SUPREME COURT OF QUEENSLAND

CITATION:	*R v Struber; R v Wilson-Struber* [2016] QCA 288
PARTIES:	**In CA No 186 of 2015:** **R** **v** **STRUBER, Stephen Roy** (appellant) **In CA No 194 of 2015:** **R** **v** **WILSON-STRUBER, Dianne Rose** (appellant)
FILE NO/S:	CA No 186 of 2015 CA No 194 of 2015 SC No 45 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Convictions: 24 July 2015
DELIVERED ON:	11 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2016
JUDGES:	Margaret McMurdo P and Philippides JA and North J Separate reasons for judgment of each member of the Court, Philippides JA and North J concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**In CA No 186 of 2015:** **1. The application to adduce further evidence is refused.** **2. The appeal against conviction is dismissed.** **In CA No 194 of 2015:** **The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellants were convicted of murder – where there was identification evidence from two witnesses – where the jury were entitled to reject the appellants' exculpatory account

to police and Mr Struber's evidence at trial – where there was no evidence anyone other than the appellants was present at the time of the murder – where the appellants could not raise hypotheses consistent with innocence on appeal that were excluded by the evidence of Mr Struber at trial – whether the verdict was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where the appellants were convicted of murder – where Mr Struber sought to adduce further evidence – where part of that evidence was that a witness had seen a man with what appeared to be a body in the back of his ute – where Mr Struber contended that the further evidence, when considered with the evidence before the jury, raised a doubt as to whether he was the person with Ms Wilson-Struber at the time of the killing of the deceased – where this hypothesis was positively inconsistent with the sworn evidence given by Mr Struber and the case run by him at trial – whether refusing to grant leave to adduce further evidence would amount to a miscarriage of justice – whether leave should be granted to adduce further evidence

Gallagher v The Queen (1986) 160 CLR 392; [1986] HCA 26, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
R v Butler [2010] 1 Qd R 325; [2009] QCA 111, cited
R v Condren; ex parte Attorney-General [1991] 1 Qd R 574, cited
R v Daley; ex parte Attorney-General (Qld) [2005] QCA 162, cited
R v Katsidis; ex parte Attorney-General (Qld) [2005] QCA 229, cited
R v Leivers and Ballinger [1999] 1 Qd R 649; [1998] QCA 99, cited
R v Main (1999) 105 A Crim R 412; [1999] QCA 148, cited
R v Spina [2012] QCA 179, cited
R v Young (No 2) [1969] Qd R 566, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited

COUNSEL:

In CA No 186 of 2015:
J Sharp, with K McMahon, for the appellant
M R Byrne QC, with N C Crane, for the respondent

In CA No 194 of 2015:
F D Richards, with J Trevino, for the appellant
M R Byrne QC, with N C Crane, for the respondent

SOLICITORS: In CA No 186 of 2015:
Brisbane Criminal Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

In CA No 194 of 2015:
Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellants, Stephen Struber and Dianne Wilson-Struber, were convicted on 24 July 2015 after a nine day jury trial of murdering Bruce Schuler at Palmer on 9 July 2012. They have each appealed against their conviction on the ground that the verdict was unreasonable and that, upon the whole of the evidence, it was not possible to be satisfied beyond reasonable doubt of their guilt. Mr Struber has also applied to adduce further evidence in the appeal. If successful, he has an additional ground of appeal, that the new evidence demonstrates a miscarriage of justice has occurred. The respondent, in opposing that application, has also applied to adduce further evidence.

[2] Before directly discussing the applications to adduce evidence and the grounds of appeal it is necessary to review the evidence at trial.

Overview of the prosecution case

[3] The prosecution case was that on 9 July 2012 the deceased, Daniel Bidner, Tremain Anderson and Kevin (Rusty) Groth were prospecting for gold with metal detectors in the Palmer River area in Far North Queensland. The river runs through the appellants' vast and remote cattle property, Palmerville Station. The deceased was prospecting in a dry gully off the river on the appellants' property when the appellants arrived from the direction of their homestead in a fawn coloured Toyota Landcruiser utility. Mr Struber stopped the vehicle adjacent to the gully. Ms Wilson-Struber, the only passenger, alighted and retrieved a long firearm from the cabin. Over the next 30 minutes there were two shots. The deceased was not seen again. The prosecution alleged that one appellant either shot or otherwise killed or incapacitated the deceased and the other intentionally aided that appellant to kill him. They then burnt incriminating evidence, or returned later to do so, and left the gully with the deceased and his possessions which they later disposed of in some unknown place.

The evidence at trial

[4] To establish that case, the prosecution called a number of witnesses and counsel jointly made significant admissions.[1]

[5] **George Wilson**, Ms Wilson-Struber's brother, gave the following evidence. He subleased a 50 square mile area, about 75 kilometres from Palmerville Station homestead. He would phone the appellants' homestead daily at 6.30 pm. He spoke to his sister on 9 July 2012 but when he rang on 10 July, an unknown male answered and the satellite phone kept dropping out. He phoned another brother-in-law to find out what was going on. Early the next afternoon he travelled to the homestead where police were present. He arrived about 4.00 pm. The trip was slow as his radiator had

1 Exhibit 1, AB 504.

lost water and was over-heating, requiring him to walk eight kilometres to get water from a dam. He also stopped to talk to a traveller in a bus who was planning to drive to Palmerville but then decided to head back out in the other direction.

[6] Mr Wilson owned a Winchester lever action .22 rifle; a 12-gauge double-barrel shotgun; a Winchester 30-30 lever action rifle; a Tikka .270 bolt action rifle; a Sturm, Ruger .22 semi-automatic rifle; and a Sturm, Ruger .44 revolver handgun. They were kept in the gun safe at Palmerville Station. Ms Wilson-Struber was the only other person who knew the whereabouts of the key to the safe. He also had a 44 Magnum which he kept at his place. On 11 July he noticed that the Winchester lever action .22 rifle was missing from the safe. The last time he saw it was on 18 June 2012. His sister used a gun, always the Winchester lever action .22 rifle,[2] but when she was out with him he always used the gun. He had also seen Mr Struber use a gun; he knew that Mr Struber owned guns but did not know how many or where they were kept. It was usual when working on the property to put a weapon in the vehicle in case injured stock needed to be put down or to kill stock for food.[3]

[7] The appellants and Mr Wilson used two vehicles on the property. One was a fawn coloured unregistered Toyota Landcruiser with a tray back[4] and the other was a fawn coloured registered Toyota Landcruiser with a tray back and a lifting arm.[5] He sometimes drove these vehicles. The unregistered vehicle had very worn gears and poor brakes; the registered vehicle was a lot better to drive and had operational gears and brakes.[6]

[8] In cross-examination by Ms Wilson-Struber's counsel, he said that Ms Wilson-Struber had lived on Palmerville Station all her life and had rarely left it. She had some very limited home-schooling but did not attend primary or high school. He was the youngest in the family. He first met Mr Struber in 1984 and offered him work. Mr Struber commenced working full-time on the station in about 1987. He was then married with a family but he started seeing Ms Wilson-Struber about that time. They married and in 2001 the lease was transferred from Mr Wilson's mother to the appellants. Mr Wilson had lived on the property for most of his life and had an intimate knowledge of it. He knew The Croc Hole where tourists and prospectors sometimes camped. It was about 15 kilometres east of the homestead.[7] He was also familiar with the main crossing on the Palmer River which was two and a half to three kilometres east of the homestead. He knew that prospectors sometimes visited the station and lit fires to open up the ground to assist their prospecting with metal detectors. When he phoned his sister on the evening of 9 July she seemed okay and he did not notice anything wrong. He confirmed that he and the appellants carried a gun in their vehicle at all times; if he was in the vehicle, he rather than Ms Wilson- Struber would use the gun; if Mr Struber was in the vehicle, he rather than she would use it.

