SUPREME COURT OF QUEENSLAND

CITATION:	*R v Oliver* [2016] QCA 27
PARTIES:	**R** **v** **OLIVER, Anthony Charles** (appellant)
FILE NO/S:	CA No 326 of 2013 SC No 479 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 5 December 2013
DELIVERED ON:	16 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2015
JUDGES:	Holmes CJ and Gotterson and Morrison JJA 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 – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was found guilty of murder on 5 December 2013 in the Supreme Court in Brisbane – where the appellant filed a notice of appeal against his conviction on 20 December 2013 – where it was not contested that the appellant killed the deceased – where the appellant denied an intent to kill – where the sole ground of appeal is that the learned trial judge erred in failing to direct the jury not to use consciousness of guilt evidence in assessing whether the prosecution had proved an intent to kill – whether the non-direction caused a miscarriage of justice *Criminal Code* (Qld), s 271(2), s 302, s 668E *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, cited *R v Ali* [2001] QCA 331, considered *R v Box and Martin* [2001] QCA 272, cited *R v Ciantar* (2006) 16 VR 26; [2006] VSCA 263, cited *R v M* [1995] 1 Qd R 213; [1994] QCA 7, cited *R v Mitchell* [2008] 2 Qd R 142; [2007] QCA 267, cited *R v Richens* [1993] 4 All ER 877; [1992] EWCA Crim 3, cited

R v Wehlow (2001) 122 A Crim R 63; [2001] QCA 193, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited

COUNSEL:	P J Morrissey for the appellant M Cowen QC for the respondent
SOLICITORS:	Robertson O'Gorman for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA and the order he proposes.

[2] **GOTTERSON JA:** On 5 December 2013, the appellant, Anthony Charles Oliver, was found guilty of the crime of murder: *Criminal Code* s 302. The count on which he was convicted alleged that on a date unknown between 19 December 2010 and 5 February 2011 at Esk or elsewhere in Queensland, he murdered Norman Desmond Cheney.[1] On 5 December 2013, the appellant was sentenced to life imprisonment. A period of pre-sentence custody of 991 days was declared to be time already served under the sentence.

[3] The appellant filed a notice of appeal against his conviction on 20 December 2013. The ground on which the appeal was argued was substituted by amendment allowed at the hearing of the appeal.

The death

[4] The body of the deceased was found in a barrel encased in concrete. The barrel was located in the Caboolture River following a flood event in February 2012. The deceased had been shot in the back of his head at close range. The centre of his head and his face had sustained a devastating traumatic injury. Death from the gunshot wound was instantaneous.[2]

[5] At trial, it was not contested that it was the appellant who had shot the deceased and that the shooting had occurred on 20 December 2010. The appellant's own evidence was that he shot the deceased with a gun after nightfall on the side of the Kilcoy-Brisbane Road near a lake or dam.[3]

[6] There were no witnesses to the shooting other than the appellant. He and the deceased had been travelling together in a car. They had been acquainted for a number of years. The deceased had supplied narcotics to the appellant who assisted him at times to supply narcotics to others. The appellant had formed a relationship with the deceased's former partner.

[7] Medical evidence at trial also identified a large open wound to the deceased's neck which was consistent with a knife blade injury delivered with mild or moderate force.[4] The defence ventured that, as a physical possibility, it might have been caused by the edge of the barrel. There were other injuries to the back of the deceased's head, his

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1 AB2.
2 AB52; Tr1-50 ll21-25.
3 AB441; Tr6-40 l1 – AB444; Tr6-43 l20.
4 There also was medical evidence that the right carotid artery was cut, possibly by a knife: AB55; Tr1-53 ll32-39; and that if the neck injury had occurred first in time and involved the carotid artery, the deceased, left unattended, would have died within 5 to 10 minutes. An intervening gunshot wound to the head would have caused instantaneous death: AB 58; T-1-56 ll17-25.

left upper arm and his left forearm. Owing to the state of decomposition, neither the open wound nor the other injuries could definitely be said to have been inflicted contemporaneously with the death.

Appellant's post-death conduct

[8] The prosecution adduced a body of evidence as to conduct by the appellant which, upon his own account of when he shot the deceased, must have occurred after the death. This evidence was relied on for what may be uncontroversially described at this point as consciousness of guilt evidence. This evidence is outlined in the respondent's written submissions from which the following summary is drawn.

[9] **Disposal of the body**: The appellant was seen in the company of an unknown person near Esk on the evening of 20 December 2010. The appellant and the other person were in a borrowed maroon-coloured Hyundai sedan. The sighting was by family members of the appellant, his sister and brother-in-law, who had lent him the car. An arrangement was made for the appellant to join them for dinner.[5] Unsuccessful attempts were made to contact the appellant when he failed to arrive for dinner.[6]

[10] The appellant contacted his sister stating that he was at Caboolture. Later, at about midnight, he again contacted her and told her that he would travel to her and her husband's property in Langtons Lane, Esk, that evening.[7] The appellant arrived at the property in the early hours of 21 December 2010 with the deceased's body in the front passenger seat of the Hyundai sedan.

