SUPREME COURT OF QUEENSLAND

CITATION:	*R v Swan* [2013] QCA 217
PARTIES:	**R** **v** **SWAN, Christopher James** (appellant)
FILE NO/S:	CA No 288 of 2012 SC No 693 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2013
JUDGES:	Holmes JA and Applegarth and Jackson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The conviction is set aside.** **3. A re-trial of Swan separate from any re-trial of Smith is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – OTHER MATTERS – where the appellant was convicted of murder but the jury was unable to reach a verdict against his co-accused – whether the failure to reach a verdict in relation to the co-accused indicated that the appellant was convicted as the primary offender – whether there was enough evidence to support the conviction of the appellant as a primary offender – where the case against the appellant was largely circumstantial and dependent upon the evidence of a Crown witness – where the Crown witness gave evidence of seeing an attack on the victim during which the appellant inflicted greater violence than his co-accused, who, after an initial assault, desisted – where the appellant admitted to later minor assaults on the victim during the absence of the witness – where, returning after her death, the witness saw the victim's body with signs of a further severe bashing – where the appellant disposed of the body – whether it was open to the

jury to be satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – EMBARRASSMENT OR PREJUDICE – where on a s 590AA application, the appellant was refused a separate trial from his co-accused – whether at trial, the evidence had changed so substantially as to warrant re-opening the ruling under s 590AA(3) Criminal Code – where the appellant and his co-accused each claimed that the other killed the victim – where the case against the appellant largely depended upon the evidence of a Crown witness, whose credibility was in issue – where the appellant's co-accused gave both highly prejudicial evidence about the appellant's violent disposition and reinforced the evidence given by and credibility of the witness – whether the risk of prejudice from the evidence of violent disposition was capable of remedy by appropriate direction – where it was necessary for the jury to arrive at separate views of the witness' credibility on the different sets of evidence in, respectively, the case against the appellant and the case against the co-accused – whether any direction could address the conceptual problems inherent in that process – whether the appellant had been denied a real chance of acquittal by the failure to grant him a separate trial – whether a miscarriage of justice occurred

Criminal Code 1899 (Qld), s 7, s 8, s 590AA
Evidence Act 1977 (Qld), s 93B

Ali v The Queen (2005) 79 ALJR 662; (2005) 214 ALR 1; [2005] HCA 8, cited
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
R v Belford & Bound (2011) 208 A Crim R 256; [2011] QCA 43, considered
R v Demirok [1976] VR 244; [1976] VicRp 19, considered
R v Jones (1991) 55 A Crim R 159; [1991] VSCA 123, cited
R v Pham [2004] NSWCCA 190, considered
R v Roughan & Jones (2007) 175 A crim R 389; [2007] QCA 443, cited
Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, cited
Winning v The Queen [2002] WASCA 44, cited

COUNSEL: D C Shepherd for the appellant
T A Fuller QC for the respondent

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

[1] **HOLMES JA**: The appellant appeals against his conviction of the murder of Amanda Quirk, essentially on the grounds that there was a miscarriage of justice because he was not granted a separate trial from his co-accused, Rachel Smith, and that the guilty verdict against him was unreasonable.

The evidence admissible against both accused

[2] Smith and Swan shared a house at Booval with Ms Quirk. She was last seen alive on 31 March 2010. Her decomposing body was found on 8 April 2010 near Tenterfield in northern New South Wales. A black plastic bag found near her body was fingerprinted; Swan's palm prints were found on its inside surface.

The post-mortem evidence

[3] When Ms Quirk's body was found, it was extensively decomposed. Ms Quirk had a high level of methadone in her liver, but there was evidence that, given the state of decomposition of the body, the reading was unreliable. There were areas of discolouration on her corpse, but it was impossible to say whether they represented bruising. The pathologist who conducted a post-mortem examination of her body was able to confirm that there was a bruise on her forehead and another on her left cheek; the latter might have been sustained at any earlier time. There were no signs of fractures to any of the facial bones. It was possible that Ms Quirk had suffered a subarachnoid haemorrhage, but that could not be confirmed. There were extensive fractures to the ribs. The pathologist was unable to ascertain a cause of death.

Mondientz' evidence

[4] A friend of Ms Quirk's, Michelle Mondientz, pleaded guilty to one charge of assaulting Ms Quirk and doing her bodily harm while in company and another charge of being an accessory after the fact to her murder. Having been sentenced, she gave evidence against Swan and Smith. Her account was that on Wednesday 31 March 2010, by arrangement she met Ms Quirk in Ipswich; the latter was to obtain amphetamines for her. Ms Quirk arrived in a vehicle which Smith was driving; Swan was also in the car. They drove some distance to a service station (later evidence showed that it was at Wynnum) where they obtained the drugs. Swan injected Mondientz with amphetamine.