[9] In cross-examination by Mr Struber's counsel, he said that the unregistered vehicle would have had difficulty getting up the dry gully where the deceased was last seen, depicted in the map of Palmerville Station,[8] unless it was in second gear and had "a little bit of a run at it."[9] In response to a question by the judge, he said he last drove the unregistered vehicle one month earlier, on about 16 or 17 June, in a muster.[10]

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2 T2-19, AB 64.
3 T2-16, AB 61.
4 See photographic Exhibit 9.1 and 9.2.
5 See photographic Exhibit 8.1 and 8.2.
6 T2-18 – T2-19, AB 63 – 64.
7 T2-21, AB 66.
8 Exhibits 2 and 4.
9 T2-26, AB 71.
10 T2-34, AB 79.

[10] **Mr Mervin Richie**, a vehicle inspection officer for the Queensland Police Service, examined the appellants' Toyota Landcruisers. The 1988 unregistered vehicle had potentially dangerous rear brakes which were "grossly out of adjustment" and could be applied only by pumping them three times.[11] He could not select first or second gear in this vehicle, although all other gears were operating.[12]

[11] On the third day of the trial, the jury undertook a view of the gully during which the jury referred to a large laminated map.[13] The numbers marked on the map showed where the witnesses and the deceased were positioned and where a termite mound, tyre impressions, cow pats, blood spots, burnt out ground, matches, a film canister and bailing twine were found. The map also depicted a looped track on comparatively flat ground and a single track leading from near the looped track down a steep incline. With the use of traffic cones, the jury were shown where these various markings were found in the gully.

[12] **Daniel Bidner** gave evidence that he met the appellants about 10 days before the deceased's disappearance when Mr Bidner was fishing at The Croc Hole. Mr Struber was in a fawn coloured Toyota utility with a woman whom Mr Bidner presumed was Ms Wilson-Struber. Mr Struber was angry and talked to him for about 15 minutes. He said he was concerned that the prospectors were taking water away from his cattle. Ms Wilson-Struber was filming the incident.[14] Although this was the first time Mr Bidner met and spoke with the appellants, he had seen them six to ten times before when passing them in vehicles in the bush; sometimes they were as close as two metres.[15] He met the deceased about 12 months earlier through their common interest in prospecting with metal detectors. He had known Mr Anderson, an old family friend, for 15 to 20 years.[16] He met Mr Groth through the deceased on 8 July 2012 when all four made camp on the southern bank of the Palmer River. A tendered DVD showed they lit a camp fire.[17]

[13] He said that early on the morning of 9 July 2012, the four prospectors crossed to the north bank of the Palmer River and walked about 500 metres downstream to a dry gully where Mr Anderson had found gold the day before.[18] They spread out and began prospecting. A little over an hour later, when Mr Bidner was on a crest to the west of the gully, he saw the deceased about 50 metres away wearing headphones and with his cattle dog.[19] Mr Bidner heard a vehicle on the track from the homestead. He recognised it as Mr Struber's fawn coloured Toyota tray back and watched it for about 150 metres. He heard the deceased's dog bark and saw that Ms Wilson-Struber had heard the dog. She gestured with her right hand then the vehicle stopped. She got out of the car and retrieved what looked like a black stick from behind the seat. He presumed it was a gun but could not tell the make or model. She looked down, as if she was loading it. He demonstrated her action with a downward and upward movement. She was facing towards him; he ducked and took cover. About one to three minutes later he heard a gunshot. He owned a firearm but neither he nor the others in his party

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11 T2-36, AB 81.
12 T2-38, AB 83.
13 Exhibit 4.
14 T4-6, AB 120.
15 T4-7, AB 121.
16 T4-8, AB 122.
17 Exhibit 7A.
18 T4-15, AB 129.
19 T4-18, AB 132.

had guns with them that day. He moved about 50 metres downstream. The vehicle stopped a second time and he heard a second shot and voices. He heard the vehicle start up and move and then he heard "a tray clang, a metal clang sound."[20] It was like two pieces of metal hitting. The maximum time between the first and the second shot was 15 minutes.[21] About 20 minutes after the second shot he heard the vehicle start up and leave, returning the way it came.[22]

[14] Mr Bidner did not light a fire in the gully and did not see anyone else light a fire in the gully that day. He went to where he last saw the deceased and looked for and yelled out to him but to no avail. He found Mr Anderson nearby crouched in some grass. They separated to look for the deceased and Mr Groth, whilst continuing their metal detecting.[23] When unsuccessful in both endeavours, they returned to their river camp where they saw the deceased's dog. Mr Anderson went out again for about an hour whilst Mr Bidner stayed at the camp with the dog and waited.[24]

[15] Mr Bidner had come to the camp in the deceased's vehicle and the deceased had the keys. Mr Bidner left on Mr Anderson's motorbike to get Mr Bidner's vehicle which was some distance away at Maytown. While driving his vehicle back to the Palmerville camp, his wife contacted him and said that Mr Anderson had let her know that Mr Groth was at the camp. Mr Bidner, Mr Anderson and Mr Groth packed up the camp into the deceased's vehicle, putting their personal gear in Mr Bidner's utility and leaving the deceased's swag and personal effects in his vehicle. They put a note on the windscreen telling him that they had his dog and were at Maytown.[25] Mr Bidner rang the police that night and met with them the following day. On 13 July 2012 he identified the appellants as the people he saw in the gully on 9 July in a photo board identification.[26]

[16] When cross-examined by counsel for Ms Wilson-Struber, he agreed that in his statement to police on 10 July he did not say the passenger who was handling the black stick moved her hand with a downward and upward motion; he may have mentioned it and the police did not take it down.[27] He also agreed he had not given this evidence at committal; this was because he was answering the specific questions and he was not asked about it; he did not have a photographic memory.[28] He said the passenger was not wearing a hat but then agreed that he told police on 10 July she was wearing a bushie's hat. Although he could not see her facial details, he could tell her age and that she was a woman.[29] He denied she had a gun when she got out; she pulled the seat forward and took the gun out after she alighted. He agreed he told police that his last vision was "her getting out of the car, her with the gun."[30] After the first shot he did not hear the dog barking or any screams.[31] The tendered map did not accurately depict his position at the time of the second shot; he was closer to where he was at the time of the first shot. When he heard the vehicle leave he stood

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20 T4-23, AB 137.
21 T4-26, AB 140.
22 T4-27, AB 141.
23 T4-28, AB 142.
24 T4-30, AB 144.
25 T4-32, AB 146.
26 Exhibits 11, 12 and 13.
27 T4-57, AB 171.
28 T4-57 – T4-58, AB, 171 – 172.
29 T4-50 – T4-51, AB 164 – 165.
30 T4-40, AB 174.
31 T4-62, AB 176.

up to get a better look. He agreed he told police that he "did not stand up and get a look at who was in [the vehicle] or who was on it." He meant by this that he did not walk up to the edge of the gully. He told police, "Once that vehicle left, I rose from my position."[32] On the morning of 10 July, before arranging to meet the police at a location away from his property, he may have driven to the deceased's camp and dropped off the deceased's gear; he was not sure; he could not remember going inside the deceased's shed. On 11 July he changed the tyres on his vehicle.[33] He agreed that, when he was speaking to Mr Struber at The Croc Hole, Mr Bidner accused him, without basis, of sending police to Mr Bidner's property where he was growing marijuana.[34]

[17] When cross-examined by counsel for Mr Struber, Mr Bidner admitted that he told police on 10 July that he did not see the driver of the vehicle. He maintained that he did see the driver but conceded that may be he did not identify him.[35]

[18] **Tremain Anderson** gave evidence that he first met Mr Struber about 10 years earlier, not far from Palmerville Station and Ms Wilson-Struber was also present. He then saw them 10 to 20 times over the years, either passing in a vehicle or by the side of the road.[36] On 8 July 2012 he rode his motorbike into Palmerville Station while Mr Bidner and Mr Groth drove with the deceased in his vehicle.[37] They all camped by the Palmer River. Early next morning they crossed the river and went downstream to the dry gully. The four men separated with Mr Anderson prospecting in and around the gully for about an hour. He then met up with the deceased and they had a chat before separating again. Mr Anderson crossed the track and headed upstream to explore gullies on the way back to camp. He heard a vehicle coming out of the river and moved quickly to a gully.[38]