[11] He told his sister and brother-in-law that he had killed the deceased because the deceased had attacked him.[8] There was something said by the appellant about the deceased having been armed with a knife.[9] He parked the Hyundai sedan in a shed with the body in it and left the property in his sister's car.[10] Neither the sister nor brother-in-law noticed any injuries to the appellant.

[12] The appellant returned three days later and concreted the body into a 44 gallon drum with a rolled steel edge. He did this with the assistance of his brother-in-law. The appellant then left with the barrel in a four-wheel drive utility which also belonged to his sister and brother-in-law.[11] The drum was disposed of during the following day, possibly with the assistance of the appellant's family members.[12] As to this, there was some inconsistency between the accounts of the appellant's sister and brother-in-law, and also with the appellant's account given in evidence.

[13] **Disposal of the Hyundai sedan**: Arrangements were made by the appellant for the Hyundai sedan in which the body had been stored to be cleaned and sold to an associate of his.[13] The appellant told the associate, who was an indemnified witness at the trial, that he "had just got sick of" the deceased. He did that when the associate, who had noticed blood in the vehicle, asked him what had happened.[14] The associate

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5 AB77; Tr2-12 l27 – AB78; Tr2-13 l33; also AB107; Tr2-42 l44 – AB108; Tr2-43 l24.
6 AB78; Tr2-13 l45 – AB79; Tr2-14 l30; Exhibit 17 page 6: AB599.
7 AB79; Tr2-14 l36 – AB80; Tr2-15 l23; Exhibit 17 page 6: AB599.
8 AB81; Tr2-16 l42 – AB82; Tr2-17 l11; also AB110; Tr2-45 ll1-5.
9 AB83; Tr2-18 ll15-20; also AB110; Tr2-45 ll1-5.
10 AB82; Tr2-17 ll20-22; also AB111; Tr2-146 l10 – AB112; Tr2-47 l3.
11 AB83; Tr2-18 l41 – AB88; Tr2-23 l20.
12 AB89; Tr2-24 l20 – AB90; Tr2-25 l19; also AB113; Tr2-48 l43 – AB115; Tr2-50 l13.
13 AB134; Tr2-69 ll5-20.
14 AB140; Tr2-75 l42 – AB141; Tr2-76 l5. The appellant denied that he said this: AB518; Tr7-54 ll3-5.

declined to take the vehicle but assisted the appellant's brother-in-law in stripping out and burning some of its contents.[15]

[14] The Hyundai sedan was subsequently taken to Crows Nest by the appellant with the assistance of a family member. They then burned it.[16]

[15] **Disposal of the gun**: In February 2012, the appellant made a request to a second associate to store property at the latter's home. The second associate obliged and property was stored in his bedroom. A little later, this associate noticed that a stuffed Snoopy Dog toy that he kept in his bedroom appeared heavier than it used to be. Nevertheless, he did not investigate.[17]

[16] In the same month, the appellant asked the associate to whom he had attempted to sell the Hyundai sedan, to purchase a replica pistol and to collect "Snoopy" from the second associate.[18] The appellant directed the associate to the second associate's home.[19] The associate travelled to the home and was given "Snoopy". The toy had a zippered front. The associate found a hand gun, a couple of magazines and some ammunition inside.[20]

[17] Police later took possession of the gun from the associate. They recovered a quantity of ammunition from the second associate's house.[21] The hand gun was fully loaded and the appellant's DNA was detected in various locations on it.[22]

[18] **Flight**: The appellant stayed at his sister and brother-in-law's property during January 2012 with the deceased's ex-partner and son. They left after police had attended at the property and taken statements from his family members about the deceased.[23] Initially, they stayed in Brisbane before going to Bundaberg and then to Cairns.[24]

[19] Admissions: At trial the deceased's ex-partner gave evidence that the appellant had told her on about 20 December 2010 that he had shot the deceased. She was staying in a motel at the time.[25] The appellant told her to say, in the event that they were stopped by the police, that there had been a fight and that petrol had been poured on him.[26]

[20] This account was inconsistent with a number of the ex-partner's previous statements that she had made to investigating authorities, including the Crime and Misconduct Commission and the police. The respondent concedes that little, if any, reliance could be placed upon the evidence of that witness.[27] Specific directions were given to the jury to scrutinise and, to be cautious about, her evidence.[28]

[21] **Lies**: The appellant was spoken to by police on 2 January 2011. On that occasion he claimed to have last seen the deceased on or about 22 December 2010 when he

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15 AB118; Tr2-53 l30 – AB119; Tr2-54 l5; also AB137; Tr2-72 l36 – AB138; Tr2-73 l28.
16 AB120; Tr2-55 l35 – AB121; Tr2-56 l20.
17 AB153; Tr2-88 ll4-27; Exhibit 11.
18 AB141; Tr2-76 l43 – AB143; Tr2-78 l13; Exhibit 10.
19 AB143; Tr2-78 ll27-31.
20 *Ibid*; Tr2-78 l20 – AB144; Tr2-79 l46; also AB153; Tr2-88 l45 – AB154; Tr2-89 l1.
21 AB153; Tr2-88 l36.
22 AB177; Tr2-112 l32; Exhibit 18 (Admissions): AB611.
23 AB94; Tr2-29 l41 – AB95; Tr2-30 l15.
24 AB158; Tr2-93 l39 – AB160; Tr2-95 l6; also AB251; Tr3-69 l13 – AB253; Tr3-71 l35.
25 AB245; Tr3-63 ll35-44.
26 AB252; Tr3-70 l35 – AB253; Tr3-71 l10.
27 Respondent's written submissions paragraph 20.
28 AB567 l15 – AB568 l12.