[5] Mondientz said that she suffered from a mental illness which amphetamine use exacerbated; on the car journey back from Wynnum she started to think that Ms Quirk was "setting [her] up." She accused Ms Quirk of trying to get Smith and Swan killed by telling violent acquaintances that there were drugs and guns in the Booval house (effectively encouraging a home invasion), and began to punch her. Smith pulled the vehicle over and Mondientz continued to assault Ms Quirk. Smith and Swan joined her in hitting the young woman who, by this stage, was bleeding from the face. In cross-examination by Smith's counsel, however, Mondientz said that she recalled Smith ceasing the assault and saying "that's enough"; she agreed that Smith was "trying to stop and slow things down".

[6] Swan obtained a rope from the vehicle and took Ms Quirk away to some bushes. Mondientz and Smith got back into the car and drove away a short distance before returning; in cross-examination, Mondientz said they drove back out of concern for the safety of Ms Quirk. Swan returned with Ms Quirk, whom Mondientz described at this point as having blood coming from her face and red marks around her neck.

She was, Mondientz said under cross-examination, in a far worse state than when they had left. The group got back into the vehicle and drove back to Ipswich, with Swan verbally abusing Ms Quirk on the journey. On their arrival back in Ipswich, Mondientz was dropped off. She said that when she left the vehicle, Ms Quirk was "very scared" and was saying "let me go".

[7] An hour or so later, Mondientz said, she received a call from Swan, who told her that Ms Quirk had died and asked her to help remove the body. He collected her in Ms Smith's vehicle and took her to the Booval house. When Mondientz arrived, she saw Ms Quirk's body on the floor in the dining room. She appeared to have been badly bashed, with bruises to her head and body and scratches on her face, and there was blood issuing from her nose. Mondientz, Smith and Swan injected amphetamines together and then Swan left with Ms Quirk's key card. (He later admitted he had used it to withdraw $600, part of which he then used to obtain more amphetamines.) Mondientz and Smith set about trying to remove blood and fingerprints from the house. Swan returned and the three had another shot of amphetamine before putting Ms Quirk's body in the boot of Smith's car. By that stage, it was about 4.00 am. Swan left in Smith's car, saying he was taking the body over the border, while Mondientz and Smith returned to cleaning the house.

[8] Under cross-examination by counsel for Smith, Mondientz agreed that she was afraid of Swan when she assisted in disposing of Ms Quirk's body, and Smith had also expressed fear of him. Mondientz believed that Ms Quirk had made the statements to others about the drugs in the house in order to get rid of Smith and Swan. In the course of assaulting Ms Quirk, she had forced her to admit to Swan what she had done. Swan had said to Ms Quirk words to the effect of, "you could have had me knocked last night".

[9] Under cross-examination by Swan's counsel, Mondientz agreed that she had originally lied to police, telling them that she had last seen Ms Quirk leaving a friend's house at Ipswich after a party. She had told a series of other lies about never having met Ms Smith and not having been to the Booval house for some years. She said that she had lied in order to avoid returning to gaol, having previously been imprisoned. After the police read Smith's statement to her in the course of the interview, she took some responsibility for what had occurred, but she did not, in the balance of the interview, make any mention of Swan having a rope at the roadside. She agreed that, in describing the assaults on Ms Quirk in her subsequent police statement, she made no mention of seeing her with red marks on her neck. Mondientz conceded that she had been diagnosed with a number of psychiatric disorders: schizophrenia, bi-polar disorder, amphetamine dependence and alcoholism. She was treated with anti-psychotic medication and had experienced psychotic episodes in which she believed things to be occurring which had no foundation in fact.

The Smith/Swan telephone call

[10] On 7 April 2010, evidently at the request of the investigating police, Smith made a pretext telephone call to Swan. A recording of the call was put into evidence. In it, Smith tells Swan that the police want to talk to her about Ms Quirk and asks what she should say about various matters. He tells her to say that she last saw Ms Quirk at 4.30 or 5.00 pm on Thursday 1 April. She asks what she should do about the blood in her car, and Swan tells her not to take the vehicle with her to the interview.

He asks her whether she got rid of Ms Quirk's telephone. In response to a question from Smith, he says that he is "pretty sure" that Ms Quirk will not be found. He responds in the affirmative to questions about whether the body is in one piece and is buried, and in the negative to a question about whether she is in Queensland. He tells Smith that it will be all right and she should "keep it together".

