IN THE COURT OF APPEAL [1998] QCA 116

SUPREME COURT OF QUEENSLAND

C.A. No. 396 of 1997

Brisbane

[R v. Babsek]

THE QUEEN

v.

CAROLINE ANGELA BABSEK

Appellant

Davies J.A.

McPherson J.A.

Moynihan J.

Judgment delivered 2 June 1998.

Reasons for judgment of Moynihan J., separate joint reasons for judgment of Davies and McPherson JJ.A. concurring as to the order made.

APPEAL AGAINST CONVICTION ALLOWED AND NEW TRIAL ORDERED.

CATCHWORDS: CRIMINAL LAW - Murder - Appeal against conviction - relevance and admissibility of evidence of whether appellant was violent towards deceased - hearsay - need for evidence to found experts' opinion - battered wife syndrome - need for evidence to connect appellant with deceased's injuries - whether appellant was deprived of a fair chance of acquittal.

Counsel: Mrs D.J. Richards for the appellant
Mrs L.J. Clare for the respondent

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

Hearing date: 12 February 1998

JOINT REASONS FOR JUDGMENT - DAVIES AND McPHERSON JJ.A.

Judgment delivered 2 June 1998

Having considered the reasons of Moynihan J., we have decided that the appeal should be allowed and the conviction and verdict set aside. There should be a new trial.

REASONS FOR JUDGMENT - MOYNIHAN J.

Judgment delivered 2 June, 1998

INTRODUCTION

Caroline Angela Babsek appeals against her conviction on 26 September 1997 in the Circuit Court in Cairns for the murder of Simon De Luca. The evidence was to the effect that the appellant and De Luca had lived in a relationship for a number of years and had had a son, Drew, who was aged two or three. At the time of De Luca's death, they had been separated for some weeks. The death occurred when the deceased went to the home at Mission Beach where the appellant and Drew were

living. He wanted to see Drew. He and Drew went to the vicinity of the Mission Beach boat ramp. The appellant went there in her car. She and Drew returned to the house in the car while the deceased followed on foot.

As a consequence of formal admissions made on the appellant's behalf at the commencement of the trial, it was not in issue that at approximately 9.35 a.m. on 18 May 1996 at her residence at 36 Wall Street Mission Beach, the appellant discharged a bullet from a .22 rifle shooting De Luca in the head as a consequence of which he died. The trial, nevertheless, went into a fourth week, 46 witnesses were called and there were 77 exhibits. The appellant called and gave evidence and the case went to the jury on issues of intent, accident, self-defence and provocation.

THE GROUNDS OF APPEAL

The first of the two grounds in the notice of appeal filed, that the summing-up lacked balance, was not pursued. The second was that the trial judge "failed to allow the expert medical witnesses to relay information from the appellant upon which they had relied but which was not in evidence at the trial". This ground relates to a number of statements or rulings made by the trial judge during the defence opening and in the course of the evidence of a psychiatrist, Dr Millner, called by the defence. A third

ground was added by leave at the hearing of the appeal. This was that the appellant was denied a fair trial by the admission of evidence in the prosecution case which was both inadmissible and highly prejudicial. This ground relates to evidence called by the prosecution which was designed to establish that the appellant had persistently been violent to the deceased. It was submitted for the appellant that some of this evidence was hearsay and in respect of other aspects the evidence did not create a sufficient connection between the appellant and violence to the accused to found an inference that she had been violent to him.

BACKGROUND

Prior to the opening of the prosecution case there was a voir dire in which rulings of no present concern were made. During its course, however, defence counsel informed the trial judge that he would ‘‘disclose his cards’’ to the extent of indicating that he was going to ‘‘run a defence of battered wife syndrome’’. It can be inferred from the record that there had previously been discussions between prosecution and defence counsel bearing on the case being conducted on the basis that an issue of that kind arose. When he initially broached the matter, defence counsel indicated that he

would be submitting that ‘‘battered wife syndrome’’ was ‘‘part of the law of Queensland’’ and he raised a question of whether such a defence would found a verdict of manslaughter or of acquittal. No ruling was sought or given at that stage. The dialogue resumed on the following day; counsel for the defence then acknowledged that battered wife syndrome was ‘‘a bad label and that the issue intended to be raised was self-defence’’ and referred to s.271 of the Code; again there was no ruling made. It is clear however that the prosecution led evidence in anticipation of a more widely based approach.