dropped him off at Morayfield.[29] Later, the appellant provided a written statement to police on 5 January 2011 in which he claimed to have last seen the deceased on 20 December 2010 when he dropped him off near his brother's home at Sandgate.[30]

Appellant's evidence

[22] The appellant was the only witness in the defence case. He claimed that he was forced to drive to Esk by the deceased, who was then drug affected, in order to obtain money from the appellant's family.[31] Upon arrival, the appellant resolved that he would not let the deceased treat his family in that way. He drove off with the deceased assaulting him in the vehicle.[32] The appellant stopped the vehicle to buy cigarettes for the deceased before travelling to a nearby dam where the two talked.[33]

[23] At the dam, the deceased consumed more drugs. He made threats to kill his ex-partner and their child, for which he sought the appellant's assistance. When assistance was refused, the deceased challenged the appellant over seeing his ex-partner. The appellant told the deceased about his relationship with the ex-partner. The deceased thereupon assaulted him about the head to such an extent that he blacked out. They were in the front seats of the car when this occurred.[34]

[24] The appellant testified that when he regained consciousness, he saw that the deceased was wearing black gloves. The deceased assaulted him further and rendered him unconscious for a second time.[35] The appellant again regained consciousness in time to find that the deceased had splashed petrol over him. The deceased then lunged at him with a knife, striking him on the thigh. No injury resulted. The deceased said, "If you are going to have all the love in my life then you can have the pain too." He believed that the deceased was going to burn him. He saw that the deceased had a lighter in his hand and was flicking it.[36] The appellant was aware that the deceased had been burnt with petrol as a teenager.

[25] At this time, the appellant noticed that there was a gun on the seat under the deceased's right leg, the leg which was closer to him. The appellant grabbed the gun with his left hand. He is naturally right-handed. Without aiming, he fired a shot in the deceased's direction. He did that in order to save his own life. He said that he did not mean to kill the deceased.[37] The appellant denied cutting the deceased's throat. He was unable to explain how the injury to the deceased's neck was sustained.[38]

[26] The appellant drove the vehicle with the body in it to the property of his sister and brother-in-law and told them that the deceased had tried to burn him and that he had shot the deceased. He was fearful of the deceased's friends and told his relatives that he would call the police after he had spoken to his partner.[39] In fact, the appellant did not contact the police.

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29 AB32; Tr1-30 ll2-4.
30 Exhibit 5 paragraph 30: AB589.
31 AB434; Tr6-33 l10.
32 AB440; Tr6-39 ll1-15.
33 AB441; Tr6-40 ll1-10.
34 AB442; Tr6-41 l5 – AB443; Tr6-42 l1.
35 AB443; Tr6-42 ll3-15.
36 *Ibid*; Tr6-42 ll15-46.
37 AB444; Tr6-43 ll5-20.
38 AB514; Tr7-52 ll1-6; also AB520; Tr7-58 ll39-40.
39 AB445; Tr6-44 ll5-46.

[27] The appellant acknowledged that he had disposed of the deceased's body with the assistance of his family.[40] He accepted that he had retained the hand gun and the ammunition that he said that he had found in the Hyundai sedan and had hidden it at the second associate's house. He also accepted that he had organised for that associate to purchase a replica hand gun.[41] He admitted burning the Hyundai sedan in order to dispose of it[42] and disposing of items including a telephone, a bag, gloves, a knife, a container for the petrol, the drugs and associated paraphernalia.[43] There was evidence that the appellant made calls to the deceased's mobile telephone after his death.[44] The appellant explained the departure from his sister's and brother-in-law's property as having been based on a mixture of concern on his part about the police and a possible retribution from the deceased's associates.[45] He acknowledged that he had lied to the police in order to protect himself.[46]

Findings open to the jury

[28] The consciousness of guilt evidence was admitted without objection. It was clearly admissible as proof of the appellant's presence at, and participation in, the death of the deceased. It was also relevant to negativing the defence of self-defence for which s 271(2) of the *Criminal Code* provides and on which the appellant sought to rely.

[29] The learned trial judge directed the jury comprehensively with respect to self-defence.[47] No criticism is made of those directions.

[30] The direction included an explanation that the jury were to consider the level of physical violence that the deceased was presenting before the appellant reacted. Two questions arose from it: whether the violence, in fact, caused the appellant to fear for his life or to fear grievous bodily harm and, second, if it had, whether, in their assessment, that view was reasonable. The jury were also to consider the appellant's response to the threat. Again, two questions arose: first, whether the appellant, in fact, believed that there was no other way he could preserve himself from death or grievous bodily harm and, second, if he did, whether there were reasonable grounds for that belief.