The evidence admissible exclusively against Smith

[11] Smith gave three statements and an interview to police. Two of the statements and the interview were given on 7 and 8 April 2010, while a third statement was given as an addendum on 6 May 2010. In the first of those statements, Smith made a number of general observations highly damaging to Swan. She explained how Swan came to live at the Booval house after being released from prison on the same day as her boyfriend. About three weeks before the incident involving Ms Quirk, she saw Swan sitting on the end of his bed holding a rifle. On another occasion, Swan had decided that he wanted to get rid of Ms Quirk's cat, to which he had taken a dislike, and threw the animal from a car moving at slow speed. Smith said that she had thought initially he was a "good guy", but after an incident when he claimed to have been abducted by a group of dealers, she started to think that he did not always tell the truth.

[12] As to the events leading to Ms Quirk's death, Smith said that on 31 March, she had driven Swan, Mondientz and Ms Quirk to Wynnum to buy amphetamines. They parked at a service station and Swan left to obtain the drugs. In the vehicle, there was discussion about something said by Ms Quirk, which was supposed to have resulted in Mondientz having to stop people from coming to the house with guns. According to Smith, Swan responded to this by verbally abusing Ms Quirk, and Mondientz assaulted her. Smith turned the car off the road onto a service road where Swan and Mondientz got out and assaulted Ms Quirk. She took no part in the assault. Swan put a rope around Ms Quirk's neck and dragged her across the road into the bush. After a short period, he returned with the young woman, who still had the rope around her neck. She was stumbling and had blood over her face.

[13] On the return journey to Ipswich, Smith said, Swan abused Ms Quirk and punched her. They dropped off Mondientz who, during the journey, had continued to exclaim over what Ms Quirk had done to them. After their arrival back at the Booval house, Swan threw Ms Quirk onto the floor, hog-tied her and taped her mouth up with duct tape. He kicked her in the side of the head and dragged her to her bedroom, hitting her head on the way. Smith remained outside. She could hear Swan punching or kicking Ms Quirk while shouting at her. At one stage, the victim managed to untie herself and attempted to run for the front door. Swan returned her to her bedroom, taped her hands and arms behind her back and tied her feet together.

[14] Swan had forced Ms Quirk to give him the PIN number for her key card before taping her mouth once more. Ms Quirk mumbled that she could not feel her hands; Swan held the flame of his cigarette lighter to her fingers until she began to scream. According to Smith, she, Smith, began to cry at this point, but Swan took hold of her and told her to calm down or she would be "the next one with [her] throat slit". He kicked Ms Quirk repeatedly and jumped on her head. She began to convulse and then to breathe irregularly. Swan attempted to revive her by throwing water on her face and giving her mouth-to-mouth resuscitation.

[15] Smith said that Swan telephoned Mondientz, who arrived soon after. Swan made Smith give him her car keys, and he and Mondientz carried the body to the car. She heard Swan say that he thought they should cut the body up, but Mondientz replied that it would make too much mess. Smith said that Swan had made her clean Ms Quirk's blood from carpet and a cupboard, indicating with a gesture that if she did not do so he would cut her throat. Later, after Mondientz left, she received a telephone call from her, telling her that there was a garbage bag which had to be disposed of. Smith found the bag and saw that it had a blanket with blood on it, a plastic glove and rope, which looked like what Swan had used to tie Ms Quirk. She initially hid it, and then some days later persuaded some friends to drive her to an area near Grandchester where she burned it. She said that she was afraid that Swan would find out she had failed to get rid of it.

[16] Smith said that despite her requests, Swan did not give back her car until 5 April. When he did bring it to a location near where she was then staying with her boyfriend in the Lockyer Valley, he moved into the back seat, and she and her boyfriend had to drive him back to Booval. She noticed he had what looked like an axe handle up his sleeve, which she thought he might use to assault her boyfriend. The car was damaged when he returned it; her iPod was missing; and on the journey to Booval, Swan used a bottle to smash a back window.

The evidence admissible exclusively against Swan

[17] Swan was interviewed by police on 7 April 2010. Initially, he said that the last time he had seen Ms Quirk was about 10.00 am on Thursday 1 April, when he was about to leave for a court appearance. Ms Quirk was saying that she planned to go to a nightclub that night. He had not returned to the house until the following Monday morning. He had borrowed Ms Smith's car to go to court and later went with a friend to his residence on the south side of Brisbane, where he had a flat tyre. He visited various people and returned the car to Ms Smith the following Monday. Swan was informed that police had found blood in the boot of Ms Smith's vehicle. He denied that anyone had bled in the car when he used it.

[18] The police played the telephone call they had recorded between Swan and Smith. After hearing it, Swan gave an account of travelling with Smith, Mondientz and Ms Quirk to obtain amphetamines. On the drive home, Swan and Smith were informed that Ms Quirk had told various people at a party that there were guns and drugs in the Booval house and that Ms Quirk had asked someone to have him and Smith "knocked" so that she could have her house back. Smith and Mondientz punched Ms Quirk. They dropped Mondientz (whom he referred to only as "Michelle") off in Ipswich and returned to the Booval house. When they arrived there, he slapped Ms Quirk once in the side of the head, but did not punch her. In the house, he tried to explain to Ms Quirk what could have happened to him and Smith had people acted on her request. He tied her hands and feet with duct tape, and he and Smith made her hop to her bedroom where they left her lying on her bedroom floor. Ms Quirk asked him to untie her, but he responded by saying the people that she had meant to send would not untie him if he asked them to. He left the room and shut the door.

