# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Susec* [2013] QCA 77 |
| PARTIES: | **R**<br>**v**<br>**SUSEC, Milan Danny**<br>(appellant) |
| FILE NO/S: | CA No 363 of 2011<br>SC No 216 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 12 April 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 30 January 2013 |
| JUDGES: | Margaret McMurdo P, Muir and Gotterson JJA<br>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 – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where evidence was led at trial by two witnesses of the appellant sharpening a knife in front of the deceased and those two witnesses – where directions were given by the trial judge on how to deal with this evidence – whether this evidence could be deemed relevant evidence of the history of a domestic relationship between the appellant and the deceased pursuant to s 132B(2) of the *Evidence Act* 1977 (Qld) – whether its prejudicial value outweighed its probative value – whether it ought to have been excluded – whether miscarriage of justice occurred<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where evidence was led from a witness of the deceased telling the witness that the appellant was going to kill the deceased – where a defence of provocation was raised by the appellant at trial – whether the evidence of the state of mind of the deceased was relevant and admissible – whether the trial judge erred in admitting evidence – whether miscarriage of justice occurred |

CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – PARTICULAR CASE – where evidence was led that was previously ruled inadmissible in a witness statement – where no objection was taken at the time the evidence was led by the witness during examination-in-chief – where no direction was given by the trial judge in relation to the evidence – whether no substantial miscarriage of justice has occurred in consequence of the admission of that evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where there was an abundance of evidence to support the guilty verdict – whether the verdict was unreasonable or insupportable having regard to the totality of the evidence

*Criminal Code* 1899 (Qld) s 668E(1)
*Evidence Act* 1977 (Qld), s 130, s 132B(2)

*HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16, cited
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, considered
*Mraz v The Queen* (1955) 93 CLR 493; [1955] HCA 59, cited
*R v Anderson* (2000) 1 VR 1; (2000) 111 A Crim R 19; [2000] VSCA 16, considered
*R v Gojanovic (No 2)* (2002) 130 A Crim R 179; [2002] VSC 118, followed
*R v Lester* (2008) 190 A Crim R 468; [2008] QCA 354; applied
*R v Wilks* [2012] QCA 14, cited
*Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, followed
*Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50, cited
*TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46, considered
*Wilson v The Queen* (1970) 123 CLR 334; [1970] HCA 17, followed

COUNSEL: M J Byrne QC for the appellant
M R Byrne SC, and B J Merrin, for the respondent

SOLICITORS: Seth Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: I agree with Gotterson JA's reasons for dismissing this appeal against conviction.

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

[3] **GOTTERSON JA**: At a 10 day trial before a judge and jury which concluded on 12 December 2011, the appellant, Milan Danny Susec, was convicted of the murder of his wife, Raelene Susec. After the jury verdict was given, the appellant was sentenced to life imprisonment. He had been in custody since 22 February 2010. The 659 days which had elapsed since then were declared to be pre-sentence custody.

[4] On 22 December 2011, the appellant filed a Notice of Appeal against his conviction.

**Circumstances of the death**

[5] The appellant and the deceased had been married for many years. There were three sons of the marriage. The eldest, aged in his early thirties, did not live with the family. Daniel, aged 25 years, owned a house at Eastern Heights Ipswich in which he, the deceased and his elder brother, Darren, aged 29 years, had lived for about five years.

[6] The appellant and the deceased were separated. He had been living in a motor home parked in the front yard of the Eastern Heights property. He used the kitchen in the house from time to time and its bathroom facilities regularly.

[7] In the months prior to the death, the appellant and the deceased argued often. The deceased considered their relationship to be over. She told the appellant of that. It was information that he was reluctant to accept. The deceased began keeping company with other men. She told the appellant a month or two before her death that she was seeing someone else. This she again told him at a wedding attended by both of them on 13 February 2010, the Saturday before her death.

[8] The death occurred sometime between 1 pm and a little after 1.30 pm on Thursday, 18 February 2010 at the house. That day, the appellant had worked on an early shift that finished at 10 am. Video footage recorded him at both Coles and Woolworths stores after 10 am. He purchased groceries at both stores, including a container of ground pepper. He left the stores at about 11.30 am. The appellant returned home at about midday. He was due to recommence work at 2 pm.

[9] Daniel Susec and a friend of his who had stayed the previous night at the house saw the appellant after his return. At times, he and the deceased were conversing in the kitchen area. The two friends left the house at about 1 pm to run an errand. Daniel told the appellant that he would return before the appellant left for work. Daniel and his friend did return at about 1.30 pm but first went downstairs.

[10] The deceased was fatally wounded during the absence of Daniel and his friend from the house.

[11] The appellant contacted "000" and immediately told the operator that his wife had stabbed him. He said that he thought that he had "got her somewhere" and that she was lying on the floor. He said that she was lying very still. The appellant told the operator that he could not see the deceased because he had pepper in his eyes. The appellant was groaning during the conversation. At the operator's suggestion, he retrieved a tea towel which he placed over his wound. The operator remained on

the line and attempted to engage the appellant for about five minutes. Daniel Susec was then heard to enter the kitchen area and yell. The telephone call terminated.

[12] On entering the upstairs of the house, Daniel was confronted with a bloodied scene. The deceased was face down in the kitchen area. The appellant was lying near the dining room table. A knife was on the ground a short distance from the deceased. Daniel shook the appellant who groaned. He then shook the deceased who did not react. He noticed that the telephone was off the hook and immediately called "000". Police and paramedics arrived a short time afterwards.

