

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Johnson* [2015] QCA 90

PARTIES: **R**  
**v**  
**JOHNSON, William Gerard**  
(appellant)

FILE NO/S: CA No 201 of 2014  
SC No 638 of 2011

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 24 July 2014

DELIVERED ON: 22 May 2015

DELIVERED AT: Brisbane

HEARING DATE: 11 February 2015

JUDGES: Margaret McMurdo P and Gotterson and Morrison JJA  
Separate reasons for judgment of each member of the Court,  
each concurring as to the order made

ORDER: **The appeal against conviction is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant pleaded guilty to manslaughter but not guilty to murder and guilty to two counts of wilful damage – where the prosecution did not accept his guilty pleas in satisfaction of the indictment and proceeded to trial – where the appellant was found guilty after trial of murder – where the appellant was in a relationship with a woman who also had a long term partner – where the appellant’s relationship with the woman ended and the appellant was very distressed – where the appellant had a long history of alcohol consumption and had a blood alcohol of 0.242 at the time of the offence – where, at about 1.00 am, the appellant caught a taxi to the woman’s house which she shared with her partner – where the appellant took a knife and a bottle of wine – where the appellant sat on the deck outside the front door and drank the wine – where the appellant cut the tyres on the woman’s car – where the appellant phoned her several times, the last time to say goodbye before he killed himself – where the appellant then knocked and kicked on the door to wake her up – where the appellant used the knife to cut the flyscreen – where the woman’s partner answered the door and asked the woman to call the police – where the

appellant and the woman's partner argued verbally – where the woman's partner was stabbed with the knife held by the appellant – where the appellant then tried to stab himself – where the appellant repeatedly said in police interviews that it was his fault and that the woman's partner did not attack him – where the appellant claimed that the woman's partner must have run into the knife when he rushed at the appellant – where the appellant denied stabbing the woman's partner – where the appellant claimed he took the knife to the woman's house intending to kill himself and not intending to kill or do grievous bodily harm to the woman's partner – whether the verdict was unreasonable

*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: M Copley QC for the appellant  
B J Merrin for the respondent

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

- [1] **MARGARET McMURDO P:** The appellant, William Johnson, was charged with murdering Mark Hutton on 26 September 2010. When arraigned at trial in front of the jury panel he pleaded guilty to manslaughter but not guilty to murder and guilty to the two counts of wilful damage. The prosecution did not accept his guilty pleas in discharge of the indictment and the trial proceeded over the next eight days. He was convicted of murder. He appeals against that conviction on the ground that the verdict was unreasonable.
- [2] The resolution of that question requires this Court to consider whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of murder: *SKA v The Queen*.<sup>1</sup> This Court must therefore review the evidence at trial.

### **The evidence at trial**

- [3] Tracy Johnston gave evidence that the deceased was her fiancé and partner for 12 and a half years. In 2005 she met the appellant and his wife, Michelle. He began spending a lot of time at the hotel where she worked. At that time the deceased was working away from home a lot. She had had cancer and her mother was suffering from terminal cancer. The appellant was very supportive and in early 2008 their relationship became sexual. She was still living with and in love with the deceased but he was often away. She told the deceased she and the appellant were in an intimate relationship. The appellant left for an overseas work trip for three or four months. Her relationships with the deceased and the appellant were complex and emotional. When the appellant returned to Brisbane she told him that she hoped she could mend her relationship with the deceased. The appellant said he did not think that would happen even though that was what she wanted because no man could forgive her for what she did to the deceased.

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<sup>1</sup> (2011) 243 CLR 400, 408 – 409, [21] – [22].

