SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hannaford* [2017] QCA 36
PARTIES:	**R** **v** **HANNAFORD, Ian Phillip** (appellant)
FILE NO/S:	CA No 271 of 2015 SC No 15 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Conviction: 27 October 2015
DELIVERED ON:	17 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2016
JUDGES:	Fraser JA and Dalton and Burns JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant was convicted by a jury of murder – where the appellant contended that the trial judge wrongly permitted a lie allegedly told by the appellant to go to the jury as evidence of consciousness of guilt – where the appellant further contended that the trial judge erred in the directions given to the jury concerning the use to which the alleged lie could be put by the jury – whether the evidence at trial was capable of establishing that the alleged lie, if told, was untrue – whether the alleged lie was capable of amounting to evidence of consciousness of guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant was convicted by a jury of murder – where the appellant contended that a miscarriage of justice occurred as a result of expert evidence given regarding a comparison of fibres and the repetition of the same in the summing up – where the appellant further contended that a miscarriage of justice occurred as a result of evidence given regarding presumptive

testing for the presence of blood on an axe purchased by the appellant and the characterisation of that evidence in the summing up – whether aspects of the fibre comparison evidence were admissible – whether the limitations of the fibre comparison evidence were made clear by the trial judge in the summing up – whether the evidence regarding the presumptive testing for the presence of blood was admissible – whether the trial judge fell into error when characterising the evidence regarding the presumptive testing in the summing up – whether there was a miscarriage of justice

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
R v Baden-Clay [2014] QSC 156, cited
R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, cited
R v Ortega-Farfan (2011) 215 A Crim R 251; [2011] QCA 364, cited
R v Sam [2002] QCA 14, cited
R v Saub [2007] QCA 194, cited
R v Sica [2014] 2 Qd R 168; [2013] QCA 247, cited
R v Tang (2006) 65 NSWLR 681; [2006] NSWCCA 167, cited

COUNSEL: S M Ryan QC for the appellant
V A Loury for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Burns J and the order proposed by his Honour.

[2] **DALTON J**: I agree with the reasons of Burns J and with his proposed order.

[3] **BURNS J:** Following a trial in the Supreme Court at Toowoomba lasting 13 days, the appellant, Ian Phillip Hannaford, was found guilty on 27 October 2015 of the murder of Gail Frances Lynch. The mandatory sentence for that crime of life imprisonment was then imposed.

[4] The deceased went missing from her home on the Southern Downs either on the evening of 3 July 2012 or in the early hours of the following day. The appellant was identified by police at an early stage as a person of interest. He had been in a relationship with the deceased until she brought it to an end about a month before she went missing. In the course of their investigation, the police spoke to the appellant on a number of occasions and, on one such occasion, he provided a written statement. In each of the appellant's accounts, he denied any involvement in the disappearance of the deceased but, based on a significant body of circumstantial evidence, he was eventually charged with her murder. In broad terms, the Crown contended that the appellant gained entry to the deceased's home, murdered her, removed her body in a rug which he had taken from the floor of her kitchen and, at some later time, disposed of her body as well as the rug.

[5] In support of this, his appeal against conviction, four separate grounds were advanced on behalf of the appellant. Two of those grounds are concerned with a lie

allegedly told by the appellant to a police officer during one of the conversations that took place during the course of the investigation. It was argued that the learned trial judge wrongly permitted probative use to be made of this alleged lie and that, having done so, his Honour then erred in the directions that were given to the jury concerning it. The other grounds are focused on two categories of forensic evidence received at trial, namely, evidence comparing fibres found in the appellant's car with fibres that were said to have come from the missing rug and evidence as to the possible sources of staining on an axe that was purchased by the appellant late on the afternoon of 4 July 2012. With respect to each of these categories, it was contended that a miscarriage of justice occurred in consequence of the evidence being received and, further, because of the way in which the trial judge treated it in the summing-up.

[6] Before considering the grounds of appeal, it is useful to commence with a brief overview of the evidence at trial.

The evidence

[7] The appellant and the deceased first made contact with each other on an internet dating site in late 2011 and, within several weeks, formed a relationship. The deceased was 55 years of age at the time and living in a rental unit in Warwick. The appellant was three years older and living in Rockville, a suburb of Toowoomba.

[8] The deceased and her sister, Lynette McMillan, were raised in an orphanage. On leaving the orphanage at the age of 15 years, the deceased secured employment as a live-in housekeeper in Brisbane. In time, she met her first partner and they had a child together, Simon. After that relationship ended, the deceased eventually met and then married another man and their union produced a daughter. A subsequent relationship produced another son. When that relationship also broke down, the deceased found herself in the unfortunate position of being unable to properly care for her three children. She therefore decided to give them up for adoption and this occurred when Simon was about six years old. She had no further contact with her children except for Simon who managed to locate his mother after he attained his majority. Thereafter, the deceased remained in contact with Simon and, after he married, with his wife, Jackie, and their children. Otherwise, the deceased kept in touch with her sister throughout her life and, after Ms McMillan moved to Warwick in 2010, the deceased decided to follow her. Accordingly, at the time of her disappearance, the only family whom the deceased had to speak of were her son and daughter-in-law, their children and her sister.

