SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murray* [2016] QCA 342
PARTIES:	**R** **v** **MURRAY, Hamish Stewart** (appellant)
FILE NO/S:	CA No 208 of 2015 SC No 34 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 28 August 2015
DELIVERED ON:	19 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2016
JUDGES:	Gotterson and Philip McMurdo JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The appellant's conviction of murder be quashed.** **3. The appellant be retried upon the indictment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted by jury of murder – where at trial the appellant's counsel applied to exclude proposed evidence from an accessory after the fact of conversations about text messages that the appellant received from the deceased – where the trial judge dismissed the application and ruled that the evidence was adverse to the appellant's interest and shed light on the relationship between the parties – where during cross-examination of the appellant, a jury note inquired as to the content and meaning of particular text messages referred to in the accessory's evidence – where the appellant contends the evidence should not have been admitted because the jury note suggests it caused the jury to impermissibly speculate as to what was said in the messages – whether the evidence was admissible CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE –

MISDIRECTION OR NON-DIRECTION – where the appellant was convicted by jury of murder – where after the events causing the deceased's death, the appellant wrapped the deceased in a carpet or blanket and disposed of the body in mangroves off an isolated road – where the appellant also disposed of items containing the deceased's blood and cleaned the scene of the crime – where in summing up the trial judge distinguished the disposal of the body and the cleaning of the scene as two distinct categories of post-offence conduct – where the trial judge directed that there are "innocent" explanations for post-offence conduct, including "panic, fear or other reasons having nothing to do with the offence charged" – where the trial judge directed that the disposal of the body may be used as consciousness of guilt of murder only if the jury excluded the "innocent" explanations – where the appellant contends a miscarriage of justice occurred because the trial judge failed to direct the jury that disposing of the body could also indicate consciousness of guilt of an unintentional killing and there is a real possibility that the jury did not consider that lesser offence – whether the non-direction amounted to a miscarriage of justice

R v Ali [2001] QCA 331, cited
R v Baden-Clay (2016) 90 ALJR 1013; [2016] HCA 35, cited
R v Box & Martin [2001] QCA 272, cited
R v Mitchell [2008] 2 Qd R 142; [2007] QCA 267, cited

COUNSEL: J R Hunter QC for the appellant (pro bono)
T A Fuller QC for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philip McMurdo JA and with the reasons given by his Honour.

[2] **PHILIP McMURDO JA:** After a five day trial before a jury, the appellant was found guilty of the murder of a man called Collins at Cairns in 2012. He appeals against his conviction upon two grounds, namely that certain evidence was wrongly admitted and that the trial judge erred in his directions about the appellant's post-offence conduct.

The evidence at the trial

[3] At the trial it was admitted that the appellant killed Mr Collins on 28 November 2012 at a certain address in Cairns. He was killed in a converted garage which was then the residence of Ms Marnie Peckham and her 19 year old son. The house which included this area belonged to Ms Peckham's mother who lived upstairs. For the few days prior to his death, Mr Collins had been staying in Ms Peckham's residence. Mr Collins, Ms Peckham and the appellant had known each other for only a short time and had become associated through the use of drugs, including methylamphetamine.

[4] During the few days when Mr Collins was staying at Ms Peckham's place, she was staying in the appellant's residence in another part of Cairns. On the morning of

28 November, the appellant decided to go to Ms Peckham's place to see Mr Collins. Ms Peckham left with the appellant and travelled with him until they stopped at a service station not far from where she lived. She then walked home and soon afterwards he arrived, parking his car next to the converted garage. There followed an altercation between the appellant and Mr Collins in which, as the appellant's evidence at the trial confirmed, Mr Collins was struck several times by the appellant with a hammer.

[5] A forensic pathologist, Dr Botterill, examined the skeletal remains of Mr Collins. He found several fractures to the skull and to the left cheek bone. One fracture to the skull was an especially large defect which, Dr Botterill said, would have required the infliction of "more than moderate force". His evidence was that the number of blows inflicted upon Mr Collins did not necessarily equate with the number of the fractures which he identified. Further it was possible, Dr Botterill said, that some of the fractures could be explained by the deceased's head striking a wall and other hard surfaces, rather than being the direct consequence of a blow or blows with the hammer. Therefore the number of times that the deceased had been struck with the hammer could not be determined. The large defect on the skull could be explained by as few as two blows.

