honour then took the jury back to the position if they were not satisfied that the appellant had committed any one of the elements of the charge of murder. In that case they must next consider the charge of manslaughter. That involved a consideration of whether the appellant caused the baby's death and whether an ordinary person in her position would have foreseen death as a possible consequence of what she did. If satisfied beyond reasonable doubt of those matters, she would be guilty of manslaughter; if not, she would be not guilty of both manslaughter and murder.[7]

[49] It is true, as Chesterman JA points out, that the judge's directions on s 23(1)(b) did not explain that accident would also be excluded if the prosecution proved beyond reasonable doubt either that the appellant intended to kill the baby or if she foresaw the baby's death was a possible consequence of her actions. This omission favoured the appellant. It is also true that the judge gave incomplete directions to the jury as to s 23(1)(a) on the murder charge. This omission did not prejudice the appellant as

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6 Set out at [31] of these reasons.

7 See [34] of these reasons.

there was no evidence that her actions relevant to the baby's death were not willed or deliberate. No redirections were sought at trial on these aspects of the judge's jury directions. Her counsel in this appeal did not contend they caused a miscarriage of justice. They plainly did not.

[50] After considering the whole of the judge's directions to the jury particularly those discussed in [48] above, I am confident those directions properly assisted the jury as to the real issues raised on the evidence and did not confuse the defence of accident under s 23 relevant to the element of unlawfulness in both murder and manslaughter with the element of intention relevant only to murder. The trial was a short one and the judge gave a balanced and comprehensive summation of the evidence. It would have been obvious to the jury which parts of the evidence related to the question of accident under s 23.

[51] The judge, unlike in *Mogg*,[8] explained the prosecution and defence cases. It is true that many judges would have given directions directly relating relevant portions of evidence to relevant aspects of the law. But there are many styles of giving jury directions. What is essential is that the judge adequately identifies the real issues in the trial; relates them to the relevant law and facts; and even-handedly outlines the main arguments of counsel. The judge did this. His Honour's directions also complied with the statement of the plurality in *Hargraves and Stoten*[9] that:

> "[T]he judge in a criminal trial must accept the responsibility of deciding what are the real issues in the case, must tell the jury what those issues are, and must instruct the jury on so much of the law as the jury needs to know to decide those issues. … But informing and underpinning all of these requirements is that the judge's instructions to the jury, whether by way of legal direction or judicial commentary on the facts, must not deflect the jury's attention from the need to be persuaded beyond reasonable doubt of the accused's guilt before returning a verdict of guilty."

[52] In my opinion, this ground of appeal is not made out.

The appellant's contentions as to whether the judge erred in not warning about general propensity and evidence of bad character

[53] The appellant's counsel emphasised that the prosecutor's final address to the jury invited them to use Nurse Slykerman's evidence,[10] that on 18 March the pregnant appellant said she wanted to stab herself in the abdomen, as a clear statement of animosity towards her unborn child when her inhibitions were lowered because she was affected by alcohol or drugs. The appellant's counsel contended that there was no evidence that the appellant had caused the abdominal marks. In any case, Nurse Slykerman's evidence of the appellant's statements and behaviour was consistent with voices telling her to harm the baby. The judge should have reminded the jury of the evidence that the appellant had been a caring mother prior to the death and that she was discharged from hospital after an assessment that she was able to care for the child. The judge should have given a direction of the kind discussed by McHugh J in *BRS v The Queen*,[11] warning the jury of the limited purpose for which

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8 [2000] QCA 244, McMurdo P [49], [52]-[54]; Thomas JA [69]-[74]; Wilson J [82]-[83].

9 (2011) 282 ALR 214; [2011] HCA 44, [42].

10 Set out at [19] of these reasons.

11 (1997) 191 CLR 275, 305; [1997] HCA 47.

the evidence was admitted and that it could be used only for that purpose. A similar warning should have been given as to the evidence of the appellant's drug-taking. The judge's failure to give such a warning has caused a miscarriage of justice and deprived the appellant of an opportunity of an acquittal.

[54] The judge should have told the jury that, before they could accept the prosecution theory that she deliberately killed the baby, they must be satisfied beyond reasonable doubt that there were not in fact voices in her head.