[9] The relationship between the appellant and the deceased lasted a number of months but by early June 2012 it was over. The deceased told her sister that she broke up with the appellant because he "wanted everything his own way".[1] She also told her son that it had been her choice to end the relationship.[2] She was reportedly "very happy" with that decision.[3]

[10] The appellant on the other hand was far from accepting that his relationship with the deceased had come to an end. He repeatedly telephoned her and, on at least one occasion, appeared unannounced at her unit in Warwick before being told to "get out".[4] The

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1 AB 172 (Lynette McMillan).
2 AB 235 (Simon).
3 AB 409 (Dugan).
4 AB 262 (Jackie).

deceased informed one witness who gave evidence at the trial that the appellant would telephone her, hang up and then "park his car around the corner … and come back and look through the windows".[5] According to her daughter-in-law, Jackie, the deceased felt "harassed" and "threatened" by the appellant's behaviour.[6] Indeed, she advised the deceased to "go to the police and talk to them about it, because [the appellant] just would not leave her alone".[7] That, however, did not occur.

[11] Towards the end of June 2012, the appellant approached the deceased's sister at a country music muster in Warwick. He asked several questions about the deceased's earlier life, and appeared to be angry. At one point during this conversation the appellant said, "If Gail keeps doing the wrong thing by … a bloke she's going to get hurt".[8] On a subsequent occasion, he told Ms McMillan that he had telephoned the deceased in order to let her know that he knew that her "life was a lie".[9] At around the same time, the appellant was observed by another witness who gave evidence at the trial to be "really upset", "emotional" and "sort of, very angry".[10] He said to another witness that he loved the deceased and "couldn't understand why she'd gone to break the relationship off"[11] and, in a separate conversation with his brother, that he "didn't understand what was going on".[12]

[12] During the day on Tuesday, 3 July 2012, the deceased was shopping in Warwick. Amongst other things, she paid the fortnightly rent for her unit and purchased some groceries. By 5.22 pm, she was at home and accessing the internet. She signed into the dating site where she initially met the appellant and removed him from her contacts. Later, she spoke by telephone with a friend,[13] as well as her sister, daughter-in-law and son.

[13] On Wednesday, 4 July 2012, the deceased's sister tried to telephone the deceased several times throughout the day and the evening without success. She also telephoned the appellant to ascertain whether he had heard from the deceased but he said that he had not had any contact with her for "a couple of weeks".[14] On the following day, Ms McMillan went to the deceased's unit and knocked on the door. She again attempted to telephone the deceased before attending at the police station to report her sister as a "missing person".[15] She returned to the deceased's unit with three police officers who, after obtaining a key from the owner, entered the premises. Ms McMillan noticed that a number of things were out of place and that a rug from the kitchen floor had been removed. The police then commenced a series of enquiries in an attempt to locate the deceased. These included attending at the appellant's residence in Rockville that evening and speaking with the appellant. One of the police officers who attended, Senior Constable Yarrow, asked the appellant whether he "knew a Gail Lynch" to which the appellant replied, "Yes, why?" The appellant was then asked whether he knew where the deceased was and he

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5 AB 430 (Tanner).
6 AB 265 (Jackie).
7 AB 282 (Jackie).
8 AB 174 (Lynette McMillan).
9 AB 175 (Lynette McMillan).
10 AB 363 (Farr).
11 AB 368-369 (Coleman).
12 AB 386 (Paul Hannaford)
13 Leanne McMillan.
14 AB 178 (Lynette McMillan).
15 AB 178 (Lynette McMillan).

answered, "No, I don't, her family told me she was on – going on holidays",[16] and it is this answer which is the focus of the first two grounds of appeal.

[14] On Friday, 6 July 2012, the police returned to the deceased's unit to conduct a more thorough examination. The next day, detectives from the Warwick CIB travelled to Toowoomba and, whilst there, twice attended at the appellant's address in an unsuccessful attempt to locate him.

[15] On Sunday, 8 July 2012, the deceased's sister saw the appellant at another music muster in Warwick. He was with his "new girlfriend".[17] Ms McMillan asked the appellant whether he had heard from the deceased. The appellant said that he had not had any contact with her but advised Ms McMillan to "check to see if her pillows are there, because if her pillows aren't there, that means she's gone away".[18] While the appellant was at the muster, police again attended at his residence. They left a calling card and, that evening, the appellant telephoned the police. He was asked about his movements on 3, 4 and 5 July 2012. He was unable to say what he had done on those days although he thought that he "would have been at home".[19]

[16] On 10 July 2012, the appellant was again spoken to by police. A written statement was obtained from him in which he denied any knowledge of the deceased's whereabouts. On the following day, searches were conducted of the appellant's car and residence. His mobile telephone and shoes were seized. He was also placed under arrest and subjected to a range of forensic procedures. Following the carrying out of those procedures, he was released from custody and accommodated for the night in a motel because his residence was still the subject of a crime scene warrant. The search of his residence continued into the next day and, during it, police recovered the axe referred to earlier as well as the contents of his rubbish bin.

[17] Once the search of his residence was completed on 12 July 2012, the police wished to speak to the appellant again but he could not be located. He was eventually found two weeks later in a toilet block in parkland at Picnic Point in Toowoomba. He was said to have been "living rough" in the park for some time. He was in an injured, dishevelled and unresponsive state. The appellant was taken for medical treatment and, on the following day, charged with the murder of the deceased.

