

SUPREME COURT OF QUEENSLAND

CITATION: *R v Langlo & Nuggins* [2013] QCA 117

PARTIES: **R**
v
LANGLO, Arthur Ramiend
(appellant)

R
v
NUGGINS, Glenn William
(appellant)

FILE NO/S: CA No 318 of 2012
CA No 319 of 2012
SC No 1 of 2012

DIVISION: Court of Appeal

PROCEEDING: Appeals against Conviction

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 21 May 2013

DELIVERED AT: Brisbane

HEARING DATE: 3 May 2013

JUDGES: Holmes and Fraser JJA and Henry J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The application to adduce fresh evidence is refused.**
2. The appeals are allowed.
3. The convictions are set aside.
4. Verdicts of acquittal are entered.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellants were convicted of manslaughter at a joint trial – where the appellants appeal against their convictions on the bases that the verdicts were unreasonable and could not be supported by the evidence – where the Crown’s case relied entirely on evidence that the appellant Langlo had pushed the victim in the chest, causing him to fall and sustain fatal injuries – where the Crown accepted that the evidence of one witness, who claimed to have seen such a push but retracted his account, could not be relied on – where the other two witnesses who claimed to have seen the push had died before the trial, and their evidence was before the jury in the form of statements and

recordings – where one of those witnesses had initially denied seeing any relevant act against the victim, but subsequently gave an account of seeing him pushed from behind and in a third version said he saw a push to the victim's chest – where there were also inconsistencies between the detail of that witness' ultimate account of the incident and his denial of having been intoxicated and the evidence of other Crown witnesses – where the other deceased witness initially gave an account that the victim had fallen by accident – where that witness gave an account inculcating the appellants at a time when she was herself under arrest for harming the victim – where both appellants gave accounts, respectively in a record of interview and at trial, of the victim's falling by accident – whether the evidence of the two deceased witnesses was capable of supporting verdicts of guilt – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellants were guilty

Criminal Code 1899 (Qld), s 7(1)(c), s 8
Evidence Act 1977 (Qld), s 93B

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited

COUNSEL: F R Richards for the appellant, Langlo
 J Allen for the appellant, Nuggins
 M R Byrne SC for the respondent

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

- [1] **HOLMES JA:** The appellants were convicted of manslaughter at a joint trial. The Crown case was that the appellant Langlo had killed Wesley Johnson by pushing him in the chest and causing him to fall backwards down a concrete embankment at Ross Creek in Townsville, hitting his head on rocks and sustaining a fatal head injury. The case against Nuggins was that he was a party to the killing, either as an aider under s 7(1)(c) or as a party to a common unlawful purpose under s 8 of the *Criminal Code 1899*. Both appellants appeal their convictions on two grounds. The first is that the verdicts were unreasonable, the critical issue being whether the evidence supported the conclusion that Langlo had pushed Mr Johnson. The second ground of appeal advanced is that a miscarriage of justice occurred because the statements and interview of a deceased person were admitted at trial under s 93B of the *Evidence Act 1977*.

The direct evidence in the Crown case

- [2] Mr Johnson was found lying on the grass near Ross Creek in the early hours of the morning, with a gash on his head and having difficulty in breathing. He died some six days later. The cause of death was a subdural haemorrhage which had caused brain swelling. The pathologist who conducted the post-mortem examination did not find any bruising on Mr Johnson's face, chest or abdomen. A blood sample

taken at the time of Mr Johnson's admission to hospital gave a blood alcohol reading of .273 per cent, which indicated that he was severely intoxicated.

