SUPREME COURT OF QUEENSLAND

CITATION:	*R v Glattback* [2004] QCA 356
PARTIES:	**R** v **GLATTBACK, Phillip John** (appellant)
FILE NO/S:	CA No 53 of 2004 SC No 251 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	25 June 2004
JUDGES:	McPherson, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - OTHER CASES - where the appellant was convicted of murdering his partner - where the cause of death could have been by neck compression or asphyxiation by use of a plastic bag, either singly or in combination, or possibly through a number of other mechanisms - where the appellant contends that a guilty verdict cannot be supported on the evidence as a reasonable jury could not have been satisfied beyond reasonable doubt that the cause of death was via neck compression and/or asphyxiation with the plastic bag and therefore could not be satisfied of his intent - whether the inferences suggested by the Crown were open to the jury based on the evidence - whether a reasonable jury could have arrived at a guilty verdict based on the evidence CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS -

PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE - GENERALLY - where evidence was given at trial of the appellant's abusive conduct towards the deceased prior to her death - where the appellant contended that the learned trial judge should have given further directions to the jury as to the use that could be made of the relationship evidence - whether the learned trial judge needed to give a further direction

BRS v The Queen (1997) 191 CLR 275, cited
Dhanhoa v The Queen (2003) 199 ALR 547, applied
Giannetto v The Queen [1997] 1 Cr App Rep 1, cited
KRM v The Queen (2001) 206 CLR 221, considered
Ratten v The Queen (1974) 131 CLR 510, cited
R v Chevathen & Dorrick [2001] QCA 337; CA No 301 of 2000, CA No 31 of 2001, 24 August 2001, cited
R v Leivers & Ballinger [1999] 1 Qd R 649, considered
R v Self [2001] QCA 338; CA No 77 of 2001, 24 August 2001, applied
R v W [1998] 2 Qd R 531, cited

COUNSEL: P J Callaghan for appellant
A J Rafter SC, with P J Feeney, for respondent

SOLICITORS: Gilshenan & Luton for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **McPHERSON JA:** I agree with the reasons of Jerrard JA for dismissing this appeal. In particular, I agree with what his Honour has said about the requirement of unanimity in this case. All members of the jury had to be satisfied about the ultimate facts, which were that the appellant had caused the death of the deceased Ms Scipione and had done so with intent to kill or do grievous bodily harm to her. Assuming they were all satisfied beyond reasonable doubt of those matters, it was not necessary that they should arrive at that conclusion by precisely the same route. The conclusion had, of course, to be unanimous, although the inferences they each drew from various parts of the evidence might not be identical throughout.

[2] I also agree with Jerrard JA concerning the evidence of the appellant's threats of violence towards Ms Scipione. It was plainly relevant to proof of his intention on the occasion of her death that he then or previously had threatened to kill or injure her on other occasions. The jury would have understood it in that sense. Any further direction designed to divert them from wrongly supposing that the evidence might be used to show the appellant was by nature a violent man likely to murder his wife should have been specifically sought - and justified - at the trial. The fact that defence counsel did not ask for it is a firm basis for concluding that the evidence about the appellant's previous threats was not understood to have that function, and that the jury in fact understood the evidence in question was directed to proving the appellant's intention and nothing more.

[3] The appeal against conviction should be dismissed.

[4] **WILLIAMS JA:** At about 10.15 am on 12 July 2002 Anita Scipione was alive. She was heard by a neighbour (Maria Draper) pleading for help in a loud voice, including using the words "Phil, don't kill me". What she heard caused Mrs Draper to telephone the police. On arrival of the police very shortly after 10.30 am Anita Scipione was found in a pool of blood on the floor of the garage which formed part of her residence. If she was not then dead she died very shortly thereafter. In a statement to police (fully set out in the reasons for judgment of Jerrard JA) the appellant conceded that he was the only person with the deceased at the material time. The version of what happened he gave to the police would not account for the injuries sustained by the deceased. He did not give evidence at the trial.