[31] Her Honour then directed the jury that it was only if they were satisfied that self-defence had been excluded beyond reasonable doubt, that they needed to consider the intent of the appellant when he shot the deceased.[48] She reminded the jury of the direction she had already given them that unlawful killing amounts to murder or to manslaughter.[49] She explained that unlawfully killing amounts to murder if it is done with intent to kill or to do grievous bodily harm.[50]

[32] It was uncontroversial at trial that the alternative verdict of manslaughter needed to be left to the jury. The prosecutor made a specific submission to that effect in discussions with the learned trial judge prior to addresses.[51]

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40 AB447; Tr6-46 l5 – AB448; Tr6-47 l45.
41 AB454; Tr6-53 ll5-6.
42 AB456; Tr6-55 ll9-10.
43 AB504; Tr7-42 l40 – AB505; Tr7-43 l42.
44 Exhibit 17 page 10: AB603; pages 12-15: AB605-608.
45 AB458; Tr6-57 ll34-43.
46 AB516; Tr7-54 l30.
47 AB568 l30 – AB571 l2.
48 AB571 Summing Up page 13 ll4-5. This form of direction had been discussed with counsel prior to addresses and both had agreed to it: AB542; Tr7-80 ll28-47.
49 *Ibid* ll5-6. That direction is at AB552 Summing Up page 1 – 2 ll31-33 and again at AB568 Summing Up page 10 l30. Her Honour had explained that manslaughter was an alternative verdict to murder during the opening address: AB18; Tr1-17 ll1-18.
50 AB571 Summing Up page 13 ll6-7.
51 AB542; Tr7-80 ll28-29.

[33] On appeal, the appellant submitted that a verdict of manslaughter was not merely technically or "artificially" available such as might have led to a "notional" miscarriage of justice.[52] It was argued for the appellant that a verdict of manslaughter would have been open if the jury rejected self-defence, as they might have done, for example, because they did not accept the appellant's testimony as to the degree of danger he faced or because they thought that the appellant had an alternative available to him such that shooting at the deceased with a hand gun was not necessary; but were not satisfied beyond reasonable doubt that the appellant killed the deceased with the intention of causing him death or of doing grievous bodily harm to him.[53]

[34] It was further argued for the appellant that whether the jury were so satisfied as to intent was not merely a matter of evaluation of inferences from evidence led in the prosecution case. In their deliberations, it was necessary for the jury to consider and decide whether they accepted or rejected the appellant's denial of a relevant intent in his evidence-in-chief.[54]

[35] In developing this argument, counsel for the appellant referred to that part of the cross-examination of his client in which he was questioned in detail about the scenario of the struggle in the vehicle after he had been splashed with petrol, to which he had testified. It was put to the appellant on a number of occasions that he "could have got out of" the vehicle.[55] The purpose of that cross-examination was, it was put in argument, not merely to expose the appellant's version as unreal, but also to test each aspect of it in recognition of a real possibility that the jury might go on to accept some, but not all, aspects of his version. Reference was made to the possibility that they might have accepted that he fired the hand gun to end the threat to himself, but not to kill or cause grievous bodily harm.[56]

The ground of appeal

[36] The single ground of appeal is that the learned trial judge erred in failing to direct the jury not to use consciousness of guilt evidence in assessing whether the prosecution had proved an intent to kill.[57] For the purposes of s 668E of the *Criminal Code*, this ground seeks to characterise the misdirection as a substantial miscarriage of justice.

[37] Underlying the ground of appeal is the proposition that the consciousness of guilt evidence was neutral as to the intentional element of murder.[58] Put another way, the proposition is that, on the one hand, each act and each lie constituting the consciousness of guilt evidence is wholly explicable by a consciousness of guilt of having unlawfully killed the deceased, that is to say, of manslaughter (or the acts founding manslaughter), and, on the other, none of them is explicable by consciousness of guilt of acting with an intention of killing or doing grievous bodily harm to the deceased.

[38] The appellant submits that in these circumstances, it was appropriate for the learned trial judge to have told the jury that they could not safely use the lies and other acts

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52 Appeal Transcript 1-4 ll34-40.

53 Appellant's written submissions paragraph 10.

54 AB461; Tr6-60 ll37-39.

55 AB499; Tr7-37 ll13-14, l22; AB501; Tr7-39 ll34-35.

56 Appeal Transcript 1-9 l40 – 1-10 l5.

57 Although this ground refers only to "an intent to kill" it is to be understood as referring to an intent to kill or to do grievous bodily harm.

58 Appellant's written submissions paragraph 15. The appellant accepts that the consciousness of guilt evidence was relevant to other elements of murder such as presence and causation, and to negativing self-defence: Appeal Transcript 1-16 ll20-26; 1-21 ll40-41.

to infer that the appellant was conscious of having intentionally killed the deceased. Her Honour's failure to do so constituted a misdirection.[59] Consideration of this ground of appeal requires an examination of the directions on the consciousness of guilt evidence that were given. The examination needs to be undertaken with due regard for contextual considerations.

Contextual considerations

[39] In discussions with counsel in the jury's absence prior to addresses and immediately after the prosecutor had submitted that manslaughter needed to be left to the jury, the learned trial judge asked the prosecutor what circumstances he relied on as evidence from which an intent to kill or to do grievous bodily harm should be drawn. The prosecutor mentioned the method of killing – that a hand gun and a knife were used, and the location of the injuries – the gunshot wound to the back of the head and a cutting of the throat.[60] No reference was made to the consciousness of guilt evidence.

