SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hunter* [2014] QCA 59
PARTIES:	**R** **v** **HUNTER, Ian Robert** (appellant)
FILE NO/S:	CA No 295 of 2012 SC No 680 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2013
JUDGES:	Fraser JA and Daubney and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF GENERAL CONDUCT OF TRIAL – where the trial judge gave directions on two separate occasions that if the jury found the appellant had lied the alleged lie was capable of amounting to an implied admission of guilt – where the appellant contends that the trial judge wrongly particularised the lies – where the appellant contends that the wrongful particularisation lead to a serious misdirection – whether the directions of the trial judge have given rise to a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – CONSIDERATION OF GENERAL CONDUCT OF TRIAL – where the trial judge gave directions in relation to lies going only to the appellant's credit – where the appellant contends that these directions were confusing and inadequate to guard against impermissible reasoning by the jury – whether those directions have given rise to a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION

AND NON-DIRECTION – CONSIDERATION OF GENERAL CONDUCT OF TRIAL – where the appellant contends the trial judge misdirected the jury in relation to the evidence that the appellant did not ask police how his wife had died – where the appellant contends that the trial judge misdirected the jury in relation to motive – where the appellant contends the trial judge erred in failing to direct the jury in relation to evidence of DNA analysis – whether the accumulation of those irregularities have rise to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the trial judge admitted evidence regarding the appellant's lack of reaction to the learning of his wife's death – where the appellant contends that the trial judged erred in admitting this evidence as evidence of the appellant's guilt – where the appellant contends in the alternative that the trial judge failed to appropriately direct the jury in relation to the use to be made of this evidence – whether this irregularity, accumulated with the other irregularities of the trial gave rise to a miscarriage of justice

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, followed
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
Hillier v The Queen (2008) 1 ACTLR 235; [2008] ACTCA 3, considered
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, considered

COUNSEL: C Heaton QC, with C Eberhardt, for the appellant
B G Campbell for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Daubney J. I agree with those reasons and with the order proposed by his Honour.

[2] **DAUBNEY J:** On 1 November 2012, after a 13 day trial, the appellant was convicted of having murdered his wife on or about 6 May 2010. He now appeals against that conviction.

[3] Before turning to the grounds of appeal, it is convenient to set out the factual background, noting that there was no challenge to these matters on appeal.

Background

[4] The appellant and the deceased had been married for some 37 years. She was a woman of small build – 165 centimetres tall and weighing about 51 kilograms.

[5] As at 6 May 2010, the deceased worked as a shop assistant in the afternoons and evenings. Shortly after she arrived home from work that evening, the deceased was struck at least 15 times to the head, including the face. She was also struck once to the right forearm. The deceased sustained multiple lacerations and multiple skull fractures including to the upper dome and skull floor, fractures to her right eye socket, right upper jaw, nasal bone and cheek bones, a fracture to her laryngeal bone and a "night stick fracture" to the left forearm. Thirteen of the blows would have required severe force. The facial injuries indicated at least three blows of severe force. The injury to the forearm was a defensive injury. The deceased suffered multiple cerebral and cerebellar haemorrhagic contusions, which also indicated a high level of applied impact force. The cause of death was head injuries.

[6] The deceased's body was discovered in the garage of the house in which she and the appellant lived. The injuries were consistent with having been caused by a metal bar which was located near her body.

[7] The house was a two-level dwelling, with the garage and a workshop area located on the ground floor. The living area, kitchen and bedrooms were located on the upper level.

[8] At 6.37 am, and again at 6.40 am, on 7 May 2010 phone calls to 000 were made from the appellant's mobile phone. No-one spoke on those calls, but as a consequence of the calls, police were dispatched to attend the residence. On arrival, police found that the home's front sliding glass door on the upper level was open, but the screen door was closed. A curtain was pulled across the screen door. Police entered through that door into the lounge room, where they found the appellant lying on his stomach. He had a letter opener sticking out of his right hand. He was clothed in underpants, and a neatly folded rug covered his body from his shoulder to his knees. A mobile telephone was near his hand. There was blood smeared over the wall and floor near him.

[9] The deceased's body was located in the garage downstairs, near her car. Her handbag was near her. There was a petrol container near her body, as well as the metal bar to which I have already referred. Towels and clothing had been thrown over the body. Her body had been doused in petrol.

[10] There was a broken light bulb in the garage, above the deceased's car. Glass from the broken light bulb was on the garage floor, including under the deceased's car.

[11] There was a series of footprints in topsoil in the yard behind the house. Those footprints appeared to lead to the back fence. The deceased's watch was found in the neighbouring property on the far side of the back fence.

[12] When paramedics arrived at the scene they treated the appellant. He was able to state his name and answer their questions in a responsive manner. When asked if he had inflicted the injuries upon himself, the appellant clearly said "No way". He said that he was hit in the head with a bar. There was an issue at trial about the precise words later spoken by the appellant in the ambulance, however this issue is not relevant to this appeal.

[13] Upon arrival at the hospital the accused was spoken to by doctors and police. He said that at about 10.30 pm he got out of bed because he thought his wife was home. He walked into the lounge room and was hit in the head by a man wearing a stocking over his head.

[14] The appellant maintained in that interview, and indeed throughout the subsequent police investigation, that an intruder had entered the house and had assaulted him and, by implication, killed the appellant's wife.

[15] The appellant had a three by four centimetre bruise over his forehead, with an overlying superficial laceration. His nose was swollen and tender. He had scratch abrasions over his right upper chest and the outside of his right forearm. He also had some superficial lacerations to both his thighs. A letter opener was embedded into the back of his right hand. The letter opener was removed and the wound sutured. That injury did not involve any bones in his hand. A CT scan of the appellant's head gave normal results. There was a considerable amount of dried flakey blood over his chest area and over his abdomen.

[16] The Crown case at trial was circumstantial. During the summing up the Crown summarised its case as including eight categories of circumstantial evidence.[1]

[17] The first category related to the deceased's body. When the deceased was discovered, clothes belonging to the appellant were draped over her body.[2] There were also obvious attempts to mop up blood around the body using towels which were also on the body.[3] The Crown case was that it was unlikely that an intruder would attempt to tidy up, and an intruder would have no reason to put the appellant's clothes on top of the deceased. If, however, the appellant was responsible and the deceased's blood was on his clothes, putting his clothes on top of her could explain the presence of the deceased's blood on the clothes.

[18] Further, the body had been doused in petrol, but there was no attempt to ignite the body.[4] The Crown case was that whilst this seemed inexplicable if an intruder had been responsible for the death of the deceased, it was completely explicable if the appellant had been responsible because the appellant erroneously believed that petrol would destroy DNA.[5]

[19] The second category of evidence related to the appearance of the garage. As noted above, the light in the garage had been smashed and glass from that light was found under the deceased's car. The inference was that the attacker had smashed the light in anticipation of the deceased returning.

[20] Moreover, around the deceased's body were impressions in blood made by a pair of thongs.[6] The consistent evidence at trial was that the appellant habitually wore thongs. There was evidence at trial from a forensic podiatrist that one of the impressions was consistent with being made by the appellant.[7]

[21] The third category of circumstantial evidence related to the weapon. A bloodstained metal bar was found beside the body. A sample from the bloodstains on the metal bar revealed a profile matching the deceased's DNA. The pathologist's evidence at trial was that the injuries suffered by the deceased were consistent with having been caused by the metal bar. DNA consistent with having been partially contributed by the appellant was found in various samples taken from the non-bloodied end of the metal bar.[8]

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1 AR 888.40-900.50.
2 AR 412.40; Exhibit 75.
3 AR 412.38-418.10.
4 AR 339.45-48; Exhibit 59; AR 1015.
5 AR 248.12-28; AR 252.50-253.12.
6 Exhibits 20, 112 and 258.
7 Impression No 6; AR 596.40-598.26.
8 AR 623.40-628.10; Exhibit 85; AR 1121.

[22] The Crown case was that it could be inferred that this metal bar belonged to the household. The appellant had previously been employed as a truck driver. There was a truck jack in the garage. Apart from this metal bar, there was no other handle for the jack.[9] There were marks on the bar consistent with it having been used as a handle for the jack.[10]

[23] The fourth category of circumstantial evidence involved the examination of the upper level of the house. A letter relating to the deceased's insurance and also some cash were on the kitchen counter.[11] There were extensive areas of bloodstaining. Evidence was adduced as to the approximate location of the stains[12] and swabs of apparent blood on the rear stairs and back entry produced a full DNA profile matching the deceased. There were also six bloodstains on the rear stairs which produced a full DNA profile matching the appellant. Evidence was led that the rear stairs had recently been varnished and were not being used by the appellant and his wife.