[6] Prior to the trial, Ms Peckham had pleaded guilty to being an accessory after the fact to the murder and received a sentence reduced for her undertaking to give evidence in the case against the appellant. She gave evidence of her association with the appellant and the deceased. The three of them and another man had travelled to Mareeba a few days prior to the death of Mr Collins, where they used drugs and supplied methylamphetamine to a woman who had deposited $1,300 into Mr Collins's bank account. On returning to Cairns, Ms Peckham went to the appellant's house where, two days before Mr Collins's death, she said that the appellant told her of a text message which he had just received from Mr Collins. According to her evidence, the appellant said that Collins had sent "a text saying that he's going to tell everyone what I am" and that as he related this, the appellant was "sort of stern, like, a little bit agitated." She said that she had another conversation with the appellant about Mr Collins on the following day, in which the appellant said that Mr Collins had sent him another text message, apologising for his earlier message and saying that he wanted to see the appellant. Ms Peckham said that on this occasion the appellant was "sort of blasé … stern still but not real angry …".

[7] Ms Peckham's evidence was that early the next morning, the appellant said that he wanted to go to her place to "see Nick [Mr Collins] about the text messages". She said that they went to the service station, where a $50 note was changed so that the appellant could give Ms Peckham's son some money to get him out of the house. She then walked home, arriving there before the appellant did in his car. When she invited the appellant in, he said that he would not come in until Ms Peckham's son and his friends had left the house. At that point Mr Collins was asleep on a chair in the downstairs of the house. She gave her son some money and he and his group left. She then went upstairs, she said, and spoke to her sister and mother. About 30 minutes later, she went downstairs where she saw Mr Collins sitting in the same chair but with duct tape over his eyes and with blood on his torso. There was also blood on the arms of the chair. The appellant was there, staring at Mr Collins and holding a hammer. Another man was with the appellant. She said that the appellant then began to pick up items in an exercise which she described as "sort of cleaning up". She then left and went to a garage area but said that she could hear moaning noises from Mr Collins and sounds of a "hitting" noise. She returned to find Mr Collins lying on a bed. He was

covered with blood but he was still breathing. The appellant was still involved in his cleaning up exercise. By that stage the other man had left. At that point Ms Peckham's son returned, and Ms Peckham managed to divert him to a bathroom. She said that she could then hear the appellant hitting Mr Collins again. She came out of the bathroom and saw the appellant wrapping Mr Collins with a blanket or carpet. He asked her to help him move Mr Collins to the appellant's Landcruiser. The appellant used sheets to cover the tray of his car before Mr Collins was lifted onto the tray. Ms Peckham then accompanied the appellant as he drove away, saying that he wanted to put Mr Collins somewhere where he would be found, because he was not dead. They drove for about five minutes to a place next to mangroves where the appellant stopped and pulled Mr Collins from the car and placed him in shallow water. By this stage, she said, it was clear that Mr Collins was dead.

[8] She and the appellant then returned to her place, where the appellant put on gloves and used bleach to clean up the blood. He did other things to hide the presence of blood on furniture. He took a shower with his clothes on and then changed into a shirt belonging to Ms Peckham's son.

[9] The appellant, Ms Peckham and her son then drove to the appellant's place where he dropped them off, saying that he was going to get rid of items which had been in his car. Two days later, that group returned to Ms Peckham's place where the appellant collected the blood-stained items and disposed of them.

[10] By early 2013, Mr Collins was listed with police as a missing person and police had a photograph of Mr Collins in the company of other persons. Within a few days, they identified those persons as including the appellant and Ms Peckham. After obtaining a statement from Ms Peckham and executing search warrants at her place and that of the appellant, the skeletal remains of Mr Collins were located in the mangroves where they had left him. Those remains were examined by Dr Botterill a few days later. The search of Ms Peckham's place located a bag of clothing and some documents which had belonged to Mr Collins.