[40] Defence counsel addressed first. He did so on the basis that "what the trial was all about" was whether, on all the evidence, the appellant's account of acting in self-defence was one that they could exclude beyond reasonable doubt so as to convict him of murder.[61] He did not refer to the alternative count of manslaughter. Insofar as he referred to the consciousness of guilt evidence, it was for the purpose of submitting that it was insufficient to negative self-defence.

[41] In his address, the prosecutor referred to the consciousness of guilt evidence in detail.[62] He urged the jury to reject the appellant's account.[63] He invited them to find that it was not reasonably necessary for the appellant to shoot the deceased in the back of the head, even if he had been attacked by the deceased and the deceased was armed with a knife. His proposition was that getting out of the car and running was a reasonable option.[64] After reminding the jury that they had to be satisfied beyond reasonable doubt that the deceased was not acting in self-defence and that it was not for the appellant to prove that he was, the prosecutor concluded his address with the following words:

> "But when you look at all the factors that I've taken you thorough, ladies and gentlemen, about **his actions before and after** and the nature of the injury that this man suffered, can there be any reasonable doubt that this man killed Norm Cheney, that, at the time he did, he had an intention to cause his death, and that he wasn't defending himself against Norm Cheney: Again, I'd ask you to think about midnight on the 20th December of 2010. Two people turn up at Langtons Lane, one of them has a hole through the back of his head, the other asked to leave a car parked in the shed and if he can borrow the other car so he can head back and just spend the rest of the day with the dead man's wife."[65] (emphasis supplied)

This concluding submission linked the appellant's post-death conduct, including the acts which occurred about midnight specifically mentioned by the prosecutor, to a probability beyond reasonable doubt that the appellant had killed the deceased with an intention to cause his death.

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59 Appellant's written submissions paragraph 19.
60 AB543; Tr7-81 ll1-27.
61 Tr8-20 ll5-9.
62 Tr8-32 – Tr8-41.
63 Tr8-44 ll13-17.
64 Tr8-44 l27 – Tr8-45 l14.
65 Tr 8-45 ll33-41.

The directions

[42] I have already referred to the directions given by the learned trial judge with respect to the elements of murder, manslaughter and self-defence. During the summing up, her Honour, relevantly for present purposes, directed the jury with respect to the process of drawing inferences.[66] Later, her Honour referred to the consciousness of guilt evidence specifically. She explained that, in principle, the jury must be satisfied that the accused engaged in the post-offending conduct alleged and that he did so because he knew that he was guilty of the offence with which he had been charged.[67]

[43] Applying the principle to the case at hand, the learned trial judge gave the following direction:

> "So first you have to be satisfied that the defendant engaged in this conduct or some of it. But unless you're satisfied that he did so out of a consciousness of guilt of murder, and not for some other reason such as panic or fear of retribution from Norm's associates, you cannot use it as evidence of his guilt of murder – or, if you come to consider manslaughter, unless you're satisfied that he engaged in this conduct out of a consciousness of guilt of manslaughter, you cannot use it as evidence of his guilt of manslaughter."[68]

In this direction, her Honour dealt with the consciousness of guilt conduct as a category. She also directed the jury on the footing that the conduct had potential utility as evidence of a consciousness of guilt of murder and a consciousness of guilt of manslaughter. A similar approach was taken when her Honour went on to tell the jury that what she had just said was as much applicable to lies as a species of post-offence conduct.[69]

[44] Her Honour then referred, one by one, to a number of errors of fact that the appellant had made in statements to police. She explained to the jury that it was a matter for them to decide whether the misstatements were deliberately untruthful lies. If they so decided, it was then a matter for them to be satisfied whether the lies were told out of the consciousness of guilt. In respect of three separate lies, her Honour's directions contained the following words or materially similar words:-

> "It's only if you're satisfied that he told the lie out of a consciousness of guilt of murder that you can use it as evidence of the murder".[70]

A similar direction was then made in respect of the appellant's conduct in making the post-death telephone calls and texts to the deceased's telephone number.[71] On none of these occasions did her Honour allude to the possibility of the appellant's having so lied because he knew that he was guilty of manslaughter.

[45] In summarising the respective cases, her Honour observed that the prosecution submitted that the jury should infer that the appellant had the requisite intent for murder from the way he killed the deceased.[72] This was repeated.[73] However, in between these two references to reliance for intent upon the mode of killing, her Honour told the jury:

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66 AB555; Summing Up 1-5 ll22-48.
67 AB560; Summing Up 2-2 ll39-743.
68 AB561; Summing Up 2-3 ll4-10.
69 *Ibid* ll23-29.
70 AB562; Summing Up 2-4 ll5-7; AB563; Summing Up 2-5 ll8-10; *Ibid* at ll20-21.
71 *Ibid* at ll39-40.
72 AB571; Summing Up 13 ll20-21.
73 AB574; Summing Up 16 ll27-28.