[24] Full DNA profiles of the appellant were also obtained from swabs of bloodstains on the front stairs and from extensive areas of bloodstaining, including smears and drops, in the lounge room, as well as areas of apparent bloodstaining on the wall leading into the hallway. A number of cupboard doors were open and items had been pulled out. For example, a display cabinet in the lounge room had its lower drawers open and items within disturbed, including a pen case. However the display cabinet itself was not disturbed. On the pen case was dried flaky blood, as opposed to droplets or smears. This item[13] gave a partial DNA profile matching the appellant. Similar dried flaky blood was found between sheets pulled out of the linen cupboard in the hallway. This item[14] produced a full DNA profile matching the appellant. Other areas also had areas of dried flaky blood with a full DNA profile which matched the appellant's DNA. These areas included the toilet,[15] bathroom items,[16] and the hallway.[17] Other areas that gave a full DNA profile matching the appellant included the kitchen and dining areas.[18] The appellant had dried flaky blood on his chest.

[25] Another bloodied thong impression which matched the tread pattern of the thong prints in the garage was found in the hallway. This item[19] was noted to be a single impression, and did not form part of a sequence of impressions.[20] This impression showed weight-bearing areas and was consistent with the weight-bearing impression from the appellant.[21]

[26] The fifth category of circumstantial evidence concerned the state in which the appellant was found when police arrived at the home. He was discovered with a blanket neatly folded over him. He was wearing only a pair of underpants. The

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9 AR 454.1-2.
10 AR 649.30-656.20; Exhibits 271 and 272.
11 Exhibits 187, 188 and 189.
12 Exhibit 208.
13 U151.
14 U152.
15 U13.
16 U8 and U9.
17 U7.
18 U15 and U16.
19 U1.
20 Depicted in Exhibits 175, 177, 178 and 257.
21 AR 593.12-596.40.

door of the lounge room was open and the temperature had been cool, down to approximately 6.3 degrees. He had the DNA of the deceased on his hands and fingernails, despite claiming to have showered twice and washed up the dishes since his wife had left for work. The appellant had relatively minor injuries, as described at [15].

[27] The sixth category involved statements made by the appellant as to how his wife was killed.[22] The appellant accurately told others she had been struck with a bar, but he had not been told what had happened to his wife and had not asked. Later he told the police he had not known what had happened to his wife,[23] but he overheard that there was a deceased female downstairs. The Crown also pointed to inconsistencies in the appellant's version as to his description of the intruder. The Crown case was that this was information which, if the appellant's version concerning the intruder was accurate, he should have known.

[28] The seventh category of circumstantial evidence relied on by the Crown involved lies which it contended had been told by the appellant. In particular, the prosecution relied on two lies as demonstrating consciousness of guilt. The first was a denial by the appellant that he had ever had the metal bar at his house, or that he had seen or used it. The Crown case was that there was evidence from which the jury could conclude that this statement was a deliberate falsehood. The second alleged lie was that the appellant told police that the thongs found by them on the verandah were the only pair of thongs he owned. Police had located these thongs on the front verandah of the house, but the tread pattern was different to those which had left the impressions in the blood around the body. There was evidence that the appellant in fact owned and used more than one pair of thongs. The police did not locate a second pair of thongs at the house.

[29] The eighth and final category of circumstantial evidence involved motive. The Crown relied on evidence of the appellant's financial difficulties and the fact that he stood to benefit financially from his wife's life insurance policy.

The grounds of appeal

[30] The appellant's grounds of appeal are as follows:

> "1. The learned Trial Judge's directions in relation to lies going only to the appellant's credit were confusing and inadequate to guard against impermissible reasoning by the jury;
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> 2. The learned Trial Judge erred in directing the jury that they could find that the appellant had lied in claiming he did not own another pair of thongs and that this alleged lie was capable of amounting to an implied admission that he had killed his wife;
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> 3. The learned Trial Judge erred in directing the jury that they could find that the appellant had lied about not having seen or used the metal bar previously and that they could use this alleged lie as an implied admission of guilt;
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> 4. The learned Trial Judge erred in admitting evidence of a lack of reaction on the part of the appellant to learning of his wife's death as evidence of the appellant's guilt, or alternatively, failed

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22 AR 138.6-14; R200.5-20; AR 783.35-60.

23 Exhibit 306; AR 1415.

to appropriately direct the jury in relation to the use to be made of this evidence;

5. The learned Trial Judge erred in failing to adequately or properly direct the jury in relation to the evidence that the appellant did not ask police how his wife had died;

6. The learned Trial Judge misdirected the jury in relation to motive;

7. The learned Trial Judge erred in failing to direct the jury in relation to the evidence of DNA analysis."[24]

[31] The appellant's oral argument before this Court was directed principally to the first ground of appeal, which necessarily encompassed reference to the second and third grounds of appeal. Consequently the appellant's primary contention related to the learned primary judge's directions that were given on lies. Counsel for the appellant properly conceded that the other matters ought to be argued as irregularities, but contended that the accumulation of those irregularities gave rise to a miscarriage of justice.

The directions about lies

[32] As will be seen, the appellant challenged the structure and content of the directions given by the trial judge on lies. It is, therefore, necessary to set out the learned trial judge's directions on lies in full:

> "One of the things that you'll take into account in assessing evidence, one important thing, is whether the evidence contains lies. Lies, obviously, affect a person's credibility. If a person is demonstrated to be a liar, you would assess what he says with great care. The prosecution has referred to a number of what it says are lies in the various interviews given by the accused. For example, the amount of his super payout as recounted to his son Jason and to the witness McNeven, or the lie about his trip to [Kingscliff] when he was being followed by the police. And the prosecution submits that those are lies and that they affect this man's credibility, and you should taken them into account in assessing whether you accept his statements in the various interviews.
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> Evaluate these statements in their context, decide whether you think they are lies in the context in which they are made. Remember that a lie told to a relative stranger in a casual conversation, for example, might not have as much impact as a lie told to police in a formal interview. Consider the possible reasons why a person might have told a lie and assess credibility in the light of your findings in that regard. Consider whether confusion might have been the cause of the problem, for example.
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> If you think that a person has told deliberate lies, you would assess anything he says with great care. But remember, even if you do not accept the evidence of a person because you find him to be a liar, that does not prove the opposite of what he said. If somebody says the car was red and you think that's not the truth, it doesn't prove what

[24] As amended at the hearing of this appeal on 18 November 2013.

colour the car was, or whatever the case may be. A lie doesn't prove the opposite of what's said in the statement.

There are in this case two particular alleged lies which the Crown says you can use in another way as well as for assessing credibility. The Crown submits that the accused has told two lies which can be used by way of an implied admission that he killed his wife. The particular lies which the Crown relies on in this way are telling police on the 6th of July 2010 that (1) he had never had the metal bar at his house, nor used it, nor seen it; and (2) that the thongs found on the landing were the only ones he owned and the only thongs he had worn for the last three or four years. Those two statements made on the 6th of July 2010 are alleged by the prosecution to be lies that you can use not simply to assess credibility, but also as evidence of guilt.

Before you can do that, there are a number of requirements of which you must be satisfied, and I will tell you what they are. There are five of them and all five requirements have to be satisfied before you can use a lie in this second way. And, remember, it is only those two particular lies that I have identified which are suggested as capable of being used this way.

The first requirement is that the statement, the alleged lie, actually does contain a falsehood. In other words, that it is untrue. Pretty obvious, isn't it? You can't guess about this or rely on intuition. There has to be other evidence which supports a conclusion that the statement was false.

Here, the prosecution submits that there is such evidence as to the bar in this: it says, first, the accused's DNA was found on the non-bloody end of the bar. Second, the jack which he did acknowledge he had, had no lever and the bar had been used as a lever. You can conclude that from the marks on it. Third, none of the screwdrivers had been used as a lever. There were no marks on them. And, fourth, you might think that it strains [incredulity] to think that an intruder would, by chance, bring with him a bar which happened to match exactly the pattern which would occur by its use in the very type of jack at Mr Hunter's house.

So the prosecution says that from those four bits of evidence, you can conclude that the statement that Mr Hunter had never had the metal bar at his house, nor used it, nor seen it, was false.

The defence says, "No, that's not right." First, it says the DNA could have come from his being hit with the bar on the evening, or from transference through clothing. Second, the marks on the bar show only that the bar could have been used somewhere else to operate a similar jack. They don't prove that it was used to operate this jack. Third, as to the screwdrivers, they say there is no evidence that if they were used as levers they would have acquired any marks. No-one has tested them to see whether they would have been marked as use by levers.

Four, the defence asks rhetorically, anyway why would he not admit it was his bar if it is truly his? What's the harm in that? Well, there

is an answer to that question. I will come to that a little later. The defence also asks rhetorically if he had used the bar, why did he not simply dispose of it in the same way as he is alleged to have disposed of the thongs. Why indeed? That's a question for you to consider.

So that's the first requirement in relation to the bar. Can I turn to that first requirement in relation now to the second lie, the lie alleged about the thongs? The prosecution submits that there is evidence that he had at least two pairs of thongs. Mr Brown gave evidence-in-chief that around the house, the accused wore double pluggers with a white top, and I think said he used others when he went out.