[18] As will already be appreciated, the Crown case on each of the elements of the offence was entirely circumstantial. Nonetheless, if the evidence in proof of those circumstances was accepted by the jury, a compelling body of evidence was advanced to prove that the deceased was dead and that the appellant intentionally caused her death without any lawful justification or excuse. The evidence included the following features:

(a) the deceased has not been seen or heard from since the evening of 3 July 2012. Her bank accounts were untouched and her body has never been located;

(b) CCTV footage revealed that a motor vehicle similar in appearance to that driven by the appellant was in the vicinity of the deceased's unit at the relevant time. The vehicle drove along the street in which her unit was situated at

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16 AB 351 (Yarrow).
17 AB 197 (Lynette McMillan).
18 Ibid.
19 AB 472 (Winter).

7.52 pm on 3 July 2012 and was filmed again near the unit at 1.50 am the next morning;

(c) a fly screen for one of the windows at the deceased's unit was found to have been partially dislodged. Latent impressions were recovered from the windowsill and architrave associated with that window. They were consistent with the pattern detail of a well-known retail brand of rubber gloves, and packaging for the same brand of gloves was located in the appellant's rubbish bin;

(d) blood stains were found on the floor of the deceased's bedroom and the mattress overlay on her bed as well as on a stuffed toy, a wardrobe, a lampshade, a pot plant and the floor of the garage. These stains were sampled and then subjected to DNA analysis. The DNA profile obtained from each of the samples was found to be an effective match with the appellant's DNA.[20] A luminol examination of the bathroom sink and tapware also revealed the presence of blood stains and, again, the DNA profiles obtained from these stains were an effective match with the appellant's DNA profile;[21]

(e) the missing rug to which reference has already been made was red in colour and came from the floor of the deceased's kitchen. It was large enough for use in the disposal of the body.[22] Fibres left behind in the kitchen were compared with fibres from the boot of the appellant's car and found to have several features in common;

(f) blood stains were detected on a number of fabric shopping bags found in the boot of the appellant's car. The stains were subjected to DNA analysis and a profile was obtained which matched what was likely to have been the DNA profile for the deceased;[23]

(g) the deceased's mobile telephone "communicated" with a cell tower in Rockville at 6.11 am on 4 July 2012, suggesting that her telephone had been moved from Warwick to Toowoomba;[24]

(h) an axe found at the appellant's address was purchased by him from a hardware store in Toowoomba at 4.54 pm on 4 July 2012.[25] The blade was swabbed and later analysed. There was a slow, but positive reaction for the presence of blood. In a similar area on the blade, a DNA profile was obtained which matched the likely DNA profile for the deceased;

(i) the appellant was observed by his employer on 5 July 2012 to have injuries to his hands; "a couple of fingers on each hand" were covered with tape.[26] There

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20 Expressed in probabilities, there was a one in 1,700,000,000,000 chance that the source of the blood on the floor of the bedroom, the mattress overlay, the stuffed toy, the wardrobe, the lampshade, the pot plant and the garage was not the appellant.

21 Again, there was a one in 1,700,000,000,000 chance that the source of the blood constituting the staining was not the appellant.

22 According to the deceased's sister, the rug was approximately three metres in length and width: AB 166 (Lynette McMillan).

23 Hairs from the deceased's hairbrush and bristles from her toothbrush were analysed and a DNA profile obtained. This was considered to be the likely DNA profile for the deceased.

24 The evidence was to the effect that, for this to occur, the mobile telephone must have been within 30 km to 40 km of the cell tower at Rockville: AB 316 (Miller).

25 AB 293 (Wallis).

26 AB 356 (Streeter).

was also a "scratch or a scrape" on the back of his right hand.[27] The appellant told his employer that he had been bitten by his own dogs;

(j) the appellant was observed tending a fire in the backyard of his property on 10 July 2012. Two days later, police located a number of partially burnt articles in the appellant's rubbish bin. These included ladies' pyjamas, ladies' underpants, sheets, pillowcases, a stuffed toy and socks. The partially burnt sheets and pillowcases matched similar bedclothes found at the deceased's unit.[28] They also shared a similar laundering history;

(k) blood stained masking tape was also located in the appellant's rubbish bin. The tape was subjected to DNA analysis and a mixed profile was obtained. The major DNA profile in the mix was an effective match with the appellant's DNA.[29] The minor profile matched the likely DNA profile for the deceased;

(l) the Crown relied on two types of conduct that were said to be revealing of a consciousness of guilt; flight (after the appellant's initial arrest and subsequent release on 12 July 2012, he evaded police until located at Picnic Point on 26 July 2012) and the telling of the alleged lie to SC Yarrow described above at [13]. In the case of the alleged lie, the Crown contended that it was open to the jury to conclude that the appellant's purpose in telling the lie was to deflect the police investigation when it was in its infancy and, further, that it was told in circumstances where the appellant knew that the truth would implicate him in the commission of the offence; and

(m) the various expressions of anger and hurt by the appellant towards the deceased detailed above at [11] were said to constitute evidence of motive. In addition, the Crown relied on an unsent letter written by the appellant to the deceased which was found at the appellant's residence. The letter read, in part, "So whatever happens to you, you deserve it so no other blokes will cop it from you. The world will be better off without you as you are a nasty, cruel, sarcastic person that acts like a 5 year old".[30]

[19] The appellant elected not to give or call evidence at his trial although the accounts he provided to police during the course of their investigation, including his written statement, were adduced in evidence as part of the Crown case.

The grounds of appeal

[20] The following grounds were advanced on behalf of the appellant:

(a) that the trial judge "erred in law [by] permitting evidence of an alleged lie by the [appellant] to [SC Yarrow] as evidence of consciousness of guilt" (**Ground 1**);

(b) that the trial judge "erred in his directions to the jury in failing to instruct them that, before any consideration of the use of the evidence as consciousness of guilt evidence arose, they had to be satisfied that the

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27 AB 357 (Streeter).