[19] Smith went into the room to verbally abuse Ms Quirk and came out a short time later. About 10 minutes later, Ms Quirk emerged from the room, having untied herself. They placed her on the floor and he taped her feet together; at Smith's

direction he did not tie her hands again. They returned her to the bedroom. He went into the kitchen. Smith said that she was going back in to the bedroom to "have a go at this cunt" and needed something hard to hit her with. He did not react to that statement, because his head was spinning from the amphetamines, and he did not know what Smith obtained.

[20] After a while, Smith came into the kitchen to make coffee and then returned to the bedroom. She came out again and said that Ms Quirk was not breathing. He attempted resuscitation but could not revive her. He telephoned Mondientz, who decided that they would have to get rid of the body but would wait until people in the neighbouring units had gone to bed. Meanwhile, he went in Smith's car to obtain some more amphetamines. On his return, the three of them took Ms Quirk's body to the vehicle and put it in the boot. He told Smith to clean the house and he drove to northern New South Wales, where he took the body out of the car and covered it with twigs and branches.

The separate trial application

[21] Shortly before the hearing date, Swan applied for a separate trial. At the outset of the application, counsel for Smith placed on the record that his client would not be seeking to adduce any evidence adverse to Swan beyond what already appeared in the Crown material. It was put for Swan that the material in Smith's interview and statements was so prejudicial to him that it would not be reasonable to expect a jury to disregard it, despite direction. Secondly, the Crown intended to call Mondientz, whose credit the jury would have to assess. Smith's evidence contained significant support for parts of what Mondientz had said; for example, the account of Swan's having put a rope around Ms Quirk's neck and dragged her into the bush.

[22] Counsel for Swan referred the judge to the decision of the New South Wales Court of Criminal Appeal in *R v Pham*.[1] There, the appellant and two co-offenders, one his brother, were tried together and were convicted of murder. The man who actually shot the victim pleaded guilty and gave evidence against the appellant and co-offenders, receiving a discount to his sentence as a result. His credibility was crucial, and there were a number of reasons for doubting it. Another witness who, on the evidence, could have been regarded as an accomplice was also called in the Crown case. The appellant's brother had given a police interview which corroborated in significant respects the evidence of both those witnesses in the case against his brother. The court regarded it as probable that the jury would not have been able to disregard the brother's prejudicial statements supporting the evidence of the two witnesses who incriminated the appellant. Hulme J, with the agreement of Spigelman CJ, observed in particular that

> "there was no practicable way [the jury] could have assessed the credibility or reliability of the evidence of the two witnesses differently in the case against the Appellant than they had or would have done in the case against his brother."[2]

[23] In resisting the application, the Crown relied on the decision of this court in *R v Belford & Bound*.[3] In that case, evidence was admitted under s 93B of the *Evidence Act* 1977 of statements made by the murder victim to the effect that he had

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1 [2004] NSWCCA 190.
2 At [8].
3 [2011] QCA 43.

been selling drugs for Bound and owed him money. The other appellant, Belford, made statements to similar effect in his record of interview. It was argued that there should have been a separate trial because the jury might have used what was said in that record of interview to support the Crown case that Bound had assaulted the victim over a drug debt. Fraser JA, considering the question of whether a separate trial ought to have been granted, pointed out that Belford's inadmissible evidence on the topic did not add much to the admissible evidence, but, even if it were prejudicial, there was no reason to doubt that the trial judge's directions would suffice to guard against such prejudice.

[24] In his reasons for refusing the application, the learned judge noted that each of the defendants was running a "cut[-]throat" defence, each claiming that the other perpetrated the violence which killed Ms Quirk. The general rule was that jointly charged defendants should be dealt with at the same trial, and the fact that one might seek to incriminate the other was not a justification for separate trials: *Ali v The Queen*.[4] His Honour referred to *Belford & Bound* and the majority's view in that case that any prejudice arising from the reinforcement of admissible evidence by inadmissible material could be cured by direction, which it could be assumed the jury would follow.

[25] The case was to be distinguished from *R v Pham*, relied on by Swan; there, the co-accused had incriminated both himself and his co-accused, his own brother. There was no motive for him to do so, making his implication of his brother all the more significant. That was not the case here, and the trial judge would give directions that Smith's incriminating statements were not admissible against Swan. The support that Smith gave to some of Mondientz' assertions was not a compelling reason to depart from the normal rule. Mondientz' version was not in complete agreement with that given by either Smith or Swan, and she would be available for cross-examination.