James Hunter testified that his father had more than one pair of thongs and that one of his pairs had white tops. And Mr McGill, the accused's good friend for 15 to 20 years, spent a lot of time with him, testified that the accused wore old thongs in the backyard and good ones to go to the pub, and he identified the ones on the front deck as possibly the backyard ones.

But Mr Lynch, in his address to you, rightly pointed out that that was only the evidence-in-chief. In cross-examination, Mr Brown, in effect, said, oh, he wouldn't necessarily know. And Mr James Hunter did likewise. And Mr McGill said he had no particular reason to take note of what thongs the accused had, although he didn't strictly abandon the proposition that there were more than one pair of thongs.

Well, it is up to you to weigh up the evidence-in-chief and the cross-examination and come to a conclusion. Unless you find the statements false, they cannot be used as lies because you have got to be satisfied that it is a lie before you can use it in this way. That's the first requirement then for using these alleged lies in the way I have been talking about.

The second requirement is that you must be satisfied that the falsehood was deliberate. A lie can amount to an implied admission only if the accused perceived that the truth was inconsistent with his innocence and deliberately told a falsehood for that reason. Consider whether the explanation may be that a falsehood was the result of a mistake or confusion, or genuine self deception.

You might think the statements in this case could really not have been false without being deliberately so, but it is a matter for you.

The third requirement is that you must be satisfied that the alleged lies related to something relevant, or at least to something that the accused thought was relevant when he told the alleged lie.

If it were a lie about an immaterial subject, the truth would not tend to implicate the accused, so the lie couldn't have been designed to avoid self implication. Therefore, you couldn't use it as an implied admission.

In the present case you might well think that the subject matters of the statements was very relevant. Possession of the bar, for example,

> would have revealed that the accused had the means as well as the opportunity to kill his wife. And inability to explain a missing pair of thongs would have revealed a potential link between him and the scene of the killing. Again, however, it is a matter for you to determine whether there was relevance.
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> The fourth requirement is that an alleged lie can be taken into account only if you are satisfied that it reveals that the accused knew of the offence or of some aspect of it. If the accused did not know something of the killing, a lie could not amount to an implied admission of guilt. In the present case, there is no doubt that the accused knew of the killing at the time he made the statements. That requirement won't cause you any difficulty.
>
> The final requirement is that the alleged lie must have been told for the reason that the accused realised that if he told the truth, it would tend to convict him. Sometimes, there are other reasons for lies; for example, to protect another person or sheer panic. Such a lie does not contain an implied admission of guilt. Ask yourselves if there is anything in the evidence to suggest that the accused might have been lying for another reason.
>
> If you are satisfied of all these five requirements, the lie may be taken into account as an implied admission that the accused killed his wife. The weight you give to the lie is a matter for you. You must assess how important the lie is in the whole scheme of things."[25]

[33] A little later in the summing up, the learned trial judge summarised the categories of circumstantial evidence on which the Crown case was based. In the course of that part of the summing up he said:

> "The seventh area, the seventh area of circumstantial evidence, are the two lies that I told you about earlier at some length, which are factors to be taken into account in assessing guilt of you find the five requirements are satisfied. I will not say any more about them. I have already told you about them."[26]

Directions concerning lies

[34] It is convenient first to deal with the contention contained in the appellant's second ground of appeal. The appellant contends that the learned trial judge erred in directing the jury that they could find that the appellant had lied in claiming he did not own another pair of thongs and that this alleged lie was capable of amounting to an implied admission that the appellant had killed his wife.

[35] In the appellant's outline of submissions, the challenge focused on the way in which the trial judge had set out the alleged lies. It was argued that when the trial judge described these alleged lies as "that the thongs found on the landing were the only ones he owned and the only thongs he had worn for the last three or four years",[27] his Honour wrongly particularised the alleged lies. It was said that the relevant lie was not identified with precision, and that "in the context of this case this was a serious misdirection".

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25 AR 879.48-886.8.

26 AR 894.46 – 56.

27 AR 881.14-18.

[36] In fact, his Honour's statement of the alleged lies was completely accurate. What his Honour said in this formulation replicated answers which the appellant had given in a formal interview with the police on 6 July 2010.[28]

[37] The appellant advanced in both written and oral submissions that the evidence in relation to the appellant's ownership of thongs at the time of the killing was not capable of sustaining a finding that the appellant owned another pair of thongs at or around the time of the killing. It was further argued that the evidence was not capable of sustaining a finding that the appellant had lied in circumstances amounting to an implied admission of guilt.

[38] The Crown led evidence from a number of witnesses in seeking to have the jury accept that the appellant had a second pair of thongs which were missing when the police searched the house.

[39] Brian McGill was a friend of the appellant. He said in evidence that the appellant always wore thongs, apart from when he was playing golf, when he would wear runners. When asked to describe the thongs, he said:

> "He wore those massage type thongs, like good ones to the pub. I believe the ones that he wore in the backyard, they could have been old massage ones, I thought they were more just like rubber thongs."[29]

[40] McGill believed that they were black thongs.[30]

[41] Under cross-examination, McGill confirmed that the appellant always wore thongs, except when he wore runners to the pub or to golf. When asked whether he knew how many pairs of thongs the appellant had as at May 2010, McGill agreed that he would not have any idea. Similarly, he agreed that he had no particular reason to take note of the particular style of thongs the appellant had at different times.[31]

[42] The appellant's son Jason Hunter was asked in evidence-in-chief whether he noticed what sort of footwear his father ordinarily wore. He answered:

> "For as long as I've known [Dad] he's always worn thongs, unless he was coming home from work. He was a truck driver, at work he'd have his boots on. But when he was around the house it was always thongs. I wouldn't have known what colour they were, what style, to me they were just, you know, the normal three plug thongs you get from Big W or somewhere like that." [32]

[43] He confirmed that this was the situation in 2010.

[44] Under cross-examination, he gave the following evidence:

> "Okay. So if I were to ask you about the style of thong that he had in May of 2010, for example, you'd say, 'I don't know'?-- As far as I know, I wouldn't know what style or what brand or anything like that. All I'd know is that they'd be the rubber thongs and the three plug ones.
>
> Okay. As to how many pairs of thongs he might have had at any given time, again-----?-- I have no idea."[33]

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28 AR 1395.
29 AR 174.42-46.
30 AR 174.48.
31 AR 179.40-50.
32 AR 205.31-40.
33 AR 207.51-59.

[45] The appellant's youngest son, James Hunter, also gave evidence. In his evidence-in-chief, he gave the following evidence:

> "... Your father, do you know what sort of footwear he would ordinarily wear?-- Just thongs.
>
> Can you describe the thongs?-- They were black thongs or white thongs.
>
> Did he have more than one pair?-- Yeah.
>
> Okay. So there was a black pair. Is that as much you can tell us about them?-- Yeah, they were just a black pair of thongs.
>
> Okay. What about - you said a white pair?-- Yep.
>
> What sort of thongs are you talking about there?-- Just your average pair of thongs from Woolworths or -----
>
> Okay. When you say that they are white, what part of the thong are you talking about?-- The top part.
>
> Is that the part your foot sits on or the straps? The part your foot sits on."[34]

[46] James Hunter was pressed on this evidence in cross-examination:

> "As at May of 2010 from your knowledge he only had one pair of thongs at that stage?-- I couldn't really tell you. I know he had a black pair and there's – I've seen white pairs and-----
>
> All right. Well, as to how many pairs he might have had over a period of time, I take it you'd say you've got no idea?-- I wouldn't have a clue.
>
> Okay. You can recall seeing a black pair?-- Yep.
>
> Whether he had one pair or more than one pair as at May of 2010, I take it you just – you wouldn't have a clue?-- No, I don't know how many pairs."[35]

[47] The evidence of these witnesses left open, at the very least, the possibility of the jury finding that, as at 6 June 2010, the appellant owned more than just a pair of black thongs and that the appellant had worn more than that pair of black thongs over the preceding three or four years. The learned trial judge, in his directions, fairly laid out the evidence to be assessed by the jury in that regard. If the jury then found that the appellant had lied about this in his interview with the police, then in the context of this case, where thong marks of a different pattern had been found in the blood near the deceased's body, it was proper for the jury to consider whether such lies about his footwear were probative of the appellant's guilt.

[48] Accordingly, I do not consider that the learned trial judge erred either in the formulation of the alleged lies concerning thongs, nor did he err in leaving to the jury the question as to whether any such alleged lies were capable of amounting to an implied admission of guilt by the appellant.

[49] Turning then to Ground 3, the appellant contended that the learned trial judge erred in directing the jury that they could find that the appellant had lied to police about

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34 AR 225.12-34.

35 AR 231.8-21.

not having seen or used the metal bar previously and that they could use this alleged lie as an implied admission of guilt.

[50] In his police interview the appellant:

(a) denied having ever seen the metal bar before he was shown it by police at the scene;

(b) denied having had that metal bar at his house before;

(c) denied having used that bar before;

(d) said he had "no idea at all" what the metal bar would be used for; and

(e) said that he had never used it and never seen it before.[36]

[51] As summarised above, at [21] and [22], there was forensic evidence at trial to the effect that the appellant's DNA was found on the "non-bloodied" end of the metal bar, and there were marks on it consistent with it having been used as the handle for a jack found on the premises. The appellant told police he used screwdrivers as a lever for the jack, but forensic testing of tools in the appellant's workshop revealed no markings consistent with any of the other tools having been used in that way.