28 For example, a burnt fitted sheet appeared to match a top sheet found at the deceased's residence.

29 There was a one in 1,700,000,000,000 chance that the source of the blood was not the appellant.

30 AB 682-683 (Harmer) and AB 1146 (Exhibit 164).

appellant said the words 'her family told me she was going on holidays'" (**Ground 1A**);[31]

(c) that "a miscarriage of justice occurred as a result of evidence given of 'fibre comparison' and the repetition of the same in the summing up" by the trial judge (**Ground 2**);

(d) that "a miscarriage of justice occurred as a result of evidence given of the claimed presence of blood on an axe and the characterisation of that evidence in the summing up" by the trial judge (**Ground 3**).

Ground 1 – Consciousness of guilt by the alleged lie

[21] It was contended under this ground that the trial judge erred in allowing probative use to be made of the lie allegedly told by the appellant to SC Yarrow. Although this contention was not supplemented by any oral submissions on the hearing of the appeal, in written submissions it was argued that the evidence before the jury was "not rationally capable of permitting the conclusion that the [appellant] was not told by the deceased's 'family' that she was going on holidays".[32] That is of course just another way of saying that, on the evidence, it could not be rationally concluded that what the appellant allegedly said to SC Yarrow was untrue.

[22] At the time of the deceased's disappearance, SC Yarrow was stationed at Toowoomba. On Thursday, 5 July 2012, he was directed to attend the residence of the appellant with another police officer to ascertain whether the deceased was at that address. When they arrived, there was no one at home. They returned that evening and, this time, the appellant answered the door. SC Yarrow informed the appellant that the Warwick police wished to speak to him about the deceased and the appellant replied that he had already spoken to them. Then, according to the evidence SC Yarrow gave at the trial, the following exchange took place:

> "… I asked him if he knew a Gail Lynch which was our earlier job that we had there and he said yes, why and I said do you know where she is at the moment and he said no, I don't, her family told me she was on – going on holidays".[33]

[23] When cross-examined, SC Yarrow agreed that he had not made any notes with respect to this conversation and that the first occasion on which he was asked to recall it was on 10 October 2012 when he was required to produce a written statement. It was suggested that his recollection of the conversation was not accurate. In particular, it was put to SC Yarrow that, although the appellant had said that he did not know where the deceased was, he "made no mention about her family saying anything".[34] SC Yarrow replied:

> "Well, my recollection was that he said her family told him she'd gone on holidays".[35]

[24] SC Yarrow was then questioned by trial counsel for the appellant about the slight difference in expression – "going on holidays" and "gone on holidays" – but he

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31 The appellant was granted leave to add this ground at the hearing of the appeal.
32 Appellant's Outline of Argument, par 18.
33 AB 351 (Yarrow).
34 AB 352 (Yarrow).
35 Ibid.

confirmed that the former was the expression used by the appellant in the answer which he gave. Lastly, it was suggested to SC Yarrow that the appellant "didn't say anything about anybody's family saying anything to him but rather just proffered that proposition that she could have gone on holidays".[36] SC Yarrow replied:

"Well, my recollection was that he said her family told him".[37]

[25] To support the Crown's contention that the appellant's answer to SC Yarrow's question as to the whereabouts of the deceased was a lie, evidence was adduced from the deceased's sister (Ms McMillan), son (Simon) and daughter-in-law (Jackie). As discussed earlier, they were the only members of the deceased's family with whom she had any contact. Only one – Ms McMillan – spoke with the appellant after the deceased went missing, and that occurred on just two occasions. The first conversation took place on Wednesday, 4 July 2012 when Ms McMillan telephoned the appellant to ascertain whether he had heard from the deceased and was told that he "hadn't had contact with her for a couple of weeks".[38] The second occurred on Sunday, 8 July 2012 at the country music muster in Warwick and, during that conversation, the appellant said that he had not heard from the deceased. When giving evidence, Ms McMillan was asked whether she told the appellant that the deceased was "going on holidays" and she replied, "No, I didn't".[39] Similarly, Jackie was asked when giving evidence whether she had ever had a conversation with the appellant during which she told him that the deceased was "going away on holidays" and she replied, "Never".[40] She also confirmed that she had no contact with the appellant after 3 July 2012. Simon said in evidence that he met the appellant at his home in Morayfield when the deceased and the appellant came to visit during Easter 2012. He could not say whether he met the appellant on any subsequent occasion but it was in any event clear from his evidence that he had little overall contact with the appellant. He was not asked whether he told the appellant that the deceased was going on holidays but it was nonetheless open to the jury to infer, given his limited contact with the appellant, that no such conversation took place and nothing to the contrary was put to him by trial counsel for the appellant. Indeed, the appellant's counsel did not suggest to any of these witnesses that they had told the appellant that the deceased was going on holidays. Instead, as discussed above at [23], his approach was to challenge the accuracy of what SC Yarrow could recall regarding the actual words spoken by the appellant.[41]

[26] Whether evidence is capable of amounting to evidence of consciousness of guilt is a question of law and, therefore, something that the trial judge must decide in the absence of the jury. That is what occurred in the court below; once objection was taken by the appellant's counsel to probative use being made of the alleged lie, the trial judge heard submissions from the parties before ruling that the alleged lie should be left to the jury for their consideration[42] subject, of course, to the giving of appropriate

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36 Ibid.