- [4] The appellant and Tracy resumed a sexual relationship as well as a business relationship in that she operated her business from his inner city residence. She sometimes stayed with him overnight and on one occasion for about a week. Her relationship with the deceased, however, continued to improve. The appellant was unhappy about this. He became more obsessive and their relationship was up and down. The appellant and his business partner had a five per cent share in Tracy's business. Once the business was successful, she planned to pay him back for his investment in setting up her office and for rent.
- [5] The appellant drank a lot of alcohol and a month or two before the deceased's death, he passed out. She called an ambulance. He was taken to hospital and was told he had been drinking too much. Meanwhile, she and the deceased had become very close and he was very supportive.
- [6] On Thursday, 23 September 2010 she was at work when the appellant went to lunch. He normally stayed in contact with her during the day but she heard nothing from him. She left a note on his bed in his living quarters above her business, stating:
- “P.S.
- Clearly lunch was very good😊.
- We had an absolutely ‘silly/blonde/whatever else’ you want to call it day!  
Love you lots. See you in morning. Going home to bed now...”<sup>2</sup>
- [7] She explained that “PS” referred to a movie they had watched “P.S. I Love You” and was their shorthand for “I Love You.”
- [8] When she returned to work the next day she had heard nothing from the appellant. She was angry and worried. She had unsuccessfully tried to locate him. He walked into her office mid-morning, smelling of alcohol. She realised he had been out drinking all night even though he almost died from alcohol consumption a month or so earlier. He had responsibilities: children and a business. When she asked him where he had been he swore at her and was “wild, raging, furious.” He said he was going to go out and get drunk that night. She was terrified. Her sister, Sheree Johnston, who worked in Tracy's business was present. Tracy realised that she wanted to be with the deceased and that she needed to end her relationship with the appellant, even if this meant she would lose her business. She packed up everything in her car and left the premises for a business meeting.
- [9] She spent the next day, Saturday, 25 September, with the deceased watching the football and relaxing. She went to bed whilst he watched another football match. She woke up in the early hours of Sunday morning to hear three really loud bangs and she and the deceased ran downstairs. She had turned off her phone because she had been receiving messages from the appellant and she did not want to deal with him. She recognised the appellant's voice, “yelling, ranting and screaming.” The deceased yelled out in a really deep, loud voice: “Who's out there, I don't even know you.” The appellant screamed out something like: “Get out here you bastard. Get out here you fucking...you couldn't have the imagination to know who I am.” The deceased told her to ring the police. The appellant was kicking at the glass in the

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<sup>2</sup> Exhibit 6, AB, 428.

door until it broke. There was glass everywhere. She was having trouble dialling the numbers on her phone but eventually dialled 000. The deceased said: "Right, mate. You've smashed my door. That's it" and walked towards the front door. She turned on a lamp. The deceased told her to stay inside and shut the door.

- [10] She heard: "Like, two bodies, like, banging together or something like that and sort of a shuffle, like a shuffle, like of shoes, sort of thing, past the glass." She was still speaking to the 000 operator. The deceased called her name and she ran to him. There was blood everywhere. He said he had been stabbed. The appellant was standing behind him on the grass. She said: "God, what have you done?" He was hitting his chest, something he did when he was upset. The deceased fell on top of her and the door shut. Following the directions from the 000 operator she provided assistance to the deceased until the police and ambulance arrived. The deceased later died at their home.
- [11] Tracy's sister, Sheree Johnston, confirmed that on the Friday before the deceased died the appellant was very aggressive towards her sister. He called the deceased: "Your precious little Mark" and said: "You just want to go back to fucking him, and, I'd smash his fucking head in." Her sister was extremely distressed. She packed all her things and left for a lunchtime meeting. Sheree later spoke briefly to the appellant about her sister. He said that she had left, taken "all her computer and stuff" and he knew she would not be coming back. In cross-examination she agreed that the deceased worked out every day whereas the appellant was small and weak and there was no way he could beat the deceased in a fight. She also agreed that the deceased was drunk that morning after being out all night.
- [12] Ms Gina Carro was in the bar of a Woolloongabba restaurant with a friend on the evening of 25 September when she met the appellant for the first time. They drank some wine and later all went to his house where he played some music and showed them around. She commented that a photograph he had on display depicted a beautiful woman. He agreed and said she was his girlfriend "technically." He talked about work, his family and his ex-wife. He was the "stereotypical Irishman. Happy, chatty, funny." When she and her friend left his home he appeared a little less cheery, and a little more serious.
- [13] The appellant left the following voicemail messages on Tracy's phone on 26 September. The first was at 12.37 am:

"Since you clearly don't want to have any contact with me, that's fine. But, I do actually need to understand where I am going with the offices. So please, email me what you think you need to do, with where you're going. Ok [unintelligible] I think that will be quite appropriate. But, if you don't-want-ta do that, then I'll protect my position as well. Your choice."

The second was at 12.44 am:

"You know what? You never fuckin' answer your phone. Well I'm tired of it now. Tell Mark, be on his fucking things. I'm coming over, I'm gonna get him,<sup>3</sup> and I'm gonna be fuckin' vindictive."

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<sup>3</sup> There was discussion at the hearing of the appeal as to whether the recording was "I am gonna get him" or "I am gonna get in". I have listened to the tape which is by no means clear but it sounded like "I am gonna get him". But in any case this is immaterial as nothing in this appeal turns on this possible discrepancy.

The third was at 1.22 am:

“Goodbye my sweetheart. I’m, ah, sitting outside your door at the present moment and it’s gone. So, goodbye.”