Conclusion as to whether the judge erred in not warning about general propensity and evidence of bad character

[55] It is true that there was a body of evidence that the appellant had behaved in strange and socially unacceptable ways; self-harmed when she was pregnant with the deceased; and took unlawful drugs. But this evidence was led without objection and for obvious reasons. It was plainly relevant and admissible; it was not mere propensity evidence. Further, much of it related directly to the appellant's relationship with her unborn baby, who, on the prosecution case, she later intentionally killed. It was evidence the jury could use to find such an intention: see *Roach v The Queen*.[12] Second, the evidence of the appellant's drug taking was capable of supporting the defence contention that she did not intend to kill or do grievous bodily harm to the baby because of her intoxication. Third, the evidence of the appellant's bizarre behaviour was capable of supporting the defence case of diminished responsibility. Nevertheless, I consider it would have been prudent for the judge to have given the jury a direction of the kind discussed in *BRS* about this evidence to ensure the jury focussed on the real issues and did not improperly reason that because the appellant took drugs, behaved bizarrely, and self-harmed whilst she was pregnant with the deceased, she therefore unlawfully killed or murdered her. But no such direction was sought by the very experienced defence counsel, probably for tactical reasons. He may have considered that such a direction would have highlighted aspects of the evidence which were unfavourable to the defence and thereby strengthened the prosecution case so that a *BRS* direction was both unnecessary and unwise. There is no rule of law mandating a propensity direction in every case. Whether such a warning is required will depend on the circumstances of each case: *R v Self*.[13]

[56] The appellant's contention that there was no evidence that she had caused the abdominal marks noticed by Nurse Slykerman is incorrect. She told senior social worker Mr Wilson that she had inflicted the injuries for which she was hospitalised on 18 March.[14] The appellant's mother also said the appellant tried to stab and cut herself.[15] And contrary to the appellant's contention, the judge in his summation of the evidence did remind the jury of the evidence which suggested that the appellant was a caring, concerned and capable mother after the birth. Nor is the appellant's contention, that the judge should have warned the jury that before convicting the appellant they must be satisfied beyond reasonable doubt that there were not in fact voices in her head, sustainable. Such a direction would have confused the jury and it is not the effect of s 304A. The issues for the jury's determination were those upon which the primary judge directed the jury, namely, causation; intention as affected by intoxication; accident (s 23); and diminished responsibility (s 304A).

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12 [2011] HCA 12, French CJ, Hayne, Crennan and Kiefel JJ [44]-[45].

13 [2001] QCA 338, [28].

14 See [19] of these reasons.

15 See [6] of these reasons.

[57] For these reasons, I am unpersuaded that, in the circumstances of this case, the judge's omission to warn the jury about general propensity and evidence of bad character in terms of *BRS* amounted to an error of law or caused a miscarriage of justice. Its omission has not led to a real risk that the jury would have undertaken unfair prejudicial reasoning.[16] In my opinion, this ground of appeal is not made out.

Conclusion

[58] As the appellant has not succeeded on either of her grounds of appeal, the appeal against conviction must be dismissed.

ORDER:

Appeal against conviction dismissed.

[59] **CHESTERMAN JA:** I agree that the appeal should be dismissed substantially for the reasons given by the President. Her Honour's reasons comprehensively set out the relevant facts, the appellant's submissions and the issues on the appeal. I can express my concurring reasons briefly because of the thoroughness of the President's recitation.

[60] The case against the appellant was very strong. She confessed both to police and to the dead child's father that she had suffocated the baby. There was persuasive evidence of a deep animosity against the unborn child and a resentment that her existence would imperil the appellant's ongoing relationship with the father. The baby had been healthy: there was no indication of any underlying medical condition which might have caused her to expire. The appellant's confessions provided an explanation for the death and a motive for homicide.

[61] The grounds of appeal are limited to alleged inadequacies in the summing up.

[62] The appellant submitted:

> "… directions … had the effect of confusing the element of specific intent on a charge of murder and the defence of accident. ... the more appropriate course would have been for (the trial judge) to explain to the jury that the first step was to be satisfied that there had been an unlawful killing. The … judge did not direct the jury to the various pieces of evidence which were relevant to … s 23. … only (where) a jury finds that the death was unlawful, should they consider the element of specific intent required to prove murder. … the manner in which the … judge directed the jury had a risk of … finding that the accused was either guilty of murder or not guilty of anything. The … subsequent directions in a similar vein on manslaughter were superfluous."

[63] The balance of the submission advanced in oral argument was that the summing up with respect to accident was confusing, and the jury should have been directed to consider whether the killing of the infant was accidental, within the terms of s 23, before considering whether the killing, if not accidental, was murder or manslaughter. The appellant complains that the directions came down to a charge that the case was "all (i.e. murder) or nothing", thereby cutting off the possibility that the jury might have considered the death to be manslaughter.

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16 *R v Self* [2001] QCA 338, [39]-[40].