[13] At the trial, police officers and paramedics gave evidence of their initial observations. Evidence was also given as to the movement of items and of the bodies of the deceased and the appellant. In particular, the knife was moved by Daniel at the request of the paramedic attending to his mother. He placed it in a sink in the kitchen where it remained until removed by police.

[14] The deceased was declared dead a short time after paramedics commenced resuscitation efforts. It was noticed that the appellant was bleeding from a wound to his abdomen. The paramedic treating him also noticed pepper around his eyes. The appellant said that the deceased had thrown pepper in his eyes and had stabbed him. Because of a concern for potential serious internal bleeding, the appellant was transported to hospital.

**Injuries to the appellant**

[15] The appellant sustained two penetration wounds to the right upper quadrant of his abdomen and one penetrating wound to the left upper quadrant of the same. The most significant of these was the one to the left upper quadrant. It involved penetration of all layers of the abdominal wall to a depth of a minimum 5 cms and severance of an artery. There was a small serosal tear to the small bowel and a serosal tear to the large bowel. Evidence was given by a treating doctor that the injuries as suffered by the appellant would not have affected his ability to talk or to walk at any time although blood loss from the severed artery, if untreated, had the potential to be fatal.

[16] The appellant was also examined by the Director of the Queensland Health Clinical Forensic Medical Unit on 20 February 2010. This doctor observed superficial linear scratches on the lower right arm, an abrasion on the bottom of the right palm, small abrasions on the left hand and a number of superficial linear cuts to the torso. In his opinion, the cuts and scratches were consistent with having been caused by the knife placed in the sink. This doctor also gave evidence that self-inflicted injuries by persons wanting to make a certain impression tend to be "superficial, multiple, generally parallel, generally in accessible areas of the body, generally avoiding structures which are sensitive … or structures, which the person believes are dangerous areas to cut. And generally speaking, there's an avoidance of damage to clothing."[1]

**Injuries to the deceased**

[17] The deceased died from a stab wound to her left chest region. This wound entered the chest cavity, penetrated into the heart and incised the left front ventricle. The wound tract was approximately 15 cms long. Significant blood loss resulted. A second stab wound to the left chest region incised her rib before entering the chest cavity and then entered the diaphragm. Its tract was measured at

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1 AB333; Tr4-36 LL24-29.

approximately 17 cms. The third stab wound which was to the left upper abdomen, did not penetrate the chest cavity. There was a bruise to the left forehead, a small abrasion to the nose and bruising and reddening of the inside of the lips. Evidence was also given of numerous incised wounds to the fingers and hands and left forearm of the deceased. The jury was told that these injuries were consistent with defensive wounds inflicted by a number of strikes with a knife. Bruising to the right upper arm consistent with grip marks was also observed. All the injuries were consistent with having been caused at around the time of death.

**Examination of scene and scientific examination results**

[18] Photographic evidence of the kitchen and dining room demonstrated a large amount of blood on the floor of the kitchen in the area where the deceased was initially observed. Blood was also observed on and inside cupboards in the kitchen. Photographs of a second area of blood near where the appellant was located were also tendered.

[19] A pepper container was found in the kitchen near to where the deceased's body was located. The lid for the container was located in a different area of the kitchen. There was evidence of blood underneath the lid and blood pooled around it.

[20] A number of swabs had been taken from the knife. It had a blade length of 15 cms. Some of the swab results revealed the presence of mixed profiles consistent with the appellant and/or the deceased. The swabs taken from each side of the tip of the blade contained a full profile matching that of the appellant only. There was no indication that any other knife had been used at the time.

[21] A trace DNA swab taken from the container lid revealed an incomplete sample which matched the profile of the appellant. The male chromosome was identified within this sample. Thus it could not have originated from the deceased. No fingerprints were found on the pepper container. Analysis of a black powder substance found in the appellant's pocket and on the back of the deceased's clothing indicated that it was ground pepper.

[22] A search of the appellant's motor home located the groceries purchased earlier that day by the appellant and associated shopping dockets. All of the groceries were located in shopping bags with the exception of the ground pepper.

**The nature of the prosecution case and the defences**

[23] The case advanced by the prosecution was a circumstantial one. A large body of evidence was adduced. Some of it, detailed later in these reasons, is the subject of the appellant's grounds of appeal.

[24] The appellant elected not to give or call evidence at the trial. The course of cross-examination of the prosecution witnesses revealed that the appellant's version of events was that he and the deceased were in the kitchen together. The deceased threw pepper in his face and then stabbed him. A struggle over the knife between the appellant and the deceased ensued.

[25] The cross-examination also disclosed the three defences on which the appellant relied. First, during the struggle the deceased was stabbed by an act of the appellant that was unwilled on his part. Alternatively, during the struggle the appellant stabbed the deceased in self-defence. In the further alternative, once hit with the pepper and having been stabbed by the deceased, the appellant lost self-control and

stabbed the deceased in provocation with the consequence that he could be convicted of manslaughter only.