[5] The eminent pathologists who gave evidence at the trial had concerns as to the precise mechanism of death. It is clear on the whole of the evidence that the significant injuries suffered by the deceased could not have been self-inflicted. At the end of the day it seems clear to me on the whole of the evidence that, regardless of the precise mechanism of death, it was the result of serious trauma to her body. The only person possibly responsible was the appellant. In the circumstances it would, in my view, be an affront to commonsense to conclude other than that the violent conduct of the appellant caused her death.

[6] As the passages from the evidence referred to by Jerrard JA in his reasons amply demonstrate, the appellant had clear motive for killing the deceased, and generally was a person of violent disposition.

[7] Despite the technical arguments as to cause of death addressed to the court by counsel for the appellant I am of the view that the case against the appellant was overwhelming.

[8] It is sufficient for me to say that I agree generally with the more detailed reasons given by Jerrard JA for concluding that the appeal against conviction must be dismissed.

[9] I would dismiss the appeal against conviction.

[10] **JERRARD JA:** On 13 February 2004 Phillip Glattback was convicted of murdering Anita Maria Scipione on 12 July 2002 at Thorneside, and sentenced to life imprisonment. He has appealed that conviction on a number of grounds. Those grounds included that the verdict was insupportable because a jury could not have been properly satisfied that the cause of death was either neck compression or asphyxiation by use of a plastic bag, separately or in combination, as opposed to any other possible cause of death; nor properly satisfied that Mr Glattback had the necessary intent; and the learned trial judge had failed to inform the jury as to the basis on which they could use the extensive evidence about Mr Glattback's abusive conduct toward Anita Scipione.

Anita Scipione's Death

[11] At about 10.15 am on 12 July 2002 a neighbour, Maria Draper, heard Anita Scipione calling out from the other side of the Jean Street roadway which separated their homes. Maria Draper described hearing Anita call "Please don't, please don't. Please, Phil, leave me alone. Please, please, Phil, don't kill me. Please don't. Please, Phil, don't kill me. Please don't, please." Maria Draper said Anita Scipione's tone was desperate, pleading and begging in a way Maria Draper had never heard anyone else plead and beg, and she believed that "something was really,

really wrong". She went inside her house and ran downstairs intending to intervene, changed her mind and ran upstairs to alert her 21 year old son and a friend of his to what was occurring, and after speaking with them rang the police. Her telephone call was received at about 10.28 am, and a police vehicle arrived outside Mrs Draper's residence at 36 Mooroondu Road, Thorneside no more than five minutes later. The two police officers were immediately directed to number 38, where Phillip Glattback and Anita Scipione lived, and Mr Glattback answered the door. He had blood all over his face, neck and arms, and he said "Quick, she's in here. Help me".

[12] He led the police officer into the garage where Anita Scipione was lying on her back on the floor. She had no pulse and was not breathing. The other officer joined him, an ambulance was called for, and CPR was attempted. Anita Scipione's eyes were swollen black and shut, there was a large wound at the back of her head, and a quantity of blood behind it. Towards the back of the garage wall were some metal strips on the floor and furniture, and a large white plastic bag covered in blood. Mr Glattback said "We were having an argument, she fell over and hit her heed [sic]".

[13] Mrs Draper's son Anthony had heard some noises as well before the police arrived. He had heard a woman's voice moaning, and on perhaps three occasions sounds which he thought resembled knives, forks, or coat hangers being dropped on the ground; and he could recall hearing the moaning sound after those "crashing" noises. At some point the moaning stopped.

[14] Other police arrived at about 10.44 am. By that time Mr Glattback had made a telephone call on his mobile phone. By the time those other police arrived there was a pool of blood under Anita Scipione's head, and her face was swollen. She did not respond to the CPR or any other treatment. She was considered dead by the officers of the Queensland Ambulance Service when they arrived. She had therefore died within about 15 minutes of her calling out the words Mrs Draper heard.