The case against the appellant at the close of the prosecution evidence was a strong one. There was evidence from a number of persons to whom she had spoken subsequent to the shooting capable of supporting an inference of the intent necessary to sustain a conviction for murder, there was little to raise self-defence or provocation and there was evidence capable of founding an inference that the appellant had persisted in a course of violent conduct towards the deceased.

The appellant gave and called evidence. In her evidence she controverted much of the evidence designed to show that she had been violent towards the deceased.

Her evidence, if accepted, was capable of founding a conclusion that De Luca was the violent partner over a number of years and that he had regularly threatened and assaulted her and had done so immediately prior to his being killed.

The case went to the jury with the appellant's credibility strongly in issue. The prosecutor pressed them to disbelieve her and invited them to conclude that her evidence as to the deceased's violence to her was "all lies".

Evidence in addition to the appellant's was called in her case. This included evidence from Dr Millner, a psychiatrist who gave opinion evidence about what he preferred to refer to as "persistently abused woman" syndrome. The weight of his evidence turned on accepting the appellant's account of the relationship between her and the deceased. The only evidence called by the prosecution in rebuttal was that of Dr Kippax, another psychiatrist. Her evidence contradicted Dr Millner's in a number of respects, notably as to whether the appellant's conduct fitted the pattern of the syndrome.

Given the issues in the case, including intent, self-defence and provocation, evidence "throwing light on the relationship" between the appellant and the deceased

was admissible; *Wilson*[1]. Moreover, s.132B of the *Evidence Act* 1977 made admissible "relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed". It was not argued that this provision rendered admissible what would otherwise be excluded as hearsay or as having failed to satisfy a requirement that the appellant be connected with manifestations of violence on the accused so as to found an inference she had inflicted it. It would be surprising if the section had that effect.

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[1] (1970) 123 CLR 334 per Barwick CJ at 337, Menzies J. at 344.

There is merit in the submission for the respondent that although a considerable amount of the trial was devoted to the "battered woman syndrome", by the close of the evidence it was of minimal significance. This is because on the appellant's evidence of the events of the killing, self-defence and provocation were fairly raised in the context of her version of the relationship between her and the deceased without reference to the battered wife syndrome. It can nevertheless be accepted that the evidence, which seeks to explain why people do not leave a relationship with a violent partner and

which suggests a heightened sensitivity on the part of the subject of the violence to prospective or threatened violence, was admissible particularly as to the latter issue. It was relevant to the issues of intent, ‘‘reasonable apprehension’’ and ‘‘belief on reasonable ground’’ raised by self-defence and to the evaluation of the deceased’s conduct relied on as constituting provocation. Notwithstanding the canvassing early in the trial of the evidence going to a defence of battered wife syndrome the case did not go to the jury on that basis and no issue of that kind was argued on the appeal. The trial judge directed the jury to the effect that the evidence bore on the appellant’s ‘‘heightened sensitivity to an impeding assault’’ and there is no complaint about this aspect of his direction. At this stage it is convenient to deal with the second ground of appeal and then return to the third ground.

SECOND GROUND OF APPEAL

It will be recalled that ground two is that the trial judge failed to allow the expert medical witnesses to relay information from the appellant upon which they had relied but which was not in evidence at the trial. The ground is based on a number of incidents which occurred during the trial. The trial judge stopped defence counsel

during his opening, from dealing with the law on provocation and self-defence and bearing on the "battered wife syndrome". In the absence of the jury the trial judge ruled that those issues did not sufficiently arise on the evidence as it then stood to make it appropriate for defence counsel to deal with the issues and that he should wait until the issues were raised on the evidence. It will be apparent from what has already been said that this is what occurred. The trial judge went on to refer to the fact that the psychiatrist to be called in the appellant's case was in court listening to the evidence and that his opinion should be based on "the evidence in the trial and not what he had been told elsewhere."