**The grounds of appeal**

[26] The appellant relies on the following four grounds of appeal:

> "1. The verdicts of the jury were unreasonable and cannot be supported having regard to the evidence.
> 2. The learned trial judge erred in admitting the evidence of a knife being sharpened in the presence of Debbie Kelly.
> 3. The learned trial judge erred in admitting the evidence of the deceased informing Darren Susec that, "Your father will kill me one day."
> 4. Evidence excluded by the trial judge was inadvertently led resulting in a miscarriage of justice."

[27] At the hearing of the appeal, counsel for the appellant addressed the Court on the admission of the knife sharpening evidence only, relying on the written submissions for the other grounds. I propose to consider the ground relating to the admission of that evidence first.

**Ground 2 – admission of the knife sharpening evidence**

[28] Two prosecution witnesses gave evidence relating to this incident. They were Debra Kelly and Darren Susec. In both instances, the evidence was given by way of typed statement that was tendered and orally.

[29] In her statement dated 19 February 2010,[2] Ms Kelly described an event which she said took place at the deceased's home at about 12 weeks prior to her death. She said:

> "18. A few weeks later just before Christmas 2009, I was again (sic) her house at about 10.00pm after work with her after she had driven me there. Raelene and I were sitting at the kitchen table and at about 11.00pm Danny came inside and said words similar to 'Oh she's bloody here again, doesn't she have a home to go to? What's she doing sitting in my chair?'
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> 19. Danny then started to cook a piece of steak he got from the freezer. I saw he was not using a flip utensil but he was using a knife instead. I saw him get a knife sharpening metal rod from the drawer and walked over to the table and stood beside Raelene. He was talking in a sarcastic smart tone the whole time. I remember Danny was looking at her and saying something like 'why don't you two go to the bedroom'.
>
> 20. I remember Raelene saying 'Why don't you fuckin grow up.'
>
> 21. Raelene then walked up to the toilet and he continued to stand beside me and sharpen the knife. He would look at her walk up the hallway, look at me, then look at the knife while sharpening it and back at me.
>
> 22. Raelene said to him that night, 'If you want to kill me then do it.'

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[2] AB791-7; Exhibit 5.

23. He said, 'What I'm just cooking my steak.'

24. He did not even cook his steak that night as he said I had been sitting in his chair. I then asked Raelene to take me home as I was scared and didn't want to be there that night. I have never been back to their house again. I only became aware that night that Danny was living in the caravan in the front driveway to the house after he came inside to cook his steak."[3]

[30] Her evidence-in-chief included the following:

"And did anything else happen that you remember?-- Danny started cooking dinner, a piece of steak for himself, and he was - he grabbed out a knife and he was sharpening his knives when Raelene got up and went either to the bathroom or bedroom and he was just sharpening two knives together, looking at Raelene, then at me, then at the TV, continuously.

You said there he started to cook dinner?-- Yes.

Can you tell us exactly what he was doing at that time?-- I just remember he'd put a piece of steak in and there was talking. I don't know.

Okay. Where was Raelene at that time?-- At the kitchen table sitting down.

And you are still at the kitchen table?-- Yes.

Do you know where Darren was?-- Not exactly, no.

Was he in the room or somewhere around?-- Could have been in the room or at the computer, I'm not sure.

You said he started sharpening two knives, was it?-- Yes.

And where did he start doing that? Where was he?-- Started in the kitchen.

Mmm-hmm?-- Then as soon as Raelene went to - yeah, as soon as Raelene got up to go towards the toilet, that's when Danny moved from the kitchen to the lounge room and he was looking up the hallway at Raelene.

All right. And can you say anything about how he was looking at Raelene?-- Just looked evil. I don't know.

All right. And you said he was in the lounge room sharpening the knives still?-- Yes.

Looking at Raelene?-- Yes.

You also said that he looked at you?-- Yes.

And how did he look at you?-- Same look as Raelene, seemed evil.

Was he saying anything at all at that time?-- No.

And you said he then looked at the TV?-- Yes.

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[3] AB794-5.

Did he look anywhere else?-- No.

And how long was he doing that for, do you know? How long was he sharpening the knives for?-- Probably about a minute. It may be a tiny bit less.

You said Raelene went down the hallway?-- Yes.

Did she come back at all?-- Yes.

Do you remember what happened when she came back?-- She sat down at the kitchen table with me to - and we went to finish off our coffees and she did turn around to Danny and said, 'If you want to kill me, kill me.'

Can you just repeat that, sorry. I just missed it, sorry, I didn't hear you quite well?-- Sorry. Raelene came and sat at the kitchen table with me. We were finishing off our coffee and she said to Danny, 'If you want to kill me, kill me.'

Had there been any other conversation before she said that?-- Not that I can recall.

How long had she been away from the table for after she'd gone down the hallway?-- Probably just under a minute.

Was there any response from Danny when she said that?-- I don't remember.

Was he still sharpening knives at that time?-- Yes."[4]

[31] Darren Susec's statement dated 18 February 2010[5] recounted the following:

"27. At about 11:00pm that night my father came up stairs and started to cook. He then stood there while Debbie was at the kitchen table by herself. I was in the kitchen and my father was standing there talking to my mother who was there saying 'Some people [don't] deserve to be here.' 'Some people don't have the right to be here.' 'If I had my way they would not be here.'

28. As my father was doing this he was eyeballing Debbie.

29. I stood up for the co-worker and told my father to stop what he was doing.

30. My mother then left and started walking down the hallway to her room and he stood there eyeballing her whilst he sharpened a knife on the sharpening steel and he watched her all the way down the hallway while watching her.