Mr Glattback's account

[15] Mr Glattback spoke with a police officer Dugger in a police car at about 11.10 am, and that conversation was tape recorded. Mr Glattback said that Ms Scipione had become "really shitto about" the fact that he had been "seeing this other girl", and that the preceding night Ms Scipione had become "absolutely pissed out of her head", drinking Cointreau, and had been "still pretty pissed" that morning. He described her speaking of his new girlfriend as a "fucken fucken slut, fucken, fucken, the whole time and I says to her, 'Please, Anita, don't do that please.'" He described having gone downstairs with Ms Scipione and:

> "we were in the laundry and she was on about driving and I said, 'Please don't drive, don't drive, you can't drive, you're drunk, you know, think about Phillip, think about yourself' you know, and then I tried to sort of stop. I said, look please just stop and held her by an arm [like], just both arms and I said to her, please stop and she sort of broke away and took at swing at me and hit me and then I sort of – we scuffled a bit and then she fell on the ground and like – I don't know, she just sort of – she hit her head and there was a lot of blood and I – I sounded to her, I said, 'Please stop, stop, stop.' I said, 'You're bleeding, you're bleeding' and I tried to grab a plastic bag

> that was on the floor. I just grabbed it and tried to put it on her head and she just – even more she just started hitting me and punching me and I tried to sort of hold her, and then, of course, all the blood was on the floor and she just fell over and she fell over again and she hit the ground again and like I was just holding her and trying to hold her and she was getting up. Mate, the strength was unbelievable. It's just – she was just like throwing me off and I kept saying to her, please, please, please, stop, stop, stop, stop, stop, stop. I said, 'You're hurt, you're hurt, you're hurt' and I was screaming at her and she was saying, 'You're trying to kill me, you're trying to kill me' and she was f'en and blinding at me … and she kept – she just kept falling over and then she went down bang, really really hard and she like didn't move and I – and I grabbed her and I just sort of was holding her and I was – I was trying to shake her and everything and – and then I tried to feel for like – listen to her breast like for the heart and I – I tried pumping the heart like the CPI because I know CPI and all that stuff and I screamed at her and then I run upstairs because I was going to make a phone call to get – try and get an ambulance and the next minute I heard the police car and that's why I came flying downstairs and opened the door".

[16] The plastic bag seen by the police, and to which he referred, was described as having blood on both the inside and the outside by one of the police officers who had arrived at the scene before 11.00 am, but the forensic scientist who conducted an examination of it was unable to be confident about that fact because she had received the plastic bag scrunched up inside another clip sealed plastic bag. Red flakes were present, consistent with blood having dried and flaked, but the manner in which it was packed for examination may have put those inside the bag.

[17] Mrs Draper did not hear Mr Glattback's voice that morning, when she heard Ms Scipione calling out. She thought that "very unusual" because "whenever there was an argument or a fight, the domestic situation over there, Phillip was the one that was always very loud and you often didn't hear Anita", whereas "this time I did not hear Phillip at all. I heard Anita only." This evidence was apparently led in an effort to contradict Mr Glattback's account of what he said to Ms Scipione in the garage; the Crown also led evidence that she had a zero blood alcohol content when she died and that while two empty Cointreau bottles were found in the residence, when those were examined for fingerprints the only identifiable ones found were Mr Glattback's. The prosecution also led evidence that the highest likely blood alcohol concentration two hours prior to her death would have been .06, assuming that she had been drinking; and that concentration in a regular social drinker would be unlikely to have caused her to have felt or looked particularly drunk.

