

SUPREME COURT OF QUEENSLAND

CITATION: *R v Cherry* [2004] QCA 328

PARTIES: **R**
v
CHERRY, Rodney Michael
(appellant)

FILE NO/S: CA No 380 of 2002
SC No 235 of 2002

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 10 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 9 June 2004

JUDGES: McPherson and Jerrard JJA and Philippides J
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 AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant convicted of two counts of murder - whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty

CRIMINAL LAW – ANCILLARY LIABILITY – COMPLICITY – COMMON PURPOSE – CODE PROVISIONS – where Crown case relied on s 8 of the *Criminal Code* with respect to the murder charged on the first count on the indictment – where person directly responsible for the killing was convicted of manslaughter but the appellant was convicted of murder – whether circumstances of appellant’s conviction for murder a miscarriage of justice

CRIMINAL LAW – COURSE OF EVIDENCE, STATEMENTS AND ADDRESSES – POWER OF CROWN TO CALL OR REFUSE TO CALL WITNESSES – DISCRETION OF CROWN – GENERALLY –where Crown did not call three people as witnesses in the Crown case

despite requests from defence to do so – whether the prosecutor was justified in the view that evidence from them would not contradict the Crown case but should be the subject of cross-examination by it – whether decision of prosecutor not to call those witnesses constituted a miscarriage of justice

CRIMINAL LAW – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF COUNTS – BY STATUTE – SAME FACTS OR SERIES OF OFFENCES OF SAME OR SIMILAR CHARACTER – where judge allowed the joinder of two counts of murder – whether sufficient nexus between the charges – whether the joinder resulted in a miscarriage of justice at trial

Criminal Code 1899 (Qld), s 8, s 567(2), s 688E

Richardson v R (1974) 131 CLR 116

R v Apostilides (1984) 154 CLR 563, applied

R v Barlow (1997) 188 CLR 1, applied

R v Collins; ex parte Attorney-General [1996] 1 Qd R 631, applied

COUNSEL: The appellant appeared on his own behalf
R G Martin, with B G Campbell, for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McPHERSON JA:** I agree with the very thorough and exhaustive analysis of the facts, the inferences to be drawn from them, and the conclusion reached by Jerrard JA in his reasons that the appeals against conviction should be dismissed.
- [2] I would only add two comments. One is to say that, on an appeal after conviction, a complaint of misjoinder of charges against an accused falls to be determined primarily by reference to the question, not whether the original joinder was correct, but whether it resulted at the trial in a miscarriage of justice within the meaning of s 668E(1) of the Code. See *R v Cranston* [1988] 1 Qd R 159, 165-166. In this instance, there was plainly a sufficient nexus between the offence of murdering Mrs Annette Cherry and the murder of Kira Guise to make the joinder proper. Indeed, the substance of the Crown case against the appellant was that Kira's knowledge of the appellant's part in the first murder formed the appellant's motive for his subsequently murdering Kira. This is very far from constituting a miscarriage of justice at the trial.
- [3] The second comment is this. It is a little difficult to understand why the prosecution sought to rely on s 8 of the Code to implicate the appellant in the killing of Annette Cherry. Given that he supplied the gun to Debbie Guise with which to carry out the killing the appellant was, within the meaning of s 7(1)(b) of the Code, a person who did an act for the purpose of enabling another to commit the offence and, as such, a principal offender under s 7(1). There can have been no miscarriage of justice in this respect.

- [4] **JERRARD JA:** On 8 November 2002 Rodney Cherry was convicted by a jury of having murdered his wife Annette Cherry on 16 June 1997 at Springsure in Queensland; and also of having murdered his stepdaughter Kira Guise on or about 23 July 1999 near Roma, Queensland. He has appealed both convictions.
- [5] The Crown case regarding Annette Cherry's death was that Mr Cherry was guilty of murdering her by reason of s 8 of the *Criminal Code*. Annette Cherry had been killed on the date charged by her daughter, Debbie Guise, who was subsequently convicted of Annette Cherry's manslaughter. The prosecution case on Rodney Cherry's trial was that he had procured Deborah Guise to kill her mother, his wife; that he had given Debbie Guise the .45 calibre colt pistol she used to kill her mother, instructed her on how to use it, supplied her with bullets and the loaded pistol, and had sent her to kill her mother, which she did.
- [6] The Crown case regarding Kira Guise's death, she being the daughter of Annette Cherry and the sister of Debbie Guise, was that Mr Cherry had kept company with Kira Guise after the death of Annette Cherry and the jailing of Debbie Guise. The Crown alleged he killed Kira Guise when she was 17 years old and wanted to leave him and their then sexual relationship. The Crown contended Mr Cherry killed Kira Guise because he believed she knew of his part in her mother's death, and that knowledge, together with the fact of his having had a sexual relationship with her prior to her 16th birthday, made her a danger to his freedom if she remained alive and angry with him.

The grounds of appeal

- [7] Mr Cherry filed an appeal on a number of grounds. His written outline of argument and oral argument on the appeal raised other matters as well. These were principally about the evidence of his ex-de facto partner Helen Molanis, and about evidence of a forensic comparison of bullets found in 2001 with undischarged bullets in the weapon used to kill Annette Cherry in 1997. Mr Cherry's case at trial, reflected in his submissions on the appeal, was that he was quite innocent of both deaths, and that in fact Kira Guise might still be alive and un-contactable by her own choice. He denied (by cross-examination) having procured Debbie Guise to kill Annette Cherry, and suggested that Kira Guise had simply left him and chosen to disappear. He complained on the appeal that a good deal of the evidence given in the prosecution case regarding Annette Cherry's death was inaccurate and deliberately dishonest, and further that the prosecuting authorities have overlooked and approved wrong doing by Crown witnesses, whilst improperly pursuing a case against him.
- [8] One of Mr Cherry's grounds of appeal is that the Crown case was "unsafe and unsatisfactory" for both of the convictions for murder. That ground of appeal is an old fashioned way of presenting a ground of appeal under s 668E of the *Code*, when an appellant argues that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.¹ That ground of appeal makes it necessary for this court to ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that Mr Cherry was guilty of either of the charges of murder. This ground makes it necessary to describe the relevant evidence for each. Mr Cherry's

¹ See *Gipp v R* (1998) 194 CLR 106 and *MFA v R* (2002) 193 ALR 184 at 195 at [46]

other grounds of appeal include complaints of error in the admission of some evidence, error in allowing the two charges of murder to be heard in the one trial; error in allowing the jury to consider a case of murder regarding Annette Cherry's death based on s 8, when Debbie Guise had been convicted of manslaughter only for directly causing that death; and grounds complaining that the Crown Prosecutor should have called five witnesses, three of whom would swear that they had or may have seen Kira Guise after the date of her alleged murder; and the other two of whom provided Mr Cherry with a possible or arguable alibi in respect of the unlawful killing of Annette Cherry.

Background matters

- [9] Mr Cherry and Annette Cherry married on 14 March 1992. They had two sons born to that marriage, and Annette Cherry's three children, namely her daughters Debbie and Kira and her son Reece, lived with them. Debbie Guise's evidence at Mr Cherry's trial for murder was that in 1994, when aged 16, she began a sexual relationship with Mr Cherry. She described intercourse happening every day, "in the house, down the paddock, in the shed, in the car". She said it was not associated with affection and that it was "like a prostitute". In Easter 1997 the family returned to Springsure to live, and moved into a house in Dame Street. Debbie Guise lived separately from the family, in a flat by herself, at Annette Cherry's insistence. On approximately 9 June 1997 Deborah Guise, when being driven in a car with her mother, Mr Cherry, and the two little boys, told Annette Cherry during an argument between the two females that she had been "having sex" with Mr Cherry. This resulted in Annette Cherry hitting Rodney Cherry, trying to slap Deborah Guise, and on 11 June 1997 Mr Cherry and Annette Cherry separated. Kira and the two little boys stayed living with Mr Cherry in Dame Street, while Reece ended up living with his mother and maternal grandmother Maureen Murray in another residence in Springsure. Deborah Guise stayed living in her flat.
- [10] Annette Cherry instituted proceedings in the Magistrates Court at Emerald for interim residence orders ("custody" orders) in her favour for the two youngest children. Mr Cherry opposed those and filed his own application for interim residence orders in his favour for his two sons. On Friday 13 June 1997 he attempted to cause Sergeant Boon of the Springsure Police to apply for a Domestic Violence Restraining Order against Annette Cherry, firstly on the ground that she was suicidal (one of the grounds on which he asked for residence of the boys), and secondly on the ground that she had assaulted him when learning about sexual intercourse having happened between himself and Debbie Guise. The Sergeant declined to bring the application, upon learning from Mr Cherry that his object was to use the order as a supporting ground in Mr Cherry's custody application. In earlier dealings with Sergeant Boon on 11 June 1997, when the Sergeant went to Mr Cherry's residence in Dame Street at Annette Cherry's request (to check on the welfare of Reece, who at that stage was also living with Mr Cherry) Mr Cherry had told Sergeant Boon that he was having an affair with Debbie Guise, but had described intercourse having occurred only once between them.
- [11] Sergeant Boon said Mr Cherry was "agitated" when seen on Friday 13 June. On that date interim orders in Annette Cherry's favour were made, but the proceedings were adjourned to Monday 16 June, and Debbie Guise's evidence was that on that weekend she helped Mr Cherry write affidavits supporting his application. She supported it because she also regarded her mother as suicidal. Her evidence at Mr

Cherry's trial was that he was aggressive and very moody that weekend, but even so she did not want her younger stepbrothers to be in what she thought was the suicidal atmosphere of her mother's home. Further, Annette Cherry had told her that she would never see her two youngest brothers again if Mrs Cherry got custody.

- [12] During that weekend both Deborah and Mr Cherry spoke on the telephone with Caroline McGregor, who had married Debbie Guise's father Brian Guise, after his divorce from Annette Cherry. The telephone contact with Caroline McGregor was apparently made in the hope of obtaining material that would assist Mr Cherry in the litigation over the children. Caroline McGregor's recollection was that the phone contact made with her was on the evening of 15 June 1997, and that Debbie Guise spoke with her first.
- [13] During that conversation Debbie Guise spoke with Caroline McGregor about the custody battle between Mr Cherry and Mrs Cherry, and about Debbie Guise having had sexual intercourse with Mr Cherry on one occasion. Mr Cherry then came on the line and told Caroline McGregor that if he did not get custody of the boys he would kill Annette Cherry, and that he despised and hated Annette Cherry. Caroline McGregor recalled his using the expression "sweet revenge" quite a few times, that being something that he would have if Annette Cherry obtained custody. Caroline McGregor also recalled Mr Cherry giving an explicit description of how intercourse occurred between himself and Deborah Guise ("she rode him like a bull"), and a further description from him of how he had put Kira on the pill and was paying for the prescription. Mr Cherry told Caroline McGregor that no court in the land could prove he had been sleeping with Kira, and that "Kira would not say anything." These all seem unusual and very frank statements to someone with whom Mr Cherry had not often previously spoken, and in cross-examination it was contended that Caroline McGregor had spoken only with Debbie, and not with Mr Cherry at all that night; telephone records and the cross-examination certainly confirmed that a phone call was made from Mr Cherry's residence at Dame Street Springsure to Caroline McGregor in New South Wales on 15 June 1997. Apart from the oddity of what had been said, the cross-examination did not demonstrate any particular reason for rejecting Caroline McGregor's evidence that she both knew and recognised Mr Cherry's voice, that he told her it was him, or said the things she described. Debbie Guise gave evidence of that call having been made, and of Mr Cherry giving a sexualized physical description of her to Caroline McGregor, but said the rest of the conversation was unimportant to her and not remembered.