31. Debbie never came back to the house again."[6]

[32] In his evidence-in-chief, he elaborated on this incident in the following terms:

"Okay. Did you know a friend of your mother's called Debbie Kelly?-- Yes.

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4 AB375-7; Tr4-78 LL22-Tr4-80 L28.
5 AB817-821; Exhibit 10.
6 AB819-820.

> And was she someone - did she come to your house?-- She used to come to the house, yes.
>
> And did she stop coming to your house at some point?-- Yes, she did.
>
> And was there something that happened?-- Well, she came – she came home with Mum that night and Mum was making a coffee and Dad came upstairs and he had all this food - or - no, Dad seen Mum came home and he got all his food and stuff, whatever, and brought it upstairs, and I thought it was a bat (sic) strange that Dad's cooking at 11 o'clock at night, and, anyway, Mum started making a coffee and Debbie was sitting at the table, and Mum has - and Dad - Dad was real angry and he was saying something about how some people don't deserve to be here, like referring to Debbie, saying she doesn't deserve to be in the house, and he was giving her, like, the evil eye and just like looking at her wrong, and Mum walked out of the room and at the same time when Mum walked down the room Dad was - because he was steeling a knife, at the same time he walked past the kitchen at - jut (sic) out of the kitchen - well, he was standing in the kitchen and he's looked down the hallway with, like, a real twisted look on his face, but happy but angry at the same time, and he's just steeling the knife and looking real strange, and - mmm, it just creeped me out, and Debbie, at the same time."[7]

[33] I pause here to note that on the first day of the trial, counsel for the appellant objected to the paragraphs in their respective statements which I have set out. Whilst not conceding the relevance of those paragraphs, counsel attributed, at most, a marginal relevance to them, outweighed by their prejudicial harm.[8]

[34] The learned trial judge ruled the evidence in these paragraphs to be admissible. In her ruling, her Honour observed:

> "… The Crown says that the evidence is relevant not only to relationship, but also to state of mind.
>
> It involved behaviour which a jury is capable of regarding as threatening to the deceased, and during the quarrel or argument the deceased accused the defendant of wanting to kill her. That accusation was made in the presence of the defendant and Ms Kelly at least, and to that extent the factual evidence is very similar to that discussed in Wilson v. The Queen (1970) 123 CLR 334, and in this regard see also The Queen v. Lester [2008] QCA 35[4] at paragraph 58.
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> In this matter the issues on the defence case are wide open and go to the identity of the person who killed the deceased, motive and premeditation as to that killing, and issues as to accident, provocation and self-defence are also, at this stage of things, open.
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> In those circumstances it seems to me that the evidence is clearly relevant and probative. There are some differences in recounting the events between the witnesses Kelly and Susec, but there is nothing

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7 AB233; Tr3-48 LL1-29.

8 AB37-38; Tr1-29 L36-Tr1-30 L28.

> about that which, in my view, is out of the ordinary or weakens the probative value of the evidence. The jury will have the evidence before it and it is classically a question for it as to what evidence it prefers.
>
> It was said that the evidence ought to be excluded under section 130 of the Evidence Act because of its prejudicial value. The deceased was killed with a knife in the kitchen of her home and the evidence as to this incident involves evidence that the defendant behaved in a way which is capable of being regarded as threatening as he sharpened a knife in the kitchen of this same home.
>
> To the extent that there is prejudicial value in that evidence in that the jury might, for example, use propensity reasoning in regard to the evidence, that can be adequately addressed by a direction to them, and I note that there will be much other evidence which goes in without objection as to the state of the relationship between the defendant and the deceased."[9]

[35] As presaged in this ruling, the learned trial judge directed the jury specifically on this incident in the course of the summing up. She said:

> "Be particularly careful with the evidence about the knife sharpening incident given by Darren Susec and Debbie Kelly. Now, first of all you have to decide whether you accept their evidence about what happened that night. If you do or if you accept part of it, don't reason this way: the incident involved sharpening a knife, the death involved use of a knife, therefore the previous incident involving a knife makes it more likely that the defendant would be guilty of a crime involving a knife, or would have intended to use the knife. Don't reason like that, don't think of it as going to a propensity for the defendant to commit the crime, or to have an intention to commit a crime, or to use a knife to commit a crime.
>
> If when you consider the evidence, you accept that Debbie Kelly is correct when she says that on that night the deceased Raelene Susec said to her husband, 'If you want to kill me, kill me.', then that is evidence as to the bitter state of that relationship, and you can use it for that, but don't use it, in this propensity way, don't use it to think, well, she must have had a feeling that he would kill her, therefore, it is more likely that he did kill her, or, therefore, it is more likely that he would have intended to kill her. That's not logical. So, you can use the evidence of what you decide happened on that night as evidence to understand the state of the relationship between this couple and their states of mind, but not for other purposes."[10]

[36] Relevant evidence of the history of a domestic relationship between a defendant and a person against whom an offence was committed is admissible in criminal proceedings for the offence pursuant to s 132B(2) of the *Evidence Act* 1977. In *Roach v The Queen*,[11] French CJ and Hayne, Crennan and Kiefel JJ spoke of the admissibility of such evidence at paragraph [12] in the following terms:

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9 AB123; Tr2-15 LL10-50.