Post-mortem examination

[18] A Professor Naylor performed a post mortem on 13 July 2002. He had performed approximately 4,000 other post mortem examinations in his career as a pathologist. He observed two straight line lacerations to the forehead, each about 10 to 15 millimetres in length (consistent with the deceased's head coming into contact with the metal strips observed in the garage, and which the prosecution said explained the noises Anthony Draper heard), and extensive bruising around both eyes, between the eyes and across the bridge of the nose. Her eye lids were swollen and Professor Naylor saw tiny areas of bleeding described as petechiae in her eyes. Her

lips were bruised in the inside, and cut on the inside of the upper lip. Her face generally showed areas of red bruising, involving the middle of the forehead, the outer part of the forehead, and both cheeks, but it was more severe on the left side where there was some swelling. There were also red or brown abrasions or grazes situated over the centre of the face and on the chin. He regarded those as peculiar in that in some areas they were "stippled", by which he meant small localised areas of grazing, particularly so over the right cheek.

[19] He found bruising in an area of some 10 x 4 centimetres over the left front and side of the head when he shaved part of the scalp; round, scattered bruises over the right wrist, right elbow, right forearm, and right biceps, and ill defined bruising on the left hand and left arm. He found some too on the left knuckles. He observed scattered bruises over the left forearm, left biceps and back of the left upper arm and left elbow. There were also bruises over the backs of the thighs.

[20] When the scalp was removed he found bruising at the left front and side of the head, corresponding to the area observed when the scalp was shaved, but also very widespread and severe bleeding over almost all of the right side of the head, and an area of bruising there measuring about 12 centimetres in diameter. He also located an area of widespread bruising over the left cheek, and to a lesser degree over the right cheek when he had removed the skin from the face. Despite all that bruising and bleeding the skull was not fractured, and the brain was normal.

[21] Professor Naylor then examined the neck structures. He also found areas of bruising and bleeding to those consistent with a severe impact or pressure. He saw bleeding on the left side of the upper neck and in the same area he found a fracture on part of the voice box called the thyroid cartilage. There was an area of bleeding immediately adjacent to the broken left cartilage in the thyroid. He also found some bleeding about half way along the spine in the neck, just behind the voice box, which he interpreted as indicative of a severe pressure to the structures of the neck, or an impact to it.

[22] He found what appeared to be some vomit in part of the trachea but no bleeding or inflammation to suggest that significant aspiration or breathing in of stomach contents had occurred before death; he doubted it was a real event. There was some scarring to the heart muscle, and one coronary artery was moderately severely narrowed, slightly less than normally seen in association with a heart attack.

[23] Examination of tissue samples from the voice box and close to the area of fracture of the cartilage, showed some neutrophils collected together in that area, which Professor Naylor said indicated inflammation, and that in that area an injury to the neck had occurred at least a number of hours before death. There was also evidence of injury to the neck which had occurred at or about the time of death.

Pathologist's opinions

[24] His opinion was that the main cause of death was compression of the neck, and the evidence for that was the fracture to the neck structure, petechiae inside all four eye lids and over the lungs, and the areas of bleeding or bruising within the neck structures. He considered, based on the amount of bruising to the face and head, that there had been a considerable amount of force applied to that part of the body but not enough to cause any fractures. It was possible that force had concussed her or "knocked her out".

[25] The matter complicating the cause of death was the presence of the inflammation right next to the fracture of the upper part of the voice box on the left. It implied a number of hours must have elapsed for that to develop, and Professor Naylor said he could not tell whether or not there was another or other episodes of neck compression prior to the compression of the neck which in his preferred opinion was the main the cause of death, and obviously occurring immediately prior to it.

[26] He did not exclude asphyxia by a plastic bag placed over the deceased's head as the substantial cause of death, describing that process as one which left virtually no changes on the body. He explained that when people commit suicide with a plastic bag, the only reason pathologists know the cause of death is because the plastic bag is still in place, and because there are no other abnormalities to account for that death occurring.