[11] An investigating police officer described the area in which the body was found, as "a very quiet spot", a few hundred metres from the end of a road on which the traffic was very light. From the road there was an almost indiscernible track through long grass leading to the place where the body was found.

[12] Ms Peckham's son gave evidence, describing some of the events of the day in question. After he had been given some money by his mother, he and his friends left the house where Mr Collins was asleep on the chair on which he had slept during the previous night. When the son returned home he noticed that the appellant's car was parked against the garage. The son went in to a bathroom where he smoked some cannabis. Whilst there, he said, he heard some moaning and hitting noises. He then looked through a hole in a door where he could see a body wrapped up in a rug, which was then taken by his mother and the appellant to the car. When he went into the room where the deceased had been, he saw blood over some of the furniture and on other items. He said that his mother and the appellant left in the Landcruiser and later returned and started to clean up the room.

[13] The appellant gave evidence. He said that he went to Ms Peckham's place on that morning to collect a motorcycle, which was stolen property and not something which Ms Peckham wanted to remain at her place. He said that Ms Peckham had told him

that her son had brought the motorcycle to the house and he did not want to part with it. It was for that reason, the appellant said, that the son was given money to leave the house so that the appellant could remove the motorcycle in the son's absence.

[14] The appellant's evidence was that when he arrived at Ms Peckham's place, he walked in to her kitchen area where he saw Mr Collins, who was standing and in the process of injecting himself with drugs. The appellant said to Mr Collins that he was there to pick up the motorcycle. At the same time he said to Mr Collins that Ms Peckham "wasn't too keen on [Mr Collins] being there". That was disputed by Mr Collins who, according to the appellant's evidence, became very angry and punched the appellant in his sternum. Mr Collins continued to assault the appellant, he said, choking him until he was unconscious. He described a continuing attack by Mr Collins after the appellant had regained consciousness, before the appellant defended himself by taking up a nearby hammer and swinging it in the direction of Mr Collins's head. He further described the fight in which, the appellant claimed, he forced Mr Collins backwards causing Mr Collins to hit a block wall behind him and then to fall head first onto a small table. Mr Collins then became unconscious. At that point, according to the appellant, he looked for something to stop the bleeding from Mr Collins's head and applied a sock and the duct tape. Ms Peckham then came downstairs. The appellant said that he "first, wanted to just leave the scene" but "[s]he just expressed that she wanted [Mr Collins] out of the house". The appellant described the two of them lifting Mr Collins into the back of the appellant's vehicle.

[15] The appellant said that his mental state at this point was still one of complete shock and that his thought processes were "not very clear". He said that after driving for a while he saw some nearby trees and believing that Mr Collins was alive but unconscious, he decided to leave him at a place where "he'd be in the shade" and where "he could stay … until he regained consciousness". But as he was removing the body from his car, he noticed that there was no breathing and no pulse. He said he tried to revive him but after a couple of minutes concluded he could not do so and he then rolled the body down a small embankment. When asked why he did not call an ambulance or the police, he said that he was "fearful of what the ramifications might have been. My children not having their father."

[16] The appellant's evidence was that when he struck the deceased with a hammer, he was not intending to kill him and was intending to save his own life. He said this was also his intention in the action which forced Mr Collins to fall against the wall and the table.

[17] The appellant denied receiving any memorable text message from Mr Collins in the days before his death and denied discussing any text message from him with Ms Peckham.

The text messages issue

[18] At the commencement of the trial the appellant applied to exclude the proposed evidence from Ms Peckham of her conversations with the appellant about the text messages from the deceased. The appellant's counsel argued that the evidence was hearsay and was not made admissible by any recognised exception. The trial judge held that it was admissible as a statement by the appellant which was adverse to his interest in that it shed "light upon the degree of antipathy" between the two men. His Honour said that it provided "information tending to shed light upon why there may have been some animus as between the accused and deceased and, indeed, why the

accused may have wanted to talk to the deceased." He added that it was "relevant in a generalised sense to what is sometimes described as motive, or, alternatively, as shedding light upon that which in the absence of such information may appear to be inexplicable."