Dr Millner, the psychiatrist called by the defence to give opinion evidence about battered woman syndrome, or as he preferred to refer to it "persistently abused woman syndrome", was the last witness called in the defence case. The prosecution called Dr Kippax, a psychiatrist, in rebuttal. After the other witnesses in the defence case had been called, and in the absence of the jury, defence counsel asked for and was granted an adjournment so that a statement could be obtained from Dr Millner, to confer with Dr Millner and to discuss aspects of the admissibility of his evidence with

the Crown prosecutor. The Crown prosecutor indicated that he had seen some material relating to the evidence intended to be called from Dr Millner and had objections about some of it. The trial judge then said:-

> "Well one thing is clear, that any opinion he might give has to be based on the evidence or certain parts of the evidence that have been lead in this case. If his opinion is based on statements or other material that he has been told out of court, that has to be put to one side."

Dr Millner had examined and reported on the appellant, been in court during some of the evidence (including the appellant's), and had taken shorthand notes which he was permitted to consult in the course of his evidence. He had also been provided with copies of the transcript of the evidence of witnesses during whose evidence he had not been present.

When permitting Dr Millner to refer to his notes, the trial judge went on to say:-

> ". . I had better make it perfectly clear, this man is an expert, is put forward as an expert, can only give evidence based on what he has seen and heard in the court."

Later the trial judge said:-

> "Well he has got to make it clear what it is he relies upon to give his opinion. If he has heard anything outside the court that is relevant to his

opinion he has got to ignore it."

These are the events relied on by the applicant to sustain the second ground of appeal. There can be no objection to the trial judge's ruling that defence counsel should not, in opening the defence case, address on issues of law which had not arisen on the evidence as it then stood, particularly since the case ultimately went to the jury on those issues.

As to the other aspect; an examining doctor can give evidence of an account given by a patient, when that constitutes a part of the material upon which the opinion given in evidence is formed. That account is not, however, admissible to prove the facts of which it speaks. Unless those facts are proved by admissible evidence, an opinion founded on them is of little or no value; *Ramsey v. Watson*[2]; *R v. Shafferius*[3]; *R. v. Tonkin and Montgomery*[4]. Thus in *Ramsey v. Watson* a trial judge was held to have been justified in excluding the history taken by a doctor from persons he had

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[2] (1961) 108 CLR 642 at 648-9

[3] [1977] Qd.R. at 213

[4] [1975] Qd.R. 1

examined but from whom it was not intended to call to give evidence in the trial. In the present case the trial judge's statements have to be construed in the circumstances of Dr Millner's giving evidence which have been referred to above. By that time all the evidence relied on by the defence to prove the facts founding the experts' opinions was before the court. In these circumstances it cannot be said that the trial judge erred in his statement, or for that matter that any admissible evidence was excluded as a consequence of what was said.

THIRD GROUND OF APPEAL

It will be recalled that this ground arose as a consequence of the prosecution leading evidence that the appellant had been systematically violent towards the deceased, apparently in anticipation of her presenting a case that the deceased had been systematically violent towards her. A substantial body of evidence of this kind was led from the deceased's father who was called early in the prosecution case. During the course of the cross-examination of the father, defence counsel put that he was "painting Caroline out to be the aggressor . . and your son the victim?" and the answer was "That's how we know it". Later in cross-examination the father spoke of