[19] He said, "I instantly panicked, because I know it'll only be one vehicle. This isn't a tourist area. It isn't the sort of area everybody goes. And I straightaway thought, well, here comes Struber."[39] He saw Mr Struber and Ms Wilson-Struber in their vehicle. They did not seem to see him; they were either pre-occupied watching the road or looking down into the gully where the deceased was. Mr Anderson ducked down into long grass. He heard the vehicle stop, some voices, and, about two minutes later, a shot.[40] About 15 minutes later he heard the vehicle start, move a short distance along the track, stop again and another shot. About half an hour later the vehicle started again and seemed to head back towards the river.[41]

[20] After about 10 or 15 minutes he met up with Mr Bidner. They decided to separately "detect" their way back to camp and wait for the others. When he returned to camp he saw the deceased's dog and Mr Bidner. Mr Anderson ran back to the gully where he had last seen the deceased and called out for him and Mr Groth.[42] He returned to camp and they decided Mr Bidner would take Mr Anderson's motorbike to Maytown and Mr Anderson would call him at around 3.00 pm if he had not found anyone.[43] Sometime after 3.00 pm Mr Groth returned to camp. When Mr Bidner arrived, they

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32 T4-64 – T4-66, AB 178 – 180.
33 T4-70, AB 184.
34 T4-41 – T4-42, AB 155 – 156.
35 T4-77, AB 191, l 6 – l 15.
36 T4-82, AB 196.
37 T4-84, AB 198.
38 T4-89, AB 203.
39 T4-89, AB 203.
40 T4-91, AB 205.
41 T4-93, AB 207.
42 T4-95, AB 209.
43 T4-96, AB 210.

packed up. Mr Anderson later rang the Palmerville Homestead. On the first call, there was no answer. He called again and it went straight to the answering machine. He left a message that if he had not heard from them in half an hour he was ringing the police. He later contacted police.[44] On 13 July he met the police at Palmerville Station and pointed out various places to them.

[21] Under cross-examination by Ms Wilson-Struber's counsel, he admitted he had been convicted of large scale cannabis production and sentenced to suspended imprisonment.[45] He accepted that he did not see the vehicle stop or anyone get out. His observations were made as he looked over his shoulder, walking briskly away seeking cover with his head down. He saw enough to know if the people in the vehicle were looking at him and where they were going. He saw both the driver and the passenger, although his focus was primarily on the driver. The glare from the sun on the windscreen partially blurred his vision.[46] The passenger was wearing a hat but he could still see her face. Mr Struber was driving and Ms Wilson-Struber was in the passenger's seat. He was 100 per cent sure he saw her. He did not hear a dog barking or any screaming or yelling, although before the first shot he heard voices.[47] Later he searched the gully but did not find anything alarming like blood.[48] As to whether he or his companions burned grass that day, he said, "...it'd be ridiculous for any of us to do it. We're just upstream from a – from the station owner's homestead."[49]

[22] Under cross-examination by Mr Struber's counsel, Mr Anderson accepted that he told police on 10 July that he only saw a glimpse of Mr Struber as he drove past and did not see what he was wearing.[50] He agreed that on 11 July he told police, "I just seen a side, sort of, profile...I took more notice of his shirt than anything." He was adamant that Ms Wilson-Struber was wearing a hat and added that Mr Struber did not appear to be wearing a hat.[51] He maintained that he identified both appellants in the vehicle.

[23] **Kevin Groth** gave evidence that he was on a ridge to the west of the dry gully where the deceased was last seen on 9 July. He heard a vehicle approaching and lay down out of sight. He only saw the roof and headboard as the vehicle passed by on the track below. He then moved north.[52] He heard a dog bark and a couple of minutes later, at about 9.30 am, a shot.[53] He did a "shuffle jog" up a hill further north and heard a thud. It was like something being thrown in the back of a utility.[54] About five to 10 minutes after the first shot he heard a second shot and smelt gunpowder, like from a fired rifle. He was not comfortable and found this "nerve-wracking." He walked up a nearby hill and saw cattle heading up a ridge. They "got spooked" and ran down the hill. He was concerned and waited for about half hour before continuing on his way. He returned to camp about 3.00 pm.[55]

[24] In cross-examination by Ms Wilson-Struber's counsel he agreed that he only saw a glimpse of the roof of the vehicle, "just the top of the ute tray, the headboard." He said,

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44 T4-99, AB 213.
45 T4-102, AB 216.
46 T5-12, AB 231.
47 T5-13, AB 232.
48 T5-14, AB 233.
49 T4-92, AB 206.
50 T5-16, AB 235.
51 T5-17, AB 236.
52 T5-26, AB 245.
53 T5-27, AB 246.
54 T5-28, AB 247.
55 T5-29, AB 248.

"The colour was a beige, faded beige, and with the headboards … orangey…rusty sort of colour."[56]

[25] **Tanya Whiting**, Ms Wilson-Struber's niece, gave evidence that Ms Wilson-Struber spent the night of 11 July at the house of Ms Whiting's mother in Mareeba. The next day Ms Wilson-Struber told Ms Whiting she wanted to telephone some friends and Ms Whiting took her to a public phone in Mareeba.[57]

[26] **Detective Sergeant Graham Camp** gave evidence that on 8 October 2012 he was able to drive the appellants' unregistered vehicle in low range, first gear, down and up a slope in the area where burnt grass and the deceased's blood was found.[58] The vehicle was not in police custody prior to 8 October.[59]

[27] **Detective Sergeant Bradley McLeish** gave evidence that the appellant's homestead was about 1.8 kilometres west. A track ran from the homestead along the northern bank of the river, crossing the mouth of the dry gully then climbing up and out of the river and along a ridge on the eastern side of the gully.[60] Police unsuccessfully searched for the deceased in the gully on 10 July 2012 and detained and spoke to the appellants at their property about their movements on 9 July 2012.[61] The recorded conversations were played to the jury.[62] They both denied seeing anyone on the property or being in the vicinity of the gully or firing any weapons that day. Ms Wilson-Struber said that the previous day they had been working "around here" and denied driving anywhere else on the property. She thought there were four firearms on the property including the one in the vehicle which Mr Struber mainly handled. She claimed she did not not touch firearms; the last time she used one was a month or two earlier. She had heard a few vehicles but had not seen anyone on the property on 9 or 10 July. Police ascertained that three licensed weapons were missing: a revolver and a bolt action rifle registered to Mr Struber and a lever action rifle registered to Mr Wilson.[63] Police found small amounts of blood, burnt patches of ground, partly burnt matches, an empty film canister, some bailing twine and an old lead projectile in the gully where the deceased was last seen. Police also found tyre tracks and a damaged termite mound in the vicinity of the tracks which led down a steep embankment towards the burnt patches.[64]

[28] **Ms Fiona Split**, the deceased's de facto partner of 27 years and mother of their two adult children, gave the following evidence. The deceased was six foot tall and weighed 86 kilograms. She had not heard from him since 7 July 2012. They had a number of shared property and business interests. There had been no unexplained withdrawals from their bank accounts. When he was out prospecting he would phone daily, sometimes twice a day. In cross-examination she said that in late June 2012 he had asked for some bailing twine to attach his prospecting rock pick to his belt. She gave him some twine, which may have been black, from the horse shed.

[29] Counsel made the following joint **admissions**.[65] The appellants' unregistered Toyota Landcruiser was examined and no traces of blood were found. A 22 bolt action "Norinco"

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56 T5-35, AB 254.
57 T5-43, AB 262.
58 A DVD recording this event, Exhibit 16, was played to the jury.
59 T5-55, AB 274.
60 T5-90, AB 309.
61 T5-80, AB 299.
62 Exhibit 17. Transcript at MFI F, AB 976 – 995.
63 T5-89, AB 308.
64 T5-87, AB 306.
65 Exhibit 1, AB 504 – 514.

rifle, a Harrington and Richardson firearm in a leather case and spent cartridge cases were found in its cabin. The appellants' Toyota Landcruiser registration 730HRU was also examined and, again, no traces of blood were found. A bolt action firearm with scope, spent and unspent cartridge cases and a firearm magazine were located in its cabin. Items of clothing belonging to the appellants were tested but no traces of human blood were found. Traces of the deceased's DNA were found on swabs from an empty film canister,[66] botanical matter,[67] "leaf" ,[68] black twine,[69] rock 1 and rock 3.[70]

[30] Photographs were taken on 11 July of the appellants' two vehicles, tyre tracks in bushland and of Palmerville Station homestead. On 13 July, photographs were taken in the gully of the location of "leaf", general views of burnt patches, a firearm projectile[71] and an anthill with scrape marks. On 14 July, photographs were taken of damaged trees, an anthill and tyre tracks in grass bushland in the gully. There were markers on the photographs. Markers one to 12 indicated tyre tracks in the grass leading from the bushland down the ravine to levelled out ground in the gully. Marker 13 indicated the location of green fibre and blood-stained leaf. Markers 14 and 15 indicated the location of the larger burnt grass area where partially burnt matchsticks were found.[72] Marker 6 indicated the knocked over termite mound[73] with gouge marks. These were consistent with being made by a metal component on the undercarriage of the appellants' unregistered Toyota Landcruiser. An examination of the gouge marks established a positive comparison between a cast from that vehicle and a cast from the termite mound. This established that the metal surface of the vehicle's undercarriage was capable of leaving reproducible marks. The marks within the termite mound were consistent with having been caused by an object such as the vehicle's undercarriage or a similar type of tool.