[19] Ultimately, the relevance of the evidence was explained in the summing up somewhat differently and more favourably to the appellant. After cautioning the jury about any use of this evidence because it was hearsay, the trial judge said:

> "However … even if you accept her evidence on this particular discrete topic I direct you it at best for the prosecution case is evidence that there was a continuing association between the two men, which is merely a relevant circumstance, part of the background against which you come to consider what you find did or did not occur on the fatal day. I direct you it is incapable of any – of amounting to any evidence of motive, such as animus. At its highest it falls well short of demonstrating any motive, and I direct it must not be used by you as so doing."

[20] During the course of the cross-examination of the appellant, after he had denied receiving any threatening or offensive text message from the deceased, the jury sent a note asking whether it was possible to have further information about the first of the messages described by Ms Peckham. The jury's note asked what was meant by the statement "I will tell everyone what you are" which, according to Ms Peckham, the appellant told her was in the first text. They asked whether there could be "a more vigorous examination of what this might be referring to?" After discussing the note with counsel, the trial judge told the jury, in effect, that there may not be any further questions asked of the appellant on that issue but that in his summing up, he would give them a particular direction as to the use which could be made of Ms Peckham's evidence in that respect. The cross-examination then resumed and no further question was asked on the subject.

[21] The appellant's submission is that despite the direction which was given, the evidence remained problematical because it might have caused the jury to impermissibly speculate as to the content of at least the first of the text messages. It is submitted that this was more likely because of the jury's interest in the subject which was plain from their note.

[22] However that enquiry was made before the jury had the benefit of his Honour's direction and there is no reason to suppose that the direction was not followed. It must be assumed then that the jury had regard to this evidence, if they accepted it, only for the limited purpose which his Honour explained. In that way the evidence was relevant. It explained Ms Peckham's evidence that on the morning in question, the appellant had said that he had wanted to go to her place to "see [Mr Collins] about the text messages". The jury may have considered that the appellant was concerned about one or both of the messages. But acting according to his Honour's directions, they would not have treated this as any evidence of motive. In my conclusion the first ground of appeal must be rejected.

Post-offence conduct

[23] The prosecution argued to the jury that the appellant's conduct in disposing of the body, cleaning up at the scene and disposing of some items which were there, was all indicative of his guilt of murder. His Honour directed the jury as to the potential relevance of post-offence conduct and related those directions to the facts of this case.

He directed that the conduct of the cleaning of the scene and disposal of the items at the scene could not be regarded as demonstrating a consciousness of guilt of murder, although it could be regarded as indicating that the appellant was guilty of manslaughter. His Honour distinguished that conduct from the appellant's disposal of the body, which his Honour said might indicate that the appellant murdered the victim.

[24] The appellant's argument does not complain of anything which *was* said by his Honour about the post-offence conduct. The appellant's argument is that his Honour ought to have added a direction that his conduct in disposing of the body could not be used as an indication of guilt of murder, except if the jury was first satisfied that the conduct was not indicative of guilt of the lesser offence of manslaughter.

[25] It is necessary to set out in full the directions which were given as to post-offence conduct:

> "There's some area of the evidence I do want to touch on very briefly and then we'll be done. It has to do with what sometimes is described as consciousness of guilt evidence. The prosecution asks you to have regard to the fact that the defendant disposed of the body as well as cleaned up at the scene and indeed disposed of some items. Before you could use that conduct as indicative of guilt, you'd have to first find that it was engaged in by with the accused because he knew he was guilty of the offence charged and not for any other reason.
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> Here, of course, you know from the accused that on his account, this is simply aftermath panic on his account. It doesn't bespeak that he'd done the wrong thing. It bespeaks panic after the event and his concern – although he didn't quite put it this way, his concern inferentially that there would be a misunderstanding about what had really happened and, as he put it, you know, he wanted to be able to be with his children.
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> You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways, for example, as a result of panic, fear or other reasons having nothing to do with the offence charged. You must have regard to what has been said to you by his counsel as well as himself about why he did what he did. And in summary, I do it no unfairness because it is, in terms of its explanation, straightforward, it was panic and poor judgment in the context of something horrific having happened to him, conduct he might in hindsight now of course regret and be ashamed about, but not conduct that was cold or cynical or calculating, but rather done in the panicked, poor judgment aftermath of an unexpected very awful event.
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> So you must have regard to that in considering whether you can safely draw any inference from the fact that he engaged in a cleanup of the scene, the fact that he disposed of certain property, such as the mattresses and recliners, which, you'd appreciate, it seems, were bloodstained, particularly one recliner in particular apparently particularly so. So before you can have regard to the cleanup, the disposal of the items and the disposal of the body as being in some way indicative as a circumstantial piece of evidence that you can use along with the other circumstances in reasoning towards any guilt, you must have regard to the innocent explanations that are apparent in relation to that, and bear in mind what I said about circumstantial evidence reasoning.

To make it plain, the fact that he cleaned up the scene, disposed of the body or disposed of the items could not of themselves prove guilt. They're but simple other pieces of circumstantial evidence that potentially may be used along with the other circumstantial evidence and remember what I said, that when you're using a piece of circumstantial evidence, the guilty inference has to be the only possible inference. In other words, innocent inferences that arise in relation to the piece of evidence would need to be excluded beyond a reasonable doubt before you could infer guilt from it, and here, of course, you had the innocent explanation for why he engaged in this conduct. So you would have to ask yourself of course whether or not you consider the innocent explanation has been excluded as part of this process of drawing inferences from that post-offence conduct, if I can use that short badge for these three pieces of evidence.

Before the evidence of this post-offence conduct can assist the prosecution, you would have to find not only that it was motivated by a consciousness of guilt on his part, but also that what was in his mind was guilt of the offence charged not of some other misconduct. If, and only if, you reach the conclusion that there was no other explanation for his departure, such as panic or fear of wrongful accusation, which, in effect, is the ill-judged reasoning, it seems, that was going on, you're entitled to use that finding as a circumstance pointing to the guilt of the defendant to be considered with all the other evidence in the case. Standing by itself, it could not prove guilt.

Now, I want to say something a little more about this. As I said, it's important that you could only use this evidence as part of your – the circumstantial reasoning along with the other evidence if it was motivated – if what was done was motivated by a consciousness of guilt of the offence charged.

Here, you know technically you're dealing with two offences: murder or, alternatively, the lesser offence of manslaughter. Now, it's a matter for you, you might potentially conclude that in this case, the state of the body was such that it bespoke potentially – and this is really the prosecution argument on the point – the intention of the killer, that the state of the body would have revealed that it had been such a savage attack as to bespeak a murderous intention, so that the disposal of the body would logically be connected with a desire to eliminate the evidence of that intention. Now, it's a matter for you whether you think the evidence does have that quality. Bear in mind of course what I've said, though, about the other innocent explanations for engaging in disposal of the body, but potentially, the disposal of the body could potentially be used as part of your circumstantial reasoning in relation to the charge of murder.

The cleaning of the scene and the disposal of the items, though, doesn't have that quality because it really couldn't potentially logically shed any light on his intention. Even if he did unlawfully kill, it wouldn't really shed any light on his mental state at the time. In short, potentially, it might demonstrate a consciousness of guilt that he unlawfully killed, it might be that he murdered, but it wouldn't really distinguish

> between the two, whereas potentially, at least, the disposal of the body, because it involves the elimination of the evidence of potentially murderous intention might have the capacity to provide a piece of circumstantial evidence in reasoning towards – in reasoning in relation to the offence of murder.
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> So I make it plain the cleaning of the scene and disposal of the body could at worst only be circumstantial evidence being relevant to manslaughter. It's only the disposal of the body that potentially is circumstantial evidence being relevant to murder, but I reiterate that of course it must not be used by you in circumstances where there lingers an inference consistent with it being the product of something other than a consciousness of guilt of such offences, particularly in this case by way of example, panic or fear of wrongful accusation."