his son's reluctance to speak of difficulties between himself and the appellant. As a result of this cross-examination and in the absence of the jury, the prosecutor took up his concern that the questions made "relevant for the jury the issue of Simon De Luca's consistency, that is to say the inference that the questions seem to give rise to, is that he didn't start to sheet home on Caroline Babsek until a very late stage (when) he appreciated she was sheeting home the blame on him." The prosecutor foreshadowed calling evidence relevant to "the issue of consistency of Simon De Luca". He told the judge that the evidence was not put forward as evidence of the truth but as evidence of the fact that "he was saying these things in a consistent way". Defence counsel stated that he did not propose to make consistency an issue and the trial judge took the view that it was unnecessary to rule on the question raised by the prosecutor unless consistency became an issue. It does not seem to have been considered that it did. The point is, however, that the evidence subsequently considered in these reasons did not go to the jury on a basis which limited its relevance to the fact it was said or occurred; it went on the basis that its relevance was determined by its being tendered as to its truth.

The evidence founding ground three is epitomised by the following examples pointed to by counsel for the applicant. There is some overlapping where the witnesses speak of the same incident and the catalogue is not necessarily exhaustive:-

(a) There was evidence from a social worker who saw the appellant and the deceased on 3 May 1996 to discuss their relationship problems. The deceased said he wanted to have the harassment and intimidation from the appellant stopped, and wanted to make arrangements to see his son. The appellant made no comment about these complaints and said that she wanted more commitment from the relationship and wanted to discuss the problems that were in the relationship.

(b) A police officer gave evidence that on 17 May 1996, the day before the murder, the deceased came to the Tully Police Station and indicated that he wished to apply for an Order under the Domestic Violence Act. She said a temporary Protection Order was made against the appellant "by the courthouse" but it was apparently not served before the killing.

(c) A cousin of the deceased gave evidence that she spoke to the appellant about 6 or 7 May 1996 and visited the appellant about 9 or 10 May. The appellant said that the deceased didn't love her anymore and that she would like to move away to Perth.

(d) The deceased's father, gave evidence that:

(i) There was an incident when he and his wife went around to the house and the deceased and the appellant were

arguing and the deceased had red marks on his face. They were told that the deceased had been hit on his face and had pushed Caroline against a wall in circumstances which are not particularly clear.

(ii) The appellant was upset about a backpacker working with the deceased in the family business, claiming that she was having an affair with the deceased. The next day when he saw the deceased he had a busted lip and skin missing off the side of his cheek. The witness acknowledged that the nature of the deceased's work might cause injury.

(iii) The following Saturday he saw an assault by the appellant on the backpacker.

(iv) On another occasion he and his wife went to their house. The deceased said `*Look she's cut me on the legs*' and the appellant said`*You've done them yourself*.

(v) At about 13 or 14 February 1996 he and his wife and others went to a restaurant. The deceased and appellant were at another table. The appellant was ''quite rude'' to a person she was introduced to and left the restaurant. The deceased followed her out and when he came back in he had red marks on his face and had tears in his eyes.

(vi) In Easter 1996 he noticed scratch marks on the deceased's neck and noticed abrasions on his chest.

(vii) On about 21 April 1996 the appellant came to the deceased's parents' house looking for the deceased, and

later that evening they saw the deceased with a cut over his eye which was bleeding. A photograph showing the injury was admitted into evidence.

(viii) After they separated the appellant rang nearly every night. (This was apparently a basis for the protection order).

(ix) On the day the deceased died he spoke to the appellant on the phone. He told his parents that he was `sick of all the crap'.

(x) In relation to injuries on the appellant, he saw her once with a lump on her head. She had a sore ankle at one stage and claimed that the deceased hurt her ankle and he claimed that she had kicked him in the head. He agreed that the appellant had told him on occasions that the deceased had hit her but said that the deceased claimed that he was defending himself.

(e) The deceased's mother gave evidence:

(i) On one occasion she and her husband went to the beach house and the appellant said the deceased had bashed her. The deceased said he had pushed her and she had fallen on the frame of the lounge because she punched him. He had red marks on his forehead and scald burns from a Milo drink he was holding. (This seems to be the incident referred to in (d)(i)).

(ii) She corroborated that the appellant complained about the backpacker.