The death of Annette Cherry

- [14] On 16 June Maureen Murray drove her daughter Annette Cherry from Springsure to Emerald for the further proceedings in the Magistrates Court, and Maureen Murray's evidence was that Mrs Cherry finally left the courtroom at about 6.00 p.m. that evening. The court had confirmed the interim residence orders in her favour, and that vehicle returned to Springsure about 7.30 p.m. Mrs Murray's recollection was that "just as the football match started" Debbie Guise arrived at Mrs Murray's residence, at a time Mrs Murray thought was about 8.30 p.m. The football match was between the Broncos and Wigan. Other evidence showed that the broadcast on that station actually began at 9.36 p.m. that night, ending at 11.29 p.m.

- [15] Mrs Murray let her granddaughter in, and told her that Annette had been awarded the custody of the two boys, and desultory conversation occurred as the three women and Reece watched the game. Mrs Murray recalled Debbie Guise speaking of friends of Debbie's who had gone to prison, waiting for the game to end, and then using the toilet for about 10 minutes. Very soon after she emerged from it she produced a pistol and killed her mother with one shot.
- [16] Debbie Guise then left that house, and her evidence at Mr Cherry's trial was that she ran back to his home, but found no one there. She contemplated suicide, but being unable to shoot herself, wrapped the pistol she had in a car mat and walked to the Springsure Police Station. There she surrendered herself and the pistol into police custody.
- [17] Her evidence at Mr Cherry's trial was that she too had gone to Emerald for the case, travelling with Mr Cherry, as did Kira, and that when it was completed Mr Cherry had returned to his vehicle where Debbie Guise was waiting, and said that Annette Cherry had obtained custody. Mr Cherry was upset and angry. They returned to Springsure, stopping briefly on the way to visit the residence of Mr Cherry's brother Garry, and then Debbie Guise had been dropped at her flat by Mr Cherry. He told her to meet him back at his residence in Dame Street at about 8.30 a.m. As she understood it, Mr Cherry and Kira, after dropping her off, were intending to travel to the residence of Mr Cherry's sister Deslyn Nixon.
- [18] Debbie Guise's evidence was that she left her flat at about 8.20 p.m. that evening and walked to the Dame Street home, where she met Mr Cherry. The walk took five to 10 minutes, at most. She went inside, he took her to the bedroom, and there was a gun lying on the bed. Mr Cherry sat on the bed and said "we've got to get rid of her". He began crying and told her to put "the bullets in the bullet case". She said she did not know how to, and he then did that, and showed her how to fire the pistol. He said Annette Cherry had ruined their lives, and that it should be Debbie Guise who killed Annette Cherry because Debbie could "get away with it". Mr Cherry explained that on the ground that no action would be taken against Debbie Guise for killing her mother, because of the abuse that Debbie Guise had suffered. On Debbie Guise's evidence it was the fact, known to Mr Cherry, that Debbie Guise had been sexually abused when a child by her father Brian Guise, before her parents had separated.
- [19] Debbie Guise's evidence included that at Mr Cherry's suggestion, the two of them went for a brief trip in a vehicle out of Springsure along the road to Tambo, for the purpose of her throwing away out of the car window some extra bullets in a box, those bullets being over and above the ones that had been loaded into the pistol. When they returned to the Dame Street residence she left that house on foot carrying the loaded pistol in her pants, and went straight to her mother's residence. She swore the dealings with Mr Cherry from her arrival at the house until she left it carrying the gun had taken about 15 minutes all up, including the car journey.
- [20] Her evidence was that she went to her mother's house, and while she kept thinking that she could not do as Mr Cherry had said, she remembered his words "we've got to get rid of her", and although she could not recall the act, she knew she had pulled out the pistol and fired a shot. She swore that she did so because he had told her to, and that she had done as he had said because otherwise she would have had to suffer the consequences. The consequences she did suffer included turning herself in to

the police, which she also swore he told her to do, as well as telling her to keep him out of it.

- [21] Sergeant Boon's evidence was that the Rockhampton Police Communications Centre contacted him at approximately 11.50 p.m. that evening, and he arrived at Mrs Murray's residence soon after, at the same time as the ambulance. Mrs Murray recalls some delay in the police and ambulance arriving; Reece had had difficulty in ringing the emergency numbers, after being awoken to see his mother dying. It appears common ground she was shot shortly after the end of the broadcast of that football game.

Mr Cherry's alibi

- [22] Mr Cherry's sister and mother gave evidence, that if accepted, would contradict Deborah Guise's evidence of having been in Mr Cherry's company from what on Debbie's account would have been about 8.30 p.m. until approximately 8.45 p.m. that evening, when she set out on foot armed with the loaded pistol and with instructions to kill her mother. The force of that evidence depends in reality upon accepting Deborah Guise's estimates of time, as well Mrs Murray's inaccurate recollection that the football broadcast began at 8.30 p.m.
- [23] Deslyn Nixon, who was called as a witness by Mr Cherry, gave evidence that he and Kira had arrived at her house for dinner that night at about 8.00 p.m., and that he, Kira, the two boys, and his mother, all left Deslyn Nixon's home between 9.15 p.m. and 9.20 p.m. When Deslyn Nixon realised her mother had left her glasses behind, Deslyn Nixon drove to her mother's home – arriving there at around 9.30 p.m. and remaining perhaps 15 minutes – and Mr Cherry was not at her mother's house during that period. Joan Cherry, Mr Cherry's mother, gave evidence when called by Mr Cherry, agreeing that he was in her company from 8.00 p.m. until he dropped her home at 9.15 p.m. that evening, and she recalled his remaining there for some 10 minutes before he went elsewhere to telephone a potential employer. Joan Cherry rang him at his home and spoke to him there at 10.00 p.m. that night.
- [24] The prosecution proved the actual start time of that football game by calling evidence from the broadcaster. Debbie Guise agreed with a suggestion in cross-examination that it would have taken her perhaps two or three minutes to walk from Mr Cherry's home to her grandmother's where her mother was staying; if the jury accepted that she arrived there at about 9.36 p.m. – when the broadcast actually started – then the evidence of Deslyn Nixon and Joan Cherry does not account for Mr Cherry's whereabouts in the 15 to 20 minutes before the broadcast. Debbie Guise had sworn to his procuring her to kill her mother and instructing her on how to do it, and throwing away unnecessary bullets, in a period of time taking no more than 15 minutes, at the end of which she walked directly to her grandmother's residence. If those events occurred as she described but not when she described (on her description they began at about 8.30 p.m.) the time when they occurred would have been in the period when, oddly enough, Mr Cherry was not in the company of either his sister or his mother. However, other evidence established that at 9.31 p.m. that night a 25 minute call was made from his home to that of a Maurice Caffra, then living in Victoria and with whom Mr Cherry had discussed a proposal to start an asparagus farm. Mr Caffra thought it was very likely that it was Mr Cherry who made that call that night, talking about the proposed partnership agreement about asparagus.

- [25] The Crown case to the jury was that that phone call might be a critical time marker, showing exactly the time that Mr Cherry believed his step-daughter was about to arrive at her grandmother's home and kill her mother; Mr Cherry made his phone call then because he was not to realise that Debbie Guise would spend nearly two hours with her mother before firing the fatal shot. The Crown did not suggest to the jury that either Deslyn Nixon or Joan Cherry were deliberately lying, and argued that Debbie Guise and Maureen Murray were each independently mistaken about the times they gave. Deslyn Nixon had explained in her evidence that the times she gave were estimates, based on her recollection of how long various tasks had taken her that evening and by reference to the length of various television programs she had watched, and agreed that there could be a five or 10 minute leeway in her recall of last seeing Mr Cherry at 9.15 p.m. She did not recall looking at her watch until arriving home from her mother's at 9.45 p.m. Joan Cherry's evidence was more emphatic as to time, because she swore she had noticed that the clock inside her kitchen door showed 9.15 p.m. just as she arrived home. The Crown's submission to the jury about all that was that it needed to find only 15 minutes in which the critical events described by Debbie Guise could have happened, and that the jury would conclude those 15 minutes occurred just prior to the 9.31 p.m. phone call to Mr Caffra. The Crown relied on the agreement by Deslyn Nixon of a five to 10 minute margin for error in her recollection, upon the submission that it was unlikely that Joan Cherry really recalled a time on a clock which she had no particular reason to notice, and suggested that Mr Cherry had been attempting to create a very specific record of his whereabouts at 9.31 p.m. when he made a relatively lengthy and apparently relatively desultory telephone call to Mr Caffra.

The gun

- [26] Debbie Guise was located outside the Springsure Police Station at about 1.13 a.m. on 17 June 1997. She was sitting in the gutter holding a pistol wrapped in a piece of carpet. It was a US Army colt .45 semi automatic, model 1911, bearing a serial number 269017. It had six rounds of .45 calibre ammunition in it, and one discharged shell. The discharged projectile which had killed Annette Cherry was also recovered by the investigating police, and examination of the weapon taken from Debbie Guise at the Springsure Police Station established that it had fired the shot which killed her mother. The Crown led evidence that a pistol with that recorded serial number had been shipped by its United States manufacturer to the US Government on April 4 1918 and evidence that an Australian ex-serviceman from World War 1, Ralph Thomas, who had been in France in 1918, was shipped home in 1919. Mr Thomas settled at a property called "Kareela", west of Rockhampton, and the prosecution established that he had possessed a pistol when on "Kareela" station identical to the one used to kill Annette Cherry. The prosecution asked the jury to infer that Mr Thomas got possession of that particular pistol in France, by reason of it having been sent there by the US Government during the First World War.
- [27] Garry Cherry has worked on occasions at "Kareela" station in 1987 and 1988, and Garry Cherry – who was called by the prosecution – gave evidence that Mr Cherry told him, in a telephone call that Mr Cherry made from prison after his arrest, that he too had worked on "Kareela" station for one week. Mr Cherry had not said when that was.

- [28] On that evidence the possibility was established that the weapon used to shoot Annette Cherry was the one owned for many years by Mr Thomas and which had somehow found its way into Debbie's hands on the fatal night. If, as she swore, it was supplied by Mr Cherry, the Crown established at least the possibility of his having acquired it when at "Kareela" station.