- [3] The background to the events was that Nuggins had been in a relationship with Mr Johnson's sister, Ms Dallachy. She separated from him and went to live with her friend, Ms Forbes. Both of those women gave evidence that Nuggins frequently came to the flat where they were living and made threats to them. On 3 October 2010, he arrived at their flat in a Jeep, with Langlo as a passenger. Nuggins approached Ms Forbes as she stood at the front screen door of the flat and asked for Ms Dallachy. Ms Forbes said that she was not there. (She was, in fact, hiding in an inner room.) Nuggins said, angrily, three or four times, that she should tell Ms Dallachy that he was going to go and catch her brother and kick his head in.
- [4] Langlo remained in the vehicle during that conversation. He was, Ms Forbes said, so intoxicated he could not walk, and he did not recognise her. Ms Dallachy heard voices outside; she said that she heard two women she knew, Topsy Watson and Irene Nuggins (the appellant Nuggins' sister) speaking, and a conversation between Nuggins and Ms Forbes. Her recall was of Nuggins saying he was going to make her life miserable and was "going to go find her queenie brother". Nuggins and his passengers left in the Jeep.
- [5] Ms Forbes said that the following afternoon, Nuggins visited her again. He said that he had gone into town and found Ms Dallachy's brother. Now she (Ms Dallachy) would know what it was like to go through pain, because he had hurt him. Nuggins said that he had "jumped all over [Mr Johnson] and kicked his head in" and that he had "picked him up and [thrown] him". He did not say that anyone had pushed Mr Johnson.
- [6] A witness, Katherine Pompey, said that on the evening of 3 October, at around 7.00 pm, she had gone to "the tunnel" (a pedestrian tunnel near Ross Creek at which people commonly drank and socialised). She was with Wesley Johnson, Clinton Daylight and Darryl Kidner. That aspect of her evidence was confirmed by a police officer, who said that about at 11.45 pm she noticed a group of people, including Mr Johnson, sitting on the grassed area near the tunnel, about five or six feet from the edge of the creek bank. Mr Johnson, who was wearing a pair of board-shorts and no shirt, was heavily intoxicated.
- [7] According to Ms Pompey, at about 10.00 pm or 11.00 pm, Nuggins, Langlo, Topsy Watson, Irene Nuggins and a man named Clifford Nardoo arrived in a Jeep. Her group was sitting together at the edge of the creek bank. The occupants of the Jeep got out of it and came towards them. Nuggins told Mr Johnson to get up and tried to lift him by the arm. Mr Johnson responded that he did not want to fight him. However, he got up and walked through a gap between where she was sitting and Langlo was standing behind her. She heard a bang and next saw Mr Johnson on the "cement part on the riverbank". (The evidence was that the retaining wall of the creek's bank was cement, with rocks at its base.) Langlo and Nardoo jumped down to that area to retrieve him and brought him back to the grass above the creek, before leaving.
- [8] Cross-examined, Ms Pompey said that she had been drinking pre-mixed combinations of rum, vodka and soft drink, but although she had drunk about nine of them, starting at about 4.00 pm, she was not intoxicated. Mr Johnson was drinking port and was, she said, quite drunk. She agreed with the proposition put to

her that when he became drunk, he tended to become unsteady on his feet. Initially, she said that Nuggins appeared angry when he was talking to Mr Johnson, but subsequently agreed under cross-examination that he was not angry or aggressive. In re-examination, she said she had not understood the questioning, and Mr Nuggins was talking “in a wild way”; that is to say, he was angry.