[52] On this evidence alone, it was open to the jury to find that the appellant had not told the truth to the police about having no knowledge of and no previous association with the metal bar. And, given the clear evidence pointing to the metal bar being the murder weapon, it is equally clear that it was open to the jury to find that the appellant told this lie in order to disassociate himself from the murder weapon.

[53] In oral argument before this Court, counsel for the appellant sought to refine this challenge by contending that the direction given in respect of this lie was inadequate because, whilst the jury was told they could use this as a lie evidencing guilt, the jury was not specifically directed as to the reasons in this case as to why the lie might not be so reliable as evidencing guilt. Ultimately in this regard, counsel for the appellant was reduced to a submission that, in properly directing the jury as to their consideration of the evidence as to whether it was, in fact, a lie, the jury should also have been given directions that undermined that conclusion, in accordance with their assessment of lies more generally.

[54] These submissions, however, overlook two matters:

(a) The appellant's case at trial was first, that it had not been proven that he had told a lie with respect to the metal bar, and secondly, that in the context of the defendant's case that there was an intruder it would have been easier for the appellant to admit ownership of the metal bar.[37] It was never suggested that there was another reason for the defendant having made these particular statements to the police.

(b) Consistently with *Edwards v The Queen*,[38] the learned trial judge did instruct this jury that there may be reasons for the telling of a lie apart from the realisation of guilt, and did so in completely conventional and appropriate terms. It is difficult to see how that aspect of his Honour's direction could have been improved, on the current state of the authorities, in a case in which it was no part of the defendant's case to have proffered any reason or excuse for having told the lie.

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36 AR 1390.

37 Supplementary AR 76-77.

38 (1993) 178 CLR 193, per Deane, Dawson & Gaudron JJ.

[55] It is therefore clear that it was open to the jury to consider the appellant's lies concerning the metal bar to be indicative of guilt. There was no error in the directions given by the learned trial judge on this issue.

[56] Argument by counsel for the appellant before this Court was directed principally to Ground 1. It was submitted that the directions to the jury failed to differentiate properly between lies left to the jury on the basis that they were relevant to the appellant's credibility and those which were relied on as evidencing guilt on the part of the appellant.

[57] Counsel for the appellant argued that, in the circumstances of this case, there was a real risk that, absent appropriate directions, the jury would use credit lies as evidence of guilt. It was argued that this risk flowed from the way in which the prosecutor had addressed the case to the jury, pointing, for example, to:

(a) the prosecutor saying, in the course of the opening, that she would ultimately be arguing that the appellant's versions that there was an intruder in the house was false and manufactured to cover up the fact that the appellant has killed his wife;

(b) the appellant had told police lies about going for a walk on the beach at Kingscliff because he knew he was a suspect and to give the appearance of a grieving widower.

[58] In respect of the second example, the evidence at trial was that on 7 June 2010 and again on 8 June 2010, the appellant met with Deborah McNeven at Palm Beach. In the course of his discussions with her, he made statements which indicated he knew how the deceased had been killed. The appellant initially told police that, during this time he had been at Kingscliff. By that time, however, the appellant was under police surveillance. In an interview with police on 6 July 2010, the appellant admitted that he had lied to the police about being at Kingscliff, saying "I didn't want anybody to know where I was".[39]

[59] The appellant's submissions directed attention to the distinction between those lies which were left to the jury on the basis of being relevant to credit only and those which were relied on as inculpatory. It was argued that there was a significant risk in this case that the jury would misunderstand the significance of the credit lies and impermissibly use them as circumstantial evidence, proving the appellant's guilt. It was suggested that the learned trial judge had invited the jury to do just that, and that it was therefore incumbent upon him to give some direction to the jury warning them against the danger of misuse of the evidence. It was further argued for the appellant:

(a) In particular, the jury should have been directed that the evidence of the credit lies was only relevant to an assessment of the appellant's credibility and that if the jury found that the appellant had told a lie about any of the matters alleged by the Crown this was not evidence of guilt and it was not led for that purpose;

(b) The learned primary judge should have, but failed to direct the jury on how to treat the evidence of the appellant's accounts if they formed an adverse view of his credibility;

(c) The jury ought to have been warned not to jump from a conclusion that the appellant's account should not be accepted, to an automatic conclusion of

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39 AR 1419.

guilt and that if they rejected his accounts they should simply set the appellant's accounts to one side and consider the balance of the evidence to determine whether or not they were prepared to accept beyond reasonable doubt that the prosecution had proved his guilt;

(d) The jury should have been directed that, unless they were able to reject the appellant's accounts beyond reasonable doubt, they should acquit.

[60] In oral argument before this Court, counsel for the appellant asserted that, importantly, the jury had not been told that, should they find that the appellant had lied, this did not necessarily support a conclusion of guilt. It was argued that this was all the more important in a case such as the present where "the vast bulk of the evidence led by the Crown was designed precisely to prove that he had lied, in that general sense, about the intruder being responsible for the killing of his wife."

[61] It was said for the appellant that there was an insufficiency in the directions given by the learned primary judge because these directions failed to identify precisely what lies were said, as a matter of law, to be relevant to an assessment of the appellant's credit, as opposed to evidence which ought properly be regarded as circumstantial evidence which might or might not be accepted.

[62] To the extent that the learned primary judge's directions did deal with lies, it was argued for the appellant that these directions did not "descend into sufficient detail to properly direct the jury as to the appropriate assessment of the evidence and what they should make of it." Counsel for the appellant repeated the argument that the jury should have been told that if they did not accept the evidence about credit lies and consciousness of guilt lies, they should put that evidence to one side and evaluate whether the Crown had otherwise proved its case beyond reasonable doubt.

[63] It is correct that the prosecutor, when opening the case, referred to the appellant's version of there having been an intruder in the house, and then said:

> "That account, I'll ultimately argue was false. It was manufactured to cover up the fact that he had killed his own wife."[40]

[64] Whilst that statement may have flagged an argument that the appellant's lies about an intruder were indicative of guilt, that is not how the case was ultimately presented to the jury.

[65] Before addresses, the learned trial judge and counsel discussed the appropriate directions to be given by the judge in the course of his summing up. At that time the prosecutor made it clear that the Crown case put forward that only the alleged lies concerning the metal bar and the thongs were indicative of guilt, and that all other alleged lies told by the appellant went only to credibility. In the course of that discussion his Honour questioned whether other alleged lies, for example, in relation to travelling to Kingscliff, would also be relied on as evidencing guilt. This was expressly disavowed by the prosecutor. Counsel for the appellant was expressly asked whether he had any objection to the two identified alleged lies being put to the jury as indicative of guilt, and counsel expressly confirmed that, after consideration, he had no objection. The upshot of the discussion was that the learned trial judge would give an *Edwards* direction with respect to the two particular alleged lies.

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40 Supplementary AR 6.23-25.

[66] In the event, this is the way in which the case was presented to the jury in addresses. In the course of her address, the Crown prosecutor distinguished between alleged lies going only to credibility and those which she argued were indicative of guilt. For example, in relation to the appellant's alleged denial of what had happened to his wife, the prosecutor submitted to the jury:

> "That then brings me to the things that he said. The things that he said reveal that something happened between he and his wife. They reveal that he has a knowledge of how Vicki Hunter died, which he claimed not to have, and they also reveal that he can't be trusted at his word."[41]

[67] A little further in her address, the prosecutor said:

> "There are numerous inconsistencies in the various accounts that he's given of what happened this night, and those inconsistencies are such that they would lead you – that they make it difficult to believe what he is saying. And that's something that you intrinsically pick up on in your everyday lives. When people tell you something on more than one occasion. If the significant details of it change, then you intrinsically start to doubt what they are telling you, doubt the accuracy of what they are telling you, or doubt the honesty of what they are telling you."[42]

[68] The basis on which the prosecutor addressed the jury in respect of the two particular alleged lies, however, was quite different. In respect of the metal bar, the prosecutor said to the jury:

> "Why would Ian Hunter lie about that? Why would he lie and say that he had never seen it? And when asked if he had it at his house, he would say not. When asked if he'd ever used it, he would say no – and that's all at page 91 of that Exhibit 306, which is that final interview that he had with police. Why would he lie about that and say he had never seen it or touched it before. The reason is quite simple: to distance himself from the murder weapon. Why would he want to do that? Because he was the person who killed her."[43]

[69] Similarly, in relation to the alleged lie concerning the thongs, the prosecutor said to the jury:

> "Why would he lie about that? Why would he lie about how many pair of thongs he had? Because that would lead to the obvious question 'Where's the other thongs? Where's the other pair of thongs,' and the answer to that question would have implicated him in the killing of his wife. That's the reason he lied."[44]

[70] When one has regard to the way in which the evidence fell and the manner in which the case was presented to the jury, the structure of the learned trial judge's summing up was both logical and sensible. This was a case in which the prosecution alleged that the appellant had told numerous lies on different occasions, but relied on only two of those lies as being indicative of guilt. It was therefore appropriate for the learned trial judge, as he did, to commence his directions to the jury on lies with

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41 Supplementary AR 52.49-51.
42 Supplementary AR 55.49-59.
43 Supplementary AR 41.43-33.
44 Supplementary AR 50.37-43.

a completely conventional general direction with respect to lies which go to credibility. Having given that appropriate general introduction concerning lies going to credibility, his Honour then expressly focused attention on the two alleged lies on which the Crown relied as indicative of guilt. That this is the structure of the summing up is evident from the words his Honour used in prefacing the *Edwards* directions:

> "There are in this case two particular alleged lies which the Crown says you can use in another way as well as for assessing credibility. The Crown submits that the accused has told two lies which can be used by way of an implied admission that he killed his wife (underlining added)."[45]

[71] What then followed were, in my respectful view, appropriate and conventional *Edwards*' directions with respect to each of the two alleged lies.