[27] Compression of the neck, his preferred mechanism of death, could have caused that death in three ways. The first was by blocking the airway; the second by compressing the arteries and veins in the neck so that the brain did not receive an adequate blood supply; and the third by causing an effect on various nerve centres, which may lead to a sudden death by way of a reflex. The presence of the petechiae meant that there must have been some sustained pressure applied to allow bleeding into the eye lids, which could have occurred more than once or once only, and he agreed the petechiae he saw could have been the result of something happening at least six hours before death occurred. Had he not found the tiny area of inflammation next to the observed cartilage fracture he would have been "quite happy" to say there had been an episode of neck compression sufficient to cause death. He found nothing to either support or discredit asphyxial death with the plastic bag. He could not exclude death by aspiration of vomit, from a tongue obstructing an airway as she lay on her back, or from a combination of the head injuries and heart disease alone; but did not suggest the death had occurred in any of those three ways.

[28] The Crown also called evidence from a second specialist pathologist, Professor Duflou, who had examined samples of tissues taken from Ms Scipione's body, seen photographs of it, and seen the transcript of Professor Naylor's evidence. In his opinion there may have been an episode of manual compression of the neck, but the amount of injury described to Ms Scipione's neck was significantly less than Professor Duflou had seen in cases in which he had attributed death to manual compression. He thought it highly likely that the fracture of the larynx had occurred at least a number of hours prior to death; he could not exclude the possibility that there had been more than one episode of neck compression. He agreed that there would not be visible injury to the face or other areas if death was a result of asphyxiation by use of a plastic bag, and highly likely that there would be no evidence that that was how death was caused. He did assume that if she struggled when being asphyxiated by a plastic bag that there would be some damage to her neck, if the bag was held tight around the neck, and some damage to the bag.

[29] In cross-examination he stressed his opinion that there was no evidence of a second episode of neck compression, no evidence that he could find that a neck injury was the cause of death, and that the cartilage fracture could have occurred by the application of minimal force. He did not express any opinion as to the actual cause of the death which did occur.

The applicant's relationship with the deceased

[30] The prosecution led evidence from a considerable number of witnesses demonstrating the nature of the relationship between Mr Glattback and Ms Scipione. A Lee McDowell, who had lived in the downstairs area of their residence from September 1999 until October 2000, described Mr Glattback as being rude and derogatory towards Ms Scipione in a way that made Mr McDowell feel uncomfortable, and that Mr Glattback would start an argument which would become a verbally abusive attack on her. These could be about matters Mr McDowell regarded as not serious, but which would cause Mr Glattback to become quite enraged. He recalled Mr Glattback telling Ms Scipione "You're fucking useless, you can't even kill yourself. I'll drain the pool and you can jump off the balcony into the pool and do it properly this time"; quite often during an argument Mr Glattback would stare at her face and tell her that he wished she was dead. He recalled an occasion when Mr Glattback struck her above the left ear with his right hand, and when she screamed "Don't hit me", Mr Glattback said "What do you mean? I didn't hit you". Mr McDowell found that strange.

[31] In that same period, in September 2000, Ms Scipione's father visited their home intending to stay the night. When Mr Glattback arrived home from work he angrily abused Ms Scipione at dinner for not putting the bib on their child. Mr Scipione decided he could not stay, and unsuccessfully attempted to persuade his daughter to leave with him.

[32] In that same month Mrs Draper (who had previously heard Mr Glattback loudly abusing Ms Scipione "Many, many times", telling Ms Scipione that she was "fucking stupid" and "Next time you try and commit suicide, make sure you're doing it", and "How about we empty the pool … you jump in head first"), heard some loud yelling from Mr Glattback. The words included "You're a fucking moron", and on that day she saw that Mr Glattback was actually standing in the driveway. Hearing abuse was nothing new, since on most weekends she would hear Ms Scipione being noisily abused, but seeing him standing there in the driveway led to Mrs Draper walking over and confronting Mr Glattback. She told him she was sick and tired of the yelling and shouting, and told Ms Scipione that she did not have to put up with that. Mr Glattback continued to yell at Ms Scipione, ignoring Mrs Draper, saying "Look what you've fucking well done now. Get that fucking kid inside"; and then approached Mrs Draper with clenched fists, yelling "You don't fucking live here. She's a fucking psycho and should be in … a straight jacket". When Ms Scipione started to walk toward Mr Glattback he hit her on the face very hard with his hand, knocking off her glasses, and Mrs Draper then said that what he had just done was a criminal offence and an assault. Mrs Draper called the police.