- [9] Ms Pompey was taken through some distances between the players in the event and identified them by reference to objects in the courtroom; unfortunately, without, in most cases, figures given for the actual distances involved. Asked to indicate how far Langlo and Mr Johnson were from each other immediately before she heard the sound of the latter’s fall, she answered by reference to the position of jurors in the jury box. However, she agreed with the proposition put by defence counsel that Langlo was “several metres” away from Mr Johnson immediately before she heard the bang.
- [10] Bevan Ketchup said that he was the uncle of Mr Johnson and knew both Langlo and Nuggins. On the last occasion he had seen his nephew, it was night time, and he, Mr Ketchup, was sitting drinking on a pedestrian bridge near the tunnel. He had drunk about two casks of wine that day. He described seeing a green Commodore pull up, Langlo and Nuggins alighting from it. One of them was pushing his nephew with two hands and he “fell over the side”.
- [11] Under cross-examination, Mr Ketchup agreed that, on the bridge, he was a long way from where Mr Johnson was. He confirmed that there were only two people in the car, which was a sedan. Cross-examined by counsel for Mr Nuggins about which of the two he had seen pushing Mr Johnson, he began by saying it had “got to be one of the two of them” and then volunteered first that it had “got to be” Langlo and then that it had “got to be” Nuggins. It was admitted that in a police statement he made about the incident in January 2011, Mr Ketchup had not said that Nuggins had pushed Mr Johnson. Under further cross-examination by counsel for Langlo, Mr Ketchup said that he had not seen what had happened to Mr Johnson, and agreed that he had only come to believe that his nephew had been pushed into the creek because he had heard rumours to that effect.

The statements of deceased witnesses

- [12] By the time of the committal proceedings, Topsy Watson, one of the witnesses to the night’s events, was dead. Two statements she had made to the police and a recorded interview, with a diagram she had drawn during it, were admitted at the trial, without objection. All were given on 7 October 2010.
- [13] The first statement was given at a time when Ms Watson was not being treated as a suspect. In that statement, she said that she had gone with Nuggins, Langlo, Clifford Nardoo and Irene Nuggins to the tunnel. Mr Johnson was sitting by himself, drinking, with two people lying down behind him. Ms Pompey and another man were a few metres to his right. Nuggins walked over, tapped Mr Johnson on the leg and said

“Jump up budda. I heard you was gonna snap my jaw.”

Mr Johnson rose, and Ms Watson saw that he was wobbling. Johnson was standing with his back to the water and with Langlo facing him. He walked away from Langlo to talk to Nuggins, but tripped on his shoe and fell back. Ms Watson saw that his shoe lace was untied when he fell. He landed on a rock, and she went down

to him. Nuggins assisted her to carry him back to the bank, where they laid him down on the grass. She believed Ms Pompey and her companion had gone to ring an ambulance. Her party got back into their vehicle and departed.

[14] After being arrested and spending a period in the watch-house, Ms Watson was interviewed under caution in relation to the offence of grievous bodily harm against Mr Johnson (who at that stage was still alive). Asked some questions about her present condition, she described herself as currently affected by alcohol but “not all that affected by it”. She had slept for five or six hours the night before, was “still a bit charged” when she woke and then had three glasses of moselle. She had not drunk anything between being picked up by police between 9.00 am and 10.00 am and the interview at 5.30 pm.

[15] The police officer told Ms Watson a number of times that she did not have to answer questions. At one point, he asked her whether she understood that she could say that she did not want to talk about what had happened. She responded

“But then, if I would have turned around and said that I would go back to the watch-house”.

The interviewing officer pointed out that he had not said anything to that effect, and Ms Watson agreed he had not.

[16] In the interview, Ms Watson said again that at night on 3 October, Nuggins, Langlo and Clifford Nardoo had collected her and Irene Nuggins in Langlo’s green four-wheel drive. Nuggins was driving. The group went to the tunnel. There was no discussion en route about Mr Johnson, nor any anger expressed towards him. At the tunnel, all of them alighted from the vehicle. She described the positions of Mr Johnson and the others around him consistently with her statement, and gave the same account of the conversation between Nuggins and Mr Johnson. She said she was about five metres away and did not hear anything else.

[17] Ms Watson said that when Johnson got up, he seemed drunk; he was shaking and wobbling. Langlo stood in front of him and pushed him, with two hands in the chest, “over the side”. Mr Johnson fell off the rocks and she heard a bang. The push looked hard and deliberate. She and Nuggins climbed down to pick Mr Johnson up and bring him back to the grassed area at the top of the bank. The others in her group did not approach Mr Johnson. Ms Pompey and the man she was with walked away. Her party got back in the four-wheel drive and went elsewhere to drink.