(iii) She saw the appellant assault the backpacker.

(iv) On another occasion the appellant showed her a bruise on her hand with a bit of blood. The deceased claimed that she pulled on the brake in the car whilst it was going at speed.

(v) She corroborated her husband's evidence about the incident referred to at (d)(iv) - the cut on the leg.

(vi) She spoke on the phone to the deceased on a night when he said the appellant had a knife to his back. The appellant denied the incident.

(vii) She remembered the appellant had a sore ankle and the deceased claiming she had kicked him in the head.

(ix) She remembered the incident at the restaurant (see (d)(v)), and the time that he appeared with a cut above his eye. (See (d)(vii)).

(x) After they separated the appellant rang every day to speak to the deceased.

(xi) On the 16 May 1996 the appellant rang her saying she was pregnant and saying that the deceased would have to pay for it. She was asked `*what do you mean*?' She said `*You'll see*'. She had said she was going to Legal Aid in Cairns.

(f) The deceased's sister gave evidence that she spoke to the

appellant on the night the deceased told his mother she had a knife at his back and she had denied it.

(g) Peter Nissen gave evidence that before Easter 1996 he saw the deceased without his shirt on with scratches on his neck and chest but there was no conversation about them.

(h) Victor Bobbermein gave evidence that the deceased was his boss, he saw scratch marks on his neck on 9, 10 or 11 April and on 21 April 1996 he saw a cut above his eye. He identified an exhibit as depicting the scratches. The deceased said `Caroline hit me'.

(i) Dr Power gave evidence of a conversation and seeing the cut on the deceased's face on 23 April 1996. It was old but he could not say how old.

(j) Peter Mitchell a friend of the deceased's gave evidence that he saw bruises on the deceased's chest and ribs in January 1996 and the cut on his eye in April 1996. On other occasions he saw cuts on his arms and legs. What the deceased said about them was not in evidence. He wasn't present when any injuries were suffered and he said injuries could be suffered in the sort of work the deceased did.

(k) Rita Gillis gave evidence that the appellant was upset about the backpacker, and she saw the deceased with fingermarks and scratches on his neck.

(l) Mark Oberthur gave evidence that he saw a puncture mark on the thigh of the deceased in February 1996.

(m) Lana Oberthur gave evidence that she saw the appellant fighting with the backpacker and that she pushed her and punched the deceased. She spoke to the appellant in February/March 1996 and she said that the deceased hit her but she didn't leave him because she loved him and, `*If I can't have him no one can*'. She saw the deceased with a cut on his knee in early 1996.

(n) Grant Milini gave evidence that he saw injuries on the deceased indicating scratches on his neck, bruises on his ribs, cuts on his arms. He was not present when the injuries were suffered.

(o) Trevor Edwards gave evidence that he saw the appellant with a black eye on one occasion and an injured ankle.

The trial judge dealt with this aspect of the evidence in summing-up in these terms:-

"In addition to (the appellant's) evidence touching on the relationship between the two persons, you have got evidence from Mr and Mrs De Luca of events concerning assaults and the relationship between Caroline and Simon. You will no doubt have noticed that that evidence, in so far as it concerned assaults, was limited to occasions when both the deceased and Caroline Babsek were present.

There were also some evidence from Justine De Luca of conversations and dealings with the accused concerning Simon De Luca and the accused's belief that Simon had a girl at Mission Beach while she, the accused, was at St Lucia. You will recall Justine De Luca also spoke of the occasion of the telephone call between Mission Beach and the De Luca house when she spoke to Caroline concerning Simon's claims that she, Caroline, had a knife at his back.

Other persons gave evidence and you may think their evidence throws some light on the nature of the relationship between Caroline Babsek and Simon. There was Mrs Lana Oberthur who told you of a conversation she had while waiting or watching Drew swim in the pool. I will remind you of that - page 436 - this was an occasion when her husband was out fishing with Simon. Mr Panayi (counsel for the appellant) said, `And you were sitting in the back watching Drew swimming in the pool. You've said to my friend that Caroline said to you, `Simon always hits me. He used to hit me when I was at De Lucas' and you said to her, `Why don't you leave him'? And Caroline said, `Because I love him and, if I can't have him, nobody can'. You clearly remember that conversation'? She said, `Yes'. He said, `Word for word'? And she replied, `Yep'.