He telephoned at 2.47 am but left no message. At 2.56 am he telephoned and said:

“Tracey, get out of bed. Mark’s not in our conversation. Not in the fuckin’ mood now. So please do it.”

- [14] A taxi driver collected the appellant at 1.09 am from his home at Woolloongabba and took him to the deceased’s home at Camp Hill. The trip took 10 minutes. The appellant was carrying a big bottle.
- [15] A number of neighbours gave evidence that they were woken in the night by loud sounds and aggressive yelling. Mr Andrew Walls lived across the road from the deceased. He was awoken by one man screaming loudly at another man in the vicinity of the deceased’s house at about 3.00 am. One man was screaming for the deceased to come out and face him. This man said: “Face me, you fucking bastard; don’t you have a conscience.” He was gesturing rather aggressively towards the deceased in strong language using “Fs” and “Cs.” He heard a number of bangs and thuds, like kicking in a door or panel. He heard glass breaking and a female scream. He heard the deceased say words to the effect of: “You’ve fucking smashed my door. Look what you’ve done to my door.” Not long after it got very quiet. The man screamed: “Come out of the fucking house,” and said the deceased had “no fucking conscience” and he also yelled out “Tracy”.
- [16] Police located the appellant in a nearby street at 3.20 am. The appellant had chest injuries and the police were keen to get him assistance. They recorded their conversation. The appellant said: “It’s over.” “It’s done.” He would not let the police touch him. The police arrested him for the stabbing. They attempted to calm him down. He said he had stabbed himself. They asked him why and he responded: “Because I fucking could.” One police officer said: “What about old mate up the road?” The appellant responded: “I take responsibility for that as well.” Police warned him and informed him of his rights. The appellant responded: “Yes, I stabbed him, right.” He put a knife on the ground and agreed that it was the weapon he used. He said:

“And I used it, and yes I stabbed him. And um I have no, absolutely [indistinct] problems with that whatsoever [indistinct].”

Police asked why he stabbed him. He responded: “Don’t, don’t, I, it’s a separate issue.”

One police officer said: “So keep, keep telling me, what happened, Willy?” The appellant responded: “No, no, no, no, no, my fault --...my total responsibility. Right.” He said he stabbed the deceased once, in the stomach he thought, adding: “Honestly, I take full responsibility for it.”

- [17] Police next recorded an interview with the appellant at 6.11 am at the hospital where he was being treated. When police asked him about the incident he said he was annoyed. He apologised and asked about the deceased’s wellbeing. The police said they would try and find out how he was. The appellant responded:

“Fucked this up, haven’t I [indistinct] well as long as he’s ok, I don’t mind I’ll take the consequences, I always have, my responsibility, and, ah. Sorry.”

He clarified that he was taking responsibility for injuring the deceased, adding:

“I stabbed him. And then I stabbed myself, unfortunately I managed to survive it, so, it’s just great.”

- [18] He explained that he took the knife with him to the deceased’s home. He added: “Totally hundred percent responsibility, it’s my fault.” He repeated that he stabbed the deceased once to the body, he thought it was the stomach, because the deceased was giving him grief. He then stabbed himself. He denied that the deceased attacked him first. He repeated that it was his fault. He denied that the deceased said anything before the appellant stabbed him, again repeating that it was his fault. He added: “I just hope he gets through.” The police officer asked whether the incident was “over love.” The appellant once more repeated that it was his fault and asked: “What am I looking at time-wise?” He said he had been drinking Bacardi rum and coke and wine. He regularly drank 10 cans of beer a day. He agreed when asked by the police officer if he was in control. When asked why he went to the deceased’s home he said he went there to injure himself. When asked how the deceased came to be stabbed, he responded that he “just got annoyed” ... “I mean I’ve told you I’m guilty, I’ve done it...I was an idiot.”
- [19] Later the police told him that the deceased had died. He repeated: “It’s my fault, it’s my fault. My responsibility.” He told police he caught a taxi from his home to the deceased’s home. He went there wanting to kill himself. He kicked at the door and the deceased came out. The appellant said that he “just lost it”. The deceased was annoyed but the appellant denied that the deceased “went for him” and yet again repeated that it was his fault. He said he intended to commit suicide on Ms Johnston’s doorstep and he had a kitchen knife in his pocket. The police asked whether he meant to stab the deceased. The appellant repeated: “I was so annoyed...so I just fought.”
- [20] Ambulance officers recorded that the appellant appeared intoxicated. A blood sample taken at 3.55 am showed a blood alcohol concentration of 0.242 per cent.
- [21] Psychiatrist, Dr Benjamin Duke, interviewed the appellant on Monday, 27 September 2010 at 9.30 am at the Princess Alexandra Hospital. He said that he had argued with his partner and he thought their relationship had terminated. He went out on the Saturday night and drank between 15 to 20 standard drinks. He then went to his partner’s house intending to kill himself. He could not recall or was unwilling to give details of the subsequent events. The appellant said that he had consumed 10 alcoholic drinks a day for 30 years with no alcohol free days. Alcohol generally acts as a depressant and impacts on a person’s level of consciousness and ability to think in a clear and succinct manner. Someone with a blood alcohol level of 0.242 who had a history of heavy daily alcohol use for many years may not necessarily show external signs of intoxication such as slurring of speech or slow thinking. A person who did not drink heavily with such a blood alcohol level would have significantly impaired behaviour including disinhibition and impaired ability to think out actions and implement plans. But for someone who had a tolerance for alcohol, there may be very little if any obvious signs of impairment. Given the appellant’s alcohol history, the alcohol he had consumed that night would not have caused a gross impairment of his cognitive functioning.
- [22] Dr Donal Buchanan, a forensic medical officer, examined the appellant at the Princess Alexandra Hospital at 2.50 pm on 27 September 2010. The appellant’s wounds had been sutured and did not require surgery. He was on an intravenous drip. A CT scan showed a three centimetre laceration to his liver. Alcohol is a