Mr Cherry's pistol

- [29] Perhaps more important was evidence which if accepted showed that in the early and mid 1990s Mr Cherry both spoke of, and was seen to have, possession of a .45 calibre pistol. A witness Rodney Hartwig described how Mr Cherry had been managing a property "Belmont" in the mid 1990s, owned by Mr Caffra and adjacent to Mr Hartwig's family property at Eidsvold. Mr Hartwig is familiar with firearms. He gave evidence of a conversation with Mr Cherry in which the latter described owning a .45 semi automatic, which Mr Cherry said he had bought from an "old fellow out west" ("Kareela" is north west of Eidsvold); and of Mr Cherry showing him some .45 rimless shells. On Mr Hartwig's understanding of firearms, that meant the weapon was a semi automatic, since a rimmed shell is designed for a revolver. Mr Hartwig also recalled once observing the butt of a pistol, which appeared to him to be a semi automatic, in a tool box in Mr Cherry's possession.
- [30] Another witness, a Mr Archie Pointon, had been employed as a driller on "Belmont". Mr Pointon recounted a conversation held in 1994, in which Mr Pointon had revealed to Mr Cherry how Mr Pointon was then undergoing divorce proceedings and trying to obtain custody or access to his children. He swore that Mr Cherry had said that the easiest way "to get your children is to shoot your missus", that "if it was up to me, that's what I'd do"; and that Mr Cherry had said "I've got the weapon here to do it". He then showed Mr Pointon a pistol, which Mr Cherry said was a US Service issue one, and which he had produced from a shoe box. Mr Pointon was sufficiently familiar with weapons to realise it was a pistol and not a revolver.
- [31] The most significant evidence Mr Pointon gave was that approximately three weeks after Annette Cherry was killed, of which event he was aware when it occurred, he received a telephone call at Bundaberg from Mr Cherry. The latter asked if the police had been "onto" Mr Pointon, and upon Mr Pointon saying "no, why?", Mr Cherry replied to the effect that it "concerned the gun and he said that you were the only one who knew I had it and if the police want to know anything then tell them you know nothing". Mr Pointon further recalled that Mr Cherry had said that police did not know where Debbie Guise had obtained the gun from "and they didn't know that Rod had the gun and he was asking me not to say anything about the gun".
- [32] Mr Pointon's evidence, and Mr Hartwig's, was challenged in cross-examination; the challenges included the propositions that both were lying about having seen Mr Cherry in possession of a pistol and Mr Pointon was lying about the described conversations. No particular reason for disbelieving either witness emerged in that cross-examination. If the evidence from both was accepted, then Mr Cherry did possess a pistol in the mid 1990's, which on Mr Cherry's description of it and the recollection of two witnesses corresponded with the one Debbie Guise used to kill her mother. Further, he admitted it was the very one Debbie Guise fired.

The bullets

- [33] On 7 April 2001, when still in custody serving her sentence for manslaughter, Debbie Guise made a statement to investigating police implicating Mr Cherry in her mother's killing in terms similar to her evidence at Mr Cherry's trial, save that she did not then describe the apparently brief car journey in which the unnecessary bullets were thrown away. On 13 April she made a further statement which gave that account. On 21 May 2001, while in police custody and on leave from prison, she went with police officers to show them the area of roadway along which she said those bullets had been thrown from the car that evening on the Springsure/Tambo Road. Police measured the particular location to which they were taken as 5.35 km from Springsure. A cursory search that day found nothing, and a more comprehensive search was mounted one month later on 27 June 2001 with a metal detector.
- [34] On 28 June 2001 a further search with the metal detector located five .45 calibre bullets, and those became exhibit 44. On 9 October 2001 a further search with a metal detector located another four .45 bullets, which became exhibit 47. The first five bullets found, exhibit 44, were discovered approximately a couple of metres from the edge of the road, spread out over an area of about two metres; the second group of four bullets were about one metre from the edge of the road and in an area of about one and a half metres. They were located in the general area shown to police in May 2001.
- [35] A forensic examination was made of exhibits 44 and 47, and these were compared with the six undischarged bullets originally extracted by police from the weapon Debbie Guise had fired. That examination was conducted by Sergeant Robert Graham of the Queensland Police Service, who holds a degree of Bachelor of Applied Science. Mr Graham had originally received the discharged projectile that killed Annette Cherry, the discharged cartridge case from which it was fired, the firearm, magazine and six rounds, all on 20 June 1997. Of the six undischarged bullets received on that date, one bore what was described as a head stamp, on the rear of the shell, which was WRAC 45AC, and the remaining five were head stamped W-W45 Auto. Mr Graham's evidence was that WRAC stood for Winchester Repeating Arms Company, which company was known from about 1954 onwards as Winchester Western. He inferred that one bullet had therefore been manufactured prior to 1954, and the others bore the stamp used from about the late 1960s to about 1999. All six had silver primers, which Winchester had ceased using in about 1997.
- [36] All nine bullets comprising exhibits 44 and 45 were head stamped W-W45 auto, and all had the same silver primer. Mr Graham's evidence included that head stamps are imprinted on bullet shells by pieces of equipment known as bunters, each of which leaves microscopically unique marks on the shell on which it imprints the head stamp. His evidence was that he understood an average bunter lasts for about 150,000 cartridge cases, "a good one for about 300,000.00" cartridge cases, and that Winchester claimed to make approximately 30 million cartridges per year. One bunter would be expected to last for a production run of between 16 to 24 hours.
- [37] Mr Graham's evidence was that, putting aside the apparently older bullet of the group of six extracted from the pistol in 1997, the remaining five of that group appear to have had their head stamp imprinted by two separate bunters. Those head stamps had been examined under a comparison microscope and two were made by the same bunter, one was made by a second bunter, and two more had gross

similarities but insufficient individual similarities to conclude they had been made by that last bunter.

- [38] Of exhibit 44, two of those five bullets had had the head stamp imprinted by a bunter making identical marks as the bunter which had imprinted head stamps on two of the five “newer” bullets extracted from the gun in 1997. Another two of the bullets in exhibit 44 could be matched to the “second” bunter which had clearly imprinted a head stamp on at least one of those five bullets extracted from the gun in 1997.
- [39] Regarding exhibit 47, all four bullets were consistent with their having been head stamped by the “second” bunter which had stamped two of those in exhibit 44 and one of the bullets extracted in 1997. Mr Graham could see nothing inconsistent with those four being stamped by that “second” bunter, but could not refine that down to a positive match. He agreed in cross-examination that this matter was the first occasion on which he had given evidence about bunters and comparing marks left by the process of bunting head stamps on cartridge shells. His evidence had the flavour of hearsay rather than observation, when describing the likely working life of a bunter, but the accuracy of that evidence was not challenged in cross-examination. The cross-examiner had obviously been briefed with a good deal of technical information on fire-arms, including the serial numbers on Colt pistols.
- [40] Mr Graham said that the spent cartridge case, from which the projectile had been discharged which killed Annette Cherry, had either been lost or destroyed along with the pistol itself, but could say that it had had a W-W45 auto head stamp as well. The impact of the evidence of the forensic examination was that it entitled the jury to conclude that the nine bullets located in 2001 had come from the same collection of bullets held by the same person as the six live bullets found in the magazine of the pistol Debbie Guise had fired. This was apparently accepted by Mr Cherry’s experienced counsel, who put to Debbie Guise that whoever gave her the gun also gave her some bullets to get rid of, and that she had gone out there on that road at some stage by herself, or with some other person, and had got rid of them. She denied this, insisting she had been driven out there by Mr Cherry; and the evidence showed only one vehicle available to her which she could have used. Mr Cherry had possession of his car, which was driven back from Emerald that day, and Debbie Guise swore that that night she had no access to any motor vehicle or any car keys. The evidence before the jury included a copy of the affidavit Annette Cherry had filed on 13 June 1997 in the Emerald Court, (tendered at the murder trial by Mr Cherry’s counsel) which contained in it the assertion that Mr Cherry had removed the distributor from Annette Cherry’s car. That left Maureen Murray’s car as the only one obviously available to Debbie Guise to use, and there was no suggestion in the evidence that Maureen Murray had made her car available at any stage of that evening to her granddaughter, who had arrived and left Maureen Murray’s home on foot.
- [41] The conclusion the jury could draw, that the bullets found by the roadside came from the same private collection or source as those in the pistol, supports the further conclusion that the person who was the source of the pistol was also the source of the bullets. That was either Debbie Guise herself, or she got them from another person. Since Debbie Guise made no effort to conceal her own part in her mother’s death, the fact that some, apparently extraneous, bullets were deliberately disposed of by the roadside would support the conclusion by the jury that the person who was

the source of the pistol and bullets was not Debbie Guise and wanted to conceal that fact; and also that that person both believed that Debbie Guise would not reveal who had supplied them, and that that person understood enough about firearms and bullets to realise that a forensic examination of those bullets found at the roadside could establish a connection between the pistol and bullets given to Debbie Guise and those thrown away. The fact of throwing them away would support the inference that the person supplying the pistol and bullets had done so believing they would be used for a purpose which could result in careful forensic examination of the bullets in the pistol.

- [42] The event most likely to cause that result would be the pistol being used to kill another person. All of this is consistent with the evidence Debbie Guise gave of her having been given those bullets to throw away on the same occasion as that when she got possession of the loaded pistol, given to her for the express purpose of her killing her mother. If her mother's death was related to the outcome of the custody applications, then the pistol and bullets had been supplied to Debbie Guise only very recently before the moment when she killed her mother, simply because the ultimate outcome of those applications was not known until late that same day. On that reasoning they were supplied by a person who expected Debbie Guise to show astonishing loyalty to that person, and who was murderously enraged by the court decision.

The letter from prison

- [43] Debbie Guise was still only 18 years old when she killed Annette Cherry. In February 1998 she was convicted of her mother's murder and sentenced to life imprisonment. At her trial she had given evidence, in which she said there had been only one act of intercourse between herself and Mr Cherry, and that she had gotten the pistol and bullets from a man named Macca, whom she met in some botanical gardens. Her defence to the charge of murder had been that she lacked the intent to kill.
- [44] At that trial she said she had initiated the one occasion of sexual intercourse between herself and Mr Cherry, and she did not in any way implicate him in her mother's death. Her evidence at Mr Cherry's trial was that at the end of her first trial, and while being held in the cells after the verdict, she was allowed a visit from her sister Kira and a woman known to her as the "Reverend Judy", an Anglican Minister with whom Debbie Guise was then friendly. During that visit Kira surreptitiously handed Debbie Guise a note, telling her that Mr Cherry had told Kira to write it out, and that Mr Cherry wanted Debbie Guise to copy it and send it to Reverend Judy. That person was not party to that particular conversation between the sisters. Debbie Guise's evidence at Mr Cherry's trial was that she did as instructed, destroyed what she had been given after she had copied it, but sent what she had copied off to Reverend Judy, it purporting to be an original letter to Reverend Judy from Debbie Guise. The latter identified a document shown to her by the Crown Prosecutor as the one she had written in prison, and forwarded to the Reverend, and that document became exhibit 23 at the trial.
- [45] It is hand written and dated 8 March 1998; it seems common ground that was approximately the date it was sent from prison. On Debbie Guise's evidence, Kira Guise wrote it at the direction of Mr Cherry, for Debbie Guise to copy. Its contents contained an apology to "Rodney" (Mr Cherry) from Debbie Guise having been "so

hard on him” at the trial; and states that Macca was “just a bloke” that Debbie Guise “had an affair with”, whom she in fact had met at the botanical gardens, and that Debbie Guise had told her mother about that affair. It describes how she then told her grandmother Maureen Murray about how Annette Cherry “was going to kill me”, and how, because Debbie Guise was worried about what “you^(Rodney) might do” to Debbie Guise for “telling mum”, Maureen Murray had given Debbie Guise the gun. (The reference to “telling mum” is presumably to telling Annette Cherry about the sexual relationship between Debbie Guise and Mr Cherry; presumably that relationship was the reason for concern that Annette was “going to kill” Debbie Guise). In exhibit 23 Debbie Guise had obviously first written the phrase “what you might do to me for telling mum”, and had then inserted^(Rodney) above and between the “you” and the “might”. This same error occurs at least five other occasions in that two and a half page letter, where the words “you” or “your” is written and when the notional author is clearly intending to refer to Mr Cherry rather than to the Reverend Judy. On three of those other occasions Debbie Guise corrected herself by writing the word “Rodney” above the “you”; on two occasions she did not correct the obvious error. On other occasions the word “Rodney” was used when referring to Mr Cherry.