[31] Mr Bidner marked Exhibit 2 (which was reproduced in Exhibit 4) with the last known position of the deceased.[74] Mr Groth, Mr Bidner and Mr Anderson also marked their positions. The area marked on Exhibits 2 and 4 between N18 and N13 was searched and no human blood or projectiles were detected. Further markings depicted the presence of tyre tracks,[75] the leaf with blood matching the deceased's DNA and four partially burnt matchsticks, one of which matched the deceased's DNA;[76] blood stains which matched the deceased's DNA profile on several rocks[77] and on ground cover;[78] a smaller area of burnt grass;[79] a knocked down tree with gouges in the bark and grease marks on the exposed wood;[80] scratches in a termite mound;[81] gouges in the bark of a tree;[82] two knocked down trees;[83] and damage to a tree and a termite mound.[84]

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66 Exhibit 5.7, marked on Exhibits 2 and 4 as G20.
67 Exhibit 5.7, marked on Exhibits 2 and 4 as G18.
68 Exhibit 5.7, marked on Exhibits 2 and 4 as G21.
69 Exhibit 5.7, marked on Exhibits 2 and 4 as G15.
70 Exhibit 5.7, marked on Exhibits 2 and 4 as G19.
71 Exhibit 5.7, marked on Exhibits 2 and 4 as G18.
72 Exhibits 2 and 4 at G19.
73 Exhibits 2 and 4 at G16.
74 Exhibits 2 and 4 at N18.
75 Exhibits 2 and 4 at N10 to N3 – N15.
76 Exhibits 2 and 4 at G21 and G19.
77 Exhibits 2 and 4 at G19.
78 Exhibits 2 and 4 at G18.
79 Exhibits 2 and 4 at G17.
80 Exhibits 2 and 4 at G1 and G2.
81 Exhibits 2 and 4 at G3 and G6.
82 Exhibits 2 and 4 at G8 – G10.
83 Exhibits 2 and 4 at G11.
84 Exhibits 2 and 4 at G12.

An old, damaged projectile was found but it had not been fired recently. Cow pats with tyre impressions corresponding in class characteristics, tread design and wear to the tyres on the appellants' unregistered vehicle were also marked.[85] These could have been made by the tyres on the appellant's unregistered vehicle or any other tyres with similar tread characteristics.

[32] On 12 July at approximately 9.27 am Ms Wilson-Struber telephoned Palmerville Station homestead from a Mareeba pay phone and spoke to a police officer. She said she had some information; the police were looking in the wrong spot; they should be searching 12 to 15 kilometres east. She refused to give her name. She said, "I have someone that was involved." When the officer tried to obtain further information the call, which lasted 86 seconds, was terminated. Attached to the admissions was a schedule of seized and missing firearms from Palmerville Station.

[33] A neighbour of the appellants, Bertie Callaghan, who was profoundly deaf did not see or hear anything relevant on 9 or 10 July.

[34] On the fifth day of the trial, counsel made the following further admissions. Mr Bidner was interviewed by police on 9 July 2012 by telephone at 9.10 pm and said the following:

> "At the very same moment, I heard [the deceased's] dog bark, and at the same time, [the deceased] said 'Quiet.'"
>
> "I even went to track the U-turn, like, after they left. I went, 'Right, I will go and see what they said to [the deceased]'."; and
>
> "But after I went back to the car and waiting a while, me and [Mr Anderson] – oh, [Mr Anderson] went back first. I also went back. So we both – we both went back to the site separately. We did track where the car turned around. We went – yeah."

Counsel also admitted that Walter Randall received a telephone call from Mr Anderson on the afternoon of 9 July 2012. Mr Anderson said that he had heard two gunshots being fired and then another shot a bit later. [86]

[35] **Mr Struber** gave evidence that he met Ms Wilson-Struber when he first worked on Palmerville Station and they married in 2001. They managed the property together. He said he knew nothing about the deceased's disappearance or of any harm coming to him. On 9 July 2012 he and Ms Wilson-Struber worked on equipment at a shed eight kilometres south of the homestead. The only time they separated was mid-afternoon when she went to get the horses after lunch. He was either at the homestead or at the shed all day. At that time his unregistered vehicle had a problem with its gear stick so that it was not possible to select first or second gear. After the police came on 10 July he fixed it temporarily and later made a permanent repair so that all the gears could be used.[87]

[36] In cross-examination he agreed that he earlier spoke to Mr Bidner at The Croc Hole and asked him to leave his property, but added that he "work[s] in" with people on the property.[88] He had never seen Mr Bidner before that day. He had never met Mr Anderson and never seen him before he gave evidence.[89] He agreed his unregistered

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85 Exhibit 4, G7.
86 T5-68 – T5-69, AB 287 – 288.
87 T6-37, AB 358.
88 T6-38, AB 360.
89 T6-38, AB 360.

Landcruiser was used as "a bit of a bush basher" to round up cattle. When an animal was killed it was placed in the back of the utility on a tarp to stop blood getting on the vehicle.[90] When he and Ms Wilson-Struber drove around the property he would normally drive. He had never seen her use a firearm. He maintained that neither of them were at the gully on the day the deceased disappeared and they were not involved in any shooting.

[37] Ms Wilson-Struber did not give evidence. Her case was that she could add little useful information to what she had told police. Her admitted phone call to police was explicable in light of her limited knowledge of the world, lack of education and naivety. She was not knowledgeable or experienced in guns. The poor quality of the identification evidence, the inconsistencies between the accounts of Mr Bidner and Mr Anderson, her exculpatory account to police and the lack of any incriminating DNA evidence would leave the jury in doubt as to her guilt.

Was the jury verdict unreasonable

[38] Both appellants contend that the guilty verdicts were unreasonable under s 668E(1) *Criminal Code* 1899 (Qld). They submit that there are many reasonable hypotheses open on the evidence consistent with their innocence. One appellant may have killed the deceased independent of the other, with the other assisting only in disposing of the body after the killing. They contend that it was impossible from the evidence to know whether either shot was directed at the deceased or actually struck him resulting in serious or fatal injury. Even if there was sufficient evidence to establish that each appellant was involved in the killing, there was insufficient evidence to infer that the killing was intentional. Either appellant may have fired the shots merely to frighten the deceased without the others knowledge or involvement. Ms Wilson-Struber may have fired the first shot as a warning, or to kill the dog, but inadvertently killed the deceased, with the second shot discharging either accidentally or after aiming and firing at the dog but missing. To conclude that one appellant knowingly aided the other in intentionally killing the deceased, in the absence of any incriminating DNA evidence, they contend, was mere speculation and conjecture.

[39] A consideration of this ground of appeal requires this Court to review the evidence at trial and determine whether it was open to the jury to be satisfied on that evidence beyond reasonable doubt of each appellant's guilt.[91] This task is often more difficult in a circumstantial case where the body has not been found and there is no direct evidence as to the factual matrix surrounding the killing.