depressant and a disinhibitor causing changes in mood and behaviour. It increases risk taking and gives a false sense of confidence. It affects a person's perception of their environment, the ability to make appropriate decisions and judgment. People make decisions when drunk which they would not make when sober. Someone with a blood alcohol level between 0.15 and about 0.25 will have marked slurring of speech, clumsy hand movements and unsteadiness on the feet, tending to staggering, particularly when turning. If someone has a tolerance to alcohol they will show less of these signs of intoxication. A person with a blood alcohol level of 0.242 would have loss of inhibition, loss of restraint, increased risk taking, mood and behaviour changes, volatile emotions and severely impaired decision-making. An ordinary person at that level of intoxication would have difficulty trying to converse with anyone in a sensible way. Even with the appellant's tolerance to alcohol he would have been intoxicated. The appellant's tolerance to alcohol meant he would have a reduced degree of impairment. While his capacity to function might be better than that of an ordinary person because his visible co-ordination was not as impaired, his cognitive ability was severely impaired. He would have been disinhibited with a reduced ability to perceive what was going on around him and to make decisions in response to those perceptions.

- [23] Pathologist, Dr Kathryn Urankar, conducted an autopsy on the deceased's body. He suffered a single wound to the chest which penetrated the entire wall of the right ventricle of the heart entering through the anterior chest wall and continuing through and up horizontally, backwards and upwards. The wound was over 85 millimetres deep. When shown the kitchen knife taken from the appellant, she said that it was capable of inflicting that injury. It was difficult to estimate the force used; this would depend on the sharpness of the blade, skin and tissue resistance, and the depth of penetration. In cross-examination Dr Urankar described the force used in light of the depth of the wound as slightly more than mild; it was modest force.
- [24] The appellant gave the following evidence. He was a qualified chartered accountant. Although he knew of the deceased from Tracy, he had never met him. He understood that Tracy and the deceased were just housemates and friends. He stayed out all night on the Thursday before the killing and returned home on the Friday morning at about 9.30 or 10.00 am feeling dreadful. He had an argument with his ex-wife about access to his children on the weekend of his 50th birthday which was approaching. He was extremely hung over. He was drinking all Thursday until 1.00 am Friday. He argued with Tracy. The combination of his bad mood after the phone call from his ex-wife and his hangover caused him to lose his temper with Tracy. He agreed with her evidence as to his behaviour and statements of her business. She left at about 11.30 am or 12.00 pm taking her laptop and papers. He assumed that this was just another argument and that their relationship would return to normal.
- [25] The next day, Saturday, 25 September he went to a nearby hotel at 10.00 am and read the morning papers over a drink. At about 12.30 pm he went to a nearby restaurant and continued drinking. He and a female friend returned to the hotel to watch the AFL grand final and later returned to the restaurant. During the evening he met Ms Carro and her friend and they continued drinking. He enjoyed their company; they were articulate and intelligent and they came to his home. After they left, he continued drinking until he caught a taxi to the deceased's place. He took a knife from the kitchen, a bottle of wine and his mobile phone. He intended to kill himself there and that Tracy would find him. He sat on the deck outside the front door and