- [46] There was no suggestion at the trial that Debbie Guise had ever intended to send that letter to Mr Cherry, or understood that it would go to him. Accordingly, the jury were entitled to consider the fact of those occasional and otherwise inexplicable errors in the use of the second person pronoun when referring to Mr Cherry, but when writing to Reverend Judy, as making the inference irresistible that Debbie Guise was telling the truth about how she came to write in those terms to the Reverend. That is, she was copying from a draft given to her; and the writer of that original draft had written it at the direction and in the company of Mr Cherry. That person had been unable consistently to refer to Mr Cherry in the third person, simply because he was there speaking to the writer. The contents of exhibit 23 show it was written after Debbie Guise was imprisoned for life, and after she had given evidence at a trial, and there would have been very few ways an original draft could have been covertly supplied to Debbie Guise for copying other than as she said, namely by her sister Kira discreetly handing it to her.
- [47] However it was supplied, the jury could have regarded the conclusion available from its composition, namely that Mr Cherry had dictated it, as a very telling piece of evidence against him. Its contents include that Maureen Murray – the person accused in that letter of supplying the gun – had told Debbie to point it at both Mr Cherry and her mother (presumably, in the event either of them appeared intent on harming Debbie Guise) and had told Debbie that she should not worry because the gun “had no bullets in it”. According to the letter, Debbie Guise thereafter carried the pistol with her in a backpack, because she was scared of running into either her mother or Mr Cherry, sometimes hiding it under a house in Emerald, and sometimes elsewhere. The letter asserts that Debbie Guise had never known there were bullets in it and that “nana is the murderer and she set me up”; and that Debbie Guise believed that her grandmother “really wanted me to kill you^{Rodney} and mum.” The word “Rodney” is inserted above the “you”).
- [48] Where the contents are so telling against Mr Cherry if dictated, by him, lies in the similarity between matters in that letter and the evidence of Debbie Guise at Mr Cherry’s trial. This includes the description of how Debbie “went back up to your place but I could not get you^(Rodney) to answer. It was then I went to nana’s,”

describing the events of 16 June 1997, and once again inserting the word “(Rodney)” above the “you”; and thereby describing what Debbie Guise would swear to nearly five years later, namely that she had set out from his residence to her grandmother’s on the fatal night. That could have been after acquired knowledge learnt in a prison visit, but that was never suggested in cross-examination. Then there is the passage which reads “I now know why nana made me hold back that hammer thing because she knew it had bullets in it”. Debbie Guise had described in her evidence in chief at Mr Cherry’s trial how the instructions she received from Mr Cherry that night had included his showing her how to pull “the top bit back” to fire the pistol. The jury could conclude whoever drafted exhibit 23 knew those instructions were given, and that Debbie Guise had needed to be shown how to work the mechanism of that gun. Again, there was no suggestion in cross-examination that Debbie Guise had told any of that to Mr Cherry after the shooting and on a prison visit.

- [49] Maureen Murray rejected the suggestion in cross-examination that she had ever owned or possessed a pistol, or supplied one to her granddaughter for any purpose, or as suggested in exhibit 23. She described the suggestion as ridiculous. If the jury accepted that denial and that the accusation against her in exhibit 23 was a falsehood, then its contents significantly strengthened the case against Mr Cherry. It was written at a time when Debbie Guise was not publicly blaming any family member for instigating her mother’s death, let alone accusing Mr Cherry, and when there was no reason for her to forge its contents in a way which implicated him by inference. Debbie Guise’s retrial for murder was five months later in August 1998, at which trial she was convicted of manslaughter, and in which she gave essentially the same evidence as at her first trial. She made no reference to the matters asserted in exhibit 23, and repeated the claim the pistol was supplied by “Macca”.
- [50] Yet the contents of exhibit 23, written between the two trials, reveal that its ultimate source, namely Mr Cherry, knew Debbie Guise would be prepared at his instruction to write that getting the gun from a man in the park was a fiction, and that instead she had been supplied with the pistol and instructions on its use. The jury could conclude the reason he knew she would write that at his behest was that both of them knew it was true. The jury could also conclude that Mr Cherry had an extraordinary hold over Debbie Guise at that time, since she complied with his direction – as he obviously assumed she would – to write a letter that contradicted her own evidence very recently given, and which therefore really did little or nothing to help her, should its contents ever become known. The only person obviously harmed by it if it were to be published and accepted as accurate was Maureen Murray, whom the Crown argued was then a potential rival for custody of Mr Cherry’s two sons. The letter also declares, in a passage Debbie Guise said was in the original, that she would attempt her own suicide as she had nothing left to live for, and asked for Reverend Judy to supply a copy of the letter to Mr Cherry and to the police. That passage also asked her to tell her two youngest brothers, Kira, and Mr Cherry that she loved them, and “good bye”. If the jury accepted Mr Cherry had dictated it, then the contents showed him to be completely indifferent to Debbie Guise’s situation or feelings.

The disappearance of Kira Guise

- [51] Debbie Guise was sentenced to six years imprisonment for her mother’s manslaughter, with parole recommended after two years. She did not receive parole

and served a little over four years in custody. Her two younger stepbrothers ultimately ended up in the care of Deslyn Nixon, and Kira in Mr Cherry's. She turned 16 on 9 July 1998 and in early February 1999 Mr Cherry and Kira moved to Mitchell, and then to a property "Cypress Downs West", not far from Roma. Debbie Guise maintained contact with her sister while in prison, and was occasionally visited by Mr Cherry with Kira. Debbie Guise swore that on those occasions Mr Cherry would make comments "on her boobs, that one was bigger than the other, and that her legs went all the way up to her snatch". These remarks annoyed Debbie Guise, who told Mr Cherry not "to talk about that". Debbie Guise said she had "plenty" of telephone conversations with Kira from the prison, and on a date established in evidence as Saturday 24 July 1999 Debbie Guise rang Mr Cherry's residence at "Cyprus Downs West". She asked if she could talk to Kira, and Mr Cherry said Kira had run away. He described how they had gone late night shopping (the preceding Thursday night), had a quarrel on the way home, and how after they had arrived home Kira had "grabbed a bag full of clothes, a few thousand dollars", and had demanded to be taken to Roma. Mr Cherry did that, dropping Kira off at a bus station, and going home. The next day he had returned to Roma and driven around the town unsuccessfully looking for her. Debbie Guise insisted that he report Kira missing. Thereafter she called frequently, attempting to locate or learn more about Kira, but as at the trial had not heard from or of her sister again.

- [52] Other friends or acquaintances of Kira were called by the Crown to declare that they too had had no contact with her after that weekend of 23rd to 26th July 1999. These included a Tarjani Pilkington, who had been a school friend in grade 9 in Monto School in 1996, and who had maintained relatively regular letter and telephone contact, which had slowly reduced to the extent that that witness did not know the name of the town to which Kira had moved, although saying Kira still phoned her "for my birthday and things like that". Ms Pilkington was contacted by Mr Cherry in, as she recalled it, mid 1999, asking if Kira had contacted her, and suggesting that he thought Kira perhaps had moved to Adelaide to be a prostitute. Mr Cherry made the latter suggestion to a number of other people too.
- [53] Perhaps because of the number of changes of residence in Kira's life, there was little evidence called from school friends and acquaintances with whom otherwise regular contact had abruptly ended on that late July 1999 weekend. Apart from Debbie Guise herself, who described a promise made by the two sisters that on Debbie's release from prison Kira would take her hand and walk with her down the main street in Springsure, the most significant evidence from a person whom Kira, if alive, might have been expected to contact after July 1999 was that of a witness Denise Lablack. She had met Kira at school at Springsure, and although the witness was unsure of which year or grade, it must have been 1997. She described a conversation which occurred approximately three or four months after Annette Cherry's death, in which Kira Guise told Ms Lablack that she believed Debbie Guise had been supplied by Mr Cherry with the gun she used. If the remembered date of that conversation was generally accurate, it took place before Mr Cherry dictated the contents of exhibit 23 to Kira. Unless Kira thereupon changed her opinion, and accepted that it was her grandmother and not her stepfather who gave Debbie the gun, writing exhibit 23 would simply have confirmed some details of Kira's belief.
- [54] Ms Lablack said that when Kira moved away from Springsure she and Kira would phone each other once or twice a week, and that this happened until the weekend

Kira went missing. Kira had told Ms Lablack that she wanted to leave where she was living, because “she wasn’t allowed to do anything, go anywhere or talk to people or anything like that”. She had told Ms Lablack that she wanted to leave when she was 16 but did not think that was possible and intended to go when she had enough money saved up or when she turned 18, whichever came first. Ms Lablack understood Kira had about \$1,000.00 saved. Kira did not tell Ms Lablack where she would go.

- [55] That evidence of Kira’s intent to leave was echoed by evidence Deslyn Nixon gave, that Kira had told her that Kira would be “out of there at 17.” Deslyn Nixon told Kira she was under the “jurisdiction” of the Family Court until 18, which led to Kira’s complaining about “another fucking year” in which Kira would have to wait before leaving home.
- [56] That evidence from witnesses called by each party supports that account Mr Cherry gave to Debbie Guise, that Kira had simply decided to leave in July 1999. It does not explain why she made no contact thereafter with either her sister or her friend Ms Lablack. It is at least possible that if alive she might not want anything to do with the sister who killed their mother, or with Mr Cherry or any members of his family; and her grandmother Maureen Murray was not asked in the trial by anybody if she had either had or would have expected to have any contact with Kira after mid July 1999. The Crown clearly needed to prove more than Kira’s apparent disappearance without trace to establish she had died, let alone that Mr Cherry had murdered her.
- [57] It principally relied upon inconsistencies in Mr Cherry’s account of when he last saw her, statements he made in a taped conversation with Debbie Guise in a Blackall motel in May 2001, and statements he made when in custody after his arrest for Annette Cherry’s murder, to support the case that Kira Guise had died at Mr Cherry’s hand.
- [58] Kira was last seen by somebody other than Mr Cherry, and who could positively identify her, on Thursday 22 July 1999, when she was refused permission by her employer Tony McLennan to use one of the farm vehicles to take a driving test. Kira had just turned 17. Debbie Guise’s evidence that she understood Mr Cherry to have told her on Saturday 24 July 1999 that Kira had left after an argument on the evening of Thursday 22 appears to be a misunderstanding of what Mr Cherry said, because Kira’s daily time sheet, recording in her own hand writing the work she had done on the property for which she was paid, records that she worked from 7.00 a.m. until 2.00 p.m. on Friday 23 July 1999. Payments to staff were routinely made on Friday, and the Crown led evidence that showed Kira’s pay cheque dated that day was deposited on 23 July, and \$600.00 was immediately withdrawn at 3.25 p.m. that afternoon, leaving a balance of \$55.57. Depositing her cheque and immediately withdrawing the bulk of its value as cash was a pattern in Kira’s banking behaviour; however, there were no further transactions on that account at all.
- [59] Apart from the curious feature that she has apparently never since withdrawn that \$55.00 owing to her, there was evidence that she had a pet male dog named Boxer, which she had left with a Vet in Roma on 9 July 1999 for treatment to an injured leg. The dog was collected on 23 July 1999, and the Vet recalled that Mr Cherry was there and was “pretty sure” that Kira was with him. The Vet recalled that both Mr Cherry and Kira had seemed very concerned about the dog when it was

originally left there, and if Kira left Roma alive and voluntarily, she left the dog behind with Mr Cherry. He gave it away some two weeks after 23 July.