[26] Earlier in his summing up, the trial judge had clearly explained to the jury the distinction between murder and manslaughter and the potential defences which, according to the evidence, the prosecution was required to disprove, namely self-defence against an unprovoked assault,[1] compulsion[2] and accident.[3] Therefore, as the respondent here argues, it should be assumed that the jury understood the difference between the elements of murder and manslaughter. But it is far from clear that the jury would have understood that they should first consider whether the conduct of the disposal of the body could be explained by a consciousness of guilt of manslaughter before considering, if at all, whether the conduct could be explained by the appellant's guilt of murder.

[27] The appellant's argument concedes that it was open to the jury to regard the conduct of the disposal of the body "as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed [the deceased]".[4] The complaint is that the jury may not have taken the necessary step of considering that question in the course of their reasoning. Rather, they may have considered only two possibilities, namely whether the conduct could be explained by reactions such as "panic, fear or other reasons having nothing to do with the offence charged" or by a consciousness of a guilt of murder. This argument focuses upon the paragraph of the summing up which I have emphasised in the above extract.

[28] The trial judge may or may not have been correct in his view of the way in which the disposal of the body was potentially probative of the appellant's guilt of murder. Importantly, in explaining that view to the jury, his Honour did not say why, in his view, the conduct was not consistent with a consciousness of guilt for an *unintentional* killing of the deceased.

[29] In *R v Mitchell*,[5] this court held that a conviction of murder should be set aside because an *Edwards*[6] direction about lies told by the appellant was ineffective, in that the jury was not instructed that the lies might show a consciousness of guilt with respect to the unlawful killing of the deceased but not necessarily murder. Speaking more generally, Keane JA (as he then was) there said:[7]

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1 *Criminal Code*, s 271.
2 *Criminal Code*, s 31.
3 *Criminal Code*, s 23.
4 *R v Baden-Clay* [2016] HCA 35 at [76].
5 [2008] 2 Qd R 142; [2007] QCA 267.
6 *Edwards v The Queen* (1993) 178 CLR 193.
7 [2008] 2 Qd R 142, 155 [48].

> "[48] In my respectful opinion, it is necessary for a trial judge to ensure that the jury clearly understand that they may use evidence of a lie by an accused as an indication of a consciousness of guilt of murder only if they are satisfied that the lie was not told out of a consciousness of guilt of some lesser offence, such as manslaughter, or, indeed, assaults occasioning bodily harm. In *R v Wehlow*, McMurdo P and Wilson J (Williams JA expressly not deciding the point) held that it was necessary precisely to identify for the jury the offence, guilt of which was said to be reflected in the accused's lie. In my respectful opinion, that approach, which conforms to that taken in *R v May*, is correct and should be followed. The requisite level of precision was absent here."

Keane JA then set out this passage from the judgment of Thomas JA (with whom McMurdo P and Davies JA agreed) in *R v Ali*:[8]

> "The term 'consciousness of guilt' or 'realisation of guilt and a fear of the truth' (*Edwards v The Queen* above at 211) remains an accepted rationale for a direction on this topic, although some of the problems associated with it have been recognised (*Zoneff v The Queen* (2000) 200 CLR 234, 244 at para 15). 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*, *R v M* and *R v R* 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."

Keane JA added:[9]

> "[50] The effect of these decisions of this Court may, I think, be summarised in the following way: while it is for the jury to determine whether the circumstances are such that a lie can be said to be understood as revealing a consciousness of guilt of the greater offence, where the false statement is capable of amounting to an acknowledgment of guilt of one or more of several offences with which the accused stands charged, it is necessary for the trial judge to point out to the jury the possibility that the consciousness of guilt revealed by the lie relates to the lesser offence. The position has been stated in similar terms in the Victorian Court of Criminal Appeal and Court of Appeal in *R v Woolley* and in *R v Ciantar* respectively. This statement of the position is also in conformity with the decision of the Court of Criminal Appeal of Western Australia in *Banks v The Queen*."