The application to re-open the separate trial ruling

[26] After Mondientz gave evidence in the trial, counsel for Swan sought to re-open the ruling against granting a separate trial. He argued that the cross-examination of Mondientz by Smith's counsel provided a different and clearer picture of how Smith intended to conduct her case. It was elicited from Mondientz that Ms Quirk was in a far worse condition when Swan brought her back to the roadway than when Mondientz and Smith left briefly in the car. There was also a good deal of cross-examination about the motive to attack Ms Quirk, in the form of concern for the safety of Smith and Swan as a result of Ms Quirk's having told violent people that there were drugs in their house.

[27] Counsel for Swan made the point that although Mondientz attributed that concern to both Smith and Swan, the impact on his client would be more significant. That was because Mondientz' account of Swan's violence on the journey from Wynnum was crucial to the case against him, and the jury would have to assess the credibility of Mondientz. It would be suggested by Smith's counsel that Mondientz' account supported his client's version of events, and at the same time Mondientz' credibility would be buttressed from an inadmissible source, the statements of Smith. The case had this in common with *Pham*: it was not practicable for the jury to assess the witness' reliability and credibility differently in the two respective cases against the co-accused.

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4 (2005) 79 ALJR 662.

[28] The learned trial judge concluded that Swan had not established, as s 590AA(3) required, special reason to re-open the earlier ruling. The fact that Mondientz had confirmed that Ms Quirk was in a worse condition after Swan had taken her away at the roadside was not a significant alteration to the evidence before the judge on the previous application, and the evidence about the motivation for the assaults was before that judge and was set out in Swan's interview. So far as Mondientz gave any evidence of Swan's propensity for violence, it was apparent that she had not met him before the day of the murder and that what she had said could be overcome by clear directions. Her Honour refused the application to re-open the ruling.

The summing-up and verdict

[29] Neither Smith nor Swan gave evidence. The Crown case against Swan was left on the alternative bases that he was the person who did the act which caused Ms Quirk's death; that he was an aider under s 7 of the *Criminal Code*; or that the killing occurred in the prosecution of a common unlawful purpose under s 8. The trial judge warned the jury of the dangers of convicting on the basis of Mondientz' evidence, given her involvement in the events before and after Ms Quirk's death; the reduction in her sentence for co-operation, with the possibility of its increase if she did not give the evidence; and her schizophrenia and her drug addiction. Her Honour also directed the jury that the statements and interviews by Smith and Swan were admissible only against their respective makers. The jury returned a verdict of guilty against Swan, but was unable to reach a verdict in relation to Smith.

The unreasonable verdict ground

[30] The jury could properly conclude that Ms Quirk was beaten to death in the Booval house leaving, as against Swan, the question of whether he had himself killed her, had aided Smith to do so, or was innocent of involvement. They plainly rejected the third alternative. Counsel for Swan on appeal argued that the jury's inability to reach a verdict in relation to Smith indicated that Swan was, in fact, convicted as the primary offender, but there was not enough circumstantial evidence for it properly to reach that conclusion.

[31] Counsel for the respondent submitted, to the contrary, that the jury could have convicted Swan either as primary offender or as a party. I do not, with respect, think that is so. Their failure to reach a verdict against Smith indicates that the jury was not satisfied, on the case against her (Mondientz' evidence and her own statements and interview) that she was responsible in any capacity for the killing. That meant, essentially, that the jury had not found Mondientz' evidence sufficient to support a conviction of Smith. The only additional piece of evidence concerning Smith which came from Swan's interview, and was thus admissible only against him, was that Smith had said she would have a "go at" Ms Quirk and sought a hard object to use against her. But it is not feasible that the jury could have accepted as credible that one item of evidence in Swan's interview to conclude that Smith was the primary offender, while rejecting Swan's accompanying statements that he was not responsible in any way and ignoring the absence of evidence of any act performed in aid of her.

[32] The submission that Swan could only have been convicted as primary offender must be accepted. The question, then, is whether there was enough evidence to support a conviction on that basis. The case against Swan was a circumstantial one, heavily

dependent on Mondientz' evidence as to what had happened on the Wynnum trip. Mondientz' said that when she later saw Ms Quirk's body at the Booval house, she appeared to have been bashed, raising the question of who, as between Smith and Swan, had committed the further assaults on her.