[40] The prosecution's principal theory at trial was that one appellant, with the knowing assistance of the other, fired at least one shot intending to kill the deceased. The case was left to the jury on the basis that they could convict if satisfied beyond reasonable doubt that both appellants were criminally involved in the intentional killing of the deceased, even though they could not point precisely to who did what.[92]

[41] As both appellants concede, even though the deceased's body has not been found, there was ample evidence for the jury to conclude beyond reasonable doubt that he is dead.

[42] The identification of both appellants by Mr Bidner and Mr Anderson certainly had its weaknesses. But the judge highlighted these for the jury with precision and fairness

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90 T6-39, AB 361.

91 *M v The Queen* (1994) 181 CLR 487, 494 – 495.

92 *R v Leivers and Ballinger* [1999] 1 Qd R 649.

and there is no suggestion these directions were inadequate. The witnesses' separate identifications were capable of being treated by the jury as two separate recognitions of the appellants in circumstances where the witnesses had seen them on a number of previous occasions, rather than less dependable identifications of and by complete strangers. The identifications of the appellants also received some support from Mr Groth's evidence: the vehicle he described was similar to the appellants' vehicles. Importantly, there was no evidence of another man and woman matching the general description of the appellants being in this isolated gully, only 1.8 kilometres from the appellants' homestead, at this time. It was open to the jury to be satisfied beyond reasonable doubt that Ms Wilson-Struber was the passenger in the vehicle and the appellant was the driver.

[43] The jury were also entitled to reject the appellants' exculpatory account to police and Mr Struber's evidence at trial. Whilst no blood was found on the clothing seized from the appellants, or in their vehicles, Mr Struber explained in evidence that they used a tarp when killing cattle for food so as to keep the vehicle free of blood. In disposing of the deceased's body and effects, they may also have disposed of the tarp and any sullied clothing. The lack of both a body and DNA evidence implicating the appellants did not necessitate their acquittal.

[44] The only rational conclusion from the evidence which I have earlier summarised in some detail was that the deceased was either injured or killed in the isolated gully where the appellants and the deceased were seen on 9 July 2012, and where traces of the deceased's blood were found after two shots were heard.

[45] There were some peculiar aspects to the prospectors' evidence, but none of them had guns on 9 July 2012. There was no evidence of any vehicles other than the appellants', or anyone other than the appellants, being in the gully at the time. The prospectors' evidence was consistent with the appellants being annoyed when they saw the deceased and his dog in their gully in the vicinity of their cattle; Ms Wilson-Struber motioning to Mr Struber to stop the vehicle; her alighting and getting a rifle from behind the seat; and her discharging the gun in the vicinity of the deceased. Mr Wilson's Winchester .22 rifle which Ms Wilson-Struber sometimes used was missing from its gun safe at the appellants' homestead. The evidence supported the inference that the appellants' vehicle proceeded down the single track to where blood and other items linked to the deceased were found. Although the prospectors denied that they would light a fire to assist their prospecting and none of them noticed that a fire had been lit, the evidence left open the possibility that the deceased did this; after all, the prospectors had a fire at their campsite.[93] If so, this may have also enraged the appellants. Alternatively, the appellants may have lit the fire later, to destroy evidence. What is clear is that the deceased was injured in the gully by one of the two shots fired, as his blood was found there. It is not known which of the appellants fired the second shot or the circumstances in which it was fired. Given the admissions, the jury were entitled to infer that the looped track and the single track which led to the deceased's blood had been made by the appellants' unregistered vehicle. Although there was difficulty with its gears, there was no reason to conclude that Mr Struber, who drove it regularly and was familiar with it, could not coax it to operate on relatively steep slopes. The jury were entitled to find that the appellants left in their vehicle with the deceased, either dead or injured. Given that the deceased was six foot tall and weighed 86 kilograms, Ms Wilson-Struber could not have lifted the body into the

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93 Exhibit 7A.

vehicle on her own; she must have been assisted by Mr Struber. The sounds described by the prospectors were consistent with the appellants together placing the deceased, either dead or injured, into the rear of their vehicle.

[46] This evidence in combination was capable of demonstrating a common design to the appellants' actions. The appellants' conversation with Mr Bidner at The Croc Hole made clear that they were concerned about the impact of prospectors on their cattle and did not want them on their property. Their observed conduct on 9 July 2012 suggested that they were angry with the deceased when Mr Struber stopped the vehicle and Ms Wilson-Struber took a gun from behind the seat, manipulated it and discharged it in the vicinity of the deceased. In the absence of evidence to the contrary, it was open to the jury to infer that, whoever did what, the appellants' acted together in killing the deceased, either in the gully where he was injured or later in unknown circumstances, and with a murderous intent to kill or seriously harm him.

[47] To convict, the jury had to conclude that this hypothesis was the only one reasonably open on the evidence in respect of each appellant.

[48] The difficulty with the various alternative possibilities raised by the appellants for the first time in this appeal is that this was not their case at trial. They gave an exculpatory account to police denying any involvement. This was supported by Mr Struber's testimony, which was evidence in both his and Ms Struber-Wilson's trials. He said that they were not involved at all in the incident; they were either at a shed eight kilometres from the homestead or at the homestead, not in a vehicle at the gully when shots were fired on the morning of 9 July 2012.

[49] As the High Court has recently restated in *R v Baden-Clay*,[94] ordinarily parties are bound on appeal by the conduct of their case at trial.[95] Mr Struber gave evidence, like the appellant in *Baden-Clay*, which was capable of excluding all the innocent hypotheses now raised on appeal.[96] He swore that he and Ms Wilson-Struber were not in the gully on 9 July 2012 and were not involved in any way in harming the deceased. This was also evidence in Ms Wilson-Struber's trial. The fact that Mr Struber's evidence was not believed by the jury does not mean it can "reasonably be disregarded altogether as having no bearing on the availability of hypotheses consistent with [the appellants'] innocence of murder."[97] If his account was disbelieved, and given that the hypotheses consistent with innocence were not raised by the appellants at trial and were contrary to Mr Struber's evidence, it was open to the jury to consider that the evidence at trial was sufficient to persuade them that all hypotheses consistent with innocence were not reasonable.[98]

[50] It follows that it was open to the jury to be satisfied beyond reasonable doubt on the evidence that the only rational hypothesis was that one or other of the appellants killed the deceased with an intent to kill or do grievous bodily harm, and with the knowing assistance of the other.[99]

[51] The appellants' first ground of appeal is not made out. As this is Ms Struber-Wilson's only ground of appeal, her appeal against conviction must be dismissed.

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94 [2016] HCA 35.
95 Above, [48] citing *Nudd v The Queen* [2006] HCA 9, [9].
96 Above, [54].
97 Above, [57].
98 Above, [57] and [63].
99 *R v Leivers and Ballinger* [1991] 1 Qd R 648.

The applications to adduce further evidence and whether that evidence demonstrates a miscarriage of justice

[52] The first piece of evidence which Mr Struber seeks to lead in this appeal is contained in a statement from Sergeant Scott Ezard dated 30 May 2016. Sergeant Ezard did not give evidence at trial but his first statement dated 11 October 2012, with annexures, was provided to Mr Struber's counsel well before the trial. This first statement relevantly included that Sergeant Ezard had measured the tyre tracks in the gully referred to in the tendered maps[100] and photographs[101] and found that those on the single track were consistent with having been made by the tyres on the appellants' registered vehicle.

[53] After Mr Struber's conviction, Sergeant Ezard had discussions with Mr Struber's solicitor and prepared his second statement which included the following. He had made a mistake in calculating the tyre track widths. There were, in any case, a number of variables that could affect the accuracy of the measurements in his first statement, including the precision of the actions of the officer assisting him. The possible variations in the measurements "could be somewhere in the vicinity of 50mm." This meant that the tyre tracks which he originally said were consistent with the appellants' registered vehicle could have been made by either of the appellants' vehicles, or many other vehicles. If the new calculations in his second statement were precise, the tyre tracks could not have been made by the appellants' unregistered vehicle.