> "Importantly, he said, he was not suggesting that the killing was planned. He said that if you look at the defendant's actions **before and after** the killing and at the nature of the injury Norm Cheney suffered, you would be satisfied beyond reasonable doubt that when the defendant killed Mr Cheney, he intended to cause his death and he was not acting in self-defence."[74] (emphasis supplied)

The appellant's submissions on misdirection

[46] The appellant submits that notwithstanding that her Honour, on several occasions, identified the evidence on which the prosecutor stated he relied for an inference of intent to kill or to do grievous bodily harm, namely, the mode of killing, the other directions to which I have referred were apt to lead the jury to understand that the consciousness of guilt conduct was capable of evidencing all of the elements of murder, including intention. Those directions did not make an exception for intention.

[47] The appellant further submits that those directions were misdirections on the basis that the consciousness of guilt conduct was neutral as between murder and manslaughter. Of itself, it did not provide an evidential basis from which a finding by inference of intent to kill or to do grievous bodily harm could be made.

[48] The submission was developed by reference to a number of decisions of this Court in which it has been held that a failure to direct on the limited use to be made of consciousness of guilt evidence in a particular case can be a misdirection. In *R v M*,[75] it was held that a failure by a trial judge to draw the jury's attention to the special difficulty of inferring from an accused's flight, a consciousness of guilt of anything more than indecent dealing. Not to have told the jury that they could not safely infer from flight alone that the accused was conscious of having raped the complainant, constituted a misdirection.

[49] As to lies, in *R v Wehlow*,[76] a direction was held to be deficient in that it did not make it sufficiently clear that the jury needed to be satisfied that the same were "told out of a realisation that the truth would implicate the appellant in the offence of murder rather than something less (for example, manslaughter)". In *R v Box and Martin*,[77] McMurdo P cited both *Wehlow* and *R v Richens*[78]and expressed the view that the making of such a distinction, where called for, is "imperative".[79] This view was reiterated by Williams JA in *R v Mitchell*.[80]

[50] Reference was also made to the decision in *R v Ali*[81] in which it was held that jury directions must make it sufficiently clear that the jury could use the evidence of lies as a consciousness of guilt of murder only if they were satisfied that they were not told out of a consciousness of guilt of some lesser offence. In that case, besides manslaughter, there were several potential alternative lesser offences to murder, open for consideration.

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74 AB573; Summing Up 15 ll27-31.
75 [1995] 1 Qd R 213 at 223 per Davies JA (McPherson JA and Williams J concurring).
76 [2001] QCA 193 per Wilson J at [33] (McMurdo P agreeing, Williams JA not deciding).
77 [2001] QCA 272.
78 [1993] 4 All ER 877.
79 At [17].
80 [2007] QCA 267 at [31] (Keane JA and Mullins J agreeing).
81 [2001] QCA 331.

[51] The trial judge in *Ali* did not explain the need to limit consciousness of guilt reasoning with the respect to each alternative charge, but did point to the need to assess carefully what criminality the defendant thought that he was covering up by lying. That was held to be sufficient in the circumstances. Thomas JA (with whom McMurdo P and Davies JA agreed) observed:

> "[43] This area of the law defies strict logical analysis. The term 'consciousness of guilt' or 'realisation of guilt and a fear of the truth' remains an accepted rationale for a direction on this topic, although some of the problems associated with it have been recognised. The problem that has been raised arises when several offences have been committed and the lie is equally explicable by consciousness of guilt of the lesser offence. Usually in such a case it is necessary that this possibility be pointed out to the jury, and in each of *R v May*,[82] *R v M* and *R v R*[83] it was held that the failure to do so amounted to an error. However I do not think that it is always necessary to direct that a lie may be used only to support guilt upon the least of the options available. Obviously each case must depend upon its own facts and circumstances. In the present case I think it was proper to leave the interpretation of these lies open to the jury as capable of supporting guilt on the appellant's part on all or any of these offences."

By way of differentiating that case from the present, the appellant has ventured in written submissions that, here, no party contends that the consciousness of guilt conduct, including the lies, was capable of grounding an inference to the requisite standard of the mental element of murder.[84]

The respondent's submissions on misdirection

[52] It is true that no specific contention to that effect was advanced by the prosecution at trial. However, on appeal, counsel for the respondent submits that, consistently with the decision of the Court of Appeal of Victoria in *R v Ciantar*,[85] the consciousness of guilt conduct, considered as a genre of circumstantial evidence and viewed in the context of the totality of the evidence, has the capacity to support an inference that the appellant killed the deceased with a murderous intent.

[53] The respondent also submits that the jury were told by both the prosecutor in his address and the learned trial judge in her summing up that the consciousness of guilt conduct was relied on by the prosecution for murder. As well, they were told that they could rely on such conduct for an inference of guilt of murder only if they were satisfied that the conduct was undertaken out of a consciousness of guilt of murder and not for some other reason such as panic or fear of retribution.

[54] The respondent accepted in argument that the jury were not specifically directed that they might use such conduct to ground an inference of the necessary intent for murder only if they considered that the conduct evinced such an intent; and that they were not specifically directed with respect to each species of such conduct for the purpose

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82 [1962] Qd R 456.
83 [2001] QCA 121.
84 *Ibid* at paragraph 31.
85 [2006] VSCA 263; (2006) 16 VR 26 at [44], [52].

of explaining to them how it might, or might not, evince such an intent. The position taken by the respondent to this was essentially two-fold. First, it was implicit in the directions that were given, and the jury could not have failed to have understood, that they could use the conduct for an inference of murderous intent only if they concluded that it evidenced such an intent.[86] Secondly, it was said that defence counsel did not object to the adequacy of the directions that were given and that, consistently with the decision of the High Court in *Dhanhoa v The Queen*,[87] if there was a misdirection, it was for the appellant to demonstrate that the deficiency in the directions constituted a miscarriage of justice and, for that purpose, to demonstrate that it is reasonably possible that the failure to direct the jury adequately may have affected the verdict.[88]

Was there a misdirection?

