SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wright* [2013] QCA 396
PARTIES:	**R** **v** **WRIGHT, Graeme Kenneth** (appellant)
FILE NO:	CA No 85 of 2013 SC No 5 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Maryborough
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2013
JUDGES:	Fraser and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – where at the commencement of the trial, the appellant pleaded guilty to the manslaughter of the deceased, but not guilty to his murder – where the appellant had previously been interviewed by police and specifically denied having been involved in the deceased's death – where the appellant contends that the learned trial judge failed to direct the jury adequately on the use of lies as evidence of a consciousness of guilt – where the prosecutor informed the learned trial judge that she would argue that these lies, coupled with other evidence, demonstrated a consciousness of guilt of murder – where the learned trial judge observed that the direction that she was required to give the jury was that they have to be satisfied that the lies show a consciousness of guilt of murder and not any other offence and "that they had to be very careful" – where the appellant's counsel was provided with a copy of the direction and no objection was taken by him to it and no re-direction sought – where the appellant contends that the direction was confusing and that it did not sufficiently explain that the appellant may have lied because he panicked or because he mistakenly believed that his participation in the killing of the deceased

attributed a murderous intent to him – where the learned trial judge specifically addressed these issues several times in her directions – whether the direction given was adequate for the circumstances of the case

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant contends that the jury's verdict was unsafe and unsatisfactory in all the circumstances – where the appellant focussed upon the unreliability of the evidence of the female co-offender contending that it was insufficient to demonstrate an intention on the appellant's part to kill or do grievous bodily harm to the deceased – where the female co-offender was cross-examined on matters going to her credibility – where this was left to the jury to determine – whether it was open to the jury to conclude on the whole of the evidence that the appellant was guilty of murder

Criminal Code 1899 (Qld), s 7(1)(a), s 302

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, followed
Michaelides v The Queen (2013) 87 ALJR 456; [2013] HCA 9, cited
R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, cited
R v Mitchell [2008] 2 Qd R 142; [2007] QCA 267, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied

COUNSEL: D J Walsh for the appellant (pro bono)
M R Byrne QC for the respondent

SOLICITORS: A W Bale & Son as agent for Legal Aid Queensland for the appellant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** On 19 March 2013, the appellant, Graeme Kenneth Wright, was found guilty on a count of murder after a trial over eight days in the Supreme Court at Maryborough. The count alleged an offence against s 302 of the *Criminal Code* (Qld) in that on or about 25 May 2009 at Maryborough, the appellant murdered Noel Clark ("the deceased"). Upon conviction, the appellant was sentenced to life imprisonment.

[3] By a notice of appeal filed on 10 April 2013, the appellant appealed against the conviction for murder. This document listed a single ground of appeal. That

ground was displaced by two other grounds of appeal which are set out in a further amended notice of appeal filed by leave at the commencement at the hearing of the appeal.

The principal issue for the jury

[4] At the commencement of the trial, the appellant pleaded guilty to the manslaughter of the deceased, but not guilty to his murder. He also pleaded to a second count on the indictment of interfering with the corpse of the deceased. The Crown did not accept the pleas in discharge of the indictment.

[5] As the manslaughter plea signalled, there was no issue that the appellant had participated in the unlawful killing of the deceased. The jury was correctly instructed that if it acquitted the appellant of murder, it must return a verdict of manslaughter on the count. The principal factual issue for the jury's determination was whether the appellant's offending was carried out with the intent requisite for murder.