[54] In answer to a question from the Court, he stated that now when he provides statements about measurements of this kind he records that the measurements are approximations only and not precisely reliable.[102] He was not asked whether he measured the tyres on Mr Wilson's vehicle but it seems from his statements that Mr Wilson's vehicle, 919CEJ, could have made the tyre tracks.[103]

[55] The second piece of evidence upon which Mr Struber seeks to rely was from Mr Stephen May, a disability pensioner who resides in his motor home, a converted bus, and describes himself as a "grey nomad." His evidence was as follows. On 6 August 2015, a few weeks after the appellants' convictions, he advised police at Mareeba that he was in the area when the Palmer River murder happened and had seen a body in a vehicle. He left his phone number but the police were not able to contact him for some weeks because he was travelling.

[56] On 24 August 2015 he went to the Cairns Police Station and gave a statement to the following effect. On 11 July 2012 he drove to the Palmer River crossing. He could not cross the river and decided to drive to Palmerville Station, about 20 kilometres away, to cross there. An old Toyota Landcruiser, fawn, brown or tan coloured, with "road looking tyres…not 4WD tyres", was driving towards him, in the direction of Palmerville Station. Mr May waved the vehicle down. He had a bad feeling and "noticed this blue tarp all rolled up and there were these boots sticking out of it and the feet had to be in the boots. They were like slip on work boots, like steel cap. I think they were black and they looked clean and new. They were boots that I didn't think anyone on the land out there would be wearing."

[57] He saw a yellow cattle dingo-type dog in the back of the utility. The driver was of wiry build, in his 30's, wearing a "cowboy looking hat and dark sun-glasses." He did

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100 Exhibits 2 and 4.
101 Exhibit 5.6.
102 Appeal Transcript, 1-27, l 7 – l 19.
103 See [63] of these reasons.

not seem pleased to see Mr May. He was careful not to mention what he had seen and talked instead about the dog. The driver looked in the back of the utility, seemed to see the boots exposed, and pulled the tarp over the boots whilst still looking at Mr May. The man said he was the manager from Palmerville Station. Mr May tried to keep the man relaxed until Mr May drove away towards the highway. He saw a police vehicle coming towards him but did not intercept it to tell police what he had seen as he "was in flight mode" and was not really thinking straight. He did not tell anyone else about what he had seen at this time. He wrote in his diary about his trip to the area but he did not write what he had seen in the utility in case the man came looking for him. He did not record in his diary what he saw until 14 August 2015 when he was away from there and knew he was safe. On 16 August (it is unclear from this statement whether this was 2012 or 2015) he heard on the radio there had been a murder at Palmer River and made a note in his diary. He has given police a copy of the diary. He decided to come forward as he was thinking of the deceased's family.

[58] In determining Mr Struber's application, the respondent invited the Court to consider Mr May's addendum statement dated 16 May 2016 which included the following. He gave details about his background including his medical and psychological history and explained how he came to travel around Australia in his campervan, "wandering, prospecting, bird watching to get fresh air and exercise." He always kept a diary. He made notes of this incident on 16 July 2012 under the page for 11 July 2012. The driver of the utility on 11 July 2012 seemed upset and was mouthing some words. Mr May felt that "this bloke didn't like [him] being there." The exposed boots were on the right-hand side of the tray next to the cab of the utility. They were on their side on top of each other with the left underneath the right. The toe of the boots was pointing up towards the front of the cab. He did not see any skin or legs but "because of the way the legs were aligned the feet had to be in the boots." There was no way, on that road, the boots could stay in that position unless feet were in them, or they were wired in position, or they were on a mannequin. He described the boots as "slip on elastic side work boots with a rubber sole." They were very clean but not brand new; they had been worn. They were black with a black sole and "a funny looking lumping pattern through the sole." He explained that another reason why he did not stop the police on 11 July 2012 was because he did not want to get involved and be caught up for too long; his involvement with occupational health had made him sceptical of the justice system. By the time he thought about whether he should tell the police, they had gone by. All these thoughts were running around in his head and that was why he did not write anything in his diary for a day or two.

[59] He first recorded this incident when he heard on the radio on 16 July 2012 that someone was shot out on the Palmer River. He told "one of the blokes from Kings Plains Station" whom he met at Archer Point, "I reckon I saw a body in a ute and he said he was a manager of Palmerville Station." He also told a number of close friends or family. When he was travelling in 2015 he heard the matter was going to trial so he decided to go to the police and tell them what he saw.

[60] The Court was provided with copies of the relevant diary pages. Under the date, Wednesday, 11 July 2012, he recorded that he met a "bloke" from Palmerville Station who gave him some advice about roads and a crossing and "got this feeling of uneasy." Under the date, Saturday, 14 July 2012 he recorded:

> "Palmerville Station bloke. Blue tarp in back of ute. Yellow dog dingo looking jumped out of old Toyota ute. He said it was car sick. Didn't look to happy. Wouldn't come back to him. Could see boots

> in back. New looking. The soles were facing me on top [drawing of shoes]. Bloke thin – wiriser [sic] type. Hat. AWD. Sunvisor he wouldn't take of [sic]. Car type tyres on the 4 x 4. Stood to block my view of back of ute. Even moved tarp a bit??? to cover boots."

[61] Under the date, Monday, 16 July 2012 he recorded:

> "Listening to radio. This morn. A bloke was murdered. Last week out at Palmerville Palmer goldfields. A 48 year old prospector radio said. Gun shots herd [sic]. He is missing and camp deserted? 'Gold fever.' This maybe what I was feeling when I was out there and couldn't setal [sic] uneasy feel there. Boy it is a wild place.' 'All twisted up smallish mountains.' More on this Local said they think it may be bloke from Palmerville Station. He's a bit like that. Local said to me. I wounder [sic] if the bloke I talked to is the fellow they are talking about. Seem OK. Friendly enough bloke, but, strange.
>
> 1) I saw what looked like a body rolled up in a blue tarp with boots sticking out on this side. Driver side of old Toyota 4 x 4 Ute [drawing] like this. – strange.
>
> 2) His dog jumped out on him stopping looked strange – frighten – nervis [sic] –
>
> 3) The first thing this bloke did was get out of ute look in back! Saw boots sticking out and covered them. Then stood in front so I could not see (looked like he was hiding something!!! I talked about his dog to put him at easy. Had a bad feeling about (-) this bloke."

[62] Mr May was not cross-examined at the hearing of the appeal so there remains some confusion as to exactly when he made the various diary notes.

[63] The respondent also invited the Court in determining the application to consider further evidence from Detective Sergeant McLeish dated 19 May 2016 to the following effect. On Wednesday, 11 July 2012 at about 3.45 pm he was at the front of Palmerville Station homestead with Detective Senior Constable Michael Dwyer when a light grey Toyota Landcruiser utility, registration number 919CEJ, arrived. The driver identified himself as George Thomas Wilson. He had a dog in the back of his utility, along with a number of bags and boxes. Sergeant McLeish had a clear view of the rear tray. He questioned Mr Wilson about his knowledge of the appellants' movements and about the deceased's disappearance. Mr Wilson admitted to having a firearm and ammunition in a bag in the front passenger seat and Sergeant McLeish took possession of a .44 Magnum hand gun and ammunition. On 2 August 2012, Mr Wilson's vehicle was examined and photographed. Sergeant McLeish was not cross-examined at the hearing of the appeal.

[64] Mr Struber contends that, but for having been in receipt of Sergeant Ezard's original statement, he may not have made many of the admissions at trial. He also points out that the prosecutor in his closing address emphasised: "there can be no doubt that [the 'unregistered vehicle'] was driven in [the gully] area"[104]. Sergeant Ezard's further evidence, Mr Struber contends, places real doubt on whether the unregistered vehicle was driven in the gully area. He submits that Mr May's evidence was not available

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[104] Closing Addresses (22 July 2015) 10, l 41 – l 42.

to or obtainable by the defence at trial. Despite some peculiarities, Mr Struber submits it is cogent and credible evidence. It should have been but was not before the jury and it is capable of belief. Importantly, it indicated that somebody other than the appellants was dealing with a body in the general area where the deceased disappeared, two days after his disappearance. This person was driving a vehicle of a broadly similar description to that seen by the prospectors at the time shots were fired and the deceased disappeared. Mr May's evidence was no less important because the driver was heading towards, rather than away from Palmerville Station with a body. Mr Struber contended that the evidence raises the possibility of another male being involved in the killing. Had this evidence combined with Sergeant Ezard's evidence and the evidence at trial been before the jury, Mr Struber submits that they may have acquitted him.