[55] Here, manslaughter was uncontroversially left to the jury as an alternative to murder. The jury were instructed with respect to the differences between the two crimes. The principal difference, namely, the intent required for murder, was explained to them. Against a background of these directions, it behoved the learned trial judge to direct the jury clearly that they might use the consciousness of guilt conduct to ground an inference of intent to kill or to do grievous bodily harm only if they considered that the conduct evidenced such an intent. That restriction upon use was not a matter to be left for deduction, inference or interpretation by the jury members.

[56] The practical need for such a direction in this case is illustrated by the absence of more particular directions as to the need to consider whether and how each species of consciousness of guilt conduct, alone or collectively, might, or might not, have evidenced the intent required for murder. Directions of that kind were also clearly appropriate.

[57] Some of that conduct considered on its own was neutral as to murderous intent. An example of that is the telling of lies by the appellant as to when he last saw the deceased. So also for the appellant's flight. On the other hand, with another species of the consciousness of guilt conduct, it is not unreasonable to suppose that the jury might view it in the context of the evidence overall, as supporting such an inference. For instance, the mode adopted by the appellant for disposal of the deceased's body, taken with the evidence of a gunshot wound to the back of his head, might be seen by the jury as evidencing a desire on the appellant's part to conceal the cause of death driven by a recognition on his part that a wound so inflicted, once discovered, would betray an intention to kill.

[58] Notwithstanding these significant differences in potential evidential value, the jury were not instructed in a way which made it clear that the consciousness of guilt evidence could constitute circumstances supporting a conclusion of murder, as opposed to manslaughter, only if they were satisfied that it did go to establishing the necessary intent. Moreover, the directions that they were given ran the risk that, despite their own misgivings, they might think that that conduct was capable of evidencing a consciousness of guilt of murder without examining its relevance to the requisite intent because the directions were given with the authority of a trial judge. In argument, counsel for the respondent was unable to advance submissions which adequately answered these criticisms.

[59] The fact that defence counsel did not object to the directions that were given is true. Perhaps that was because his focus was upon self-defence. However, that may be,

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86 Appeal Transcript 1-30 ll8-30.

87 [2003] HCA 40; (2003) 217 CLR 1 per McHugh and Gummow JJ at [49].

88 Appeal Transcript 1-34 ll12-15; Respondent's written submissions paragraph 40.

the absence of an objection is not relevant to, much less determinative of, the question whether there was a misdirection. That is not to doubt its relevance to the question of whether there was a miscarriage of justice.

[60] The appellant's appeal ground is too broadly expressed. It was not an error to fail to direct the jury that the consciousness of guilt evidence could not be used in assessing whether the intent to kill was proved. The evidence concerning the manner of disposition of the body was capable of being construed as demonstrating a desire to conceal the manner of death because it would suggest murder, not merely unlawful killing. If that conclusion were reached, the lies told might be interpreted as of a piece with that conduct. It was an error, however, to fail to direct the jury as to how the evidence could be used; that its relevance to a finding of murder rather than manslaughter turned on whether it in fact demonstrated an intent to kill. The directions given were apt to leave the jury with the impression that the evidence could in some general way establish murder, without further consideration of its significance. For these more limited reasons, I accept the appellant's submission that the jury were misdirected. I now turn to consider whether the misdirection occasioned a miscarriage of justice.

Appellant's submissions on miscarriage of justice

[61] The appellant submits that the jury might have proceeded on the assumption that all of the consciousness of guilt conduct was evidence from which a murderous intent might be inferred. They might have so used it to allay doubt they had as to the sufficiency of the evidence expressly identified by the prosecutor as evidence of intent – the gunshot wound to the head and the neck wound, as proof beyond reasonable doubt of the requisite intent.

[62] In developing the submission, the appellant contends that, on the medical evidence, almost certainly, the wound to the neck was not the fatal wound. Moreover, the evidence left open the possibility that the wound was inflicted *post mortem*. Had that been the sequence of events, the wound would have been of no evidentiary value as evidence of intent. As to the gunshot wound, it was contended that the rejection by the jury of self-defence did not mean that they necessarily had rejected the appellant's account of an unintentional wounding in a combative environment. The rejection may have meant no more than that they were satisfied that alternative evasive action was reasonably open to him. Given these considerations, it is not unreasonable to suppose that the jury were not satisfied beyond reasonable doubt of intent on the mode of killing evidence alone.

[63] The appellant's case is that had the jury been directed adequately, they would have disregarded the consciousness of guilt conduct in considering the intent element of murder. Had they not been satisfied beyond reasonable doubt of an intent to kill or to do grievous bodily harm on the mode of killing evidence alone, they would not have made use of the consciousness of guilt conduct to bolster it. That the jury may have so used the consciousness of guilt conduct meant that it was reasonably possible that the misdirection affected the verdict in that the appellant was found guilty of murder rather than of manslaughter.