Mr Henry (the prosecutor) cross-examined the accused and said, `Now you said, did you not, to Lana Oberthur, `Simon hits me. Used to hit me when we were at De Lucas, when we were working at De Lucas'? She answered, `Yes, I did say that'. Questions, `To which she said, `Why don't you leave him'? She said, `No, she never said that'. Mr Henry said, `I suggest she did. And you responded, `Because I love him'? She said, `No, never said that'. Mr Henry said, `And you went on to say, I suggest, to Lana Oberthur, `If I can't have him, no-one can' and she said, `No'.

Now one matter you might think is important, and it is entirely for you when you are considering the relationship, and that is that on the 21st of April 1996 Simon and Caroline separated. They no longer lived under the one roof. There appears to be no doubt about this. You may think therefore that these two persons had not lived together as man and wife for 27 days before Simon's death.

Now you have got evidence from various persons concerning Caroline's conduct during that period. Of that evidence, Mr Henry took you in considerable detail through it but I will mention some of it. You recall Mrs De Luca telling you that Caroline telephoned the house a lot, and was after Simon all the time. She spoke of her husband having accompanied her and Simon to the beach house on the weekend of the 11th and 12th of May when she said Caroline and Simon were quite friendly. She said Simon didn't come back with them on the 11th May but did so later that night. She told you that on Sunday the 12th May Caroline telephoned and said, `Simon and I had sex yesterday while Drew was asleep' and went on to comment she sounded very happy.

The 11th of May was the day of the alleged sodomy and rape. How does that evidence of Mrs De Luca fit in with Caroline Babsek's evidence as to sodomy and rape and vice versa? How does Caroline's evidence fit in with Mrs De Luca's evidence?

Mrs De Luca said that on the 13th of May, Caroline came to the Tully house and Simon went to the car. She said, `Caroline asked me for money' but Simon said the $200 he was going to give her, he was going to give her less because she was probably wasting money on petrol trying to find him.

Mrs De Luca told you that on the 14th of May, Caroline rang and spoke to Simon and, in the result, she and Simon drove to the beach house. She said Drew was present and the two stayed for perhaps an hour and then came home. Mrs De Luca said that on the 15th of May, Caroline arrived at Tully at 8 to 8.30 p.m. but didn't come into the house. She said she had Drew with her and Simon went out to speak to her. Mrs De Luca looked through the screen door and she said she heard Caroline

say, `I've had enough. I'm clearing off to Perth. I need 5 or $6,000 to set myself up'. She went on to say she heard Caroline say she wanted to drive there with Drew and follow one of Blennerhasset's trucks. Mrs De Luca said she told her, `That's crazy. You can't do that' and Caroline said she had a friend over there. When Simon asked who it was, Caroline said it was some girl she met at work.

Mrs De Luca told you that she herself said, `If you go that far away, Drew needs to see his father and to have contact with his father. You will probably have to pay half the plane fares for Drew's visits'. According to Mrs De Luca, this upset Caroline, she told her to `get f...ed' and jumped in the car and drove off in a crazy fashion. She said Caroline's last words were, `Simon's ruining my life and I'm going to ruin his'.

Now those last words about `ruining Simon's life' are capable of more than one inference. Obviously she could do that in a number of ways. One, I suppose you might say, is by shooting him. Now I remind you of what I said sometime ago, that where you have evidence from which you can draw more than one inference, you must draw the inference more favourable or most favourable to the accused. While it may be possible to say `I am going to ruin his life' would encompass shooting Simon, that would be only one of a number of inferences and I must tell you that you must not draw such an inference from that statement. It would be quite wrong to do so.