[33] Mr Glattback has a hearing disability which could explain why statements he made to Ms Scipione were said loudly. It does not explain why Mrs Draper, who heard many statements he made, swore that she had never heard him once say anything nice to Ms Scipione. She had noticed that in the last six months before her death Ms Scipione had begun saying things back to Mr Glattback, such as "Piss off", "Get out of my life", "Get out of this house", "Get away from me", "Leave me alone", and "that sort of stuff".

[34] Police were again called to the residence by neighbours on 29 March 2001, and Mr Glattback told the officers that there had been a fight over the couple's child. A

little later, when picking a skipping rope up off a lounge chair, he shouted in the presence of the police that "if I go to jail tonight, I'll kill her."

[35] The prosecution called a body of other evidence in furtherance of the picture given by those police officers, Mrs Draper, and the boarder. Another neighbour, Andre Ayton, who lived diagonally opposite Ms Scipione's residence, recalled being able to hear a male voice calling loudly and "Sort of swearing and berating and belittling" on a "Reasonably [regular]" basis, and "Mainly at weekends". He was able to identify the house as Ms Scipione's. Sonja Ayton described hearing "Always just one voice … . Just the male voice", probably "three or four times a week", speaking in a loud aggressive voice.

[36] At least one other neighbour, who also described repeatedly hearing loud angry words from Mr Glattback, echoed Mrs Draper's evidence that that neighbour had never heard Mr Glattback speak civilly to Ms Scipione. Evidence was called from a number of persons who had heard Mr Glattback abusing Ms Scipione while those two people were working together on renovations to their house during June and July 2002. Another neighbour, Colin Neilsen, described consistently hearing what sounded like an argument coming from their home, at nights, two or three times a week; and that what he heard was abusive language used towards Anita. He recalled hearing "fucking shut up", "shut your fucking mouth", and that Mr Glattback would call her a "stupid fucking bitch" and "things like that".

Anita Scipione's final 24 hours

[37] Mr Neilsen particularly recalled Thursday 11 July 2002, and hearing Mr Glattback speaking on a mobile phone and saying "Have you lost your fucking mind? You're a fucking idiot". He said Mr Glattback "kept on and on and on and on". The telephone call Mr Neilsen said he could not help but overhear is undoubtedly explained by the evidence of Sherilee Jury, who had met Mr Glattback in April 2002 and who started then going out with him on a regular basis. They would meet in the city for lunch and go out together in the evening, and she understood that they had agreed to announce an engagement on Christmas Day 2002. They were to be married in March or April 2003, and had looked at several engagement rings. Mr Glattback had told her he was single, and that his house was under construction and he did not want to her see it since it was a mess.

[38] On Thursday 11 July 2002 Ms Scipione telephoned Ms Jury and told her that Ms Scipione was Mr Glattback's wife, and still living with him; and it became apparent to Ms Jury during the call that Ms Scipione was speaking from a mobile phone while standing outside Ms Jury's residence. Ms Jury then heard Ms Scipione speaking on the telephone to someone else, and Ms Jury called the police.

[39] Ms Jury also called Mr Glattback "quite angrily" at least "a couple of times" in an attempt to have Mr Glattback come and remove Ms Scipione, and at some later stage that day he did arrive in person. She recalled his explaining that he had not come earlier, when she first telephoned him asking him to remove Ms Scipione, because "he would kill her" (Anita Scipione) "if he'd come close to her… that's the words that he used". That conversation was held with Ms Jury around 4.00 pm on 11 July.