[18] After the interview, Ms Watson provided an addendum statement in which she said that Langlo had stood in the middle of Nuggins and Mr Johnson. She did not hear Langlo say anything. At a time when Mr Johnson was about half a metre from the rocks, she saw Langlo push him with two hands in the chest, in a deliberate, and what looked to be a hard, push, forcing him “over the side”.

[19] Another of the witnesses to the events, Darryl Kidner, died after the committal but before the trial. His statements and a transcript of his evidence at the committal hearing were also admitted without objection. The first of his statements was made on 4 October 2010. He said that he had been drinking with Ms Pompey and Mr Johnson and was very drunk. He remembered seeing Langlo and Nuggins arrive with a couple of girls. Langlo and Nuggins began arguing with Mr Johnson, who stood up. The two of them started pushing him. Anxious not to get involved,

he, Mr Kidner, walked away. Because he was so drunk he did not remember exactly what happened. He did not see anyone push Mr Johnson onto the rocks of the creek bank.

- [20] On 11 October, Mr Kidner made a further statement. He said that the group which had arrived with Langlo and Nuggins had walked to where he was sitting with Ms Pompey and Mr Johnson. Ms Pompey got up and walked away, and the group had surrounded him and Mr Johnson. He heard Langlo saying “Here he is here now, hit him” to Nuggins. Mr Johnson got up to talk to the pair. They continued to argue, but he did not respond, instead turning to sit down again. As he did so, Mr Kidner saw Langlo push him in the back. He used both hands to punch Mr Johnson in the back and Mr Johnson “went straight over the side of the wall into [the] rocks”. He did not see anyone pull Mr Johnson back from the rocks.
- [21] In his evidence at the committal hearing in July 2011, Mr Kidner maintained that he was sober that night. “They” (which he said included Nuggins) came along “pulled him over there, palmed him over... [and] dragged him back up”. Asked to give more detail, he said “Arthur [Langlo] palmed him”. In cross-examination, he agreed that he was an alcoholic but insisted that he was not drunk that night. He denied having said anything different to the police. It was put to him that he did not know what had happened to Mr Johnson, but he responded, “I seen Arthur pushed him”. Langlo had not punched Mr Johnson, but had hit him in the chest. Mr Johnson was drunk but he did not “just fall over”. He, Mr Kidner, was “right beside” Mr Johnson when Langlo “palmed” him. He was too frightened to look over the edge of the bank and had walked away. The others dragged Mr Johnson up. Asked whether Langlo had pushed Mr Johnson in the back or the front, he said the front; there had been no push to the back. All of this had happened, he said, at about 7.00 pm.

Nuggins’ record of interview

- [22] Nuggins was interviewed on 11 October 2010, and the recording of that interview was placed before the jury. Asked what had occurred in relation to Wesley Johnson, he said that he and others went into town for a ride, saw some people at the bridge, and got out of the car and went to them. He continued,

“And then I spotted Wesley and went over there and like, he – he felt threatened for me. He thought I was gonna hit him because I – I live with his sister and his sister was telling me things about me – me and – what he’s gonna do to me. So I just walked over and talked to him. I said ‘Here, bungie can I ask you something, brother?’ He got up, fell [indistinct]. Then he thought me and my bungie [Langlo] was gonna double him, so my bungie walked a bit – when he walked behind him, he tripped. Then Wesley went back over and he went all the way into – and hit the cement, the – the big bricks there and on the rocks there and on the creek.”

(It was explained in the course of the trial that the expression “bungie” was equivalent to the term “in-law”.) Nuggins went on to say that he and Langlo and Ms Watson had brought Mr Johnson back up to the bank.