[64] The trial judge considered that *Stevens v The Queen* (2005) 227 CLR 319 compelled him to address the jury on the issue of accident though he thought that such a direction would "generate confusion". Defence counsel addressed some submissions to the jury on the topic and the trial judge gave directions with respect to it. Those are the directions which are the subject of complaint in ground 1.

[65] *Stevens* and *Murray v The Queen* (2002) 211 CLR 193 both decide that s 23 of the *Criminal Code* is available on a charge of murder, at least in some cases, despite murder requiring as an element of the charge proof that the killing was intentional. Such intention will, necessarily, disprove accident. Nevertheless it is not the case that s 23, and the exculpation it offers, is applicable in every murder trial; nor is it the law that a trial judge must instruct a jury with respect to the operation of the section regardless of the facts. *Stevens* did not lay down any such rule. In that case the majority held that the evidence gave rise to the possible application of s 23(1)(b) and the jury had to be directed about its terms and the evidence relevant to the section. It is, I think, clear from the judgments of McHugh J (at 329); Kirby J (at 343) and Callinan J (at 366) that it was the particular evidence in the case that gave rise to the need to address accident. Both *Stevens* and *Murray* demonstrate the difficulty of, and scope for judicial disagreement about, the applicability of s 23 in the factual context of particular cases of murder.

[66] Accepting that the section may apply to a charge of murder, and that in deciding whether or not to instruct the jury about the section a trial judge should perhaps err on the side of caution, it is nonetheless right that a direction on accident should not be given as a matter of course, but only where the evidence fairly raises it.

[67] Defence counsel did not ask the trial judge to direct the jury with respect to accident. His Honour indicated that he understood *Stevens* required him to undertake that task. Defence counsel therefore seems to have felt obliged to say something on the topic, though he struggled to understand how the section might apply to the case.

[68] He said as a preliminary to his submissions on accident:

> "One would think, if the child was laying in the bed and you put the hand straight over and suffocate it and put the hand right down, that would not be an accident."

The argument, such as it was, which followed was:

> "The second issue, an unlawful killing; so she's satisfied beyond reasonable doubt that she caused the death. Was that event one that was caused by an accident? (If it was not) she'd be not guilty of murder or manslaughter. What's an accident? An event can only be regarded as an accident if the defendant neither intended it to happen nor foresaw it could happen and, this is the important part, and if an ordinary person in her position at the time would not reasonably have foreseen it could happen. So if she was, for instance, burping; if she was, for instance, looking at the ceiling; if she was, for instance, putting the hand over her mouth not realising it, … you might think you would say (you) would have a doubt about whether she intended for that event to happen nor foresaw it, but would an ordinary person in her position it might be a different position. … [a]n ordinary person probably, should be alerted to it. But that's still a matter for you."

[69] The cause of death could not be determined by autopsy. The only explanation offered by the evidence, and the one implicating the appellant, was that the child was smothered in the manner the appellant described. If the jury were not satisfied beyond reasonable doubt that the appellant had caused the death then they had to acquit. So much is obvious, and the jury was directed to that effect. However, they were satisfied of the cause of death and the appellant's agency in causing it as the verdict shows. On that hypothesis, which the jury accepted, there was no scope for the application of s 23. The appellant described a willed act in placing her hand over her child's face and it is impossible to conclude that a reasonable adult would not foresee death as a possible result of cutting off the supply of air to a four day old baby.

[70] The summing up began relevantly with an accurate summary of the *Code's* provisions as to homicide and the elements of murder. The direction concluded:

> "… [a]nd, of course, the killing must be unlawful, that is not authorised, justified or excused by law. Here the relevant consideration is accident and for the prosecution to exclude accident you have to be satisfied beyond a reasonable doubt, firstly, that the action of the accused, which caused the death, was a conscious and willed action. That it was her conscious and willed act. In this case what's alleged … is the suffocating of the child. The prosecution … (had) to satisfy you that her … suffocating the child … was a willed and conscious act and not just something that happened independently of her will … And, secondly, they would have to satisfy you that an ordinary person in the position of the accused would have foreseen death as a possible consequence of what she did. … [s]o there are those four elements; that she killed the deceased, that she intended to kill …, that her action which caused the death … was a conscious and willed act on her part, and that an ordinary person in her position would have foreseen death as a possible consequence of what she did."

[71] When the offence was committed and the trial conducted s 23 provided that:

> "(1) … a person is not criminally responsible for –
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that occurs by accident."