What Mr Cherry said about Kira's absence

- [60] Mr Cherry provided an account to the police in November 2000 about Kira's disappearance, in which he described her increasingly wanting to leave "Cyprus Downs West" when she turned 17. He also said that most of her friends were from the Springsure and Eidsvold areas, she had no real friends in Roma, and no boyfriend. He said she was upset at being refused permission to use the farm vehicle to get her license, and that after they had collected the dog from the Vet on 23 July and returned to their home the dog had urinated on a lounge chair. This had led to an argument, resulting in his driving her at her request to Roma, his giving her \$800.00, and his dropping her off at some public toilets in Roma. The next day he searched for her, and that was the day Debbie Guise rang wanting to talk to Kira.
- [61] Mr Cherry's account did not say he had left Kira at the bus stop, or that they had spoken about a bus. His account said he had not seen Kira since that day nor heard from her.
- [62] Debbie Guise said in cross-examination that she had been told by Mr Cherry that he had dropped Kira off at the public toilets, and also that he had dropped her at a bus station. Those are two different locations in Roma, about 1.5 kilometres apart. Mr Cherry told the then manager of "Cyprus Downs West", Paul McLennan, on either Monday 26 July or Tuesday 27, that he thought Kira had gone on a bus, probably to Adelaide, and possibly to be a prostitute. Also on Monday 26 July Mr Cherry told another employee on "Cyprus Downs West", an Anthony Jensen, that he had taken Kira to the town and put her on a bus on the Sunday. It was suggested to Mr Jensen that he had that conversation by telephone on Saturday and was confusing Sunday with "the day before" referred to in a Saturday conversation, but Mr Jensen disagreed with that.
- [63] Mr Cherry told a Sergeant Ryan of the Roma Police on that same Monday that he feared Kira had gone to South Australia to become a prostitute, and that he had last seen her on the Friday night when dropping her at the amenities near a sports ground.
- [64] A different account was recalled by Ester Zerbst who was then living on "Cyprus Downs West", and who asked after Kira's whereabouts in late July 1999. She remembered Mr Cherry saying that Kira had just packed her port and walked out to the Northern Road, (which ran past the property in the direction of Taroom), and had hitched a ride. It was approximately five kilometres from the house Mr Cherry and Kira lived in to the Northern Road. That is a quite different description of their parting from his having dropped her in Roma at either the bus station or the toilet; the witness said that nothing was said to her about Mr Cherry having taken Kira "to town".
- [65] Another version was told to a Leanne Godfrey in September 1999, when she visited "Cyprus Downs West" with her husband on a pig shooting excursion, and spoke with Mr Cherry. Leanne Godfrey had noticed a photo of Kira at "Cyprus Downs West", and Mr Cherry said that Kira had gone to Roma to the dole office with her boyfriend and had never returned. That witness disagreed with the suggestion in

cross-examination that her memory was in error and that nothing had been said about Kira's boyfriend having taken her into Roma or the dole office.

Versions given to Helen Molanis

- [66] That witness met Mr Cherry in late 1999 when she went to work on "Cyprus Downs West", working as a child carer for his sons. A sexual relationship began, and after Mr Cherry left "Cyprus Downs West" and went to Roma to live, they lived there together, and then in March 2001 moved to "Marsden" station near Jericho. Mr Cherry initially told her that he had taken Kira into Roma to drop her off at a friend's place, and that when he went back to pick her up, Kira was gone. He added that he thought she might have gone to Adelaide to take up prostitution, and Ms Molanis asked why he was not concerned about that as Kira's stepfather. Mr Cherry replied that Kira was very strong minded. Subsequently in their relationship she was told both that Mr Cherry had dropped Kira off at the bus stop in Roma, and that he had dropped her at the public toilets on the edge of Roma, the account which is recorded in his statement to police.
- [67] After Mr Cherry was charged on 20 May 2001 with Annette Cherry's murder, Helen Molanis visited him in prison and otherwise provided support to him for a period. On one of those prison visits she told him she wanted to know what really happened to Kira, and Mr Cherry repeated that Kira had left after an argument, which on that occasion he said arose from the fact that he had walked in and found Kira naked having sex with the dog (the one collected from the Vet that day) and taking photographs of herself. This resulted in an argument and his taking Kira to Roma. Ms Molanis then taxed him the fact that he had given different accounts of Kira's disappearance, and he replied that he had been so upset about it that he was not sure what he had told different people.
- [68] If the accounts others recalled him giving were accurately recalled, he clearly did give differing versions. The most common included leaving her at the Roma bus stop, and that she may have become a prostitute. The fact that he gave other inconsistent versions may show no more than that he did not care to describe to others what he thought was his business. Perhaps the strongest point for the prosecution in everything he said about Kira's disappearance is that each account of it was capable of explaining why she would never be heard of again. This particularly includes what he said to Debbie Guise on 24 July and to Mr McLennan, Mr Jensen, Sergeant Ryan, and Ester Zerst. Yet when he spoke to Debbie Guise, Mr McLennan, Mr Jensen, and Sergeant Ryan, Kira had only been away from "Cyprus Downs West" for perhaps two days, and could well have been staying in Roma with a friend and intending to return after missing one day's work.
- [69] Debbie Guise's evidence made it clear that from the moment she was first told that Kira was missing she was concerned for Kira and suspicious of Mr Cherry. She said that when speaking on 24 July with Mr Cherry she told him "I knew things about him" (intending him to understand she meant Annette Cherry's death), and intending by that statement to prompt him to report Kira missing. Debbie Guise said she spoke in that guarded way because she knew the conversation might be being taped and monitored in the prison. In September and November 2000 she was visited by police in prison, who were inquiring *inter alia* about her sister's disappearance; and by 7 April 2001, when she made her first statement to police which incriminated Mr Cherry in her mother's murder, it seems plain that she

believed by then that he had murdered Kira. She described the police officer who took that statement from her as having “laid out the facts” about Kira’s disappearance, and that that officer believed that Mr Cherry had killed her. Debbie Guise’s own belief to that effect resulted in her statements of 7 and 13 April, and her agreeing with the police that she would meet with Mr Cherry by arrangement at a motel in Blackall, pretend to have been finally released from custody, and that she would have a conversation with him which the police could tape record. Arrangements to that effect were made and she met Mr Cherry on the evening of 20 May 2001 in that motel, she having been released into police custody for that purpose, although not from the Corrective Services system.

- [70] The Crown rely on the recorded conversation as containing implicit admission of complicity in Annette Cherry’s death and knowledge that Kira Guise would never reappear. Those inferences could be drawn from what was said; if one assumes Mr Cherry is innocent, then his answers are often evasive, often oddly and unnecessarily so, and sometimes rather obtuse. The other evidence showed he was anything but obtuse. One example of his alertness was given by Helen Molanis, who had visited Mr Cherry soon after his arrest, which had happened while she was on a visit to Western Australia. He had told her of how the police car carrying him from Blackall had hit a feral pig, which was injured, and so shot by one of the officers. Mr Cherry had noted where the ejected shell fell, and described its location to her so accurately that - at this request – she was able to find it and give it to his solicitor. She said he described an intent to concoct an account in which a police officer had fired at him, and to use the recovered shell as purported corroboration.

The Blackall Motel conversation

- [71] Very early in the taped conversation Mr Cherry told Debbie Guise that “Kira’s running because you told her you are not coming home. As far as Kira’s concerned Debbie’s not coming home”, a reference to the fact that Debbie Guise, (having been refused) had decided not to apply again for parole and to remain in prison until her release date. That was a new explanation for Kira’s disappearance. Mr Cherry said “he hadn’t heard jack shit” from Kira and was worried that she was in trouble or hurt, and later he said that she “ain’t fuckin coming back”.
- [72] He also warned Debbie Guise that police were still pursuing her, and that the “copper in Roma” wanted to see them both in jail, and that while she could not be re-tried (on the murder) “they can get you on perjury, right?” A little later in the conversation he spoke of the possibility of investigators who “could be walking around with bugs”, and again reminded Debbie Guise that “perjury will put you there for life, right?”, adding that he did not want to talk about it in the motel and proposed they move outside.
- [73] Ms Guise immediately asked him about her mother’s death, saying that she did not know why “did I have to do it”. The reply was that Mr Cherry had taken “two, no three”, guns from Kira after her mother was killed, and that Kira could not handle the fact that “you done it, right, and not her”. When Debbie Guise pressed her question again, the second answer was “why? if it wasn’t you it was gonna be either me, or you, or her, or Debbie or Kira, someone right” and that “there’s no answer to that”. Debbie Guise then explicitly asserted “But Rodney I wouldn’t have done it unless you hadn’t made me”. This time Mr Cherry was emphatic in his response,

which was “well you can blame me for making you Deb, I didn’t make you”, and when she said “but you told me to”, he said “ok, if you’re gunna blame me, I’ll go and leave you here.” He attempted to persuade her to come and live with him; Helen Molanis was away, and not returning for three weeks. Mr Cherry was proposing that Debbie Guise replace her.

- [74] Debbie asked “But why did you give it to me, why did you say go do it, its fuckin” and got the answer “mate this isn’t gunna work, right”, and the further answer “I don’t know the answer, this woman took everything and destroyed me. I’m destroyed completely”, as part of a longer non responsive answer in which he spoke of Annette Cherry in terms which debased her (“there would be fifty blokes she’s been screwing in the last fucking twelve months of our life”).
- [75] That was the end of the attempt to have Mr Cherry agree he had instructed Annette Cherry’s death, and although he did not say that, he did not ask why Debbie Guise was questioning him as she did in questions which would have seemed bizarre if he was innocent; and nor did either of them make any reference to the proposition asserted in exhibit 23, that her grandmother had given Debbie Guise a pistol saying it was unloaded. Her questions and his answers equally assume that account was irrelevant to the truth. His statements warning Debbie Guise of the penalty for perjury reveal knowledge that she had given untruthful evidence, and the only possible topics would be her intent and the source of the weapon.
- [76] Mr Cherry suggested to Debbie Guise that either Kira was still running or else something had happened to Kira. He claimed she had left his home with the intention of killing three people he named to Debbie Guise, and he denied to her that he had been having a sexual relationship with Kira, saying they were just “mates”. That denial was false; the investigating police found photographs of Kira of an explicitly sexual nature on Mr Cherry’s computer, some of which showed Kira naked and performing oral sex upon him. The background of those and other like photographs of Kira was at “Cyprus Downs West”, and at Joan Cherry’s residence in Springsure. They did not allow a conclusion as to Kira’s age when the earliest one was taken. At the point in their conversation when Mr Cherry was denying (falsely) any sexual relationship with Kira, he offered to give Debbie Guise a ring he was wearing, identifying it as Kira’s and describing it as one he had promised Kira he would never take off his own finger. That ring was identified in evidence as one given to Kira by Deslyn Nixon, which Kira apparently valued, and the prosecution argued that Mr Cherry’s possession of it also told against him.
- [77] The most unequivocally incriminating statement made by Mr Cherry was advice to Debbie Guise, “don’t squeal and ruin your life”, and that “the most important thing you’ve got to remember mate is you stick to your story you told in the courtroom because you never know when you’ll tell it to the wrong person, ever. Now Kira knows the fuckin truth.” That statement reflects knowledge Debbie Guise did not tell the truth at her trial, and when she asked how and why Kira knew the truth Mr Cherry said “because she worked it out a long time before”. When asked “how, did you tell her?” Mr Cherry replied “The only thing she doesn’t know for sure is the gun, right, the rest she knows”. He did not immediately challenge the implied assertion that only he and Debbie Guise knew the truth.