[6] The unlawful killing of the deceased was carried out by the appellant, a female co-offender, and a male co-offender. The female co-offender had an intimate relationship with the deceased during 2008 until the beginning of 2009. She began an intimate relationship with the male co-offender about a month before the deceased's death.[1] Both the female co-offender and the male co-offender pleaded guilty to the manslaughter of the deceased. The Crown accepted their pleas. The female co-offender gave evidence at the appellant's trial. At that time, she was serving a sentence for her manslaughter conviction. The male co-offender was not called in the Crown case, the prosecutor having formed the view that he was not a reliable witness.[2]

[7] The Crown advanced its case against the appellant in terms of both principal and accessorial liability.[3] Consequently, so far as intent was concerned, the Crown had to prove either:

(a) that the appellant acted intending to kill or cause grievous bodily harm to the deceased: *Code* s 7(1)(a); or

(b) that the appellant intentionally aided the male co-offender in an assault on the deceased knowing that the male co-offender intended to kill the deceased or cause him grievous bodily harm: *Code* s 7(1)(b), (c); or

(c) that the appellant with the female co-offender and male co-offender formed a common intention to prosecute an unlawful purpose, namely, to seriously assault the deceased in circumstances where the murder of the deceased was a probable consequence of the prosecution of that purpose: *Code* s 8.

Circumstances of the offending as related by the female co-offender

[8] The Crown case was very substantially dependent upon the evidence of the female co-offender. Her evidence-in-chief is summarised in the following six paragraphs of these reasons.

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1 AB126; Tr3-25 L30-AB128; Tr3-27 L5.

2 AB25; Tr2-2 LL8-10.

3 AB502

[9] The female co-offender knew of the appellant through his sister. She met him for the first time in 2009 about two months before the Maryborough show. Her evidence was that he telephoned her "out of the blue" and that evening came to her house in Maryborough where she was living with her son. The male co-offender was residing there at the time. The appellant asked them "to help him set up" the deceased.[4] He said that "he hated [the deceased] and he just wanted help to get him."[5] There was a conversation about a can of "Start Ya Bastard". The appellant wrote that name on a piece of paper with his telephone number. He said, "if you spray it into a piece of cloth and put it over someone's mouth, it knocks them out."[6] He wanted them to get a can of it. In a later telephone conversation, the appellant told the female co-offender that he wanted to get the deceased because he was sleeping with his [the appellant's] girlfriend.[7]

[10] According to the evidence of this witness at trial, on the day of the killing the appellant came to her house early when the male co-offender was there. They went to Centrelink. She got a six-pack of a rum drink and then walked home. Thereafter, she, the appellant and the male co-offender were at the house. They telephoned the deceased often and eventually learned that he was at Centrelink. The appellant had brought a can of "Start Ya Bastard" to the house. He sprayed it on a piece of cloth, showing the male co-offender how to do it and explaining to him that you put it over a person's face and it knocks them out.[8] The appellant denigrated the deceased in the presence of the female co-offender and the male co-offender accusing him of wrecking his relationship with his girlfriend. Other objects that the female co-offender noticed at the time were electrical cords which had been disconnected from a DVD player at the house and a bat that she said the appellant had brought to her house.[9]

[11] The female co-offender walked with her son to Centrelink to meet up with the deceased. The deceased withdrew some cash from an ATM. They went to the Blue Corner Store and then to the deceased's cousin's house. They got into the deceased's blue Ford, went to a petrol station and then drove back to her house, apparently for two reasons: "to have a shot of drugs"; and for the deceased and the appellant "to sort … their problems out".[10] On arrival at the house, they entered, she put her son to bed.

[12] According to the female co-offender, the following events then ensued:

> " … [The deceased] was talking to me in the lounge room, and [the male co-offender] come out of the – [female co-offender's son's] room-----
>
> Yes?-- -----swinging the baseball bat and missed. And [the deceased] was pushing - pushing [the male co-offender] back.
>
> Yes?-- And, then, [the male co-offender] yelled out to [the appellant] to get out here. And then [the appellant] grabbed electrical cords and wrapped them round [the deceased's] neck while [the male co-offender] was hitting [the deceased] with the baseball bat.

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4 AB128; Tr3-27 LL40-42.
5 AB129; Tr3-28 LL5-6.
6 AB129; Tr3-28 L24-AB130; Tr3-29 L15.
7 AB131; Tr3-30 LL12-15.
8 AB132; Tr3-31 LL20-41.
9 AB134; Tr3-33 LL17-35.
10 AB134; Tr3-33 L40-AB136; Tr3-35 L9.