[72] The sensible way in which the learned trial judge structured this part of the summing up, in my view, answers the appellant's complaints before this Court that the way in which his Honour summed up left a significant risk of the jury becoming confused as to the way in which they could deal with lies generally and lies relied on as indicative of guilt. The structure of the summing up made it clear that the general directions applied to all of the lies, and the specific directions related to the two lies "which can be used by way of an implied admission that [the appellant] killed his wife". There was no failure to differentiate between the two categories of lies. On the contrary, the summing up drew a clear and sensible distinction.

[73] The contention that the way in which the summing up proceeded left open a risk of the jury using credit lies as evidence of guilt does not sit well with the terms of the directions actually given. As I have already noted, the prosecutor clearly distinguished, in the course of her address, those alleged lies relied on as going to credibility and those two alleged lies relied on as indicative of guilt. The form in which the learned trial judge gave directions also made it very clear that there was a distinction between these two species of lies in terms which, in my view, would have been well understood by the jury.

[74] Criticism of the level of detail to which his Honour descended in respect of the lies going to credit is also, in my view, unfounded. The learned primary judge gave appropriate examples of the lies on which the Crown relied as going to credit by referring specifically to "the amount of his super payout as recounted to his son Jason and to the witness [McNevan], or the lie about his trip to [Kingscliff] when he was being followed by the police."[46] Importantly, as I have already said, his Honour identified precisely the only two alleged lies which were relied on as indicative of guilt.

[75] The appellant's complaints otherwise amounted to an assertion that the learned trial judge should have, but failed to, tell the jury how to deal with findings of lies that went only to credibility and not to jump from such findings to a finding of guilt.

[76] It will be recalled that, when summing up on lies going to credibility, his Honour said:

> "If you think that a person has told deliberate lies, you would assess anything he says with great care. But remember, even if you do not

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45 AR 880.59-881.8.

46 AR 880.1-8.

> accept the evidence of a person because you find him to be a liar, that does not prove the opposite of what he said. If somebody says the car was red and you think that's not the truth, it doesn't prove what colour the car was, or whatever the case may be. A lie doesn't prove the opposite of what's said in the statement."[47]

[77] The learned trial judge then clearly and distinctly moved to the specific directions concerning the two alleged lies relied on by the Crown as evidence of guilt. His Honour made clear the purpose for which the Crown relied on these two alleged lies:

> "Those two statements made on the 6th of July 2010 are alleged by the prosecution to be lies that you can use not simply to assess credibility, but also as evidence of guilt."[48]

[78] The learned trial judge then gave directions in relation to the two alleged lies in terms conformable with the requirements of *Edwards v The Queen*.[49]

[79] The structure of the summing up made it clear that the *Edwards*' directions related only to the two specific alleged lies and did not relate to the lies going only to credibility. This was not a case like *Zoneff v The Queen*, in which the prosecution had not presented the case as one in which the jury would be entitled to convict on the basis that any lies found would be a ground for an inference of guilt.[50] In *Zoneff* the trial judge, however, had given a direction to the jury about the significance of lies told by the accused in which he referred to the possibility that the telling of lies indicated a consciousness of guilt, but reminded the jury that there were many reasons why people lie, some of which were not consistent with guilt. The plurality in the High Court noted that *Zoneff* was an unusual case because not only had there been no such suggestion by the prosecutor during cross-examination, the prosecutor did not address the jury and accordingly there was no such suggestion at any later stage of the trial.[51] Their Honours said that in *Zoneff*, an *Edwards*-style direction was unnecessary and indeed undesirable in the circumstances of the case,[52] and then referred to the trial judge's evident concern that, having regard to some of the cross-examination of the defendant in that case, there was a serious risk that the jury might engage in an impermissible process of reasoning in relation to the matter of lies.[53] They said:

> "A direction which might have appropriately been given and which would have allayed any concerns which the trial judge may have had, in this unusual case, in which the issues may not have been defined as they might have been had the prosecutor made a speech to the jury, is one in these terms:
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> > 'You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the

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47 AR 880.39-54.
48 AR 881.18-22.
49 (1993) 178 CLR 193.
50 (2000) 200 CLR 234.
51 Gleeson CJ, Gaudron, Gummow and Callinan JJ at 244-245; [18]-[19].
52 245; [20].
53 245; [22].

> effect that just because a person is shown to have told a lie about something, that is evidence of guilt.'
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> A direction in such terms may well be adaptable to other cases in which there is a risk of a misunderstanding about the significance of possible lies even though the prosecution has not suggested that the accused told certain lies because he or she knew the truth would implicate him or her in the commission of the offence."[54]

[80] It is to be noted that a direction of the type referred to in *Zoneff* may well be required in a case when there is a risk of a jury misunderstanding the significance of possible lies. Whilst it is clearly necessary for *Edwards*-style directions to be given in a case where alleged lies are relied on as indicative of guilt, and a *Zoneff*-style direction may be necessary where there is a risk of misunderstanding, the mere fact that the Crown case includes allegations of lies going to credibility does not compel the giving of either of those style directions. In *Dhanhoa v The Queen*,[55] Gleeson CJ and Hayne J said:

> "It is not necessary for a trial judge to give a direction, either of the kind referred to in *Edwards*, or of the kind referred to in *Zoneff*, every time it is suggested in cross-examination or argument, that something that an accused person has said, either in court or out of court, is untrue or otherwise reflects adversely on his or her reliability. Where the prosecution does not contend that a lie is evidence of guilt, then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction. *Zoneff* was said to be an unusual case, and the direction there proposed was said to be appropriate where there is a risk of misunderstanding about the significance of possible lies. The present was not such a case."[56]

[81] The present case was also one in which, in my view, it was not necessary for the learned trial judge to go further than he did in the directions he gave to the jury about lies going to credit. As I have already said, his Honour drew a clear distinction between lies going to credit and the two specific lies relied on as indicative of guilt. In respect of the latter category his Honour gave clear directions as to how to approach that evidence. The directions his Honour gave generally in relation to lies concerning credibility were adequate. The way in which the case was presented, and summed up to the jury, was not, in my view, apt to lead to misunderstanding on the part of the jury as to the way in which they should approach and treat the relevant evidence concerning the two categories of lies.

[82] Accordingly, the appellant has not persuaded me that the directions relating to lies going only to credit were confusing and inadequate to guard against impermissible reasoning (Ground 1).

The appellant's lack of reaction to his wife's death

[83] In the course of her final address to the jury, the prosecutor referred the jury to evidence which had been led about the appellant's apparent lack of reaction on

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54 245; [23]-[24].
55 (2003) 217 CLR 1.
56 12, [34].

learning of his wife's death. This evidence concerned interactions between the appellant and ambulance officers and the police. A paramedic gave evidence that he was treating the appellant on the lounge room floor when another paramedic told him that there was a deceased woman downstairs with a metal bar next to her. The first paramedic gave evidence that the appellant "showed no reaction" upon hearing this.[57] The appellant was being treated for head injuries and associated trauma at the time that these observations were made. A medical practitioner subsequently diagnosed the appellant as suffering from some form of concussion.[58]

[84] The jury also had evidence that the appellant spoke to police at 12.40 pm on that same day and at the end of the interview police informed him that his wife had died. The appellant responded by saying that he had heard this news earlier that morning when he was lying on the floor. One of the police officers gave evidence that the appellant showed "no real reaction at all" to receiving the news of his wife's death.[59] He stated that he was surprised by the lack of reaction. Another police officer at the interview gave evidence that the appellant "did not show much of a reaction to this news".[60]

[85] After the interview with police, the appellant made a handwritten statement in the presence of his son and daughter-in-law, Jason and Louise Hunter. Louise Hunter described the appellant's demeanour as "very shaky" and that he "seemed very confused".[61] Jason Hunter described the appellant as being "very incoherent" with slurred speech and "shaky".[62]

[86] In an interview on 8 May 2010, the appellant told police that he did not know what to ask them and that "As soon as I start thinking about anything (INDISTINCT) broke down in tears" (sic).[63] During the interview, the appellant was shown his wife's watch. One of the police officers present gave evidence that the appellant did not show any reaction when seeing the watch.[64]

[87] On 9 May 2010, James Hunter picked the appellant up from hospital, and found the appellant outside, upset and crying.[65] The appellant resided with Jason and Louise Hunter after he was discharged from hospital. At different times, Jason and Louise Hunter observed the appellant upset, crying and drinking heavily.[66]

[88] Other witnesses, Scott Brown and Deborah McNevan, gave evidence of having separate conversations with the appellant in June 2010 in which the appellant became upset and cried when discussing his wife's death.