[40] At about 1.00 am on 12 July Mr Draper, Mrs Draper's husband heard what he described as footsteps running down the hallway of the Glattback/Scipione

residence and noises sounding like "shoving and pushing and I distinctly heard someone being shoved against the wall", and Anita give a scream "in defence". The screaming lasted three or four minutes, and the sound of shoving and pushing was heard a couple of times. He was used to hearing their domestic disputes, which he described as an "extremely regular occurrence" and incessant; they consisted of extremely loud yelling by Mr Glattback who belittled Ms Scipione. He too had heard "You're stupid", "You're an idiot", "You haven't got a fucken brain", and the suggestion she jump into a empty pool.

[41] Another neighbour, Bronwyn Midson, who had heard Mr Glattback screaming abusively at Ms Scipione "every day" during June and July 2002 while renovations were being done both to the Midson home and the Scipione/Glattback residence, noticed a light on the Glattback/Scipione residence at about 6.00 am on 12 July 2002. She considered that unusual, because usually she did not notice them up and about until 8.00 am in the morning. Some time between 8.30 am and 9.10 am Ms Scipione telephoned and cancelled a dental appointment she had that day, and Mr Glattback took their son to preschool at 9.00 am, that being the first time he had done that. Mr Glattback told the teacher that Ms Scipione had had "one too many Cointreaus last might [sic]." Mr Glattback appeared calm, friendly, and was loving towards the little boy. The next time Ms Scipione was heard from was when Mrs Draper heard her pleading for her life at 10.15 am.

The grounds of appeal

[42] Mr Glattback's first ground of appeal is that the verdict cannot be supported having regard to the evidence, because a reasonable jury could not have been satisfied beyond reasonable doubt that the cause or causes of death was or were neck compression, and or alternatively, asphyxiation by use of the plastic bag, as opposed to any other possible cause of death raised on the evidence. Mr Callaghan, his counsel on the appeal, pointed to the summation of the Crown case by the trial judge in these terms[1]:

> "Well, the Crown case on this point is that the accused killed Anita by compression of her neck or asphyxiating her or both, though other factors may also have been operating concurrently: for example, narrowing of the coronary artery. The Crown says that may or may not have been happening, doesn't matter. He killed her by compression of her neck or by asphyxiating her, and the Crown case accepts that unless you're satisfied of that beyond reasonable doubt you should acquit."

[43] Mr Callaghan's submission was that while the evidence conclusively established there had been an instance of neck compression, it was equally conclusive that this had occurred some hours before death, causing the inflammation indicated by neutrophil reactions; Professor Naylor's opinion that neck compression was a cause of death either by itself or in combination with other factors rested on the proposition that there had been a second bout of neck compression immediately prior to death, and Mr Callaghan submitted that that was simply speculation. So too was the proposition that death was caused by plastic bag asphyxiation. He submitted that the evidence did not exclude death by Ms Scipione having swallowed her tongue while concussed, or choking on her own vomit, or as a result of the combination of her head injuries and her heart disease.

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1 At AR 587

[44] Mr Callaghan's submissions accurately reflected the evidence and were carefully and well presented. I respectfully consider that they overlook that Mrs Draper heard Anita Scipione begging Mr Glattback not to kill her. There was no suggestion on the appeal that those words were inadmissible, and it was open to the jury to conclude that whatever was happening in the garage had caused Anita Scipione genuinely to believe that Mr Glattback was doing or about to do things to her which would kill her. Proof that she was able to speak loudly at that moment, that she had an apparent terror of imminent death from his actions, and that she communicated that to him, was all relevant to proof that he had intentionally caused her death which happened within the next 15 minutes. The words she spoke were admissible in the same way as the words which were spoken by the person who called the Echuca telephone exchange in *Ratten v R* (1974) 131 CLR 510.[2]

[45] Mr Callaghan did not argue that the Crown had to prove death by one of the two means it advanced to the exclusion of the other, or that the jury had to be unanimous as to the actual means of death. He argues that a conclusion of death in either of those two suggested ways was no better than speculation. The proposition cited from *Giannetto v R*[3] in the joint judgment of Fitzgerald P and Moynihan J in *R v Leivers & Ballinger*[4], that a cardinal principle is that the jury must be agreed upon the basis on which they find a defendant guilty, would ordinarily mean in a case of this nature no more than that before the jurors could find Mr Glattback guilty of murder, they had to be unanimously agreed beyond reasonable doubt that Mr Glattback committed a willed act or omission that was a substantial or significant cause of Ms Scipione's death, and that that act or omission was done with an intent to cause her death or cause grievous bodily harm to her.