Where did [the appellant] come from?-- Out of the bathroom.

And you say he wrapped an electrical cord around [the deceased's] neck?-- Yep.

And what did he do once he'd wrapped the cord around his neck?-- Just held him-----

Yes?-- -----so that [the male co-offender] could hit him.

And how did [the male co-offender] hit him?-- Across the head really hard with the baseball bat.

How many times did he do that?-- Three.

And was [the appellant] holding the cord that whole time?-- Yeah.

And what happened as [the deceased] was being hit in the head with the baseball bat?-- He fell to the ground.

All right. Did you see whether he was injured at all at that stage?-- Yeah, he had - his head was split open and there was blood everywhere.

And did you see when his head was split open, in terms of which blow?-- On the second blow.

Okay. And where was [the appellant]?-- He was tying [the deceased's] hands up once [the deceased] fell to the floor.

Okay. When his head was split open, where was [the appellant] at that point in time?-- In the bathroom with - in the bathroom/laundry.

Okay. Can I take you - I might've taken you out of sequence. Can I take you back a little bit?-- Yeah.

You said that [the appellant] came out of the bathroom and put a cord around [the deceased's] neck?-- Yeah.

And is that when [the male co-offender] then hit him in the head?-- Yeah.

Okay. You see some blood from being hit in the head?-- Yeah.

Was [the appellant] still there-----?-- Yeah.

-----with the cord-----?-- Yep.

-----around [the deceased's] neck?-- Yeah.

And you say that [the deceased] fell to the ground?-- Yeah.

Was that in the lounge room?-- No, that was in the bathroom.

Okay. How did they get to the bathroom?—'Cause [the appellant] was pulling him back into the laundry, 'cause my laundry leads off my bathroom.

Okay. And how was he pulling him?-- Just - he had the cords around his neck, holding him.

Was the can of spray that you'd spoken about used at all?-- Yeah. When he was knocked out.

Okay. So, you say that [the deceased] fell to the ground?-- Yep.

What happened when he fell to the ground?—[the appellant] was spraying the spray in his face.

Okay. How was he doing that?-- Leaning over him and spraying it.

How close to his face was he?-- About that far away.

And how much of the can did he spray into his face?-- I don't know, probably half of it.

Okay. Could - did you know whether [the deceased] was still alive when he fell to the ground?—[the appellant] reckons he checked his pulse and he was dead so.

And when did he check his pulse; did you see him do that?-- Yep, after.

After what?-- After he'd been tied up and that-----

Okay?-- -----like 'cause he fell to the ground and then he tied his arms back.

So, when you say he tied his arms back, is that behind him?-- Yep.

And what did he use to tie his arms?-- The electrical cords that he had held around him.

And when he was tying [the deceased's] arms behind his back, was [the deceased] conscious?-- I don't know. I don't-----

Do you know what I mean by that?-- He was looking a bit blue.

Okay. At that stage?-- Yeah.

And the can of spray, when was that sprayed on him?-- After he fell to the ground.

And was that before or after his hands had been tied?-- Before.

Okay. So after the spray was put into his face, were his hands then tied?-- Yeah.

What happened then?-- They put a - they grabbed a doona cover off my son's bed and hung it on the clothes line out the back near the ramp so the neighbour's couldn't see.

Okay. When those things were happening to [the deceased], what was [the appellant] and [the male co-offender] saying?-- They were laughing about it.

Well, this is during the - when the baseball bat was being used by [the male co-offender]-----?-- Yeah.

-----was he saying anything?-- Yeah. They were calling [the deceased] a dog and a home wrecker and a rapist."[11]

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[11] AB136; Tr3-35 L46-AB139; Tr3-38 L5.

[13] Thereafter, the female co-offender, the appellant and the male co-offender drank rum mixers from cans for about an hour while the deceased was tied upon the floor. The appellant "reckoned there was no pulse". He then went through the deceased's pockets and took his mobile phones and wallet.[12] After that, the appellant and the male co-offender wrapped up what, by then, probably was the deceased's body, in a doona cover and dragged it to the boot of the deceased's car which was parked in the backyard.