[89] The appellant's fundamental complaint was expressed in written submissions as follows:

> "Despite not addressing the issue in her opening, the Crown prosecutor made forceful submissions about the appellant's lack of reaction to learning of his wife's death. The effect of these

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57 AR 291.35.
58 AR 325-327.
59 AR 393.4-5.
60 AR 796.21.
61 AR 220.30-32.
62 AR 216.41-46.
63 AR 1102.43-44.
64 AR 398.43.
65 AR 233.44.
66 AR 849-850.

> submissions was that the appellant did not behave as one would expect a person in his position to behave in the circumstances. The jury was invited to infer from this aspect of the appellant's conduct that he was guilty of the offence."

[90] The appellant's submissions in support of the assertion that the trial miscarried due to the learned trial judge's failure to direct the jury about evidence of the appellant's lack of reaction at learning of his wife's death (Ground 4) proceeded, on the basis that the evidence had so little probative value that the learned trial judge should have withdrawn it from the consideration of the jury, or alternatively a very strong direction should have been given highlighting the dangers involved in drawing adverse inferences from a person's demeanour, particularly having regard to facts and circumstances of this kind.

[91] The fundamental difficulty with this line of complaint by the appellant is that, contrary to the basal submission, there was no invitation to the jury by the prosecutor to infer from this aspect of the appellant's conduct that he was guilty of the offence.

[92] In the discussion with counsel before addresses, the learned trial judge specifically asked the Crown prosecutor to identify any conduct of the appellant upon which the prosecutor would be submitting as constituting evidence of guilt. It is quite clear from the terms of that discussion with the learned trial judge that the prosecutor was not going to present to the jury a case that they should rely on the evidence they had heard of the appellant's apparent lack of reaction to infer that he was guilty of the offence.

[93] In the course of her address to the jury, the prosecutor spoke compendiously to two bodies of evidence. The first was evidence as to statements which had been made by the appellant to various people indicating knowledge on his part as to how the deceased was killed. The second was the evidence concerning his apparent lack of reaction to the news that his wife had died. In introducing this part of the address, the prosecutor said:

> "That then brings me to the things that he said. The things that he said reveal that something happened between he and his wife. They reveal that he has a knowledge of how Vicki Hunter died, which he claimed not to have, and they also reveal that he can't be trusted at his word."[67]

[94] The prosecutor then addressed, in turn, on the evidence relating to statements made by the appellant, and then on the evidence concerning his apparent lack of reaction to the news of her death. The prosecutor concluded that section of the address by saying:

> "But I said to you that these things he said show three things: one being there was an altercation, the second thing being it shows he has a knowledge of how she died, and the third thing that his statements and the things he said say about him is that he can't be trusted at his word."[68]

[95] The prosecutor then made the statement to the jury that I have set out above at [66].

[96] In short, the prosecution did not seek to rely on the appellant's lack of reaction as an implied admission or as a circumstance from which guilt could be inferred. The

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67 Supplementary AR 52.48-51.

68 Supplementary AR 55.43-59.

evidence about the appellant's apparent lack of reaction, together with competing evidence as to his apparent state of distress, was all evidence to which the jury could properly have regard in assessing the appellant's credibility. There was no suggestion at trial that this evidence should be excluded, nor was there any request for a specific direction in relation to this evidence. Indeed, to the extent that it is now submitted that this evidence should have been the subject of a "forceful direction", I consider that any such direction which might have raised even the possibility of the jury having regard to this evidence for the purposes of inferring guilt would have been adverse to the appellant's interests.

[97] Accordingly, I do not accept that the learned trial judge erred in the manner contended for in Ground 4.

The appellant's failure to ask what had happened to his wife

[98] The next ground of appeal, Ground 5, was that the trial miscarried due to a failure by the learned trial judge to direct the jury about the evidence of the appellant's failure to inquire about how his wife had died.

[99] The prosecution led evidence from investigating police that the appellant had never asked them what happened to his wife.[69] One of the detectives gave evidence that the appellant never asked him what had happened to the deceased.[70] When the appellant was interviewed by police on 6 July 2010, it was put to him by police that it was a "very notable thing" that at no stage had the appellant asked the police or made any inquiries as to what had actually occurred.[71]

[100] On several occasions in the course of her closing address, the Crown prosecutor made reference to this lack of inquiry on the part of the appellant for the purposes of contrasting that with evidence which had been led of statements made by the appellant to other people which tended to indicate that he had some knowledge of the way in which the deceased had been killed.

[101] Contrary to the submissions of the appellant before this Court, however, it is simply not the case that the prosecutor relied on this evidence to establish "consciousness of guilt".

[102] When summing up, the learned trial judge addressed the various categories of circumstantial evidence on which the Crown relied. Relevantly, he said:

> "Sixth, the knowledge or state of mind of the accused. The Crown points out that the accused knew how Vicki died. That's clear from the evidence of Mr Brown, of Jason Hunter and Ms McNevan – yet he had not been told by the police how she died; he agreed that he hadn't been. He didn't ask the police, that is odd in itself, and the media had been reporting that she died by a knife. How them, says the Crown, did he know the way she died in order to be able to tell those three people? In response the accused says, 'Well, James had been told by the police how she died. He [might have] passed it on at a time that nobody can remember or the accused might have overheard the police talking about it.' Alternatively, the defence says he might have guessed that was the cause of death. After all,

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69 AR 138; 141; 779.
70 AR 796.49-50.
71 AR 1421.

> there was talk of a bar in the first recording. Well, you listen to it and see whether you think that that is enough."[72]

[103] Counsel for the appellant conceded, quite properly, that evidence that the appellant did not make any inquiry of police about how his wife had died was admissible to show that he could not have found out how she died from police. It is clear from the manner in which the case was presented by the Crown prosecutor, and on his Honour's summing up, that it was not being put to the jury that this evidence was relied on as an implicit admission or as an individual circumstance from which guilt could be inferred. It was evidence against which the jury could make an assessment of the accounts given by the appellant and of his creditworthiness. It is also clear that any direction of the sort suggested by the appellant would have been adverse to the appellant's interests at trial.

[104] In my view, the appellant has not demonstrated the error contended for under Ground 5.

Directions on motive

[105] The appellant next contended (Ground 6) that the learned trial judge had misdirected the jury on motive. The appellant's central submission was:

> "The effect of the learned trial judge's direction ... was a recasting of the motive alleged by the prosecution from a desire to obtain the proceeds of the life insurance policy to enable the appellant to continue his excessive gambling to a desire to achieve financial security in his retirement."

[106] Evidence was led on the personal financial dealings and standing of the appellant and the deceased over a period of time up to the death of the deceased. This included:

(a) evidence of transactions on the various bank accounts and credit cards held by the appellant and the deceased;

(b) evidence of the extent of expenditure on gambling;

(c) evidence of their overall financial position, including their equity in their home;

(d) evidence of statements by the appellant that he and the deceased intended to sell their house and travel and work in the Northern Territory;

(e) evidence of the receipt of some $76,500 on 13 January 2010 by way of the appellant's superannuation payout. These funds were deposited into an account held by the appellant and the deceased. Some $26,000 of that was used to pay off credit cards and their home loan;

(f) evidence of continuing expenditure on the appellant's credit card for gambling.

[107] At trial, formal admissions made by the appellant included:

> "6. Ian Hunter and Vicki Hunter were the holders of Suncorp Life Insurance. Cover commenced on 6 November 2004 and was current when Vicki Hunter died. The policy was owned in joint tenancy. In the event of the death of Vicki or Ian Hunter, the level of cover payable was $180 726.
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> 7. On 18 May 2010, Ian Hunter telephoned Suncorp to request a claim form to place a claim on the joint life insurance policy. There was further contact through a firm of solicitors.

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72 AR 893.42-894.16.

8. The Suncorp Life Insurance policy referred to at paragraph 6 was a term life policy.

9. Vicki Hunter's superannuation account contained death cover insurance. It was a fixed insurance amount of $37 000. A claim has been made by solicitors acting as administrators of Vicki Hunter's estate.