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8 [2001] QCA 331 at [43] cited in *Mitchell* [2007] QCA 267 at [49].

9 [2008] 2 Qd R 142, 155 [50].

[30] As the respondent's argument appears to accept, the conduct of the disposing of the body was capable of amounting to an acknowledgement of guilt of manslaughter. In other words, it was open to the jury to find that the explanation for this conduct was that the appellant wanted to destroy evidence that he had unintentionally killed the deceased. The question is whether the directions which were given sufficiently indicated that factual possibility and instructed the jury that unless they rejected it, the conduct could not be indicative of the appellant's guilt of murder.

[31] There was no specific direction that the jury should reason in this way. That would not be critical if the directions, considered as a whole, did sufficiently instruct the jury such that they would know that they had to reason in the required way. There are examples of directions which were sufficient in that way in *R v Box & Martin*[10] and *R v Ali*.

[32] In *Box & Martin*, the relevant direction given by the trial judge was as follows:[11]

> "As to whether the lie was told from a consciousness of guilt, you have to consider whether that lie was explicable only on the basis that the truth could implicate the accused Box in the offence of murder.
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> …
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> Now, there may be reasons for the lie apart from a realisation of guilt. I am sure that you can think of reasons. People sometimes lie because they wish to conceal disgraceful behaviour other than that which goes to the offence charged. … In this case you need to be satisfied that the accused was lying because he was unable to account innocently for his involvement in the killing of [the deceased], and, more specifically, that he was lying because his involvement amounted to the offence of murder.
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> One explanation that might account for the telling of the lie to the police is the one that was suggested to you yesterday by Mr Walsh of counsel, that is that Box wanted to hide his involvement in disposing of the body and cleaning up the flat because that made him an accessory after the fact to murder. Another explanation for the lie could be that the accused Box wanted to protect Martin. There are other explanations that may occur to you."

In that case, McMurdo P said that "In giving such a direction, it is imperative that the judge make it sufficiently clear to the jury that the lies were told out of a realisation that the truth would implicate the appellant in the offence of murder rather than something less, such as manslaughter or accessory after the fact to murder …".[12] But her Honour then said:[13]

> "In this case … the judge's directions set out above make it plain that the lie could be used as a consciousness of guilt if the lie was only explicable on the basis that the truth would implicate Box in the offence of *murder* and that the jury must consider other reasons for the lie, such as Box's involvement as accessory after the fact. Although the further alternative that Box lied because he unlawfully killed the

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10 [2001] QCA 272.
11 [2001] QCA 272 at [6].
12 [2001] QCA 272 at [7].
13 [2001] QCA 272 at [8].

> deceased but without intending to kill or do grievous bodily harm (manslaughter) was not specifically put to the jury, the primary defence case was that Box was an accessory after the fact to Martin's killing of the deceased … The jury were also told that they could return a verdict of not guilty to murder but guilty to manslaughter. … It may have been preferable had the judge's directions specifically warned the jury that the lie could not be used as consciousness of guilt of murder if the lie was told to conceal involvement in an unlawful killing without an intention to kill or do grievous bodily harm, but it is not necessary to mention every possible reason for the lie."

[33] In *Ali*, the relevant direction was as follows:[14]

> "It would be quite wrong for you to approach the case on the basis that if [the appellant] told lies he must be guilty of one or more of the offences with which he has been charged.
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> … You have to be satisfied that he told the lies because he knew the truth would implicate him in the murder of the baby and/or in an attempt to conceal her birth and/or in improperly interfering with her dead body. …
>
> … You have to bear in mind that there can be other reasons why people tell lies. Bearing all those factors in mind, are you satisfied that he told lies indicative of his own guilt of murdering the baby, indicate of his own guilt of attempting to conceal the baby's birth, indicative of his own guilt of improperly interfering with a dead body?"