[14] They then drank for another half hour. The appellant and the male co-offender drove off in the deceased's car while the female co-offender and her son travelled in the appellant's utility. At some point, she and the male co-offender swapped vehicles and he drove the utility. They stopped in bushland out of Maryborough. The appellant and the male co-offender pulled the deceased's body out of the boot. The appellant cut his trousers and the female co-offender "ended up chopping off his penis" with a Stanley knife.[13] She said that she did this because she was scared that the others were going to do something to her. They all departed in the deceased's car. She did not see the body again.

[15] In cross-examination, counsel for the appellant established that the female co-offender had agreed to provide a statement in exchange for the Crown's acceptance of her plea[14] and that she had received a significant discount in her sentence for her cooperation with the authorities.[15] She agreed that before she testified, she had given at least four versions of what had happened to authorities.[16] Importantly for this appeal, she conceded that some of them were "bare-faced lies".[17] She said that she lied initially because she was scared.[18]

[16] In a version given to police on 26 August 2009, the female co-offender implicated only the male co-offender in the killing.[19] She agreed that the appellant had not threatened her before she gave that version and that he had never threatened her.[20] In a version given on the following day, she made reference to the appellant's presence at her house but distanced herself from any involvement in the killing.[21] Much later, and at a time when she had been in prison for about two years and wished to get into a Turning Point program for parole eligibility, she gave a different version to prison authorities in which she said that when she returned to her house, she located the appellant and the male co-offender in the bathroom standing over the deceased's body. On that occasion she did not say that she witnessed the assaults on the deceased.[22]

[17] The appellant has instanced other aspects of the female co-offender's cross-examination which, it was submitted, were inconsistent with her evidence-in-chief or gave reasons to doubt it. She agreed that she had "bragged" to acquaintances about having cut off the deceased's penis.[23] In speaking to an associate, one

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12 AB139; Tr3-38 L30-AB141; Tr3-40 L10.
13 AB141; Tr3-40 L12-AB142; Tr3-41 L16.
14 AB153; Tr3-52 LL39-47.
15 AB150; Tr3-49 LL35-60.
16 AB149; Tr3-48 LL22-25.
17 AB149; Tr3-48 LL25-30.
18 *Ibid*; AB156; Tr3-55 LL12-13.
19 AB154; Tr3-53 L56-AB156; Tr3-55 L3.
20 AB156; Tr3-55 L22.
21 AB157; Tr3-56 LL45-50.
22 AB150; Tr3-49 LL15-26.
23 AB167; Tr3-66 LL1-10.

Campbell, whom she believed was one of a number of drug dealers whom the deceased had intended to "put in", she did not attribute any role to the appellant to the killing. This conversation occurred close in time to the date of the deceased's death.[24] The female co-offender conceded that, in fact, she had not seen the baseball bat until the male co-offender was wielding it, but explained that "it was meant to be his" (meaning the appellant's).[25] She said that she left the can of "Start Ya Bastard" on the shelf when she moved out of the house, although her evidence-in-chief had been, at that point, she "[cleaned] up all the stuff".[26]

Other evidence

[18] The deceased's body was never found and a cause of death was never established by forensic examination. The appellant neither testified nor called evidence in his defence. However, a range of other witnesses had been called in the prosecution case. Their evidence, if accepted, would itself have grounded a circumstantial case against the appellant. That evidence, as collected in the respondent's written submissions on appeal, is summarised in the following paragraphs.