[33] On Mondientz' account, in the roadside episode, Smith had desisted; had expressed the view ("that's enough") that the attack on Ms Quirk should stop; and had returned to where they left Swan and Ms Quirk out of concern for the latter. In contrast, Swan inflicted more extreme violence, dragging her across the road and bringing her back with greater injuries. Swan, unlike Smith, had continued to exhibit anger against Ms Quirk on the journey back to Ipswich, accusing her of risking his life: "you could have had me knocked". On his own admission, on their arrival back at Booval, he slapped Ms Quirk, took her upstairs and tied her hand and foot. An hour later, she was dead. It was he who took the role of removing the body.

[34] If the jury concluded on Mondientz' evidence that Swan had continued to exhibit anger and violence toward Ms Quirk after Smith had withdrawn and assumed an attitude to her which was mildly protective, although ineffectual, it could have been satisfied beyond reasonable doubt that it was Swan who was the perpetrator of the violence committed at the house. It was by no means an overwhelming case, but it was open to the jury to convict Swan on it. This ground of appeal must fail.

The separate trial ground

[35] Swan submitted that, in refusing the original application for a separate trial, the judge had failed to take into account the difficulties entailed for the jury in assessing the credibility of Mondientz on different sets of material in the respective cases against Smith and Swan. *R v Belford & Bound*, which the Crown had relied on, was distinguishable, because the trial judge there had determined that the relevant statements were sufficiently reliable to be admitted under s 93B, and Belford's further statements were unlikely to be of any real significance. Here, the jury had to assess Mondientz' evidence in circumstances where a warning was given that the jury should be careful in acting on her evidence unless it was supported in some way. The case was closer to *R v Pham*.

[36] The judge had not taken into account that the written police statements of Smith would be taken into the jury room during deliberations, increasing their prejudicial impact. And he had failed to give sufficient consideration to whether the different evidence admissible against Smith and Swan, with the possibility of different verdicts, warranted separate trials. There was a real prospect that the jury could find, on the separate cases, both Smith and Swan guilty as aiders, with no-one then found to be a principal.

[37] Counsel for the respondent argued that the evidence inadmissible against Swan was readily identified and was the subject of warnings. The real issue was whether Smith's evidence impermissibly affected the jury's assessment of Mondientz' credibility; the judge determining the separate trial application was aware of that issue, but had properly distinguished the decision in *Pham*. Both Smith and Swan were in dispute with Mondientz as to narrow bands of evidence: her account, in relation to Swan, of his taking Ms Quirk away with the rope, and in relation to Smith, of her delivering violence to Ms Quirk at the roadside. It was clear that the jury had not approached the matter as a choice as to which of Smith and Swan was

guilty, because they had been unable to return a verdict against Smith; had they simply accepted her version of affairs they would have acquitted her. The evidence given at trial was consistent with that before the judge on the separate trial application, and no special reason was established to re-open the application.

Conclusions

[38] In my view, the respondent is correct in saying that the evidence had not changed so substantially in its effect at the trial as to require the trial judge to revisit the ruling on the s 590AA application. The real question is whether there was error in failing to make an order for separate trials in the first instance, resulting in a miscarriage of justice.

[39] The starting position is that co-accused should be jointly tried. In *R v Demirok*,[5] the Full Court of the Supreme Court of Victoria summarised the reasons for that position:

> "In the first place, there is the question of the administrative matters of court time spent and public expense incurred if more than one trial is to be conducted. These matters will in many cases not be of very great weight, in others they may assume real significance. Secondly, it is against the interests of justice that there should be inconsistent verdicts, and those interests require that where the accounts of accused persons differ or conflict their differences should be resolved by the same jury at the same trial. Thirdly, and allied with the first two considerations, it has always been the policy of the law to reach finality as expeditiously as possible; and no system could function if it permitted the repeated retrial of the same issues except in situations where the concept of justice so required. Fourthly, the convenience of witnesses must be considered."[6]

The second of the factors identified, the risk of inconsistent verdicts, is particularly significant where each accused seeks to blame the other. The risk of prejudice from inadmissible evidence "must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused".[7]

[40] However, I have come to the conclusion that the prejudice to Swan, in trying him before a jury which also had before it the case against Smith, was beyond cure by direction and that the consequence was a miscarriage of justice. Smith's statements and interviews contained a great deal of prejudicial material, the effect of which was particularly acute in a situation where the jury was considering which of them was responsible for the killing. Into that context was put Smith's account of Swan's having moved into the house at Booval direct from gaol. Why he was imprisoned was left unexplained. Smith described him as having had a gun and as a liar and a thief. She portrayed him as someone of whom she was afraid, and who controlled her actions by the threat of violence.

[41] Those pieces of evidence were, no doubt, permitted to go before the jury because they went, firstly, to demonstrating Swan's violent disposition, making it more

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5 [1976] VR 244.