Well, Mrs De Luca spoke of a telephone call on the 16th of May when she said Caroline rang and said she had taken sleeping tablets which had not worn off and she spoke of going to Cairns the next day to get Legal Aid. You will recall this was the occasion when Caroline said she was pregnant. Mrs De Luca asked whether she told any of the family and

> she said, `No, I'd be too ashamed. Simon's going to have to pay for this'. Mrs De Luca said, `What do you mean'? Caroline said, `You'll see'. Again that statement is capable of bearing more than one meaning. Remember if you do decide to draw inferences, you must draw the inference more favourable to the accused. For instance, do not draw wild speculation. It would be quite wrong to say by saying `Simon is going to pay for this', he is going to pay for it with his life. That would be quite wrong.
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> The other witness, Sharlene Corcoran. She was the first cousin, she told you, of Simon De Luca. She said she spoke of having telephoned Caroline on the 6th or 7th May and that Caroline said she would like Sharlene to visit her. Mrs Corcoran told you that on or about the 9th or 10th of May she did so. According to Ms Corcoran, Caroline said, `Simon doesn't love me any more' and spoke about possibly going to Perth to which Ms Corcoran said that was too far away, she should think about going to Cairns."

The aspect of the summing-up just canvassed came after the trial judge had dealt with the issues of intent, accident and self-defence and before he turned to provocation. There is no complaint about his directions as to the law to be applied by the jury in dealing with these issues. In dealing with self-defence and provocation, he told the jury in effect that they could have regard to the psychiatric evidence in considering whether the appellant was conditioned to sense impending violence by De Luca.

There can be no doubt that some of the evidence the subject of ground three is prejudicial to the accused; it goes both to the appellant's credibility and to the issues of intent, self-defence and provocation. It is difficult to conceive of a basis on which the police officer's evidence of the deceased's complaint and of the order referred to in 8(b) was admissible. The evidence was hearsay. The issue to which the evidence was directed was not the fact of complaint, of the order or of the quarrel, but that the relationship between the appellant and the deceased was characterised by the appellant being violent towards him.[5] The evidence was capable of giving the jury the impression that the authorities endorsed the deceased's complaints. Similar considerations apply to the social worker's evidence referred to on page 8, paragraph (a). As a general observation when there are issues such as self defence and provocation, evidence by a witness of what others said to them is unlikely to be admissible, as the issue will be the truth of the matters stated.

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[5]In *Wilson* (1970) 123 CLR 334 (footnote 1) Barwick CJ said at 337 that what was said in the course of quarrels admitted in evidence of the history of the relationship was "simply part of the quarrel" and not admitted as to the truth of the matters stated.

Where evidence of injuries to the deceased seen by others was relied on as

evidencing violence by the appellant towards the deceased, there needs to be admissible evidence capable of sustaining a conclusion that she inflicted them. This cannot be done with hearsay evidence and a basis has to be provided for eliminating other causes, for example, work related causes. It may well be for example that the inference that the deceased had assaulted the accused was open in respect of the incident referred to on page 9, (d)(v) where the deceased followed the appellant from the restaurant and came back, but the evidence referred to in paras (d) (vi) and (vii), (g), (h), (i), (j), (l), and (n) should have been excluded. His Honour should have given specific directions with respect to paragraph (a) where the appellant is said to have acquiesced in or adopted statements which would otherwise be hearsay so as to constitute admissions.

Put shortly, the case went to the jury on the basis of evidence some of which was admissible and some not; or admissible only if specific issues were determined in a particular way. It is impossible to disentangle the admissible from the inadmissible or to safely conclude that the jury only acted on evidence which was properly established as being relevant or admissible. This is a case where the appellant's credibility was

very much in issue and the jury may be taken as having rejected her evidence in returning a verdict of guilty of murder. The possibility that the jury acted on evidence which was inadmissible and prejudicial cannot be excluded. The appellant thereby lost a chance, fairly open to her, of acquittal. The verdict should be set aside and there should be a new trial.