- [23] Nuggins repeated a similar account later in the course of the interview, making it clearer that Langlo was walking behind Johnson and tripped, and that Mr Johnson,

when he went backwards, fell over him. Ms Watson had, he said, rung for an ambulance; then Nuggins and his group left in Langlo's Jeep, leaving Ms Pompey to wait for the ambulance. Nuggins denied that he had gone looking for Mr Johnson. He recalled going to Ms Forbes' unit on the evening of 3 October. He had tried to borrow money from her for petrol. He did not make any threats concerning Ms Dallachy.

The defence case: Mr Langlo's evidence

- [24] The appellant Langlo gave evidence at the trial; the appellant Nuggins did not. Langlo said that on the night of 3 October, Nuggins had woke him up wanting to go for a drive to his aunt's, where Irene Nuggins and Topsy Watson were drinking, in order to collect the two women. Langlo had had a lot to drink, and Nuggins was driving. He remembered waking up as they arrived at the tunnel. Nuggins walked over to the group and talked with Mr Johnson. Topsy Watson was also there talking. He noticed Ms Pompey. He, Langlo, returned to the Jeep to have another drink and asked Irene Nuggins who it was that Nuggins was talking to. She explained to him who Mr Johnson was and to whom he was related.
- [25] Langlo's evidence was that he decided to go and introduce himself to Mr Johnson, because he realised that they were related. As he walked over to him to introduce himself, he tumbled towards him, falling to his knees. At the same time, Mr Johnson fell backwards into the creek. He had not touched him, nor had he made any threats to or about Mr Johnson that night. Nuggins had picked him, Langlo, up and told him that Mr Johnson had fallen over. The two of them, with Topsy Watson, picked him up and brought him up to the creek bank and told Ms Pompey to watch him.
- [26] In cross-examination, Mr Langlo said that he did not know that Nuggins and Ms Dallachy had separated. He had not approached Mr Johnson from the front but from the side. Nuggins had told Mr Johnson not to walk too far back. Langlo was asked about Nuggins' statement in his interview that he, Langlo, had fallen behind Mr Johnson who had in turn fallen over him, and said that he did not remember if that had occurred.

The admission of Ms Watson's evidence

- [27] Despite the lack of any objection at trial to the tender of Ms Watson's evidence, the appellants submitted that it was not admissible under s 93B of the *Evidence Act* and that its admission had produced a miscarriage of justice. A failure to object to its admission was not explicable as a natural forensic choice. Mr Nuggins made an application to adduce fresh evidence on the point, which amounted to an attempt to introduce a subjective account of counsel's intentions, and would be refused for that reason alone. But in any case, it is superfluous; it has proved unnecessary to reach a conclusion on this ground, because the other ground of appeal must succeed.

The submissions on the unreasonable verdict ground

- [28] Both appellants contended that it was not open to the jury to be satisfied in either case that they were guilty. Their submissions focussed on the evidence that Langlo pushed Mr Johnson. The points made were that all the witnesses who alleged a push were intoxicated to varying degrees, and their observations were made at night in an area where the lighting was not good. Mr Ketchup's evidence of a push

had been discredited, and Ms Watson's account came only after she had already described an accidental fall but had been arrested in relation to the matter. Her recorded interview was given in a context in which she had been drinking and described herself as still affected by alcohol. Her evidence, like Mr Kidner's, was untested before the jury. Mr Kidner had changed his account of what he had seen in each successive iteration of it.

- [29] Counsel for the respondent pointed to the evidence of Nuggins' threat to Mr Johnson. Although there was some indication that Langlo was not aware of that threat, there was evidence the two had acted together in confronting Mr Johnson. As to the mechanism of Mr Johnson's fall, counsel, with his usual frankness, accepted that the evidence of Mr Ketchup should be put to one side as incapable of belief. He accepted, too, that there was conflict between the other eyewitness accounts, but submitted that the jury was entitled to have regard to the fact that the witnesses were not articulate people. The inconsistencies were not unusual in a trial of the type, and were within the jury's province to assess.