[65] The respondent contends that Sergeant Ezard's evidence when combined with the evidence at trial does not raise a significant possibility or likelihood that the jury would have acquitted Mr Struber. As to Mr May's evidence, Sergeant McLeish's evidence at trial and in this appeal suggests that Mr May met up with Mr Wilson, Ms Wilson-Struber's brother. Mr Wilson told police that he met a traveller in a bus that day.[105] Had there been a body in Mr Wilson's vehicle, the respondent submits, he would hardly have been taking it back to the homestead where police were present. Mr May's description of the boots is inconsistent with those of a seasoned prospector. The respondent at this appeal hearing referred to the video-recording[106] which depicted the deceased but added that, as his boots were covered with protectors, it may be of limited assistance. Mr May's intuition and radio reports about the killing, the respondent submits, may have coloured his perception. The respondent also contends that Mr May's reliability is questionable given his reluctance to report what he saw to the police for years.

[66] Appellate courts have long recognised that there is a residual discretion in exceptional cases to receive new or further evidence, which is not fresh in the legal sense, where to refuse to do so would result in a miscarriage of justice.[107] In determining an appeal which turns on new or further evidence there are two questions. The first is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice. These questions often merge and can be dealt with together, as is appropriate in this case.[108]

[67] Sergeant Ezard's evidence is not of itself of great moment, although, but for the admissions made at trial, it is capable of throwing some doubt on whether the appellant's unregistered vehicle made the tyre and other marks on the steep single track and in other areas of the gully where, it can be accepted, the deceased was shot and his body put into a vehicle. It leaves open the possibility that one of the appellants' vehicles, or another vehicle, made the tracks in the gully. On its own, it would not be sufficient to justify this Court's receipt of it.

[68] Mr May's evidence is in a different category. His credibility and reliability is in issue but he was not cross-examined. The respondent's concerns on this issue have weight. He may be completely unreliable and prone to flights of fancy. The circumstances of

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105 AB 627. See also his evidence at trial summarised at [5] – [9] of these reasons.

106 Exhibit 7A.

107 *Mallard v The Queen* (2005) 224 CLR 125, 131 – 132 [10] – [13]; *R v Spina* [2012] QCA 179, [34]; *R v Young (No 2)* [1969] Qd R 566; *R v Condren; ex parte Attorney-General* [1991] 1 Qd R 574, 579; *R v Main* [1999] 105 A Crim R 412, 416 – 417 [16] – [17], 417 – 418 [22] – [24]; *R v Daley; ex parte Attorney-General (Qld)* [2005] QCA 162; *R v Katsidis; ex parte A-G (Qld)* [2005] QCA 229, [3] – [19].

108 *Main* [1999] 105 A Crim R 412, 417 – 418 [22] – [23]; *Katsidis* [2005] QCA 229, [4]; *Spina* [2012] QCA 179, [34].

how he came to make the diary notes are unclear. On the other hand, he could be an eccentric but honest and reliable loner, frightened for his safety, who avoids authority figures and is slow in making decisions, and who only reluctantly came forward after some years. It is not inherently improbable that someone was disposing of the deceased's body on 11 July 2012 in an area between where this person met Mr May and Palmerville Station. There is presently no evidence as to what the deceased's boots looked like but I note from the video-recording depicting the deceased[109] that he was neatly dressed in new-looking clothes suitable for walking or working in the bush. Mr May's evidence, as yet untested in cross-examination, taken together with the evidence at trial, does raise the real possibility that a man other than Mr Struber, with a vehicle similar to the appellants', may have been involved, not only in disposing of the body but in the killing. These are questions for a jury.

[69] As the respondent contends, it seems that the man Mr May met was Mr Wilson. He lived on Palmerville Station, had access to and was familiar with firearms, and probably had access to the appellants' vehicles. It is possible his vehicle made the tyre tracks in the gully. It was his rifle which was missing from the gun safe, a gun which Ms Struber-Wilson used. The identifications of Mr Struber as the driver of the vehicle in the gully by Mr Bidner and Mr Anderson had many weaknesses. They were made from a considerable distance and in far from ideal conditions. Mr Bidner and Mr Anderson may wrongly have assumed it was Mr Struber, as the driver was with Ms Wilson-Struber in a similar vehicle to that used by the appellants, close to their homestead. Mr Bidner's photoboard identification could have been of the man he met at The Croc Hole rather than the man driving the vehicle. Whilst Mr Wilson gave evidence that he was not involved in any incident with the deceased, so too did Mr Struber. Mr Struber's evidence was that neither he nor Ms Wilson-Struber were in the gully at the time the shots were fired and the deceased disappeared. A jury considering the further evidence together with the evidence at trial would be unlikely to accept Mr Struber's evidence as there is no doubt that a man and Ms Wilson-Struber were present in the gully when she fired the gun in the vicinity of the deceased, at least once. But the jury may consider that Mr Struber may have been lying to protect his wife and, perhaps, her brother, Mr Wilson. In that case, they could have a reasonable doubt on the evidence as to whether Mr Struber was the driver of the vehicle in the gully; it may have been Mr Wilson. These difficult questions are for a jury to decide after the competing hypotheses have been tested at trial.

[70] Mr May's evidence is unquestionably fresh evidence in the sense that it was not available at the trial and could not with reasonable diligence have been discovered by Mr Struber's lawyers at or before the trial. It is against the public interest for a conviction to stand if the conviction was not based on all relevant evidence,[110] especially in a circumstantial case like this with many evidential gaps. The question for this Court in determining the application to adduce further evidence is whether there is a significant possibility, or it is likely, that in light of all the admissible evidence, both the evidence in this appeal and the evidence at trial, a jury acting reasonably would have acquitted.[111] For the reasons I have given in reviewing the further evidence, I am persuaded that there is a significant possibility that, if it had been led at trial, the jury may have acquitted Mr Struber of both murder and manslaughter. They may not be satisfied beyond reasonable doubt that he was in the vehicle in the gully with

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109 Exhibit 7A.

110 *Spina* [2012] QCA 179, [32] and *R v Butler* [2010] 1 Qd R 325, 335 [41] – [42].

111 *Gallagher v The Queen* (1986) 160 CLR 392, 397, 407; *Mickelberg v The Queen* (1989) 167 CLR 259, 273, 292, 301 – 302; *Spina* [2012] QCA 179, [33].

Ms Wilson-Struber at the time the shots were fired and the deceased disappeared. They may not be able to exclude the possibility that Mr Wilson was in the gully with Ms Wilson-Struber and that they rather than Mr Struber killed the deceased.

[71] The applications to adduce further evidence should be granted and Mr Struber's appeal against conviction allowed to avoid a possible miscarriage of justice.

[72] Ms Wilson-Struber did not join in this ground of appeal, for good reason. The further evidence does not diminish the strength of the case against her at trial, even when combined with the further evidence in this appeal. She was with a man in the gully where the deceased disappeared; she manipulated something resembling a rifle and pointed it in the direction of the deceased; two shots were fired; traces of the deceased's blood were found in the gully; she and the man loaded the body into their vehicle; and the deceased was never seen again. In the absence of any evidence raising an innocent hypothesis, there was no significant possibility and nor was it likely that the further evidence would have resulted in an acquittal in her case.

[73] For these reasons, in Mr Struber's case, I would grant the applications to adduce further evidence; allow the appeal against conviction; set aside the guilty verdict; and order a retrial.

Orders

[74] I propose the following orders.

In Mr Struber's appeal, CA 186 of 2015:

1. The applications to adduce further evidence are granted.
2. The appeal against conviction is allowed.
3. The verdict of guilty is set aside.
4. A retrial is ordered.

In Ms Wilson-Struber's appeal, CA 194 of 2015:

The appeal against conviction is dismissed.

[75] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Margaret McMurdo P. I agree with her Honour's conclusion concerning the ground raised by the appellants that the verdicts were unreasonable.

[76] As to the application by Mr Struber to adduce further evidence, it concerns two matters:

(a) Senior Constable Ezard's evidence as to his analysis of the tyre tracks leading down into the gully; and

(b) Mr May's evidence concerning an interaction with a man driving towards Palmerville Station.