drank the wine. He cut the tyres on Tracy's car. He phoned her several times, the last time to say goodbye before he killed himself. He then knocked and kicked on the door to wake her up. He smashed the glass panel in the bottom of the door. The whole incident happened quickly. He cut the flyscreen door. The deceased shouted something like: "I am going to have you, mate." The deceased came outside and the appellant moved back. The appellant was yelling for Tracy; he wanted her to come out. He was using foul language and calling her disgusting names. The deceased rushed at him. The next thing the appellant remembered was the deceased called out to Tracy: "I've been stabbed." He must have run into the knife when he rushed at the appellant. The appellant did not stab him. The knife was in his hand as he had been using it to cut the flyscreen. The deceased went back inside and the appellant walked onto the grass where he shouted out and repeatedly stabbed himself in an attempted suicide. He did not intend to hurt the deceased. He "just wanted it to end." He had no animosity towards the deceased and was not jealous of him. He believed he and Tracy were in a monogamous relationship.

- [26] In cross-examination he stated that he thought his relationship with Tracy would continue to progress. But he understood their relationship was over when she texted or emailed him saying she would not be back. He was not sure but he thought he probably received this message on the Saturday. He was then certain that their relationship was finished. He maintained, however, that he considered Tracy's relationship with the deceased was simply a friendship and that they shared the same house. He agreed that Tracy was the love of his life; that their relationship had just ended; and that she was living with a man with whom she had been in a relationship for 10 years. He agreed that he had a greater tolerance for alcohol than an average social drinker. Whilst he agreed he was able to make decisions on the night of the killing despite his intoxication, he considered his decisions were impaired. He gave the taxi driver directions to the deceased's house and waited for change when he left the taxi. He agreed that when he pressed the knife into own his chest he did not press it very hard and his wounds did not bleed. He agreed that he did not try to kill himself before the deceased was stabbed. The knife was in his hand because he was cutting the flyscreen.

### **The appellant's contentions**

- [27] The appellant contends that there was a paucity of evidence from which it could be inferred that the appellant intended to kill or do grievous bodily harm to the deceased. The appellant had never met the deceased. A reasonable inference open on the evidence was that the appellant went to the deceased's house intending to behave in a way designed to attract Tracy's attention and to embarrass her. The appellant's knifing of the tyres before the killing and his self-inflicted injuries afterwards are consistent with this. He had long been tolerant of Tracy's contact with the deceased and nothing had happened to change that. He was irrational, maudlin and self-indulgent but that did not equate to a murderous intent. There was only one wound to the deceased. The pathologist said it was inflicted with mild to modest force. There were no eyewitnesses. It could have unfolded as the appellant stated in his evidence by the deceased moving towards the appellant who was holding the knife after cutting the flyscreen. The deceased's wound track was not suggestive of a stabbing motion. Nothing said by the appellant after the incident or in his evidence assisted the prosecution case as to murderous intent. Indeed, he expressed concern for the deceased's well-being. Tracy's evidence was that the appellant had not manifested jealousy towards the deceased in the weeks preceding the killing. The jury could

not exclude the reasonable possibility that the deceased ran into the knife when he collided with the appellant in the dark. The jury verdict was unreasonable and against the weight of the evidence. The appeal should be allowed. The verdict of guilty set aside and a verdict of acquittal entered.

### **Conclusion**

- [28] The jury were entitled to reject the appellant's evidence that he did not intend to hurt the deceased and that the stabbing occurred during the confusing altercation when the deceased ran at him. Although the appellant was extremely intoxicated, he was a heavy drinker who had developed a remarkable tolerance to the consumption of large amounts of alcohol. The jury were entitled to conclude that as the night wore on he became more and more distressed, fuelled by his increasing intoxication, at the break-up of his relationship with Tracy and that he went to her home to protest about it. Even if he took the knife to hurt himself at her home which she shared with the deceased, the jury could have reasoned that his intent changed when he saw the deceased. He had good reason to be upset with the deceased who continued to have a positive, ongoing relationship with Tracy. The appellant knew his relationship with her was over. Sheree's evidence was that the appellant spoke aggressively about the deceased the Friday before the killing. The jury were entitled to conclude that the only reasonable hypothesis open on the evidence was that when the appellant saw the deceased he stabbed at him with the intent, albeit a drunken one, of at least seriously hurting him. It was well open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. This was not inconsistent with the appellant later being remorseful and concerned for the deceased's welfare. It follows that the verdict of guilty to murder was reasonable and was not against the weight of the evidence.
- [29] For these reasons I would dismiss the appeal against conviction.
- [30] **GOTTERSON JA:** I agree with the order proposed by McMurdo P and with the reasons given by her Honour.
- [31] **MORRISON JA:** I have had the advantage of reading the reasons of McMurdo P and agree with those reasons and the order her Honour proposes.