37 Ibid.

38 AB 178 (Lynette McMillan).

39 AB 198 (Lynette McMillan).

40 AB 277 (Jackie).

41 In his closing address to the jury, counsel for the appellant submitted that SC Yarrow "may well be mistaken about the precise words that were used and that perhaps comes as no surprise in the circumstances. This conversation occurred on the 5th of July 2012. He did not make any note of the conversation at the time. The first time he was asked to recall it was when he prepared his statement on the 10th of October, three months later": Transcript of the addresses by counsel, p 34.

42 AB 1009-1011.

directions in accordance with *Edwards v The Queen*.[43] Although the objection was overruled on a number of bases, only one was challenged under this ground of appeal, that is to say, his Honour's conclusion that the evidence was "sufficient to demonstrate the untruth"[44] of what the appellant said to SC Yarrow. As to this, his Honour concluded that the sufficiency or otherwise of the evidence on that point was a "matter for the jury to make up its mind"[45] about.

[27] For the appellant, it was submitted that his Honour fell into error by rejecting the defence submission that the evidence regarding what the appellant said to SC Yarrow was untrue was "logically inadequate to permit that conclusion".[46] That was because, it was argued, the deceased came from a "large extended family"[47] but, despite that, only three members of her family were called as witnesses at the trial and, of them, only two were asked whether they had told the appellant that the deceased was going on holidays. It was argued that such evidence was incapable of rationally supporting the conclusion that what the appellant allegedly said to SC Yarrow was untrue.

[28] The difficulty with these arguments is their premise. If the appellant did say to SC Yarrow that the deceased's family told him that she was going on holidays, the evidence discussed above at [25] was *capable* of sustaining the conclusion that this was a lie. The deceased was not from a "large extended family"; she only maintained contact with the three family witnesses who were called at the trial, and that had been the position for many years. Two of those witnesses flatly rejected the notion that they had told the appellant that the deceased was going on holidays and although the third, Simon, was not asked about that topic when he was called to give evidence, it was open to the jury for the reasons earlier stated to infer that he had no such conversation with the appellant. Of course, whether the evidence of the three witnesses was *sufficient* to persuade the jury to the conclusion that the appellant lied to SC Yarrow was another matter, as the trial judge correctly held. Once there was evidence that was capable of sustaining such a conclusion, it was for the jury to evaluate that evidence in order to decide whether what the appellant said was in fact untrue. The position would be different where, for example, an innocent explanation for the lie could not be disregarded or where the lie was "intractably neutral".[48] In either of those circumstances the trial judge would be obliged to intervene to prevent probative use being made of the alleged lie, but neither circumstance arose here.

[29] This ground of appeal must fail.

Ground 1A – Directions about proof of the alleged lie

[30] The next ground was raised for the first time, and then developed, in oral submissions on the hearing of the appeal. It was in a sense related to Ground 1 because it is focused on the same alleged lie but, under this ground, it was argued that the trial judge failed to instruct the jury that they needed to be satisfied that the appellant said to SC Yarrow that the deceased's "family told [him] she was going

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43 (1993) 178 CLR 193.
44 AB 1010.
45 Ibid.
46 Appellant's Outline of Argument, par 15.
47 Ibid 17.
48 *R v Ciantar* [2006] 16 VR 26 at [72]. And see *R v Ortega-Farfan* [2011] QCA 364 at [53] per Fraser JA (Chesterman JA and Mullins J agreeing).

on holidays" before they could give consideration to the use of his answer as evidence of consciousness of guilt.

[31] As already discussed, the challenge to SC Yarrow's evidence at trial was to its accuracy. It was suggested that SC Yarrow was mistaken in his recollection of what the appellant said in answer to his question about the deceased's whereabouts. His memory was unassisted by any contemporaneous notes and he had no occasion to recall the conversation until he was required to provide a written statement some months later. Consistently with what was put to SC Yarrow in cross-examination, the defence contended at trial that, when asked about the deceased's whereabouts, the appellant replied that he did not know where she was but suggested that she could have gone on holidays and, to the point, that no mention had been made of the deceased's family having said anything to him regarding her whereabouts. Of course, the appellant did not give evidence at trial and nor did the police officer who accompanied SC Yarrow and was present during the conversation.[49] As such, the only evidence as to the conversation came from SC Yarrow, but he rejected these contentions on the part of the defence.[50] Of course, it was still a matter for the jury whether they accepted his evidence in this regard.

[32] That the jury needed to first be satisfied that the appellant said to SC Yarrow that the deceased's family had told him that she was going on holidays before any consideration could be given by them to the use of the answer as evidence of consciousness of guilt cannot be doubted. However, the complaint that underlies this ground of appeal – a failure on the part of the trial judge to direct the jury about this requirement – cannot be sustained when proper regard is had to the structure and content of his Honour's charge to the jury.