10 AB725-726; Tr9-43 L10-Tr9-44-L3.

11 (2011) 242 CLR 610.

> "The first requirement which must be fulfilled, for evidence to be admissible, is that it be relevant. The question as to relevance is whether the evidence, if accepted, could rationally affect the assessment by the jury of the probability of the existence of a fact in issue[12]. It may do so indirectly. As Gleeson CJ observed in *HML v The Queen*[13]http://www.austlii.edu.au/au/cases/cth/HCA/2011/12.html - fn13#fn13, evidence may be relevant if it assists in the evaluation of other evidence."

[37] Their Honours observed later:

> "[30] It should first be observed that the text of ss 130 and 132B does not contain any suggestion that the test in *Pfennig* is to be applied. Evidence of the kind contemplated by s 132B – of other acts of domestic violence in the history of a relationship – may clearly enough qualify as similar fact evidence which might, in a particular case, be tendered as proof of an accused's propensity. It may also be relevant as evidence of a person's state of mind, or as part of the res gestae, which is to say, part of the circumstances of the crime. Its further possible relevance, to show the kind of relationship the complainant and the accused had and its use to assist in the evaluation of the complainant's evidence, will be discussed later in these reasons. And, in cases where the recipient of domestic violence is accused of an offence against the perpetrator of the violence, the evidence may be relevant and admissible to a plea of provocation or self-defence.
>
> [31] The section therefore has a potentially wide operation. It is not restricted in its application to similar fact evidence tendered to prove propensity on the part of the accused, which is the focus of this appeal. Its purpose is to ensure that in criminal trials evidence of the history of domestic violence is put before a jury, or other arbiter of fact, so long as it is relevant to an issue in those proceedings. Relevance is the only requirement stated for admissibility. It may be assumed that that legislative choice was made with knowledge of the decision in *Pfennig*, which had been made some two years earlier and which effected an important change. It was not necessary for the rule in that case to be expressly excluded, as the appellant submitted. The sole basis to be applied for admissibility, relevance, is clearly stated."

[38] On the hearing of the appeal, counsel for the appellant acknowledged that evidence of a kind where an accused is said to have used, at the time approximate to the event, the weapon, or a similar one, in an overtly threatening way to a deceased, can have clear and strong probative value.[14] Short of submitting that there was a lack of relevance in it for the purposes of s 132B(2), counsel for the appellant attributed

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12 *Smith v The Queen* (2001) 206 CLR 650 at 654.

13 (2008) 235 CLR 334 at 352.

14 Appeal Transcript 1-3 LL33-41.

a number of features to the evidence on this topic which, it was contended, weakened its probative value to a point that that value was overwhelmed by its prejudicial harm. That being so, it was further contended that the evidence ought to have been excluded in exercise of the power affirmed by s 130 of the *Evidence Act* to exclude unfair evidence. The features so attributed to the evidence are:

(a) the distance in time of this incident from the date of death;

(b) that nothing threatening was said by the appellant towards the deceased on the occasion;

(c) that any ill-feeling expressed by the appellant then was towards Ms Kelly;

(d) that there was no evidence that the deceased had seen the appellant with the knife as might have prompted her to make the remark to the appellant about killing her; and

(e) that the descriptions of the appellant's facial expression as "evil", "giving the evil eye", "real twisted", "creepy" and "real strange" and the witness reaction to it as "creeping me out" were subjective, personal impressions which were all but impossible to challenge effectively in cross-examination.

[39] To my mind, the distance in time was not such as to impact significantly upon the relevance of the evidence. A comparison may be made with the evidence admitted in *Wilson v The Queen*.[15] In a circumstantial case, the appellant asserted that his wife's death had been caused by the accidental discharge of a gun. The court held that evidence that the deceased, in the course of quarrels with the accused, had accused him of wanting to kill her, was admissible. One of these occasions had happened at least two years prior to the death and another some 18 months before it.

[40] It is true that there was no evidence of the use of threatening words by the appellant and that the appellant did express some resentment towards the presence of Ms Kelly in the house. However, there was clear evidence of threatening conduct towards the deceased on the part of the appellant. Both witnesses referred to the appellant as having followed the deceased from the kitchen into the hallway while sharpening the knife. Ms Kelly also gave evidence that the appellant continued to sharpen the knife in the lounge room as the deceased returned. Moreover, Ms Kelly said in cross-examination[16] that the deceased saw this as she was returning. It was just after she returned that the deceased said to the appellant "If you want to kill me, kill me."

[41] The descriptions given were obviously personal in that they were based upon observations and reactive feelings of the two witnesses. However, it is an everyday experience to observe, and then to describe, the facial expressions of others. There is a range of commonly understood words and terms which are conventionally used to describe expressions of emotion such as happiness, impassivity, disappointment, fear and malevolence. Each of the words or terms used by the witnesses here are within that range. The jury would have readily understood what meaning the witness intended to convey by the use of any one of them. It was open to defence counsel to cross-examine either witness with respect to the descriptions used, although that course might well have run the obvious risk that the witness would not only affirm, but also elaborate upon, the description already given.

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15 (1970) 123 CLR 334.