[19] The evidence reliably established animosity between the appellant and the deceased relevant to motive. It was founded on the fact that the deceased had recently started a sexual relationship with a previous partner of the appellant, a woman in whom the latter was still romantically interested.[27] Further, there was evidence of a physical encounter about one month prior to the killing in which the appellant attacked the deceased's head and body with a metal bar causing injury. Wrestling and punching ensued.[28]

[20] As well, there was evidence of threats made by the appellant about the deceased, including that he "[wasn't] finished with him yet";[29] that he would "get him";[30] and that he was going to "kill the cunt".[31]

[21] Other circumstantial evidence suggested that the appellant was the prime mover in the escapade rather than someone who was merely caught up in events which were being driven by others. Firstly, there was evidence that he was monitoring the movements of the deceased prior to the killing – a telephone intercept indicated that he knew at what time the deceased had left the house of the appellant's sister and a friend of the deceased on the day he was killed,[32] and pieces of paper located in the appellant's utility contained details of the deceased's car.[33]

[22] Secondly, the deceased's wallet taken by the appellant contained the former's bank cards.[34] There was evidence that the appellant had asked his sister for the deceased's PIN number, saying that it would be worth her while.[35] Yet there was

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24 AB172; Tr3-71 LL37-39.
25 AB182; Tr4-3 LL12-35.
26 AB182; Tr4-3 LL39-50.
27 For example, at AB36; Tr2-32 L39-AB37; Tr2-33 L55.
28 AB38; Tr2-34 L43-AB40; Tr2-36 L20.
29 AB247; Tr4-68 L50.
30 AB129; Tr3-28 L20.
31 AB306; Tr6-27 LL2-10.
32 AB524-525.
33 AB371; Tr6-92 LL15-60.
34 AB140; Tr3-39 L23-AB141; Tr3-40 L9.
35 AB306; Tr6-27 L58-AB307; Tr6-28 L23.

no evidence to suggest that the deceased had complained of having lost a PIN card prior to his being killed. There was also evidence of attempts to use one of the cards on 10 and then 12 June 2009 and also of the appellant's whereabouts which placed him within the vicinity of the locations at the times when the attempts were made.

[23] Thirdly, there was evidence that the SIM card from a mobile phone of the deceased was used in the appellant's mobile phone some eight days after the killing.

[24] Fourthly, there was evidence that after the body had been disposed of, the appellant had taken the deceased's Ford motor vehicle and hidden it in or near a transport yard at Deception Bay. The yard was a work base for the appellant. He told others that he was intending to sell it,[36] or parts from it.[37]

[25] Fifthly, there was evidence that on 25 October 2009, at a time after the deceased's vehicle had been seized by police without the appellant's knowledge, the appellant was speaking by telephone with the manager of the transport yard where the vehicle had been hidden. The appellant said that he hoped that the vehicle had been stolen and not seized by police. When the manager asked him what was in it, he replied, "… all sorts of things" and giggled or laughed.[38]

[26] I now turn to another body of evidence which formed part of the prosecution case and relates to one of the grounds of appeal. The jury watched a video recording of an interview of the appellant conducted by Detective P F McCusker on 28 August 2009 at Dalby,[39] and an audio recording of a further interview of the appellant in which Detective McCusker participated which was also held on that day at Dalby.[40]

[27] In the first interview, the appellant spoke of the physical altercation between him and the deceased and of two telephone conversations that he had with the deceased within a week or so of that event. He denied having any other contact with the deceased after that.[41] In the second interview, he specifically denied having been involved in the deceased's death, saying that the last time that he laid eyes on the deceased was "when …, we had the punch up".[42]

[28] The appellant's plea to manslaughter of the deceased revealed these statements to be lies. The basis of the tender of the statements was that they were a species of circumstantial evidence which, in combination with other evidence, tended to prove that the appellant was involved in the killing as a murderer rather than as a less culpable offender.[43]

Grounds of appeal

[29] The appellant has appealed against conviction on the following grounds:

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36 AB299; Tr6-20 L18.
37 AB599.
38 AB609-AB610.
39 DVD Exhibit 11 (Transcript Exhibit A; AB712-747).
40 DVD Exhibit 12 (Transcript Exhibit B; AB748-788).
41 AB726 LL1-15.
42 AB779 LL30-38.
43 As to the admissibility of such evidence, see *R v Mitchell* [2008] 2 Qd r 142 at [26] and *R v Ciantar* (2006) 16 VR 26 at [69]-[72].