[33] In the directions which the trial judge gave, his Honour emphasised that "the first step in considering whether you'd draw any inference from the conduct of the defendant is you have to consider whether or not you find that conduct occurred, that is, you have to find the basic fact, and that if you find it occurred, there's the question of why it occurred".[51] Then, after discussing other aspects of the appellant's conduct that were relied on by the Crown to evince a consciousness of guilt, the trial judge gave comprehensive directions on the issue of the alleged lie. His Honour commenced by reminding the jury of the evidence given by SC Yarrow on the point and then said:

> "You will recall that [the appellant's counsel] submitted to you that it's a matter for you to determine whether you accept [SC Yarrow's] evidence. He submitted to you that [SC Yarrow] might have been mistaken. After all the conversation, so [the appellant's counsel] suggested to you, was on 5th July yet the first time that [SC Yarrow] was asked to recall it was some three months later when apparently he gave a statement in relation to this matter. [The appellant's counsel] submitted to you that it would have only been trivial at the time so why would he remember it?"[52]

[34] Next, his Honour summarised the evidence of the deceased's sister and daughter-in-

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49 Constable Simon Giuliano accompanied SC Yarrow and was standing behind him when he spoke with the appellant. See AB 350-351 (Yarrow).

50 AB 352 (Yarrow).

51 AB 1077.

52 AB 1079-1080.

law which the Crown relied on to establish that what the appellant said in answer to SC Yarrow was, in fact, untrue.

[35] The following directions were then given:

> "It's important to note that your use of the lie, *if you find the lie to have been told*, must be limited to that issue. The Crown does not contend that it goes to support the issue of proof of intention to kill or cause grievous bodily harm to [the deceased], which is an element of the offence of murder. The Crown relies on other matters to satisfy that element, and I'll direct your attention to that when I get to them.
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> Before you can use this evidence against the defendant, you've got to be satisfied of a number of matters. Unless you're satisfied of all these matters, you can't use this evidence against the defendant.
>
> First, you must be satisfied that the defendant has, in fact, told a deliberate untruth. There's a difference between the mere rejection by you of a person's account of events and your finding that the person has actually lied.
>
> In many cases where there appears to be a departure from the truth, it may not be possible to say that a deliberate lie has been told. The defendant might have been confused, or there might be other reasons which would prevent you from finding that he's deliberately told an untruth. You might ask yourselves whether the explanation that the defendant was confused or misunderstood conversations that he had with [the deceased's] sister, Lyn, [the appellant's counsel] submitted to you that this is something you could consider.
>
> …"[53] [Emphasis added]

[36] The directions extracted immediately above were concerned with whether the appellant told a deliberate untruth and, as the words emphasised in the first line of the extract make plain, they could only have applied if the jury had already concluded that SC Yarrow's evidence as to the appellant's answer should be accepted. That this was so would have been clear to the jury from the preceding directions (above at [33] and [34]). They required the jury to first consider whether there was satisfactory proof that the answer recalled by SC Yarrow had been given by the appellant and, further, whether it was untrue. To adopt the trial judge's expression, each was a "basic fact" about which the jury needed to be satisfied before giving consideration to the use to which the evidence could be put. There is accordingly no substance in the complaint that his Honour failed to direct the jury about this requirement.

[37] This ground of appeal also fails.

Ground 2 – The fibre comparison evidence

[38] As with Ground 1, this ground was not supplemented by any oral submissions on the hearing of the appeal. However, it was argued in written submissions that one

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53 AB 1081. The trial judge then went on to direct the jury that they need to be satisfied that the alleged lie was concerned with a circumstance or event connected with the unlawful killing of the deceased and that the lie was told because the appellant knew that the truth of the matter would implicate him in the commission of the offence and not of some lesser offence.

of the expert witnesses in the Crown case, Richard Mattner, overstated the extent to which a comparison could be drawn between the fibres from the missing rug found on the floor of the deceased's kitchen and the fibres found in the boot of the appellant's car. It was also argued that the trial judge ought to have corrected the impression that Mr Mattner's evidence gave rise to a suggestion that the fibres came from the same source.

[39] Mr Mattner is a chemist who specialised in the forensic comparison of different types of physical evidence. He compared the fibres found on the floor of the deceased's kitchen with the fibres found in the boot of the appellant's car. There were a number of features in common. He said that, while it was not possible to identify the source of a particular fibre because comprehensive product databases have never been kept, it was possible to use a microscope to compare fibres by reference to their diameter, cross-section, delustrant level and dischroism (orientation of the pigment particles). In addition, an infrared microscope could be used to examine the infrared spectrum of the respective fibres. Using these techniques, Mr Mattner was unable to discriminate between the fibres found on the kitchen floor and the fibres found in the car. They were similar in shape, diameter and colour. The infrared spectroscopy established that the fibres also had a similar chemical composition and one that was typical of fibres found in carpet or rugs.

[40] Mr Mattner said in evidence that he looked at the "combination of not particularly diagnostic comparisons, which basically build up to a similarity which is getting hard to ignore".[54] He was then asked for his opinion about the fibres and said:

> "Well, basically I cannot exclude the fibres from [the car] … from having a common origin with [the fibres from the kitchen]. So when I say I cannot exclude clearly there are other sources – other potential sources of fibres which – with the same – same optical and physical characteristics. Same dimensions. … Same morphology. So it's not exclusive. It's not absolute or categorical by any stretch".[55]

[41] A short time later he was asked what he would "need" to be able to state that the "two different pieces of fabric came from a common origin". Mr Mattner replied:

> "Well, that's simply not possible, because, as we know, most manufactured items are manufactured in bulk or in large numbers, and so, conceivably, there are other rugs with identical composition. … And it's simply not possible to say that these fibres came from an individual rug, because they're – like, they're a mass produced item.
>
> …
>
> [The] fact is that I conducted as many tests as I was able to under the circumstances and I was unable to eliminate them … from having a common origin. So that's all I can say. It's impossible to go any further than that.
>
> …
>
> I've failed to see any differences at all in the fibres."[56]