16 AB381; Tr4-84 Ll10-30.

[42] In summary, this evidence was relevant to the state of the relationship between the deceased and the appellant. It was also relevant to the issues of self-defence and provocation. It was therefore clearly admissible under s 132B. For the reasons I have given, I consider that none of the features attributed to it provide a convincing basis for rejection of the evidence under s 130. Furthermore, as required by *Roach*,[17] the learned trial judge gave a clear and comprehensible warning to the jury against misuse of the evidence by way of propensity reason. There was no miscarriage of justice.

[43] Accordingly, in my view, this ground of appeal is not made out.

**Ground 3 – admission of evidence of what the deceased said to Darren Susec**

[44] Darren Susec testified with respect to a conversation that he had with his mother a week or two before she died. His evidence was as follows:

> "We were driving - I can't remember where - exactly where we were going, but we were driving and mum was saying how she's worried and I said, 'What are you worried about, mum?' Because they must have had a - I think they had an argument that day or the night before. And said, 'What are you worried about, mum?' And she said, 'Danny, he's going to kill me.' I said, 'Dad's not going to kill ya.' And I said, 'He doesn't have the guts to do that. He's got too much pride for that.' And she said, 'Look, he's going to do it.' …"[18]

[45] His written statement[19] contained, at paragraph 26 the more general statement that his mother had said to him many times that she believed his father would kill her one day. Objection was taken on the first day of the trial to this paragraph and also to more specific evidence of a similar kind to the above that Darren Susec had given at the committal. The learned trial judge overruled the objection. She gave the following reasons for the ruling:

> "Because the statement or representation made to Darren Susec was of a belief or feeling, it would be inadmissible unless it were relevant to the state of mind of the deceased as opposed to the state of mind of the defendant, or relevant to relationship evidence. R v. Lester.
>
> However, it is clear from paragraph 54 of Lester's case that where provocation is an issue for the jury, the state of mind of the deceased will be relevant, and the Crown puts the evidence forward as relevant to this issue.
>
> As I say, the ability to introduce a belief or feeling not referenced to any conduct of the defendant, or in the presence of the defendant, is supported by paragraph 54 of Lester expressly and, I think, implicitly by paragraph 58 of The Queen v. Anderson [2000] VSCA 16.
>
> So it seems to me that the evidence is relevant to the deceased's state of mind, and that is relevant to the issues involved in provocation defence."[20]

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17 At [47].
18 AB238 Tr3-53 LL17-26.
19 Exhibit 10.
20 AB132 Tr2-24 LL10-29.

[46] By way of summing up, the learned trial judge gave directions to the jury concerning two aspects of the evidence of statements of this kind made by the deceased.[21] Her Honour spoke of its hearsay character and the need to consider carefully its reliability and accuracy. She spoke first of the use that could be made of the evidence of the appellant's state of mind. She then explained:

> "… You can use the evidence of Raelene Susec's state of mind too about matters that bear on provocation, say. If she were genuinely fearful of the defendant does it make sense that she would act to provoke him?[22]

[47] Whether the deceased initiated an assault on the appellant or provoked the attack on her were factual matters for the jury to determine. The deceased's attitude to the appellant, particularly a fear of him, was relevant to the jury's deliberations. In *R v Gojanovic (No 2)*,[23] evidence of the deceased's state of mind, being one of fear of the accused, was considered "probatively significant since it bore on the probability of her having smiled and laughed and verbally taunted the accused immediately prior to her death" (conduct alleged to be provocation by the accused). That evidence was held to be admissible because it had relevance to a fact in issue.

[48] Here, also, the evidence of the state of mind of the deceased was similarly relevant and admissible. The learned trial judge did not err in admitting it. Furthermore, her Honour properly directed the jury as to how they should treat and use the evidence. This eliminated the risk of impermissible reasoning on the part of the jury. There was no miscarriage of justice.

[49] This ground of appeal also fails.

**Ground 4 – excluded evidence inadvertently led**

[50] Ms Vaetolu Mulivai provided a written statement dated 19 February 2010.[24] She was a co-worker of the deceased. This statement contained the following paragraph:

> "10. I remember her telling me on several occasions that her husband threatens her. There was one particular conversation I recall Raeylene telling me that her husband had told her that he would stab her, that he would kill her. This occurred several months ago and I cannot remember the circumstances it arose or the rest of the conversation."[25]

[51] Objection was taken to this paragraph on the first day of the trial. The learned trial judge upheld the objection and excluded the paragraph, ruling that the first sentence of it was too vague and that the remainder did not meet the high probability of reliability test for the admission of hearsay in s 93B(2)(b) of the *Evidence Act*.[26]

[52] In paragraph 14 of her written statement, Ms Mulivai recounted a conversation she had had with the deceased within a week of her death. That conversation did not involve threats on the appellant's part. It was not excluded. Ms Mulivai was one of twelve witnesses who testified on the fourth day of the trial. In the course of her

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21 AB721-3.
22 AB723 Tr9-41 LL46-56.
23 (2002) 130 A Crim R 179 at [22].
24 AB805-7; Exhibit 7.
25 AB806.
26 AB127 Tr2-19 L52-AB128 Tr2-20 L14.

evidence-in-chief, she was asked a question which was expressly referenced to that conversation.