The case for murder of Annette Cherry

- [78] Mr Cherry was arrested very soon after making that statement. The evidence the prosecution led at his trial proved an overwhelmingly strong case of participation in causing Annette Cherry's death. Firstly there was the evidence of Debbie Guise, which judging from the transcript, appears to have stood up well enough to a searching and detailed cross-examination. The thrust of that cross-examination was to suggest that she had killed her mother without prompting by Mr Cherry, and had done so because of her mother's own ill treatment of her, her mother saying she would not see her younger brothers now her mother had custody, her violent temper, her mother's threat to tell her employers that Debbie Guise had attempted to overdose; all matters Debbie Guise agreed with in cross-examination, while steadfastly maintaining that Mr Cherry had procured the killing.
- [79] It is difficult to understand any part of the taped conversation in Blackall as inconsistent with the Crown case, and easy to regard it as consistent; the jury thus had Mr Cherry's own spoken words supporting the prosecution, just as they had the damning inferences available from what he wrote in exhibit 23. Added to that there was the evidence of his possession of a pistol and what he said to Mr Pointon, and the equally damning inferences available from the fact of disposal of the unnecessary .45 cartridges. Then there was the evidence of his declared intent, and of motive. Far from a verdict of guilty being unreasonable having regard to all of the described evidence the jury heard on this charge of murder, a verdict of acquittal would have been perverse.

Evidence from Tony Marsden

- [80] The taped statement Mr Cherry made in Blackall does not add much strength to the Crown case that Kira Guise had died. It shows he believed she knew matters which if proven would lead to his imprisonment, but not that he had reason to believe that she could cause that by herself. He said nothing inconsistent with her having voluntarily left the Roma area and having chosen not to make contact with her family or any friends. To make its case of murder the Crown substantially relied on the evidence of Anthony Marsden, another prisoner in the remand prison in which Mr Cherry was held in custody after 20 May 2001 waiting for the committal hearing for the murder of Annette Cherry. Mr Marsden was in custody waiting sentence on a substantial number of charges relating to fraud, perhaps 33, and had a number of prior convictions for dishonesty. These included convictions for various offences of dishonesty incurred on 30 November 1992, 7 October 1993, 26 May 1994, (including possession of a document purporting to identify him as a member of the Australian Federal Police), 18 August 1997 and 19 February 1999. On 23 July 2001 when he appeared for sentence the period of some four months he had been in custody in remand on those perhaps 33 charges was taken into account, and he was sentenced to nine months imprisonment to be served by way of an intensive correction order. That was a very good result for an offender with his record of prior convictions and sentences, for he had previously received both suspended sentences and probation, which he had breached. It was common ground at Mr Cherry's trial that Mr Marsden had benefited from what was described as a "letter of comfort" given on his behalf to the sentencing Magistrate on 23 July 2001, no doubt recounting the assistance the prosecution had by then received from Mr Marsden in the prosecution of Mr Cherry.
- [81] That assistance was principally given with respect to the case against him for the murder of Kira Guise. He was only charged with that murder on 23 September

2001, the commencing date of the committal hearing for his wife's murder. A separate committal hearing was held in November 2001 for Kira Guise's death. Mr Marsden's evidence included that on 26 June 2001 Mr Cherry told him that he suspected that Debbie Guise had been taken out of custody and placed in a witness protection program, and Mr Cherry drafted a letter for Mr Marsden to copy and send to Debbie. Mr Marsden did that and posted the letter as requested, but kept the original, which became exhibit 21 and was admitted to have been written by Mr Cherry.

- [82] Mr Marsden said it was written on 21 June 2001, and it does purport to be from Mr Marsden. In that regard it echoes what Debbie Guise said she was told about how exhibit 23 was written. Returning to exhibit 21, it tells Debbie that the author knows her "step-dad" who is "cut to pieces" because the police had told him "your sister is dead. They even accused him of her death"; and that "He is destroyed to think your sister is dead and cannot believe you lied and set him up". It also enquires "Could you tell me if the police told you your sister is dead and how they know"?
- [83] It continues in similar vein and could be regarded as fishing for information about the state of the police investigation into Kira's absence. Mr Marsden's possession of the original draft independently confirms that Mr Cherry was involving Mr Marsden with Mr Cherry's concerns.
- [84] Mr Marsden said that on 28 June 2001 Mr Cherry said he was going to get a photograph of Kira sent in to the prison, and he proposed that Mr Marsden sign a statement saying he had seen Kira in a nightclub in Rockhampton. Mr Marsden had never seen Kira in his life, and did not say he had; the purpose of getting the photograph was so Mr Marsden could describe Kira in detail. Mr Cherry said things about Kira consistent with what he had generally told the police and others, including that he had dropped her off in Roma and how "bikies could have taken her", or she could be down at Melbourne "with the mafia", or that she may have been killed in Rockhampton. He also said that a person he knew had seen Kira (apparently in Roma) a week after Mr Cherry had left her there, but that Mr Cherry was having difficulty remembering the man's name.
- [85] He made other statements consistent with his being innocent, including complaints apparently made on a number of occasions about the police and other potential witnesses all planning to give false evidence against him, complaints that he was being "set up" by the police, and various statements about a .45 pistol, including that he had never owned one, that a friend had given him one, and a third account that "it had come from his grandmother". (This may have been a misunderstood reference to Maureen Murray).
- [86] Mr Cherry also said things to Mr Marsden which did incriminate him, if Mr Marsden's account was correct. This included that Debbie Guise had written a letter "to a preacher friend from Springsure saying that she got the gun off her grandmother and that the police had taken that letter off the preacher lady", and that Mr Cherry was going to "run with that idea when it come to court that Debbie got the gun off the grandmother". Mr Marsden said that Mr Cherry also told him that he gave Debbie the .45 and taught her how to shoot it; and that there was a pressure plate on the rear of the pistol which needed to be pushed in before the trigger could be pulled.

- [87] The more significant statements were those Mr Marsden said Mr Cherry made about Kira. One of those was said to have been made on 18 June 2001, in the course of a conversation in which Mr Cherry expressed concern about a picture of Kira, recovered from a digital camera, and which Mr Cherry said was taken when she was drunk and lying on the toilet and which he said made her appear dead. Mr Cherry said he was worried that the police would get hold of that photo and change the background, to make it appear both that she was dead and somewhere other than where the photograph was taken. Mr Cherry then said that “he didn’t need the police to fabricate the evidence, he knows where she is and how she died”, and that “no-one’s going to find out.” Mr Marsden said that those remarks were just “snapped out”, when Mr Cherry was agitated and “cranky”. After that he calmed down but not before saying that Kira “couldn’t keep her mouth shut, like her mother”.
- [88] On 6 July 2001 Mr Marsden, who by then was making later written notes of their conversations, recorded that Mr Cherry had read a newspaper article about Kira and appeared upset, and said that he did not mean to hurt her; on 13 July 2001 he said, apparently apropos of Kira, that “they’ve got no body, I’ve made sure of that”; or “they’ve got no evidence, I’ve hidden the body”. Mr Marsden also said on a day when he was preparing for court proceedings, (and therefore on or about the date of his own release on an intensive correction order) Mr Cherry said, referring to an article on DNA, that “DNA is the only thing that is going to link me to Kira’s death”. He also said that Mr Cherry had been asking other inmates about DNA as well, when they came into the prison.
- [89] That was the extent of the evidence Mr Marsden gave directly incriminating Mr Cherry for the murder of Kira. If the jury accepted those statements were made and that they were true, they admit that Kira was dead, that Mr Cherry had concealed her body, that he knew how she had died, and that DNA analysis – presumably of her body – could link him to her death.
- [90] Mr Marsden has many convictions for dishonesty, and had benefited from being prepared to give evidence against Mr Cherry. On the other hand, he had been dealt with after 23 July 2001 and prior to the trial in October 2002, and had not received any further obvious benefit. He had been arrested on 18 October 2001 on a charge of dishonestly applying for his own use one Australian Tax Office Assessment Notice, another charge of attempting dishonestly to obtain property, and two charges of dishonestly obtaining property. He was granted bail, failed to appear, and on 11 January 2002 dealt with for breaches of his bail conditions and sentenced to two months imprisonment. It appears he re-offended regarding bail after release, because on 23 July 2002 he was sentenced to 90 days imprisonment for a breach of a bail undertaking. As at the trial he still awaited sentence on the charges for which he was arrested in October 2001, and said that he did not expect to receive a “letter of comfort” for those matters. All of this was before the jury, who heard him subjected to an extensive cross-examination. His evidence in chief and that cross-examination showed that he had had a good number of conversations with Mr Cherry, and that what Mr Cherry challenged were the specifically incriminating statements described by Mr Marsden.
- [91] What appeared uncontested was the description that Mr Cherry “rants and raves a bit” about his asserted mistreatment by the police and the Correctional Services. Cross-examination confirmed that Mr Cherry was frustrated that his mail was being

intercepted and read, and his telephone calls being listened to, and that Mr Marsden had on occasions become fed up with Mr Cherry's habitual complaining. It appears that the cross-examiner accepted that picture of Mr Marsden as accurate, reflecting acceptance that the two men had spent time in prison speaking together and particularly about Mr Cherry's charges and difficulties.