6 At 254.

7 *Webb v The Queen* (1994) 181 CLR 41 at 89.

probable that he was the one responsible for Ms Quirk's death, and secondly, to countering any suggestion that Smith's presence at Ms Quirk's killing was as an aider (as opposed to her being passive through fear). In addition to the statements going to general disposition, there were the horrific aspects to Ms Smith's description of Swan's treatment of Ms Quirk: jumping on her head, burning her fingers and proposing to dismember her body. Those matters had the potential to cause considerable prejudice; but I think that, alone, they might have been capable of remedy by appropriate directions.

[42] What was not capable of being so resolved was the problem that Smith's account reinforced Mondientz' on aspects that were critical in establishing a case against Swan: the story of his violence to Ms Quirk at the roadside with, at the same time, the withdrawal of Smith from the attack on Ms Quirk and her indication in the admonition "that's enough", that no further harm should be done to the woman. It was inevitable that the jury would regard Mondientz' account as more credible for that reinforcement; and, as I have indicated, those circumstances were pivotal to a conviction of Swan.

[43] The case, in my view, is distinguishable from *Belford & Bound*, in which the inadmissible evidence contained in the co-accused's interview was not of great significance, taken in context with the admissible evidence on the same point. The case against Swan was not strong; it depended entirely on Mondientz' version of events, and her credibility, which there were many reasons to question, was critical.

[44] It is evident from the summing-up that Smith's counsel had addressed the jury on the basis of the "common story" of Mondientz and Smith, emphasising that both women were in fear of Swan. The trial judge did not attempt to direct the jury that, while Smith was entitled to point to the correspondence of her account with Mondientz' to argue that both of them should be believed as to Swan's violence, Mondientz' credit in the case against Swan should be assessed only on the evidence admissible against him. I do not say that as any criticism of her Honour, because it seems to me that to do so could only have resulted in confusion. But the difficulty of fashioning a coherent and comprehensible direction which explained that Mondientz' credit had to be assessed separately on each of the two cases highlights the problem of attempting to try Smith and Swan together.

[45] The problem is of the same kind as was identified in successful appeals in *R v Demirok,*[8] *R v Jones*[9] and *R v Pham*: the impossibility of arriving at a direction which the jury could both comprehend and be expected to follow. Everything turned on Mondientz' credibility, which could be regarded differently depending on which set of evidence – that admissible against Smith or that admissible against Swan – it was assessed against. A jury could not reasonably be expected to arrive at a view of her credit based on the case against Smith and then embark again on the same exercise, but disregarding that evidence, in relation to the case against Swan.

[46] In my respectful view, the judge who heard the separate trial application did not appreciate the real nature of the difficulty involved and was mistaken in thinking that the problems of a joint trial could be overcome by the standard direction that the out of court statements of one accused were not admissible against the other.

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8 [1976] VR 244.

9 (1991) 55 A Crim R 159.

[47] To borrow from the words used in *Winning v R*,[10] (referred to by this court in *R v Roughan & Jones*[11]) the prospect of undertaking the assessment of Mondientz' credit on two separate sets of evidence was

> "such that no directions of a trial Judge would be adequate to ensure that a jury could be expected to perform 'the remarkable mental feats required of them'".[12]

Given that Swan's conviction depended on Mondientz' evidence; given the many causes for concern about her credibility; and given that her credit is likely to have been bolstered by evidence inadmissible against him; one must conclude that Swan has been denied a real chance of acquittal by the failure to grant him a separate trial.

[48] I would allow the appeal, set aside the conviction and order a re-trial of Swan separate from any re-trial of Smith.

[49] **APPLEGARTH J**: I have had the advantage of reading the reasons of Holmes JA, with which I agree. I also agree with the order that her Honour proposes. I also have had the advantage of reading the observations of Jackson J with which I agree.

[50] **JACKSON J**: I agree with Holmes JA's reasons and the orders her Honour proposes, but wish to add a few observations upon the critical question – whether the Judge who dismissed the appellant's application for a separate trial erred.

[51] On that question, her Honour has stated the circumstances and question with such clarity that it would detract from the analysis were I to restate them for myself. The point of arrival is whether the task of the jury, properly directed, required that they undertake unrealistic mental gymnastics to a degree that the appellant was unfairly denied the right to a fair trial.

[52] My concern is grounded in the difficulty of formulating, in similar cases, a practicable articulation of the distinction to be drawn between a case where the line has been crossed and one where it has not.

[53] Some of the problems in this area are intractable. Where defendants are tried together in circumstances like the present case, there will often be evidence of admissions receivable against one but not the other. It also must often be true that the "credibility" of the evidence of a witness against one defendant could be affected if regard is had to the inadmissible evidence against that defendant but admissible against the other.

[54] So, the problem presented by the present case is not to be resolved in favour of separate trials simply because those risks exist, in general. The strong resolve of the High Court in favour of the principle that co-offenders should be tried together, as articulated in *Webb v The Queen*,[13] informs the consideration of any problem of this kind.