[42] In cross-examination, Mr Mattner accepted that he was unable to say whether the

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54 AB 793.
55 AB 794.
56 AB 794-795.

fibres were produced with a "common manufacturing technique"[57] or even if they were from a rug.[58] He could not, for example, exclude clothing or "things like blankets" from being the source of one or more of the fibres.[59] He agreed that he could not say whether the fibres "actually came from the suspected rug".[60]

[43] The criticism of Mr Mattner's evidence in the appellant's written argument focused on two separate observations made by the witness: first, that the "combination of not particularly diagnostic comparisons" had built up to "a similarity which is getting hard to ignore"[61] and, second, that "it's not absolute or categorical by any stretch". It was argued that, when considered together, the "only implication [from the observations] was that the witness considered the fibres to be from the same source but simply could not be certain about it whereas all he could actually say was that he could not exclude them from coming from the same source".[62] This, it was contended, "crossed the line from permissible 'cannot exclude' evidence to an expression – in effect – of likelihood [that] both fibres [came] from the same source".[63] There was no proper basis, it was submitted, for the expression of such an opinion,[64] and this was something that the trial judge ought to have corrected in his summing up.

[44] I do not agree. The observations relied on are not to be considered in isolation. In evidence in chief, Mr Mattner made it perfectly clear that although he was unable to eliminate the fibres as having a common origin it was impossible to say in any positive sense that this was so. Furthermore, the limitations associated with the testing he performed were explained and, in cross-examination, Mr Mattner agreed that he could not say, and was not saying, that the fibres came from the same source or even that they had come from a rug. To the point of this ground of appeal, and as the appellant's counsel frankly acknowledged at the hearing, the witness made clear the limited extent to which a useful comparison could be made between the fibres.[65] It follows that there was nothing for the trial judge to correct, whether by way of "impression" or otherwise, and no miscarriage of justice.[66]

[45] This ground of appeal cannot be sustained.

Ground 3 – The evidence and characterisation of the stain on the axe

[46] The final ground of appeal concerned evidence given at the trial by a scenes of crime officer, Senior Constable David Hartland, concerning the axe purchased by the appellant on the day after the deceased went missing. It was argued that presumptive testing for the presence of blood on the axe carried out by SC Hartland was

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57 AB 796-797.
58 AB 797.
59 Ibid.
60 Ibid.
61 AB 793.
62 Appellant's Outline of Argument, par 26.
63 Ibid 27.
64 The appellant relied on the discussion of principle to this effect in *R v Sica* (2013) 232 A Crim R 572 at [103]-[111] and [119], *R v Tang* [2006] NSWCCA 167 at [142]-[155] and *R v Baden-Clay* [2014] QSC 156 at [69].
65 T. 1-2.
66 For completeness, it should be noted that the trial judge accurately summarised the effect of the evidence in his summing up, reminding the jury that Mr Mattner "could not exclude [the] fibres as having come from a common origin, but he couldn't categorically or absolutely say that they did come from a common origin": AB 1070.

inadmissible and should not have been received and, further, that the jury had been "wrongly invited" by the trial judge to use that evidence to positively conclude that blood was present.[67]

[47] As earlier mentioned, the axe was located by police at the appellant's residence. SC Hartland attended to photograph and examine it. He observed "some grass or vegetation or something" on the handle and the "axe head" as well as what appeared to him to be "mud or dirt or something like that"[68] on the blade which he described as being "brownish"[69] in colour. He said in evidence that the "areas of brown" were "more or less across the sharp end of the axe" as well as in an area towards the "head of the axe".[70] He could not see anything "blood-wise or what appeared to be blood".[71] SC Hartland conducted an examination which he referred to as "sub-sampling for DNA".[72] This involved rubbing a swab dampened with ethanol "across the axe in a number of different areas to collect what material may have been there".[73] He sampled the head and handle of the axe in this way "in a couple of places".[74] One swab was used for both sides of the sharp edge of the blade. He assigned a forensic exhibit number and description; the description read "Trace DNA/blood axe head/blade office".[75] A swab was also taken from the handle of the axe and it was assigned a separate forensic exhibit number and description – "Trace DNA/blood axe handle office".[76]

[48] SC Hartland then conducted a presumptive test for the presence of blood on the axe head and handle using "Combur-3 test" strips. He ran one strip across "the sharp edge of the axe and subsequently got a colour-change reaction, although that reaction was very slow".[77] When giving evidence he agreed that this was "more or less" in the same place where he had swabbed for DNA. He explained that, before he did any testing, he conducted a control test with known blood. This produced an immediate reaction in that the strip "started changing colour more or less straight away".[78] However, the strip that he had run across the sharp edge of the axe produced a much slower reaction – eight seconds before he could see some colour change and "30 seconds or so" before he could see a "full colour change".[79] SC Hartland explained that the reaction he saw was consistent with the presence of blood because the testing "does vary quite considerably as to how long the test takes".[80] He volunteered that the reaction in this instance was "fairly slow" and then said:

> "It doesn't tell me that it is blood, of course. It's only an indication that it may be".[81]

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67 Appellant's Outline of Argument, par 55.
68 AB 827.
69 AB 828.
70 Ibid.
71 AB 830.
72 AB 828.
73 Ibid.
74 Ibid.
75 AB 829.
76 Ibid.
77 AB 830.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.