- [92] Mr Marsden also described things Mr Cherry said about other family members, including that the only thing "that's going to sink him for the murders is, um, 'that cunt of a daughter of mine'". Mr Cherry also said, when referring to his sister in law, that "he should have shot her years ago" (the Crown contended that his sister in law was also a potential adverse claimant for custody of the two boys). The evidence that he made those particular statements went unchallenged, and likewise that he had complained about the police having photographs of Helen Molanis watering marijuana plants but had not charged her. The nature of that complaint reflected matters raised in the cross-examination of Helen Molanis, establishing that she had consumed marijuana and been photographed when doing so and apparently enjoying the experience. The jury could conclude from all that that Mr Cherry had told Mr Marsden about at least some of the matters which did actually upset Mr Cherry, and had both intentionally and unintentionally revealed features of himself to Mr Marsden. The Crown's argument was that the jury could accept that he had on occasions, when angry, unintentionally revealed the truth to Mr Marsden.
- [93] The Crown also relied on a note written to Helen Molanis, which Mr Cherry had dropped from his pocket on an occasion of a prison visit, found by a prison officer on 2 September 2001. Ms Molanis gave evidence of a conversation at the prison in which Mr Cherry said the note he had written her had fallen out when he was being searched, and that he hoped one of the other prisoners found it before staff did. The note was put in evidence, and was admitted to be in Mr Cherry's hand writing. It includes an instruction to Ms Molanis to destroy it, and advice that Mr Cherry has no doubt that Mr Marsden has "squealed"; and Mr Cherry wrote "I had to trust someone and talk with someone". The Crown argued the jury could infer Mr Cherry had done that with Mr Marsden.
- [94] The learned trial judge directed the jury that it would be dangerous to act on the evidence of Mr Marsden if there were no independent evidence confirming it, and that they should act on his evidence only if, after very careful scrutiny and having regard to the warning given to them, they were convinced of the truth and accuracy of what he said. That was a strongly worded warning, which left it open to the jury to accept as true Mr Marsden's evidence of Mr Cherry's incriminating statements; and I consider this court cannot hold that it was not open to the jury to accept that those were made.
- [95] There then remains the question whether the jury were entitled to accept beyond reasonable doubt that what Mr Cherry said was true. The learned judge correctly warned the jury of the need to be satisfied of that second matter as well. He also reminded them of the importance of the evidence of the witnesses Ken and Madge Mitchell.

Evidence of the Mitchells

- [96] Those were two witnesses called on Mr Cherry's behalf. He himself did not give evidence. Mrs Mitchell had lived in Springsure until early 1997, and had known

Joan Cherry for many years, and Mr Cherry from when he was born. She saw Kira on occasions when Mrs Mitchell visited Joan Cherry, and when Mr Cherry's family were also visiting. She had probably first seen Kira when she was five or six years old. Mrs Mitchell knew the Cherry family had lived in the Monto area for some time, and had last seen Kira at Annette Cherry's funeral.

- [97] Mrs Mitchell swore that when visiting the Keppel Sailing Club at Yeppoon on the Thursday before Easter 2000 she had sat beside a young woman seated at an adjacent poker machine, and had thought the young woman was Kira. They were side by side for perhaps half an hour, but Mrs Mitchell did not speak to the young woman, because she "didn't really know if it was her or not". She had said that she had remarked to her husband at the time that she thought it was Kira and swore that "as I think more and more I know now I'm pretty sure it was". She agreed in cross-examination that she had told the police in October 2000 that she thought she had seen Kira but did not get a good look at the person next to her. She further agreed in cross-examination that she did not really know if it was Kira or not, but then said that in the last month (prior to the trial) she had become more certain that it was.
- [98] Mr Mitchell recalled his wife having said that day "doesn't that look like Kira sitting there?", and that although he could only see part of the face of the young woman, "it looks like Kira to me". He agreed in cross-examination that he had told the investigating police that he had just "caught a glance at her because I didn't take much notice you know", and that his wife "pointed her out to me but as I say like I didn't know her". However, while he agreed in cross-examination that all he caught was a glimpse of the young woman, he swore he now considered that "the girl I saw was definitely Kira".

The case for murder of Kira Guise

- [99] That was important evidence for the jury to consider, but the difficulty in relying on it to raise a reasonable doubt is that it is obvious neither witness was confident at the time that the person was Kira Guise, and neither spoke to that person. The jury could accept that both of the Mitchells were honest witnesses and still draw the conclusion beyond reasonable doubt that Kira Guise was dead, if the other evidence so satisfied them. What was critical was whether Mr Cherry was speaking truthfully when telling Mr Marsden he had disposed of Kira's body. The jurors would necessarily have observed how some of Mr Cherry's statements to others were more probably made because of their capacity to shock, rather than because they were true. Examples include his statements to Caroline McGregor and to Helen Molanis.
- [100] The Crown case for the murder of Kira Guise is far weaker than the Crown case against Mr Cherry for the murder of Annette Cherry. Despite that, on the whole of the evidence it was open to the jury to conclude beyond reasonable doubt that Mr Cherry was guilty of murdering Kira Guise. There was evidence of a motive, in Mr Cherry's belief that Kira knew the truth about Annette Cherry's death, and there was also evidence that the Family Court proceedings were still on foot in August of 1999. Evidence of a sexual relationship with his stepdaughter, even if it only occurred after she was 16, would have hampered Mr Cherry's case for residence orders in those proceedings. There was evidence, by way of formal admission in exhibit 67, that searches of the records of apparently relevant Commonwealth departments and organisations, and those of this State and other States, and of

financial institutions, had disclosed no trace of either Kira Guise or Kira Cherry since 23 July 1999. The evidence they heard could satisfy the jury that Mr Cherry was ruthlessly manipulative in protecting his interests, willing to kill for that purpose if he saw how he might escape the consequences, and without the slightest compassion.

- [101] This was the person whose interests Kira Guise threatened because of his behaviour which she could reveal. He had procured her mother's death, using her sister Debbie – whom he had seduced while a child in his care – as the instrument, resulting in Debbie's lengthy imprisonment; perhaps attempted to procure that sister's suicide; had taken Kira too as his sexual partner and then after she disappeared, had described Kira to a number of people as intending to prostitute herself, to Helen Molanis as having committed bestiality, and to her sister Debbie as an intending murderess. Those descriptions revile her in a manner reflecting his references to Annette Cherry. The jury could conclude that the evidence showed the real nature of his relationship with Kira Guise was an entirely abusive and exploitative one, and such that if he felt she threatened his security, he would kill her; and could conclude that the circumstances established in evidence proved beyond reasonable doubt that he had. I would reject the ground of appeal that argues the verdict of the jury on the evidence led on either or both murders should be set aside as unreasonable or unsupportable.

Joinder

- [102] That conclusion leads immediately to the grounds of appeal which complain of the admission of some of that evidence or the process by which the jury heard it. The first ground, (a), argues that the learned judge conducting a pre-trial hearing pursuant to s 592A of the *Criminal Code*² erred in allowing the prosecution to join the two counts of murder. The judge held that joinder was permitted pursuant to s 567(2) of the *Code*, which provides that charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose. The learned judge held that the two alleged offences of murder did form part of a series of offences of the same or similar character, and that the charges had a sufficient nexus. That was that on the prosecution case a strong motive for the commission of the second murder was Mr Cherry's awareness of the second alleged victim's knowledge of his complicity in the first. The prosecution made a further argument that the commission of the second murder was, accordingly, an admission by conduct of the commission of the first, but the learned judge merely repeated rather than adopted that submission.
- [103] Mr Cherry's written outline argued that the joinder was unjustified because the gun used to kill Annette Cherry had not been positively identified as coming from "Kareela" station, and he relied on extracts of the evidence given in each of Debbie Guise's trials for murder. In those extracts a witness Whitelaw was recorded giving evidence to the effect that the police had been unable to locate the source of that firearm. As to that complaint, the apparent impossibility of identifying the history and provenance of that firearm had changed by the time Mr Cherry was tried, and in any event that point is not relevant to whether the joinder was proper.

²

Now s 590AA

- [104] Mr Cherry also argued the joinder was an error because the investigating police had conceded in his committal hearing that, as at 30 March 2001, there was insufficient evidence to charge any person over the disappearance of Kira Guise. Once again, that situation changed when the police got Mr Marsden's evidence.
- [105] In *R v Collins ex-parte Attorney-General* [1996] 1 Qd R 631 at 636, McPherson JA and Lee J wrote that it has long been accepted that the basic criterion for the joinder of counts under s 567(2) is the existence of some connection or nexus between them, each limb of the sub-section being illustrative of the circumstances giving rise to that nexus.³ In these appeals the decision of the learned judge who declined to order separate trials, and held that the case alleged by the Crown established a sufficient nexus, should be upheld. The evidence actually led did support the argument that Kira Guise was murdered because Mr Cherry believed she knew what he did to lead Debbie Guise to kill Annette Cherry, and the related argument that he murdered Kira Guise because he had instigated Annette Cherry's death. Additionally, the evidence of the taped conversation at the Blackall motel and the evidence of Mr Marsden would have been very difficult to separate into evidence relating to one death only, although it would have been easier to do that with Mr Marsden's evidence than the taped conversation. Further, a jury hearing only the charge of Annette Cherry's murder would have learnt from that taped conversation that Kira Guise had disappeared, and that she had disappeared while with Mr Cherry and leaving behind "all her gear". The evidence Debbie Guise gave of the long history of events leading up to the conversation in the motel would inevitably have revealed that it was the fact of that disappearance which had led to Debbie Guise assisting in the arrangements for that meeting, and explained why the conversation was primarily about her mother's death and her sister's disappearance. On the other hand, a jury hearing only the charge of Kira Guise's murder would necessarily have heard of Mr Cherry's asserted role in Annette Cherry's death, of Kira Guise's knowledge or belief about that, and Mr Cherry's belief about Kira's knowledge, as evidence relevant both to motive and to proof of the fact that Kira Guise was murdered. The evidence on both counts was therefore inextricably mixed and established a strong nexus; much of it was admissible in each count, and the joinder was proper.

Alleged error in admitting evidence

- [106] Mr Cherry's next ground, (b), argued that the judge conducting that pre-trial hearing erred in ruling the tape of the Blackall Motel conversation admissible. Mr Cherry submitted it disclosed no admission and was at best equivocal. Its contents have already been described and the jury could conclude that Mr Cherry had made both some guarded and unguarded admissions concerning Annette Cherry's death. Mr Cherry also submitted on the appeal that the tape had been edited and remixed. He did not point to anything in the transcript or elsewhere to support that claim, and it was not made at the trial. That ground should be dismissed.
- [107] Mr Cherry's next ground of appeal was that the judge conducting the pre-trial hearing further erred in allowing the prosecution to lead the evidence from Denise Lablack of the statements to her by Kira Guise about the latter's belief that Mr Cherry had supplied Debbie Guise with the gun used to kill their mother. That

³ Citing *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, 39; *R v Kray* [1970] 1 QB 125, 130 – 131; *R v Clayton-Wright* [1948] 2 All ER 763, 765; *R v Cranston* [1988] 1 Qd R 159, 164

complaint overlooks that the learned judge admitted evidence of that conversation only as evidence of the alleged victim's state of knowledge or belief, that being relevant to the possible motive for killing her, and admitted for that reason only, and not as evidence of the truth of her belief.⁴ The learned judge was correct and the evidence was admissible on that basis. Mr Cherry's trial counsel did not complain at all that the learned judge had not instructed the jury adequately on the limited use they could make of the evidence. That ground of appeal should be dismissed.