Conclusions

- [30] I have come to the conclusion that the verdicts cannot stand. Mr Ketchup's evidence is properly to be disregarded. He resiled from his evidence in chief; even had he not done so, the detail he gave of the appellants' arrival in a sedan unaccompanied by anyone else and his rapid change of account as to who he saw pushing his nephew made his evidence implausible. There was certainly evidence of motive on the part of Nuggins to harm Mr Johnson, and he boasted of having done so; but his vaunted actions were not consistent with any of the evidence. The act on which the Crown case depended entirely as the cause of Mr Johnson's death was the alleged push delivered by Langlo. As to that, there were really only two witnesses, Ms Watson and Mr Kidner. This court is in as good a position as the jury to assess their evidence.
- [31] The fact that those witnesses' evidence was given purely by way of statement or recording would not preclude its acceptance. But in circumstances in which both had given an initial exculpatory account, there must be a question about their reliability. That concern is exacerbated in the case of Ms Watson by the circumstances in which she gave her inculpatory account. The recording of her interview does not indicate that she was so affected by alcohol as to be under any misapprehension as to what she was saying. But she must have perceived that she was at risk of being charged herself in relation to Mr Johnson's injuries, and there is a real risk that she thought it prudent to oblige the interviewing officer by giving an account implicating Langlo in Mr Johnson's fall. She certainly appeared to believe that if she did not answer the police officer's questions, she would be returned to the watch-house.
- [32] The way in which Mr Kidner's account emerged is even more troubling. In his initial statement, he denied seeing anyone push Mr Johnson onto the rocks. The fact that he made a further statement to different effect might not be problematic, had he not given in it a different description of the mechanism of the pushing (Langlo punching Mr Johnson in the back) from both Ms Watson and from his ultimate account at the committal. In addition, Mr Kidner positioned himself "right beside" Mr Johnson when Langlo pushed him. That did not accord with Ms Watson's account, which made no reference to Mr Kidner as being in the vicinity, or

Ms Pompey's, which had him seated with her. And Mr Kidner's timing of the incident involving Mr Johnson's fall at 7.00 pm, although not of great significance, does not suggest any great clarity of recall.

- [33] Another concerning aspect of Mr Kidner's evidence is his move from his first statement that he was very drunk, having shared half a cask of wine, some Jim Beam and some port as well as smoking marijuana, to his insistence at the committal that he was sober. That claim also does not sit well with Ms Pompey's evidence that Mr Kidner was already at the tunnel, drunk, when she arrived at about 7.00 pm, and that he had continued to drink steadily, with an interruption to buy more alcohol from a hotel, up until the time Nuggins and Langlo arrived.
- [34] Those features of the evidence make it impossible to be satisfied that Ms Watson's and Mr Kidner's ultimate accounts of how Mr Johnson fell were reliable. Those accounts lack credibility for the reasons I have set out, which go beyond the manner in which they were given.¹ The appellants could not properly be convicted on evidence of that quality, untested as it was at trial. There was other evidence, in the form of Ms Watson's initial account, Nuggins' interview and Langlo's evidence at trial, which, although variable as to the mechanism, suggested that Mr Johnson fell by accident; something which was not implausible, given his state of intoxication. The existence of that evidence goes some way to reinforce the view I have reached, but is not critical to it. The poor calibre of the evidence on which the Crown case depended of itself leads me to the conclusion that "there is a significant possibility that ... innocent person[s] have been convicted".²

Orders

- [35] Having reached the conclusion that the verdicts were unreasonable and cannot be supported having regard to the evidence, I would:
1. Refuse the application to adduce fresh evidence.
 2. Allow the appeals.
 3. Set the convictions aside.
 4. Enter verdicts of acquittal.
- [36] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.
- [37] **HENRY J:** I have read the reasons of Holmes JA. I agree with those reasons and the orders proposed.

¹ *M v The Queen* (1994) 181 CLR 487 at 494.

² *Supra* at 494.