The respondent's submissions on miscarriage of justice

[64] The respondent submits that, having regard to the way the case was run, the focus of the jury's attention was on whether self-defence had been excluded. A conviction for manslaughter, though technically open, was not a "viable option".[89]

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89 Respondent's written submissions paragraph 43.

[65] In any event, the mode of killing which the prosecutor specifically identified as evidencing an intention to kill or to do grievous bodily harm gave rise to an "overwhelming inference" of the requisite intent for murder.[90] That resort might have been taken to the consciousness of guilt conduct in order to bolster a finding of intent was not a realistic proposition. Accordingly, the respondent submits, the identified misdirection did not occasion of a miscarriage of justice.

Was there a miscarriage of justice?

[66] This question is one that must be considered from the perspective of the misdirection as found by the Court, namely, failure to direct the jury as to how the consciousness of guilt evidence could be used; that its relevance to a finding of murder rather than manslaughter turned on whether it in fact demonstrated an intent to kill. It is not a question to be answered on the footing that, as the appellant erroneously submitted, the jury should have been directed that that evidence could not be used in assessing whether an intent to kill was proved.

[67] Whether the misdirection so found was productive of an actual miscarriage of justice is dependent to a highly significant, if not critical, extent upon the degree of likelihood that the jury might have resorted to the consciousness of guilt evidence for the purpose of deciding whether they were satisfied beyond reasonable doubt of the element of intent for murder. That degree of likelihood has, in turn, an inverse correlation with the cogency of the proof of intent in the other evidence before the jury. The more cogent that evidence, the less likely it is that the jury would have resorted to the consciousness of guilt evidence. The respondent submits that the likelihood is so low as for it to be unrealistic to suppose that the jury did resort to that evidence.

[68] It is important then to assess carefully the cogency of the other evidence relied on by the prosecution for a finding beyond reasonable doubt of intent. That evidence is the wound to the neck and the gunshot wound to the back of the head.

[69] In the absence of any account from the appellant attributing responsibility for these wounds to the deceased, a jury would regard it as quite improbable that they were self-inflicted. Whilst the medical evidence could not exclude the possibility that the wound to the neck was inflicted *post mortem*, it is very likely that a jury would conclude that that did not occur. The absence of any apparent reason for inflicting such a wound *post mortem* would be influential in their reaching such a conclusion. Beyond that, a jury would very likely arrive at conclusions about two further matters. The first is that, though not fatal, the neck wound was inflicted very soon before death by a knife wielded by the appellant. That conclusion would be justified by the absence from the scene of any other person except the appellant. The second is that the knife wounding evidenced that at that point, the appellant was minded to inflict grievous bodily harm at least, on the deceased; a frame of mind which he was disposed to maintain. The extent and nature of the wound as one which damaged the right carotid artery to a point of being life-threatening would support such a conclusion about the appellant's state of mind.

[70] As to the gunshot wound to the back of the deceased's head, I accept that the rejection of self-defence did not mean that the jury had necessarily rejected the appellant's account of an unintended wounding. I accept also that his account was not so lacking in logic or practical reality that the jury had no option but to reject it on that basis. It

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90 Appeal Transcript 1-34 ll35-39.

was, however, for the jury to decide whether or not, based upon their observations of him as a witness, they rejected the appellant's account as deliberately false or otherwise unreliable.

[71] To my mind, the gunshot wound to the back of the deceased's head, unexplained by any evidence on the part of the appellant, would provide conclusive evidence for a finding by the jury that they were satisfied beyond reasonable doubt that the wound was inflicted by the appellant with a murderous intent. It cannot be the case that a person could intentionally aim a gun and fire a bullet into the back of the head of another person without intending to kill or to do grievous bodily harm. Where, as here, the appellant testified to a version of events in which a murderous intent was negated, it was a matter for the jury to decide whether they accepted or rejected the appellant's version including his denials of such an intent. However, once they had rejected it, as their verdict strongly suggests this jury did, then the evidence of the gunshot wounding would be as cogent with respect to intent as it would have been in the absence of any explanation by the appellant.

[72] Together, the evidence of the wounding to the neck and the gunshot wound to the back of the deceased's head provided cogent and powerful evidence on which the jury could have based a finding beyond reasonable doubt of intent to kill or to do grievous bodily harm. It was clearly open to them to have done so. It is no overstatement to describe that evidence as overwhelming in this respect. In my view, the degree of likelihood that the jury based their finding as to murderous intent on that evidence and without resort to the consciousness of guilt evidence, is very high. It is of such a degree that it is improbable that the jury did resort to the latter in order to be satisfied beyond reasonable doubt as to intent.

[73] As noted, the appellant has an onus of establishing a miscarriage of justice. For these reasons, the appellant has not, in my view, established that it is reasonably possible that the misdirection may have affected the jury's verdict.[91] I am therefore not satisfied that the onus has been discharged.

Disposition

[74] The appellant having failed to establish a miscarriage of justice, this appeal must be dismissed.

Order

[75] I would propose the following order:

1. Appeal dismissed.

[76] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

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91 *Simic v The Queen* (1980) 144 CLR 319 per the Court at 332.