[55] As I understand Holmes JA's reasons, the dividing line in this case is crossed because of the combination of the circumstances that the case was not a strong one against Swan and depended on Mondientz' version and her credibility, which there

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10 [2002] WASCA 44 at 42.
11 [2007] QCA 443.
12 *Winning v The Queen* [2002] WASCA 44 at [42].
13 (1994) 181 CLR 41 at 88-89.

were many reasons to question. Against that background, in at least two important respects, the evidence inadmissible against Swan bolstered Mondientz' credibility. Those respects were the story of Swan's violence to Ms Quirk at the roadside and Smith's withdrawal from the attack in the car and statement that: "That's enough." Those points are assessed by her Honour against the (practical) task of fashioning a coherent and comprehensible direction which explained that Mondientz' credibility had to be assessed separately on each of the two cases.

[56] Holmes JA compares these circumstances to cases where the problem was of the same kind: *R v Demirok*,[14] *R v Jones & Waghorn*,[15] and *R v Pham*.[16] Her Honour concludes that a jury could not reasonably be expected to arrive at a view of Mondientz' credibility based on the evidence admissible against Smith and then embark on the same exercise again against Swan, but disregarding the evidence inadmissible against Swan.

[57] Of course, "[t]he criminal trial on indictment proceeds on the assumption that jurors are true to their oath… and that they obey the trial judge's directions."[17] Yet, in two of those cases, the Court took the view that the circumstances were such that a satisfactory direction could not be given because it would have required the jury to form separate assessments of credibility of the principal witnesses against each defendant on different evidence. So, in *Jones & Waghorn*, Murphy J said:

> "I could not be satisfied that any warning by a trial judge… could hope to persuade a jury, which first accepted [the witness]'s evidence as to [the other defendant]'s implication in the killing… to reconsider that same evidence implicating [the appellant], by disregarding the prior acceptance of it assisted by the [other defendant]'s admissions."[18]

[58] And in *Pham*, Adams J said:

> "… it would have been virtually impossible, as a matter of common sense, for the jury to disregard [the other defendant]'s interview in dealing with the case against the appellant, despite the emphatic directions that [the other defendant]'s alleged confession formed no part of the case against the appellant and should be disregarded so far as he was concerned."[19]

[59] It was also a factor of significance in *Pham* that the crown case against the appellant "was far from strong".[20]

[60] Thus far, I respectfully observe that the analysis supports Holmes JA's conclusions. But there is at least one troubling aspect. In *Demirok*, the Full Court of the Supreme Court of Victoria said that they "would not have taken the view that there had been a miscarriage of justice arising out of the joint trial if… the appellant's wife had been charged jointly with him on the [count of murder]."[21] This was analysed by Crockett J in *Jones & Waghorn* as follows:

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14 [1976] VR 244.
15 (1991) 55 A Crim R 159.
16 [2004] NSWCCA 190.
17 *Gilbert v The Queen* (2000) 201 CLR 414 at [31].
18 At 167.
19 At [34].
20 At [26].
21 At 255.

> "…it would appear that the Court was of opinion that a joint trial… would have led to each blaming the other… which was a factor that told strongly against separate trials. Also there was a consequent real possibility of inconsistent verdicts…".[22]

[61] What moved Crockett J to conclude that separate trials were nevertheless required in *Jones & Waghorn* was that there was evidence inadmissible against the appellant in that case, but apparently tendered as against the other defendant, that the other defendant was "terrified of [the appellant]" and "that the [the appellant] had a disposition to violence and murder and who was a professional criminal who had committed at least one armed robbery".[23]

[62] In this case, there was a joint trial on a single count of murder by Swan and Smith. Even on Crockett J's narrower explanation of the basis of *Demirok*, as Holmes JA's analysis shows, the present case compares to *Jones & Waghorn* because of Smith's statements as to the character of and her fear of Swan.[24]

[63] However, in principle, that seems to me to be a consideration that is not the gravamen of the reasoning that this line of cases seems to support. The prejudicial evidence relied upon by Crockett J in *Jones & Waghorn* did not go to the credibility of the important witness or witnesses against the appellant, in the context of an otherwise weak crown case against the appellant.

[64] I regard the particular problem with which this line of cases deals to be that which arises where the crown case against the relevant defendant is weak and turns on the credibility of an important witness or witnesses about whom there is an apparent real question of credibility. A separate trial may be called for where the apparent evidence admissible against another defendant but not against the relevant defendant would have the effect of bolstering the important witnesses' credibility against the relevant defendant.

[65] For those reasons, on the particular facts of this case, in my view the orders proposed by Holmes JA should be made.

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22 At 165.
23 At 165.
24 At [40].