Section 23(1)(b) was understood at the time to mean that to negative accident the prosecution had to prove:

> "… that the accused intended that the event in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome."

The proposition comes from *R v Taiters; ex parte Attorney-General* [1997] 1 Qd R 333. The "event" was the infant's death. Amendments made to s 23 in April 2011 have given statutory expression to the proposition.

[72] The directions addressed the terms of both s 23(1)(a) and (b), but the direction with respect to the latter was incomplete. The death would not have been accidental within the meaning of s 23 if the appellant intended the death, or if she foresaw it as

a possible outcome of putting her hand over the baby's mouth and nose. The jury was not told that. The direction was limited to whether an ordinary person in the appellant's position would have foreseen the possibility.

[73] The inadequacy of the direction worked in the appellant's favour. The jury was told that the test for accident was whether an ordinary person in the accused's position would have foreseen death as a possible outcome of the relevant act, in this case putting the hand on the face. They were not told that the test also included intention or the accused's own foresight. Properly instructed they would have realised that if the accused foresaw death as a possible result of her act, or if she intended it, the death was not accidental. An easier test than that which the law prescribes was imparted to the jury.

[74] Both elements of s 23 were addressed as being relevant. Section 23(1)(a) was referred to without elaboration and without reference to the evidence. That may be in some cases a ground of criticism. The difficulty in determining what is a willed or voluntary act appears in the judgment of Gummow and Hayne JJ in *Murray* (211 CLR 193 at 208-212). The philosophical and factual problems to which the concept can give rise were of no concern in this case. The jury must have found that the cause of death was the appellant's act of smothering the baby. The placing of the hand over the mouth and nose can only have been a willed, voluntary and deliberate act. Any inadequacy in dealing with s 23(1)(a) is inconsequential.

[75] The summing up, having dealt with intention and the effects of intoxication or stupification on it, turned to manslaughter. The trial judge described the offence and continued:

> "So it is described in the Criminal Code as unlawful killing. And the elements of that are, again, … the accused caused the death of the deceased and that she did so unlawfully, and the prosecution would satisfy you that it was unlawful if you were satisfied beyond a reasonable doubt that an ordinary person in her position would have foreseen death as a possible consequence of what she did. So the two elements here, the causation of death, firstly, and, secondly, in circumstances where an ordinary person in her position would have foreseen death as a possible consequence of what she did."

[76] This direction is also incomplete. It omits all reference to s 23(1)(a) which had been mentioned when considering accident in relation to murder and, with respect to s 23(1)(b) it omitted the instruction that death would not be accidental if the appellant had intended the death or if she had herself foreseen it as a possible consequence of her action.

[77] Here, also, the inadequacy of the summing up as to s 23(1)(b) worked in favour of the appellant. The jury was told that they could not convict of manslaughter unless satisfied, beyond reasonable doubt that the death was not accidental and the description of what would make it accidental was truncated, making it easier to satisfy. Omitting reference to s 23(1)(a) was irrelevant for the reasons given earlier.

[78] The appellant complains that the trial judge should have directed the jury to consider whether the death was accidental before turning to consider whether the prosecution established murder or manslaughter. The judge in fact gave that precise direction, conceding, as his Honour was bound to, that the manner of deliberating was peculiarly for the jury to determine. In any event a discrete separation of the

questions, whether the death was accidental, and whether it amounted to murder, was not logically or factually necessary, even if possible. The jury in considering whether the death was accidental were entitled to consider whether the killing was intentional. A finding that it was intentional would have negatived accident, but also compelled a conviction of murder. The facts relevant to the cause of death and intention were extricably contained in the same evidence which was relevant to both issues.

[79] Despite the inaccuracies in the summing up on the question of accident and the inadequacy of the legal analysis concerning s 23 there has been no injustice and no possibility that the jury might have reasoned impermissibly to a conclusion of guilt. Directions on accident were unnecessary because s 23 had no application on the facts. Nevertheless even though incomplete they can only have operated in favour of the appellant. They indicated a basis, not in fact available, by which the jury might have acquitted. The section was described in such terms as to make its application easier than the terms of the section provided.

[80] The second ground of appeal was that the trial judge failed to give a direction as to the dangers of propensity evidence in the terms recommended by McHugh J in *BRS v The Queen* (1997) 191 CLR 275 at 305. The evidence in respect of which the warning was said to have been necessary is rehearsed in the President's reasons. McHugh J said:

> "If evidence revealing a criminal or reprehensible propensity is admitted, the trial judge must give the jury careful directions concerning the use which they can make of the evidence. If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose."