1. That the learned trial judge failed to direct the jury adequately on the use of lies as evidence of a consciousness of guilt; and
2. That the jury's verdict was unsafe and unsatisfactory in all the circumstances.

It is convenient to consider these grounds separately.

Ground 1 – lies direction

[30] Before addresses, the prosecutor informed the learned trial judge that she would argue that these lies, coupled with other evidence, demonstrated a consciousness of guilt of murder.[44] That raised the need for an *Edwards* direction. Her Honour observed, correctly, that the direction that she was required to give the jury was that "they have to be satisfied that the lies show a consciousness of guilt of murder and not any other offence … that they have to be very careful".[45] Her Honour formulated a structure for the direction based on the Benchbook lies direction. She read it to both counsel.[46] The appellant's counsel was provided with a copy of the direction to read.[47] No objection was taken by him to it.

[31] In the course of summing up, her Honour reminded the jury of the evidence of the lies. Then she gave the following direction concerning their use:

> "The Crown therefore alleges that those lies indicate not just that he knew about his death, but that he actually murdered [the deceased] and that his lies show a consciousness of guilt of that offence of murder, that is, the killing of [the deceased], with an intent to cause death or grievous bodily harm.
>
> Now before you can use those lies as evidence against [the appellant], you must be satisfied of a number of matters. Unless you are satisfied of these matters, you can't use the evidence against [the appellant]. First, you must be satisfied that [the appellant] has told a deliberate untruth. There is a difference between the mere rejection of a person's account of events and a finding that the person has lied.
>
> In many cases, where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told, as sometimes a person may have been confused or there may be other reasons which would prevent you from finding that a person has deliberately told an untruth.
>
> You should listen, again, to those interviews, between [the appellant] and the police and ascertain whether there was, indeed, a deliberate misleading of the police. Secondly, you must be satisfied that the lies told by [the appellant] concern some circumstance or event connected with the offence of murder and not simply the offence of manslaughter or interfering with a corpse. You can only use a lie against [the appellant] if you are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence of murder and not simply manslaughter or interfering with a corpse after his death, or some aspect of murder.

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44 AB413; Tr7-13 LL15-17.
45 *Ibid* at LL28-30.
46 AB414; Tr7-14 L15-AB415; Tr7-15 L40.
47 AB426; Tr7-26 LL1-8.

> Thirdly, you must be satisfied that the lie was told because [the appellant] knew that the truth of the matter would implicate him in the commission of the offence of murder, not just manslaughter or interfering with a corpse. You must be satisfied that [the appellant] must be lying because he was conscious that the truth would convict him of murder. That said, there may be reasons for the lie, apart from a realisation of guilt. Sometimes people have an innocent explanation. If you accept that there is an innocent reason of this kind, and that's the explanation for the lie, you can't use it against [the appellant]. You can only use the lie against [the appellant] if you are satisfied he lied out of a realisation that the truth would implicate him in the offence of murder and not manslaughter or some other events, such as interfering with a corpse.
>
> Having considered that evidence, and the question of lies, it may be that you conclude that [the appellant] deliberately told lies, but not that it showed consciousness of guilt. It is for you to decide whether or not the lies show a consciousness of guilt. It may be that you consider that the fact he lied does affect his credibility, however, you should bear in mind this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that that is evidence of guilt.
>
> The mere fact that [the appellant] tells a lie is not, in itself, evidence of guilt. A defendant may lie for many reasons, for example, to bolster a true defence, to protect somebody else, to conceal disgraceful conduct of his, short of a commission of the offence of murder, or out of panic or confusion. If you think that there is, or may be, some innocent explanation for his lies, then you should take no notice of the lie."[48]

No re-direction or clarification of the direction was sought.