McMurdo P then said:[15]

> "As in *Box and Martin*, the judge's directions did not suggest the lie could be used to demonstrate a consciousness of guilt of manslaughter, the alternative verdict to count 1 (murder). But the learned primary judge pointed out clearly the possibility that the lies may have been told out of a consciousness of guilt of the lesser offences charged in counts 2 and 3 in the indictment. The direction made it sufficiently clear that the jury could use the evidence of lies as a consciousness of guilt of murder only if they were satisfied the lies were not told out of a consciousness of guilt of some lesser offence such as attempting to conceal a birth or improperly interfering with a dead body. It may have been preferable had the judge specifically warned the jury that the lie could not be used as a consciousness of guilt of murder if it was told to conceal involvement in manslaughter but that was implicit in the directions given; elsewhere in the summing-up the judge explained that manslaughter was an alternative verdict on count 1 (murder); *Edwards v R* does not require a trial judge to set out every possible reason for the lie. These directions do not constitute an appealable error."

[34] In each of those cases, the directions specifically alerted the jury to the possibility that the lies were indicative of the accused's guilt of lesser offences to murder, although there was no specific reference to the lesser offence of manslaughter. In the present case, the direction which was given specifically as to the conduct of disposing

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14 [2001] QCA 331 at [4].
15 [2001] QCA 331 at [5].

of the body did not refer to the one relevant lesser offence, namely manslaughter. Rather it reminded the jury only of the other alternatives by the statement: "Bear in mind of course what I've said, though, about the other innocent explanations for engaging in disposal of the body …". That was a reference to what his Honour had said about the possible explanations of "panic, fear or other reasons having nothing to do with the offence charged …".

[35] Of course the direction which then followed, which discussed the conduct of cleaning up the scene and disposing of the items there, did tell the jury that conduct could be indicative of a consciousness of a guilt of manslaughter, rather than murder. Possibly, at least some members of the jury would then have understood that this was a necessary distinction also for their consideration of the conduct of the disposal of the body. But in my conclusion, there remains a real likelihood that this was not understood by all of the jury and that their verdict was reached by impermissible reasoning. There is a real risk that in considering the conduct of the disposal of the body, the jury treated that conduct as indicative of a consciousness of guilt of murder once they had rejected "innocent explanations", that is to say explanations which were consistent with innocence of any offence.

[36] It must be said that these directions were made with the approval of the appellant's trial counsel. But the question is whether there was a miscarriage of justice and the absence of an objection to the direction does not answer that question. In my conclusion the appellant was deprived of the possibility of an acquittal of murder and there was a miscarriage of justice which warrants the quashing of the conviction and a retrial.

[37] The respondent argues that if there was a misdirection, there was no miscarriage of justice which resulted. It is submitted that the jury clearly rejected the defences raised by the appellant's evidence, particularly self-defence, and that the "critical question was the nature of the injuries which were inflicted on the deceased by the appellant and what they evidenced." It is further submitted that "the jury may well have not needed to resort to the consciousness of guilt evidence to satisfy themselves of the appellant's intent."

[38] As the respondent submits, the injuries suffered by the deceased show the extent of the force used in the assault upon him. It may be accepted, for present purposes, that it was open to the jury to convict the appellant of murder. But it does not follow that the evidence of the disposal of the body was inconsequential in the jury's deliberation. The jury was not bound to convict the appellant of murder absent the evidence of that conduct. And the jury's characterisation of that conduct may well have influenced their findings in respect of other evidence. Therefore the respondent's submission that there was no miscarriage of justice,[16] if there was a misdirection, cannot be accepted.

[39] That submission by the respondent was not directed to the possible application of the proviso.[17] In this case there would be a "natural limitation" upon the ability of this court to make an assessment of the appellant's guilt, not having seen the evidence of Ms Peckham and the appellant himself.

Conclusion and orders

[40] I would order as follows:

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16 As that term is used in s 668E(1) of the *Code*.

17 *Criminal Code*, s 668E(2).

(1) The appeal be allowed.

(2) The appellant's conviction of murder be quashed.

(3) The appellant be retried upon the indictment.

[41] **DOUGLAS J:** I agree with Philip McMurdo JA.