[81] It is at once obvious that the evidence in question was not propensity evidence. It was not led to show that the appellant was likely to commit criminal or reprehensible acts. It was adduced to prove a fact in issue in the trial i.e. that the appellant killed her child intending the result. Animosity displayed or expressed by an accused toward his victim is admissible as tending to show that the accused committed the crime charged. In *R v Ball* [1911] AC 47 Lord Atkinson said (68) in the course of argument:

> "Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. … Evidence of motive necessarily goes to prove the fact of the homicide by the accused … inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not."

[82] *Wilson v The Queen* (1970) 123 CLR 334 was a case in which Mrs Wilson was shot in the back of the head as a she drove a tractor pulling a load of hay. Her husband was charged with her murder. The issue in the trial was whether the gun, which had been placed on the hay, discharged accidentally or was fired by the accused. There was evidence that in the past they had quarrelled bitterly and the wife, in the presence of witnesses, had accused her husband to his face of wanting her dead.

[83] Barwick CJ said (339):

> "But it is clear that such evidence (of bad feelings between the parties) may also provide material on which the fact of the killing may be inferred. See for example per Lord Atkinson in *R v Ball* … . It is not in my opinion only in those cases where the evidence of the relations of the accused with others tends to establish motive that it is admissible. If the evidence does tend to explain the occurrence, or, as in this case, to assist the choice between the two explanations of the occurrence, then in my opinion on general principles, because it is relevant, it is admissible."

[84] Menzies J said (344):

> "Any jury called upon to decide whether they were convinced beyond reasonable doubt that the applicant killed his wife would require to know what was the relationship between the deceased and the accused. Were they an ordinary married couple with a good relationship despite differences and disagreements, or was their relationship one of enmity and distrust? It seems to me that nothing spoke more eloquently of the bitter relationship ... than that the wife … should charge her husband with the desire to kill her. The evidence is admissible not because the wife's statements were causally connected with her death but to assist the jury in deciding whether the wife was murdered in cold blood or was the victim of mischance."

[85] The authorities were exhaustively reviewed by Heydon JA (as his Honour then was) in *Clark* (2001) 123 A Crim R 506 at 550 to 568. His Honour referred with approval to the judgment of Maguire J in *Garner* (1964) NSWR 1131 at 1139-1140:

> "… evidence of the other assaults was admissible … to the real and only issue … namely, whether the November assault took place and whether, as a result … Rasmussen was caused actual bodily harm. In my opinion evidence was admissible as to the relationship between Rasmussen and the accused over the period of five or six months preceding November 1962. If, for instance, instead of assaulting Rasmussen on these earlier occasions the accused had been heard to express great hostility to or contempt for him, I think that evidence to that effect would have been admissible on the question of whether Rasmussen was assaulted by the accused in November. Furthermore, if actual threats to injure Rasmussen had been made from time to time, I consider that evidence of such threats would have been admissible. Such evidence would have been logically probative in relation to the issue which had to be submitted to the jury at the trial. … [t]his … would be relevant … not for the purpose of showing that … he was likely to have committed the (offence) charged against him, but as part of the background of the relationship … establishing … an atmosphere which would render it less unlikely that the offence charged would have been committed in the circumstances which arose on the occasion of that assault."

[86] Heydon JA at (562) criticised the designation of such evidence as "relationship evidence" and thought that its reception could not be justified on the basis that it proved a "relationship". His Honour preferred the formulation Gleeson CJ had advanced in *Frawley* (1993) 69 A Crim R 208 at 222, that evidence of the present kind should not be considered "in terms of generality as to "relationship" but,

rather, to consider whether the evidence in question is direct evidence of any fact relevant to a fact in issue."

[87] On the authorities the evidence was relevant and therefore admissible because it was logically probative of the question whether the appellant had killed her child, intending to kill her. The evidence was not led as to any propensity in the appellant to commit acts of violence or other reprehensible conduct. It was led specifically and only as indicating an animosity to the unborn child and a motive for ending her life when born. The only reference to the evidence in the summing up appears in the trial judge's summary of the prosecution case and explained the prosecutor's reliance upon the evidence for the purpose I have just discussed.

[88] The limited role of the evidence was sufficiently made clear. It was not propensity evidence and it could not, I think, have been mistaken for it. There was no criticism of the summing up at the trial and no request for a redirection. A warning of the kind now said to have been necessary might have alerted the jury to the possibility of misusing the evidence. That may have been a reason why the warning was not asked for.

[89] Neither ground of appeal has been made out. The appeal should be dismissed.

[90] **MULLINS J:** I agree with the President.