In the same vein, and after explaining that presumptive testing could return "false positive readings" in the case of, for example, rust, vegetable matter or bleaches,[82] SC Hartland said that the testing was not "definitive" but, rather, "just an indicator as to where to target a sampling area".[83] Furthermore, the point was made that the testing strips are not designed "specifically for forensic use" but are adapted by the police for that purpose.[84]

[49] In support of this ground of appeal, it was argued that SC Hartland's evidence should have been objected to by the appellant's trial counsel on the ground that it was inadmissible. That was submitted to follow from the features that there was no apparent blood stain on the axe, the precise areas sampled for DNA and those subjected to presumptive testing were not necessarily the same, the slow reaction to the presumptive testing was "problematic", the witness was not qualified to explain the significance or otherwise of this slow reaction and there was in any event a real possibility that a "false positive" result had been obtained. At best, it was argued, the probative value of the evidence was "very low" and should not have been received.[85] Although the evidence was not the subject of any objection at trial, it was submitted that the failure on the part of the appellant's counsel to do so was not fatal to this ground of appeal because there could have been no conceivable forensic advantage for not objecting.[86] Lastly, it was submitted that the problem caused by the receipt of this evidence was compounded by the trial judge because his Honour "summarised without qualification the Crown proposition that there was blood on the axe" and "in ways that put it as a fact rather than as a Crown submission".[87]

[50] There are several difficulties with these arguments.

[51] *First*, SC Hartland was not the only scientific officer to give evidence about the axe. Another scenes of crime officer, Senior Constable Julie Butler, examined the axe after SC Hartland and she was well qualified to give evidence regarding these matters.[88] She said in evidence that she tested the blade of the axe with a "Combur" test strip. It gave a "very weak and slow reaction" which, to her, did not indicate the presence of blood.[89] She also tested an area where the head of the axe was joined to the handle and it gave a slow reaction (35 seconds). She expressed the opinion that, if blood was present in a sufficient quantity, the test would have returned an instant result. On the other hand, she pointed out that the slow reaction might be explained by the presence of diluted blood, the sampling of the area previously, the washing or cleaning of the sampled area or the presence of an entirely different substance such as rust. In cross-examination, she accepted that animal blood, horseradish and some cleaning products could all return false positive results. In the result, the evidence of SC Hartland under challenge on the hearing of this appeal was supported by evidence to a notably similar effect from another scenes of crime officer whose testimony was not challenged in this appeal, and nor was her expertise.

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82 Ibid.
83 AB 831.
84 AB 838.
85 Appellant's Outline of Argument, par 51.
86 For this point, the appellant relied on the observations made by Keane JA in *R v Saub* [2007] QCA 194 at [10].
87 Appellant's Outline of Submissions, par 56. The appellant relied on passages from the summing up appearing at AB 1055 and AB 1072.
88 Her expertise was the subject of a *voir dire* and subsequent favourable ruling by the trial judge: AB 720-724.
89 AB 749.

[52] *Secondly*, the evidence of both scientific officers was admissible.[90] Their testimony went no further than to establish the results of the separate presumptive tests for the presence of blood and, in the case of each witness, the evidence was suitably qualified by a clear explanation of the limitations inherent in that type of testing.[91] It was a matter for the jury to assess their evidence and to attach such weight to it as they considered appropriate.

[53] *Thirdly*, the evidence did not establish, and was not relied on by the Crown as establishing, that there was blood on any part of the axe or its handle. Rather, the evidence left open the possibility – among several others – that blood was present. As such, this evidence fell to be considered alongside the other circumstantial evidence in the case, most notably the presence of the deceased's DNA in material taken from a swab of both sides of the sharp edge of the blade area and the timing of that deposition relative to the disappearance of the deceased.[92]

[54] *Fourthly*, even if objection could have been successfully taken to the reception of SC Hartland's evidence, there was a good forensic reason why trial counsel would have been most unlikely to do so. That is because the presence of the deceased's DNA on the blade of the axe required some explanation, and the explanation relied on by the appellant's counsel in his argument to the jury was that this could have come about through a process of "secondary transfer" when a towel on which the deceased's DNA was found had been innocently used by the appellant to wipe down the axe.[93] The DNA extracted from the towel was from an area of blood staining. The presence of blood on the axe was therefore consistent with this hypothesis and may have been thought by his counsel to support it.

[55] *Lastly*, a proper reading of the passages from the summing up relied on by the appellant does not support the contention that the trial judge invited the jury to use the evidence to conclude that blood was present on the axe.[94] In the first of those passages, his Honour was doing no more than reminding the jury of the submissions made by the Crown on that topic and, in the second passage, his Honour was referring back to his summary of the evidence on the same topic.[95] Nothing that the trial judge said in either passage could have been taken as advancing, as a fact established by the evidence, that there was blood on the axe.

[56] There is no merit in this ground of appeal.

Disposition

[57] As none of the grounds of appeal have in my opinion been made out, the appeal must be dismissed.

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90 See *R v Sam* [2002] QCA 14.

91 For this reason nothing turns on the feature that the relevant forensic samples were labelled as though blood had been detected; the only evidence on the point was that such a conclusion could not be reached.

92 That is to say, the deceased's DNA could not have been deposited on the blade until some time after the axe was purchased by the appellant late on the afternoon of the day following her disappearance.

93 Addresses of counsel at 28.

94 The appellant relied on passages from the summing up appearing at AB 1055 and AB 1072.

95 AB 1047-1053 and AB 1056.