[53] The transcript reveals that the following series of questions were asked and answers given to them:

> "Now, I just wanted to ask you about a conversation. Did you have a conversation with Raelene about a week before she died or in the same week that she died where she spoke to you about her ex-husband?-- Yes.
>
> And can you recall what that conversation was about?-- She was frightened.
>
> And did she say anything else in that conversation?-- That she - the fact that she was frightened that she was going to be killed.
>
> Did she say anything in that conversation in relation to her husband wanting to get back together with her?-- She did.
>
> Okay. And did she say how she responded to that?-- She wasn't going to."[27]

[54] No objection was taken to this evidence at the time. However, late that afternoon, and in the absence of the jury, counsel for the appellant raised the admission of this evidence. He said he would get some instructions from his client on it.[28] Counsel did not raise the matter again.

[55] The learned trial judge discussed the directions to be given to the jury with counsel (Ms Farnden for the prosecution and Mr McGuire for the defence) towards the end of the seventh day of the trial. In the course of this, her Honour raised the matter of this evidence. The following discussion ensued:

> "HER HONOUR: Now, look, in relation to the one witness, I have forgotten who it was, who said what I actually regard as a conclusory statement but said - gave evidence of the threat to kill, I'll hear both of you on this but my inclination is just not to intention (sic) it. And I just think that afternoon they had so many witnesses, so many statements, I think that to mention it makes it worse.
>
> MS FARNDEN: Your Honour, the witness was Vaetolu Mulivai, I just put that on the record.
>
> HER HONOUR: Yes, that's right.
>
> MS FARNDEN: Your Honour, I wasn't intending on mentioning it and had the same view as your Honour.
>
> HER HONOUR: Look, I really think that's right, and I'll hear you, Mr McGuire, but-----
>
> MR McGUIRE: I agree, your Honour.
>
> HER HONOUR: Yes. I just think it's - just let it go through to the keeper.
>
> MS FARNDEN: Yes."[29]

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27 AB384 Tr4-87 L44-AB385 Tr4-88 L2.
28 AB393 Tr4-96 LL20-42.
29 AB637 Tr7-44 L55-AB638 Tr 7-45 L21.

[56] In written submissions, the appellant contends that an application to discharge the jury at the point when the evidence was given ought to have been made, and, alternatively, at "the very least", a direction should have been given to the jury to ignore the evidence. That neither occurred, it is submitted, has resulted in a miscarriage of justice warranting a setting aside of the conviction.

[57] Clearly, this evidence ought not to have been admitted. Its admission was an irregularity. The issue for consideration is whether no substantial miscarriage of justice has occurred in consequence of its admission.[30] As Gaudron J observed in *TKWJ v The Queen*:[31]

> "The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open' *Mraz v The Queen* (1955) 93 CLR 493 at 514, per Fullagar J. …"[32]

[58] Here, the jury had heard evidence of the appellant's threatening behaviour with a knife and of the deceased's fear of him after he had threatened to kill her. This evidence was subject to directions as to the limited use to which it could be put and to the manner in which it was not to be used.[33] Thus, if the evidence of Ms Mulivai had been remembered by the jury, they were, by these directions, correctly instructed as to the limited use to which it could be put. Moreover, as explained in the analysis of the last ground of appeal which follows, the case for the prosecution was a compelling one. In light of all of this, in my view, no substantial miscarriage of justice resulted from the inadvertent admission of this evidence.

[59] I would add that insofar as the appellant's written submissions may imply criticism of the conduct of the appellant's defence at trial, it is evident that decisions were made, first, not to request the learned trial judge to take any step in relation to the evidence about the time it was given and, then, not to request a direction in relation to it. These decisions are explicable from a forensic viewpoint. Counsel would have wished to avoid any risk of placing emphasis on the evidence, bearing in mind the quantity of admissible evidence that had been given concerning the strained relationship between the appellant and the deceased and the deceased's state of mind towards the appellant.

[60] This ground of appeal cannot succeed.

**Ground 1 – unreasonable or unsupportable verdict**

[61] This ground of appeal is based upon s 668E(1) of the *Criminal Code*. Where an appellant relies upon it, it is the task of the appellate court to look at the whole of the evidence and decide whether it was open to the jury on that evidence to be satisfied beyond reasonable doubt of the appellant's guilt.[34]

[62] The learned trial judge commenced her sentencing remarks with the observation that "there was an abundance of evidence to support the verdict" of murder.[35] Having considered the evidence that was before the jury, in my view, this observation was

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30 *Criminal Code* s 668E(1A).
31 (2002) 212 CLR 124.
32 At [26]; see also per McHugh J at [79].
33 See [33] *ante*.
34 *MFA v The Queen* (2002) 213 CLR 606 at [25], [59]; *R v Wilks* [2012] QCA 14 at [17].
35 AB764 Sentence Tr1-2 LL3-5.

entirely accurate. In written submissions, the respondent has identified a wide range of facts and circumstances proved at trial, often by undisputed evidence, all or many of which were apt to have satisfied the jury that the appellant unlawfully killed the deceased with an intention to cause her death or grievous bodily harm. I draw upon the respondent's submissions for the following catalogue of those facts and circumstances.

[63] The injuries to the deceased were consistent with a concentrated and intentional attack with a knife. The fatal stab wound was a significant one, aimed at the area of the heart and measured as long as the blade of the knife. The second stab wound also resulted in serious injury to the left side of the deceased's chest. The third stab wound was inflicted in a similar area, near to the left side of the deceased's chest. The remaining multiple injuries were characteristic of defensive wounds to the hands and arm of the deceased. These injuries together supported a finding that the stabbing was a deliberate attack accompanied by a murderous intention.