10. Vicki Hunter was born on 23 March 1955 making her 55 years of age at the time of her death."

[108] The prosecutor commenced the relevant part of her address to the jury by saying:

> "That all then begs the question, 'Why would he kill his wife?' It's not necessary for me to prove why he would kill his wife. The reasons might be entirely personal to him and something that will never be known, but there is something here, a possible motive I would suggest, and it comes from their finances. They may have appeared to have been a normal happily married couple, but that doesn't mean that he had no motive. They weren't destitute. They had the house and they had equity in the house, but this was a man who wanted to retire at 55, who was saying his wife was going to retire that year, also at 55. His superannuation pay-out was all but used up by May 2010. Her superannuation pay-out at the 30th of June was worth around about $29,500 and whilst that would have accrued of course while she continued working, it wasn't enough to sustain them in retirement you would think.
>
> They could have sold the house of course. They had equity in the house, so they would have got some money which would have allowed them to go travelling for a period, but it wasn't really going to sustain the poker machine usage that Ian Hunter enjoyed when you think about how much of that superannuation pay-out had been used."[73]

[109] The prosecutor then addressed the jury on the evidence of poker machine usage, the receipt and application of money from the superannuation payout, and the financial feasibility of the appellant and the deceased being able to continue to fund their lifestyles. The prosecutor continued:

> "He was man who didn't want to work any more and you will remember that Robert Sellars had offered him some work at some point around April, perhaps a little earlier, just some casual work, and Ian Hunter had declined, assuring him that he was okay. So he didn't want to work any more, he was going through his superannuation money at speed, declined the offer of work, the money was running out. When it did, his wife was going to know their true financial positions and the proceeds of a life insurance policy would have enabled him to continue that excessive use of the poker machines and that's what I would suggest was his motive to kill her."[74]

[110] When summing up to the jury on motive, the learned trial judge said:

> "The prosecution alleges that the motive was to get $180,000 from the life insurance policy at a time of serious financial stress. The

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73 Supplementary AR 62.42-63.6.

74 Supplementary AR 64.56-65.8.

> defence submits that there was no such stress and that the financial position was trivial in the light of 37 years of stable marriage and happy family relationships."[75]

[111] His Honour then turned to summarise the competing arguments which had been advanced by the prosecution and the defence, and the evidence which had been referred to in respect of those competing arguments.

[112] The contention that the learned trial judge wrongly recast the motive alleged by the prosecution rests particularly on this statement by the judge to the jury:

> "You will consider their financial position and work out whether you think there were sufficient funds and whether you think that that was, on their standards, adequate for what they needed for maybe 20 years or more of retirement."[76]

[113] This sentence, however, needs to be read in its full context. The first of the competing arguments on which his Honour summed up concerned the prospect of the appellant earning further income from other work. His Honour continued:

> "Second, the prosecution says he had spent his retirement money, that is his superannuation, the $78,000, in less than six months and his Visa Card was now almost at its credit limit. Vicki had $30,000 coming to her when she retired but that wasn't very much to live on for the rest of their lives. The defence says, 'No, not so. There was still money at the bank and they were not in immediate desperate financial straits.' You will consider their financial position and work out whether you think there were sufficient funds and whether you think that that was, on their standards, adequate for what they needed for maybe 20 years or more of retirement.
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> The prosecution pointed out that they could not, after his retirement, after the accused's retirement, afford repayments on the house plus their living expenses, to which the defence responds that the uncontroverted evidence is that they intended to sell the house, it was being done up for that purpose, and they intended to become grey nomads in the Northern Territory."[77]

[114] His Honour then referred to the competing contentions in relation to the couple's ongoing financial capacity, whether they retained their home or went travelling, evidence about the appellant's knowledge of having a financial problem and evidence as to the appellant's and the deceased's respective states of knowledge in relation to their finances. His Honour referred to evidence of the appellant's credit card statements being in a locked cupboard with the documentation about the appellant's superannuation payout, and continued:

> "Well, yes, that's to be weighed up, too, but the one big thing that the defence says that you have to take into account against which everything else that have referred to pales into insignificance is the fact that there were 37 years of contented marriage. The marriage appeared to everyone, to every witness who spoke about it, as a normal marriage. There was no abnormal disharmony observed by

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75 AR 896.19-29.
76 AR 896.59-897.8.
77 AR 896.42-897.24.

> anyone, even by close family members, and the family members had adequate opportunities to observe the couple.
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> The prosecution says, 'Oh, yes, I suppose that's a countervailing factor.' They didn't really say very much about that aspect of it. It is a strong point for the defence. You have to take that into account."[78]

[115] I am not at all satisfied that the learned trial judge improperly recast the motive sought to be attributed by the prosecutor to the appellant. It is clear that the prosecution case was, relevantly, that a number of factors, particularly the appellant's gambling, had led to a situation of financial stress and that the motive for killing the deceased was to receive the $180,000 and thereby alleviate the financial difficulties. Part of the prosecution's case in this regard focused on the appellant's capacity to survive financially in the future. The learned trial judge appropriately summarised for the jury the Crown's contentions in that regard, and all the responses made to these points on behalf of the appellant.

[116] Finally on this point, it is to be noted that, when addressing the jury, the appellant's counsel also summarised the Crown contention on motive in similar terms:

> "The first thing that he has to have done in order to have killed her is to reach some conclusion in his own mind that it was necessary and what's suggested is that it was necessary because of his failing financial position; that he had to get his hands on this 180,000 so he could continue to play the pokies and live happily ever after. You might think none of that adds up as a legitimate motive for him to have killed Vicki because, firstly, his financial position wasn't that bad quite frankly, you might think. It's clear that he was playing the pokies and spending money and spending the money that had been deposited in January, but they were hardly bankrupt or about to go backwards. They had substantial equity in the house, there was still money in the bank. Why on earth, why on earth would someone, married for 37 years, suddenly in that position, say, 'My only way out of this is to kill my wife to claim $180,000 in insurance.' It wouldn't even clear the mortgage. So, you've had time to examine it. Does it make any sense?"[79]

[117] I am not satisfied that the learned trial judge misdirected the jury on motive in the way contended for by the appellant.

DNA evidence

[118] The final ground of appeal, Ground 7, is that the learned trial judge failed to direct the jury in relation to the evidence of DNA analysis.

[119] The DNA analysis evidence at trial was led from Ms Emma Caunt, a forensic biologist at Queensland Health Forensic and Scientific Services. Ms Caunt said that her work involved primarily the interpretation of DNA profiling results and reporting those results for presentation in court. She explained at some length the processes of DNA profiling, and also gave evidence about the analysis of mixed DNA profiles, DNA transfer, and the process by which DNA samples collected from a crime scene are compared with reference samples. Ms Caunt gave lengthy

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78 AR 899.

79 Supplementary AR 75.41-59.

evidence about particular samples submitted for analysis in this case, especially those which contained mixed DNA profiles, explaining on numerous occasions whether, in particular instances, it was or was not possible to reliably statistically evaluate the results.

[120] The samples which were tested for this case and the respective DNA test results were tabulated in Exhibit 85.

[121] None of this evidence was challenged at trial by the appellant. Indeed, the appellant's counsel at trial relied on this evidence in advancing the appellant's defence. For example, when addressing the jury the appellant's trial counsel said:

> "The finding of the unidentified male's DNA on the hairs found in Vicki Hunter's hand. This was just some unfortunate coincidence for the prosecution; that she just happened to handle a bank note or handle something else and yet what was tested was – what was swabbed was the blood that was on the hairs. Unidentified male. What an unfortunate consequence, coincidence.
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> Fortunate for Ian Hunter if you assume that he was innocent and look to see whether this evidence actually proves anything. Starting from the right starting point you might think, 'Well, what does that do?' You can't say that it's Vicki Hunter's hair because there is an unidentified male's DNA in that blood that's in the hair. You of course have DNA discovered in other locations and so it's not the case that there is no DNA everywhere else throughout the house but, for example, there's some inconclusive testing which showed the presence of someone else's DNA. We can't say that it shows categorically that it wasn't Ian Hunter but it raises the question. For example, looking at Exhibit 85, the schedule of fingernails of Vicki Hunter, it was in addition to her DNA, a minor profile of insufficient information for reliable interpretation. So it's not right to say that there was no-one else's DNA. There was someone's, we just don't know whose."[80]

[122] Before this Court, however, the appellant argued that the DNA evidence had "little probative value", and contended that without careful and comprehensive directions the jury was likely to have attached too much weight to the evidence of DNA analysis. It was argued that this is particularly so in relation to parts of the evidence that suggested the DNA of the appellant and the DNA of his wife were co-located, and in each case there were "significant reasons to be concerned about drawing an inference adverse to the appellant".[81] The appellant's submissions pointed to particular aspects of the DNA evidence, particularly relating to samples containing mixed DNA profiles, and advanced alternative theories as to how those profiles might have been obtained. None of the issues sought to be ventilated in this Court were raised at trial, and no directions with respect to these matters were sought from the trial judge.

[123] In advancing this ground of appeal, the appellant relied on the following observation by the ACT Court of Appeal in *Hillier v The Queen*[82]:

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80 Supplementary AR 80.54-81.20.

81 Appellant's submissions, [96].

82 [2008] ACTCA 3.