[32] The appellant's addendum outline of argument on appeal challenged the adequacy of the lies direction in a number of respects. The theme of the challenges was that the direction was confusing and that it did not sufficiently explain to the jury that the appellant may have lied because he panicked or because he mistakenly believed that his participation in the killing of the deceased, of itself, attributed a murderous intent to him. I do not regard these challenges as well made. As can be seen, the direction, at several points, in clear terms distinguished between lying which would implicate the appellant in an offence of murder on the one hand, or offences of manslaughter and interfering with a corpse on the other. As well, her Honour mentioned several times reasons for lying other than guilt of the offence in question, referring to panic and confusion as examples. I consider that the direction given was both comprehensive and adequate for the circumstances of the case.

[33] At the hearing of the appeal, counsel for the appellant did not develop those challenges to the lies direction. Instead, criticism was made by him of the adequacy of an allied direction concerning other post-offence conduct of the appellant which, the Crown argued, also evidenced a consciousness of guilt. Those criticisms were to the effect that more particularity was required in the directions concerning three topics, namely:

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48 AB455; Tr7-30 L29-AB457; Tr7-32 L45.

- the fact that initially the female co-offender did not implicate the appellant in the version of events she gave to the police;
- that she did not do so in her conversation with Campbell; and
- the inconclusiveness of her evidence with respect to the fate of the can of "Start Ya Bastard".

[34] It is plain, in my view, that these criticisms are not relevant to, and do not advance, this ground of appeal which is concerned with the lies direction only. To the extent that the criticisms might have any relevance to the grounds of appeal, it is to the other ground to which I now turn.

Ground 2 – unsafe and satisfactory verdict

[35] Counsel for the appellant did not address the Court on this ground of appeal. He relied on the submissions in the written outlines. These submissions focused upon the unreliability of the evidence of the female co-offender, contending that it was insufficient to demonstrate an intention on the appellant's part to kill or to do grievous bodily harm to the deceased.

[36] In *SKA v The Queen*,[49] four members of the High Court reaffirmed[50] that the function to be performed by an intermediate court of appeal is as stated in *M v The Queen*,[51] by Mason CJ, Deane, Dawson and Toohey JJ:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

[37] This test has been accepted as applicable to a statutory formula which refers to the impugned verdict as "unreasonable".[52] In *M*, the joint judgment went on to say:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred."[53]

[38] The criticisms of the female co-offender's credibility including those to which counsel referred in argument of the appeal, were developed in cross-examination of her and elaborated in addresses. How those criticisms might influence the jury's assessment of her credibility given that they had seen and heard her give evidence, was a matter for them.

[39] If the jury accepted the evidence of the female co-offender, then it, together with the evidence of the appellant's post-offending conduct, presented a compelling basis for the jury to be satisfied beyond reasonable doubt of the appellant's guilt on Count 1. The female co-offender's account that the appellant held the deceased around the

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49 [2011] HCA 13; (2011) 243 CLR 400.

50 French CJ, Gummow and Kiefel JJ at [11]; Crennan J at [78]; see also *Michaelides v The Queen* [2013] HCA 9; (2013) 296 ALR 1 per French CJ and Crennan J at [4].

51 (1994) 181 CLR 487 at 493.

52 *SKA* at [12]; *MFA v The Queen* (2002) 213 CLR 606 at [58].

53 At 494.

neck with the cord so that the male co-offender could hit him to the head with the baseball bat and that after the deceased fell to the floor, the appellant dragged him to the bathroom by the cord with it still around the deceased's neck was powerful evidence sufficient to satisfy the jury on any or all of the bases of intent on which the Crown advanced the case. Her evidence of his expressed intention to set up the deceased and of his demonstrating how to use the "Start Ya Bastard" to render a person unconscious was indicative of a leadership role on the appellant's part in the enterprise. Moreover, the evidence of the appellant's post-offending conduct from other witnesses was apt to fortify the factual basis underpinning an inference of the requisite intent.

[40] I am therefore quite unpersuaded that the jury's verdict was unsafe or unsatisfactory. This ground of appeal cannot succeed.

Order

[41] Neither ground of appeal has succeeded. I would therefore propose the following order:

1. Appeal against conviction dismissed.

[42] **McMEEKIN J**: I have read the reasons in draft of Gotterson JA. I agree with those reasons and the order proposed.