[64] There were facts which supported a finding by inference that there was no assault by the deceased on the appellant and that, consequently, self-defence was negated by the prosecution. The presence of the appellant's DNA only on each side of the tip of the knife was likely to have been a compelling factor in the jury's deliberations. It strongly implied that the deceased had been stabbed first and the appellant afterwards. Other circumstances which strengthened this inference included the presence of blood underneath the lid of the pepper container and the fact that the only DNA profile on the swab from the lid, though incomplete, was consistent with the appellant's to a high degree of probability. There was an unexpectedly sizeable collection of ground pepper in the pockets of the appellant's shirt but the only place that it was observed on his face and head was around his eyes.[36] This evidence was apt to persuade the jury that the presence of the pepper was the result of conduct undertaken by the appellant subsequent to his stabbing the deceased. The evidence that pepper was also located on the back of the pants of the deceased when she had been found lying on her stomach was also capable of assuming some relevance for the jury.

[65] Further, a comparison of the injuries sustained by the appellant and those suffered by the deceased was capable of negating self-defence. The limited evidence on which this defence was based included the appellant's own injuries and his assertions that the deceased threw pepper in his eyes and stabbed him first. As observed, the jury was entitled to be persuaded by the evidence that the deceased did not assault the appellant at all. But even if the jury had not reached a firm conclusion on that issue, it was open to them to find that if the deceased had acted first, once the appellant had disarmed her, it was not necessary for him to attack her in a manner intended, or likely, to cause her death or at least very serious harm, as the particular manner adopted by him was.

[66] Other factors pointed to the appellant's guilt. A partial text message which was in the course of being composed by the deceased, was capable of indicating that she had been interrupted by the appellant. That the appellant had purchased ground pepper that morning when it was not needed in the house or in his motor home may have held some significance for the jury. Also of potential relevance was the fact that the pepper was the only item missing from the groceries found in the mobile home that the appellant had purchased earlier that day.

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36 Exhibits 37A-K.

[67] The evidence of the relationship between the appellant and the deceased demonstrated his inability or unwillingness to accept that the relationship was over. The evidence indicated that there was a progressive deterioration of the relationship since at least August 2009. By that stage, the deceased and the appellant had lived separately for some time and the deceased had communicated to the appellant her lack of interest in a reconciliation. Consistent with the deceased's attitude towards the relationship was the fact that she had commenced dating other men, or at least contacting them on internet dating sites. The deceased rejected any of the appellant's persistent suggestions of reconciliation. His persistence was a source of upset for the deceased. On occasion, it required the intervention of the appellant's sons. His entreaties escalated to a point of nastiness with accusations by him that she was letting the family down.

[68] In the days leading up to the deceased's death, events confirmed for the appellant that, despite his efforts, the deceased did not intend to reconcile, that she had moved on with her life, and that she was seeing other men. On 12 February 2010, the deceased was very upset after a fight with the appellant. On 13 February, at the wedding, the deceased clearly communicated to the appellant her attitude towards the relationship. That the appellant was realising the futility of his attempts to reconcile was demonstrated by the comment he made that evening, "You gave me a little bit of hope and then you take it away". The following day, the appellant gave the deceased two Valentine's Day cards but was again rejected. It was open to the jury to find that in the face of the deceased's maintained rejection of the appellant, the reality of the situation was driven home to him and that his frustration, jealousy and inability to accept the situation led to his actions a few days later.

[69] The state of the relationship was relevant to the jury in determining what occurred in the kitchen area that day. Observations by others of the interactions between the deceased and the appellant were capable of assisting the jury in determining the attitude each had towards the other and in determining the state of mind each had at the time that the offence occurred. The deceased's fear of the appellant, her anxiety at the situation and his repeated harrassing entreaties were all proper bases for the jury to be satisfied that the deceased was unlikely to have initiated an assault on the appellant or to have done anything to provoke his loss of self-control. A motive of jealousy and unwillingness to accept the end of the relationship were also relevant in assessing the likelihood of the appellant's having initiated the attack.

[70] A conclusion that the appellant's post-offence conduct involved inflicting wounds on himself, putting pepper in his own eyes and exaggerating the seriousness of his condition was clearly open on the evidence. That the appellant suffered a significant injury himself could have been seen as misadventure by the appellant and not as a negation of self-infliction. The characteristics of his multiple injuries were inconsistent with an attack on him by the deceased with a knife. The appellant's ability to inform the "000" operator that the deceased was on the floor and not moving, and to fetch a tea towel for his own injuries was entirely inconsistent with his later claimed inability even to open his eyes because of the pepper in them. His apparent self-helplessness was inconsistent with the medical evidence. The jury was entitled to conclude that the only reasonable inference was that his conduct demonstrated a consciousness of guilt on his part with respect to his involvement in an unlawful killing.

[71] The conduct of the appellant prior to the incident also supported a level of premeditation or planning. Particularly, there was evidence given by a co-worker

that, shortly prior to the death, the appellant had queried with him what the penalty would be for killing someone.

[72] In light of the above, the jury's verdict was neither unreasonable nor unsupported by the evidence.

[73] This ground of appeal also fails.

**Disposition**

[74] As none of the grounds of appeal has succeeded, this appeal against conviction must be dismissed.

**Order**

[75] I would propose the following order:

Appeal dismissed.