> "DNA evidence has undoubtedly made an enormous contribution to the criminal justice system. It has acquired a well deserved reputation for accuracy and scientific certainty. It is, however, challenging material for lawyers, judges and juries to understand and also to appreciate its proper limits. A jury is likely to give DNA evidence enormous weight. Accordingly, DNA evidence and the dangers of its possible misuse must be carefully and fully explained to juries."[83]

[124] It is instructive for present purposes to look at the case being considered by the ACT Court of Appeal in *Hillier* in order to put that observation by the Court in its proper context.

[125] Hillier was convicted of murdering his former de facto wife. On appeal, his conviction was set aside. The Director of Public Prosecutions sought leave to appeal to the High Court, and the High Court granted that leave, set aside the orders of the Court of Appeal, and remitted the matter to the Court of Appeal for rehearing. The judgment to which the appellant referred in the present case was the judgment of the Court of Appeal on that rehearing. The evidence at trial was that Hillier's former de facto wife had been found dead on the morning of Wednesday, 2 October 2002. No-one had had any contact with her since the previous Monday. There had been a fire in her bedroom, but the evidence demonstrated she had died before the fire. There was forensic evidence in relation to injuries she had suffered leading a pathologist to determine that the cause of death was neck compression. The prosecution's case was circumstantial. Relevant for present purposes is that one of the four components relied on by the prosecution was that there was evidence which demonstrated the presence of Hillier's DNA on the pyjama top the deceased was wearing at the time of her death.

[126] At trial, three experts gave evidence concerning the DNA analysis – two were called by the prosecution and the third was called by the defence. Of particular importance was a tape lift taken from the deceased's pyjamas and subjected to DNA analysis which was identified as "15C7". One of the prosecution experts said that, in relation to sample 15C7, the expert had obtained a mixed DNA profile that could have come from at least two individuals. It emerged after the trial, however, in circumstances which are not relevant for present purposes that a second DNA profile had been obtained from sample 15C7. This was labelled "15C7+", and was neither mentioned to the jury nor tendered. None of the experts at trial made reference to the result for sample 15C7+.

[127] When it subsequently emerged that there was this further sample, the ACT Court of Appeal received further evidence from the defendant's expert. This expert had been critical of the original sample 15C7 result because it was overloaded in terms of DNA. It is unnecessary for present purposes to go into the detail of the further scientific evidence which was adduced before the Court of Appeal. It is sufficient to note that the evidence of the defendant's expert, Dr McDonald, was noted by the ACT Court of Appeal to include the following:

> "99 When asked if his evidence would have been different at trial if he had been aware of item 15C7+, Dr McDonald responded 'Yes'. He continued:
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> > 'The result from 15C7+ confirmed the unreliability and irreproducibility of the minor peaks in the profile of the

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83 At [181].

> overloaded result of 15C7 which in turn compromised the interpretation of those peaks. The correct procedure in a situation of a clear case of overloading as exists for 15C7 is to rerun the sample with less DNA as for 15C7+ and interpret the results accordingly. The nature of the testing is that the SAMPLE is overloaded NOT individual peaks as ALL are amplified together as the same sample. As such the entire SAMPLE has to be treated to rectify the problem. The only result confirmed by the re testing was the profile of the deceased and the existence of a minor contribution of "other" DNA. No meaningful assessment of a minor profile is possible.'"[84]

[128] Each of the DNA experts who had given evidence at trial gave oral evidence before the ACT Court of Appeal. There was a clear divergence between the opinions of those experts. So far as the defendant's expert was concerned, the Court of Appeal said:

> "114 Nonetheless, we consider that Dr McDonald was and is a truthful witness, who was genuinely endeavouring to assist the Court. His expertise is unquestionable. Were he to give the evidence that he now says he would be able to give, in the light of 15C7+, a jury would have to give it serious consideration."[85]

[129] The Court of Appeal concluded its analysis of the experts' evidence before it saying:

> "119 At the end of the day therefore, the issue remains firmly joined between the Crown experts, on the one hand, who insist that 15C7 can be used in conjunction with 15C7+ as the basis for their conclusions, and Dr McDonald who now says this cannot be done. He insists that had he known of 15C7+, he would have confronted the Crown experts directly, rather than embarking upon statistical calculations based on wholly unreliable material."[86]

[130] When analysing whether there were proper grounds to set aside the conviction and order a further trial, based on the impact of sample 15C7+, the Court of Appeal said:

> "154 There is no doubt, in our minds, that Dr McDonald ought to have been much more forthright in expressing the views that he now says he always held regarding 15C7. There is equally no doubt that 15C7+ represents a powerful tool, in the hands of an expert, in attacking the conclusions reached by the Crown witnesses, and that it graphically demonstrates a number of the points that Dr McDonald says he would have made had he had it in his possession at the time of trial. The question is whether what he now says he would have done, and armed with 15C7+, would do in any future trial, provides a proper basis for setting aside Mr Hillier's conviction."[87]

[131] Their Honours then discussed the distinction between "fresh evidence" and evidence which is merely "new" and the law in the Australian Capital Territory

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84 At [99].
85 At [114].
86 At [119].
87 At [154].

concerning the receipt of evidence by the ACT Court of Appeal. In respect of the particular DNA evidence with which the appeal was concerned, the Court of Appeal said:

> "173 In the appeal before this Court, the starting point is to observe that the DNA evidence formed an essential part of the Crown's case against Mr Hillier. That case was entirely circumstantial. It is highly likely that the jury would have regarded the fact that his DNA was on the collar of the deceased's pyjamas as strongly probative of his guilt.
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> 174 The evidence given by Dr McDonald at trial did little to assist Mr Hillier in meeting the Crown case. In substance, he agreed with Ms Ristevska and Dr Roberts that Mr Hillier could not be excluded as a contributor to the minor component identified in 15C7. Of course, his assessment of the probability that the DNA might have come from some other source differed from theirs. Nonetheless, he acknowledged that the chances of that being the case were remote. In effect, the issue between Dr McDonald and the Crown's DNA experts, so far as the jury were concerned, was his opinion that Mr Hillier's DNA could have been transferred to the pyjamas via the children, an opinion they obviously rejected.
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> 175 The case takes on a completely different complexion when Dr McDonald says, as he now does, that in the light of 15C7+, the DNA evidence linking Mr Hillier with the deceased's pyjamas is essentially worthless. If one in three members of the community would produce the same results as are shown in 15C7+, that evidence ceases to have any real probative value."[88]

[132] The ACT Court of Appeal then traversed the relevant authorities concerning whether a miscarriage of justice had occurred at trial, and then concluded:

> "181 DNA evidence has undoubtedly made an enormous contribution to the criminal justice system. It has acquired a well deserved reputation for accuracy and scientific certainty. It is, however, challenging material for lawyers, judges and juries to understand and also to appreciate its proper limits. A jury is likely to give DNA evidence enormous weight. Accordingly, DNA evidence and the dangers of its possible misuse must be carefully and fully explained to juries. This case indicates a need for the urgent preparation of universally acceptable protocols so as to ensure, among other things, that there is full and unmistakeably explicit disclosure to the defence of all DNA testing steps and results, and pre-trial exchange of expert reports about DNA evidence. It must be rare that an expert such as Dr McDonald casts such a degree of doubt upon the opinions expressed by DNA experts called by the Crown.
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> 182. The fact that Dr McDonald did not express himself as he should, and as he would have liked to have done, at the trial, is

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88 At [173]-[175].

> no basis for ordering a new trial. However, his evidence that he did not have knowledge of what he regards as a critical document, and his uncontroverted evidence that he would have given quite different evidence on the basis of that document is sufficient in our view to say that this verdict cannot be permitted to stand. It is, in a relevant sense, 'unsafe and unsatisfactory', though not so as to preclude a new trial if all relevant evidence is placed before the jury. See generally *Tran v The Queen* (2000) 105 FCR 182 at 209-210. There should, in our view, be a new trial."[89]

[133] The particular circumstances considered by the ACT Court of Appeal in *Hillier v The Queen* were palpably different from those in the present case. In this case, there was no challenge to the accuracy of the DNA results. There was no challenge to or issue raised with respect to the analysis of those DNA results. The unchallenged DNA evidence was clearly relevant to the prosecution case, and was relied on by the defence. When summing up, the learned trial judge accurately referred the jury to the competing contentions which had been made by the prosecutor and defence counsel with respect to the relevance of the DNA evidence to particular aspects of the case. The adequacy of these directions was not challenged on appeal.

[134] Given the way in which this case was presented to the jury, it was not one in which it could be said that the DNA evidence, and the limitations on the use of the DNA evidence, were difficult to understand. In my view, there was no need for any further particular direction in respect of the DNA analysis evidence. This ground of appeal has not been made out.

Conclusion

[135] For these reasons, the appellant has not, in my view, demonstrated any error in the learned trial judge's directions to the jury. The appeal should be dismissed.

[136] **APPLEGARTH J:** I agree with the reasons of Daubney J and with the order proposed by his Honour.

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89 At [181]-[182].