[77] The relevant principles concerning further evidence are as set out in *R v Spina*:[112]

> "Australian appellate courts have long recognised an important distinction between admitting fresh evidence and admitting new evidence. Fresh evidence is evidence which either did not exist at the time of the trial or which could not then with reasonable diligence have been

[112] [2012] QCA 179 at [32]-[34] per McMurdo P, Fraser JA and Margaret Wilson AJA agreeing.

> discovered. See *Ratten v The Queen*;[113] *Lawless v The Queen*[114] and *R v Katsidis; ex parte A-G (Qld)*.[115] New or further evidence is evidence on which a party seeks to rely in an appeal which was available at trial or could with reasonable diligence then have been discovered. The distinction between fresh and new evidence is sometimes blurred but it should remain significant for two reasons. The first is because the community has an interest in ensuring that defendants charged with criminal offences ordinarily have only one trial at which they have an opportunity to put forward all the available evidence upon which they rely. It is not in the public interest for defendants to hold back evidence so that, if they are unsuccessful at trial, they can use the withheld evidence to appeal and obtain a new trial. The second reason is that, where there is admissible fresh evidence, it is equally against the public interest for a conviction to stand as the conviction would not be based on all the available relevant evidence.[116]
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> In determining whether to allow an appeal against conviction based on fresh evidence, the test is whether it is established that there is a significant possibility (or that it is likely) that, in light of all the admissible evidence, both the fresh evidence and the evidence at trial, a jury acting reasonably would have acquitted. See *Gallagher v The Queen*[117] and *Mickelberg v The Queen*.[118]
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> Appellate courts recognise, however, that there remains a residual discretion in exceptional cases to receive new or further evidence which is not fresh in the legal sense where to refuse to do so would result in a miscarriage of justice. See *Mallard v The Queen*;[119] *R v Young (No 2)*;[120] *R v Condren; ex parte Attorney-General*;[121] *R v Main*;[122] *R v Daley; ex parte A-G (Qld)*;[123] and *R v Katsidis*.[124] In determining an appeal which turns on new or further evidence, there are strictly two questions. The first is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice. Frequently those two questions can be conveniently dealt with together.[125]"

[78] I agree with what McMurdo P has said about the evidence of Senior Constable Ezard, which cannot be considered fresh evidence. On its own it would not be a sufficient basis to find that a miscarriage of justice occurred.

[79] In relation to the proposed evidence of Mr May, it was not contested that it was fresh evidence. The effect of Mr May's evidence is that he had a discussion on 11 July

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113 (1974) 131 CLR 510 at 516–517.
114 (1979) 142 CLR 659 at 674–676.
115 [2005] QCA 229 at [2], [10]–[19].
116 *R v Butler* [2010] 1 Qd R 325 at 335 [41]–[42].
117 (1986) 160 CLR 392, 397, 407.
118 (1989) 167 CLR 259, 273, 292, 301–302.
119 (2005) 224 CLR 125, 131–132 [10]–[13].
120 [1969] Qd R 566.
121 [1991] 1 Qd R 574, 579.
122 (1999) 105 A Crim R 412, 416– 417 [16]–[17] (McMurdo P), 417–418 [22]–[24] (Pincus JA).
123 [2005] QCA 162.
124 [2005] QCA 229, [3], [19].
125 *R v Main* (1999) 105 A Crim R 412, 417–418 [22]–[23]; *Katsidis* [2005] QCA 229, [4].

with a man who was alone in a ute heading towards Palmerville Station. It appeared to him that there was a body in the back of the ute.

[80] Accepting that the proposed evidence should be considered in light of the evidence at the trial and that of Senior Constable Ezard,[126] I am unable to reach the same conclusion as McMurdo P.

[81] Even if the evidence of Mr May is capable of being accepted as establishing that the person he saw was Mr Wilson and that the deceased's body was in the back of the ute, I am unable to conclude that, had that evidence been before the jury, it combined with the other evidence before the jury (and the proposed evidence of Senior Constable Ezard) is such that there is a real possibility that the jury may not have convicted Mr Struber of murder or manslaughter.

[82] The question raised focuses on whether there is a possibility that, when viewed with all the other evidence, the fresh evidence may raise doubt as to whether Mr Struber was the man (identified by the witnesses, Mr Bidner and Mr Anderson) with the woman (who was undoubtedly Mr Struber's wife, Ms Wilson-Struber).

[83] The difficulty with the submissions advanced on behalf of Mr Struber lies in the evidence given by him and case run on his behalf at trial. In *R v Baden-Clay*,[127] it was observed:

> "… the respondent chose to give evidence. To say that the respondent's evidence was disbelieved does not mean that his evidence could reasonably be disregarded altogether as having no bearing on the availability of hypotheses consistent with the respondent's innocence of murder. His evidence was important, even if it was disbelieved, because it was open to the jury to consider that the hypothesis identified by the Court of Appeal was not a reasonable inference from the evidence when the only witness who could have given evidence to support the hypothesis gave evidence which necessarily excluded it as a possibility.
>
> … The hypothesis was contrary to, and excluded by, the case that the respondent put to the jury."

[84] Mr Struber gave evidence that neither he nor his wife were present in the gully at the time the shots were fired. As McMurdo P states at [69], a jury considering the further evidence together with the evidence at trial would be unlikely to accept that evidence.

[85] As to the further proposition stated by McMurdo P at [69] that the jury might nonetheless consider that Mr Struber may have been lying to protect his wife, and perhaps her brother, Mr Wilson, in which case they could have been left with a reasonable doubt on the evidence as to whether Mr Struber was the driver of the vehicle in the gully, it is relevant to note the following. The hypothesis that Mr Struber was not the person with Ms Wilson-Struber on the day in question was not one raised by Mr Struber's counsel at trial. On the contrary, Mr Struber's evidence was not only that he and his wife were not present in the gully but that, on the day in question, he remained with Ms Wilson-Struber (except for a period when she went to get the horses). His evidence and the case run by him at trial was positively inconsistent with

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126 There is authority that supports that this approach may be adopted in the context of a pardon application: *Mallard v The Queen* (2005) 224 CLR 125 at [13]; *R v Stafford* [2009] QCA 407 at [135].

127 (2016) 90 ALJR 1013 at [57] and [59].

the possibility that his wife was in the gully with another man. Nor was there was any suggestion advanced on his behalf at trial that Mr Struber, in giving the evidence he gave, may have been protecting his wife or anyone else.

[86] The case run at trial was never one that, even if the jury were satisfied Ms Wilson-Struber was present and fired the gun, there was a real possibility that the person she was with was not Mr Struber. This was not a case where the fresh evidence would go to weaken the Crown case or strengthen the defence case on an issue at trial.

[87] I would refuse the application to adduce further evidence and dismiss the appeals by both appellants.

[88] **NORTH J:** I have had the advantage of reading the reasons for judgment of the President and gratefully adopt her summary of the evidence.

[89] I agree with her Honour's reasons concerning the appellants' ground that the verdict was unreasonable.

[90] I agree with Philippides JA's reasons concerning the new evidence of Senior Constable Ezard and the fresh evidence of Mr May. I also agree with Philippides JA that the hypothesis that the appellant Struber was not the man present in the motor vehicle with Ms Wilson-Struber was inconsistent with Struber's own sworn evidence and his case at trial. The appellant Struber gave evidence that he and his wife worked together on 9 July performing various tasks and did not venture in the direction of the gully which was approximately 1.8 kilometres away[128] in a different direction.[129] He emphatically denied that he or his wife drove to the gully, insisting that they were at different places and that as far as he was aware only he and his wife were present on the property.[130] He gave evidence that the only time they were apart for a significant period was after lunch when his wife went to get the horse to go over to the cattle yards some half a kilometre away.[131] It will be recalled that the evidence of the three witnesses concerning the events in the gully was that they occurred over a reasonably protracted period and in the morning.[132]

[91] For the reasons given by Philippides JA I agree with the orders proposed by her Honour.

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128 T5-91/5, AB310; T6-40/29, AB362.
129 T6-35/26, AB357.
130 AB362-364.
131 T6-36/14-24, AB358.
132 AB143, AB230, AB248.