The s 8 argument

- [108] In his ground (d) Mr Cherry submits that the learned trial judge erred in ruling that there was a case to answer on count 1 on the indictment based on a Crown case relying on s 8 of the *Criminal Code*. That ground reflected a submission made to the judge, which pointed to the fact of Debbie Guise's conviction being for manslaughter and not murder.
- [109] The Crown case on count 1 was unusual in that the actor directly responsible for the killing was convicted of manslaughter and acquitted of murder, yet the Crown pressed for murder against the non-actor. Section 8 provides that when 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence. In *R v Barlow* (1996-1997) 188 CLR 1 the joint judgment of Brennan CJ and Dawson and Toohey JJ holds that "offence" in s 8 must be understood to refer to an act done or omission made⁵, and that s 8 sheets home to the secondary offender such conduct (act or omission) of the principal offender as (1) renders the principal offender liable to punishment but (2) only to the extent that the conduct (the doing of the act or the making of the omission) was a probable consequence of prosecuting a common unlawful purpose. The joint judgment went on to hold (at p 14) that once s 8 does its work of deeming the secondary party to have done the act or to have made the omission which the principal did or made insofar as that act or omission was of a nature covered by the parties' common intention, then the state of mind of the secondary party might again require consideration. If, at the time that the act was done or the omission was made, the secondary party had a state of mind which, in combination with an act or omission which s 8 deemed (him) to have done or made, rendered (him) guilty of a more serious offence than the offence of which the principal offender was guilty, the secondary party was liable to conviction to the more serious offence.
- [110] The prosecution submitted the jury could be satisfied that Mr Cherry and Debbie Guise formed a common intention to prosecute an unlawful purpose in conjunction with one another and that in the prosecution of that purpose the offence of unlawful killing of Annette Cherry was committed, it being of such a nature that its commission was a probable consequence of the prosecution of that purpose. Further, Mr Cherry had a state of mind which in combination with that unlawful killing rendered him guilty of murder. He intended that Debbie Guise kill Annette Cherry. Debbie Guise had given evidence at Mr Cherry's trial that her mind was simply empty when she shot her mother, and so claimed she lacked specific intent.

⁴ The learned judge referred to the judgment in *Walton v R* (1989) 166 CLR 283 at 288 and 300

⁵ At p. 10. Kirby J agreed, at p. 43-44

Her conviction for manslaughter and his for murder accord both with the construction of s 8 authoritatively enunciated in *R v Barlow* and with the further observations of the High Court in *Osland v R* (1998) 159 ALR 170 at [16]–[17] by Gaudron and Gummow JJ and at [75] by McHugh J. Those judgments emphasised the propriety of a person being found guilty of murder on the basis that his or her act substantially contributed to the death of another even though the immediate cause of death was a wound inflicted by a person found not guilty of murder but guilty of manslaughter. It also accords with the result in *R v Warren and Ireland* [1987] WA 314 and the judgments of Kennedy J (at 322) and Franklyn J (329-330) therein. This ground of appeal should also be dismissed.

The conduct of the prosecutor

- [111] Mr Cherry's next ground complains that the Crown Prosecutor erred in his duty in not calling the Mitchells, Deslyn Nixon, and Joan Cherry as witnesses in the Crown case. That ground of appeal particularly relies on the fact that the Crown Prosecutor did not suggest in his cross-examination of any of those four witnesses, or in his closing address, that they were dishonest. On the appeal the Crown particularly relied on the passage in the joint judgment in *Richardson v Queen* (1974) 131 CLR 116 at 119, quoted in the joint judgment in *R v Apostilides* (1983-1984) 154 CLR 563 at 573- 574, which holds that in discharging the responsibility of ensuring that the Crown case is presented with fairness to the person accused, and when deciding on the witnesses the Crown will call, a prosecutor may take into account whether or not in the interest of justice the evidence of those witnesses should be subject to cross-examination by the Crown.
- [112] That is what happened at the trial. The prosecutor had been asked to call the Mitchells and a Melanie Larsen as witnesses, but declined; by the end of the Crown case that request had been withdrawn regarding Melanie Larsen. Regarding the Mitchells, on what each had told the investigating police and (later) the Crown prosecutor, each was unsure whether the young woman Mrs Mitchell sat next to was Kira Guise. The prosecutor was justified in the view that evidence from them would not necessarily contradict the Crown case but should be the subject of cross-examination by it. The jury did hear evidence from both Mitchells and both grew considerably firmer in their identification in the witness box, thereby justifying the view that cross-examination would assist the jury in evaluating the accuracy of any identification they gave. The joint judgment in *Apostilides* held that a decision by a prosecutor not to call a particular person as a witness would only constitute a ground for setting aside a conviction if it could be seen to give rise to a miscarriage of justice, and that did not happen in this case because Mr Cherry called the witnesses rather than the prosecution. Had the prosecution called them the jury may have heard only of the apparent confidence with which those witnesses now identified the young woman they saw as Kira Guise, and may not have heard of their clearly expressed uncertainty some two years earlier.
- [113] With regard to Mr Cherry's sister and mother, a notice of alibi had been served on the prosecution naming those two witnesses, and the Crown was not asked at any time to call them. No statement from them had been provided to the police, and nothing has been shown on the appeal suggesting a miscarriage of justice flowing from the appellant's failure to ask at the trial that the prosecution call those witnesses, let alone any reason why it should have. That ground of appeal should be dismissed as well.

- [114] Mr Cherry's next ground (f) complains that the prosecutor erred in his duty in not calling a Melanie Larsen as a witness, when her evidence at the committal hearing was that she had seen a person she believed to be Kira Guise in December 1999. Melanie Larsen did say that at the committal hearing, and Mr Cherry took the court to extracts from the committal transcript. It recorded that Melanie Larsen had met Kira two or three times when both of them were living in Springsure, and had spoken to her only once, that being in 1995 when she was introduced to Kira and said "hello".
- [115] Ms Larsen saw a young woman in December 1999 at the Allenstown Shopping Centre in Rockhampton, who was one of a group of other young people, standing outside Woolworths. In February 2002 Ms Larsen told police that the person she had seen in November 1999 was similar in appearance to Kira and "could've been Kira but it could've been someone else as well. I didn't really take that much notice." Ms Larsen did not speak to that young woman, and as at the date of her evidence in the committal hearing (March 2002) was not sure whether it was Kira or not whom she had seen.
- [116] By the end of the Crown case the Crown prosecutor was no longer asked to call Ms Larsen as a witness, and Mr Cherry's counsel did not call her either. Neither case would have been strengthened by her evidence, and no breach of the prosecutor's duty or miscarriage of justice could be inferred. That ground of appeal should be dismissed.
- [117] Mr Cherry's next ground (g) complains that the prosecution had not ensured that Debbie Guise was promptly charged with perjury when she stated she had given false evidence at her own trial, and nor had prosecuting authorities ensured that Helen Molanis was charged at all, when her evidence revealed she had committed offences involving dangerous drugs. Mr Cherry complained that prosecuting bodies had thereby aided and abetted the commission of indictable offences by others.
- [118] Those submissions reflected complaints Mr Marsden said Mr Cherry had made to him. Debbie Guise was charged with perjury on 19 September 2002, although the court hearing Mr Cherry's appeal was not told anything further about any result. The non-prosecution or non-conviction of those two witnesses by the date of Mr Cherry's trial, or ever, could not cause or result in a miscarriage of justice, when the jury were fully aware of the facts on which Mr Cherry relied to assert those witnesses had committed offences. They knew Debbie Guise had been charged with perjury shortly before the start of Mr Cherry's trial. To the extent that those matters adversely affected the credit of those two witnesses, the jury were well apprised of them.
- [119] Mr Cherry complained of conduct by the correctional authorities in opening his mail, and that the prosecution had failed to stop that occurring. Assuming it had, that was not shown to have had any effect at all in causing any relevant evidence to be unavailable to, or withheld from, the jury.
- [120] He complained that the police had recorded interviews with the Mitchells without the latter's knowledge; but if that happened, it was not improper conduct on the part of the police. It was a sensible step which resulted in the police being able to show exactly the words each of the Mitchells had used. That did not cause any injustice in the trial proceedings. Mr Cherry likewise complained that the potential witness

Melanie Larsen had been questioned too firmly by a detective. Ms Larsen's evidence at the committal had been that the officer was "pushing me" as to "was it Kira?"; this had resulted in the witness telling the officer in reply that she "did not really take that much notice". That complaint made on Ms Larsen's behalf by Mr Cherry is irrelevant to whether or not there was any injustice to him in the trial process.

- [121] Mr Cherry complains at some length in his written outline and supporting documents of slow production, and non-production, by the correctional authorities, of correspondence between himself when in custody and Helen Molanis. He annexed a considerable quantity of that correspondence, contending that it showed that she had freely expressed support and affection for him in letters, as opposed to having been induced or commanded by him to write in those supportive and affectionate terms. She had claimed in her evidence at the trial that he did procure her to do that. Again, nothing turns on this. Although many of the submissions by Mr Cherry focus on Helen Molanis and her asserted dishonesty in not admitting feelings genuinely held for him, her actual evidence at the trial added little to the prosecution case. The most significant point to emerge from it was the opportunity Mr Cherry lost when she revealed his apparent intent to make dishonest use of the fact that his legal advisers had a cartridge case discharged from a police officer's revolver. Those of his grounds of appeal which were apparently drawn by a lawyer, or with the assistance of one, do not complain about the admission of that evidence from Helen Molanis. All that was suggested about it in cross-examination was that he had asked her to find the empty shell so that he could demonstrate how good his memory was, if someone questioned it. The limited challenge to that evidence makes irrelevant Mr Cherry's claim that at least some of the affectionate letters she wrote him in prison were genuine ones from her and not dictated by him.

Missing or incorrectly sampled bullets

- [122] Mr Cherry did present a carefully researched oral argument on the hearing of the appeal, about the authenticity of the bullets collected from the roadside in 2001, and whether or not those with which they were compared were really the six undischarged ones taken from the pistol used by Debbie Guise. He had utilised FOI processes to considerable effect to trace the movement records relevant to those six bullets. He argued that those only clearly showed that the bullets had been returned (by the Supreme Court) to the Rockhampton Police Station on 16 July 1998, and prior to Debbie Guise's second trial. He pointed to that fact that the ones the witness Graham said had come from the pistol, and which the witness swore he had compared with those found at the roadside, were not actually tendered as exhibits in Mr Cherry's trial. He also pointed to apparent discrepancies in the records of what had been sent to the Rockhampton Police Station from the Supreme Court in July 1998.
- [123] The Crown's written argument in response included the statement that it was still in possession of the bullets associated with the gun used to kill Annette Cherry, and that those bore packaging and labelling indicating appropriate historical provenance. That provenance was not an issue at all during the trial. Mr Graham had been shown what remained of six bullets when in the witness box at Mr Cherry's trial, and had sworn that that was all that was left of the six originally intact bullets removed from the pistol. He had discharged five of them, and broken the other one down. The Crown did not make any of those six shells or remnants an exhibit, and

the witness described the result of his microscopic comparison of the shells with the bullets found at the road. The absence of any challenge at the trial to his identification of the shells in the witness box as the ones he received in 1997 and later examined for comparison with the roadside bullets means that Mr Cherry's researches are simply an attempt to cloud an issue of fact which was very clear at the trial.

[124] I consider his complaints of miscarriage of justice resulting from misconduct by either the police or the Crown, or his jailers, have no merit, and that all grounds of appeal should be dismissed.

[125] **PHILIPIDES J:** I have had the advantage of reading the comprehensive judgment of Jerrard JA. I agree for the reasons stated in his Honour's judgment that the appeals against convictions should be dismissed.