[46] However, the citation from *Giannetto* repeated in *R v Leivers & Ballinger* states as a second cardinal principle that a defendant must know what case he has to meet. Mr Glattback would have understood that case to be that he, having the necessary intent, by one or other of the two nominated ways caused the result – her death – made criminal by the law. The directions the learned judge gave the jury were accordingly accurate, though favourable to Mr Glattback. Although the prosecution did not have to prove the exact mechanism of her death, procedural fairness requires that, as observed in *Giannetto,* a prosecution case generally has to be established in the terms in which it is put.

[47] Despite Mr Callaghan's careful submissions to the contrary, I consider the Crown case here was established in those terms. The evidence the Crown led explained two possible ways in which Mr Glattback could be found to have caused Ms Scipione's death, if the jury were satisfied beyond reasonable doubt that he had the necessary intent. It was open to the jury to accept Professor Naylor's opinion as being much more than speculation, and being a very experienced pathologist's view formed after a meticulous examination, and to conclude that Mr Glattback had caused the death by compressing Ms Scipione's neck immediately before she died; or to find that Mr Glattback asphyxiated Ms Scipione using a plastic bag. When considering asphyxiation by a plastic bag, the jurors could reasonably have regard to Mr Glattback's acknowledgment, in his description of events, of how his usage of it had caused Ms Scipione to say he was going to kill her. That admission lifted the

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2 Described at CLR 529

3 [1997] 1 Cr App Rep 1

4 [1999] 1 Qd R 649 at 657

possibility of death from that cause above the level of speculation. They were not required to be unanimous as to which way she was killed, but were entitled to conclude "if it was not the one, then it must have been the other."

[48] That quotation is from an article "Satisfying the Jury"[5] by Professor Sir John Smith, quoted in *R v Cramp*[6] in the judgment of the court given by Barr J, who (at A Crim R 212) considered that even expressing a jury requirement that way stated the relevant principle too widely; the correct proposition is that a jury could properly convict where alternative bases for conviction – on which there was not unanimity but unanimity as to the verdict – did not involve materially different issues or consequences. That is how this court expressed the position in *R v Lievers & Ballinger* at Qd R 662. In this matter what the jurors were entitled to regard as purely speculative were the suggested mechanisms of death other than the two upon which the Crown relied, and to dismiss those other ones from their consideration. They were entitled to place great weight on Ms Scipione's apparent realisation she was about to die, when deciding whether the prosecution had proved beyond reasonable doubt that Mr Glattback had killed her in one of the two possible ways the Crown advanced.

What followed from the relationship evidence

[49] The evidence about their relationship was led by the Crown as a circumstance from which it invited the jury to reject most of what Mr Glattback said to the investigating police officers, particularly what he claimed to have said to Anita Scipione in the final minutes of her life, and how he claimed to have acted in those. The Crown submission was simply that the jury could conclude from that relationship evidence that Mr Glattback would not have spoken to her in the manner he said, in which he showed apparent concern for her welfare, a concern persisted in despite the unresponsive, violent, and irrational behaviour by her which he described. The Crown also relied on that extensive evidence about the relationship as very relevant to proof that whatever he did, it was done with an intent to kill.

[50] Mr Callaghan agreed in argument that the jurors could have concluded the following matters from that relationship evidence, and that it would have been appropriate for the judge to so direct them, although the learned judge did not. Firstly that the relationship between Mr Glattback and Ms Scipione was one in which he had a pervasive and constantly expressed hostility and contempt for her. Secondly, that he made no effort to control his expression of that hostility. For example, he had assaulted Ms Scipione in the presence of a neighbour, and apparently unlawfully; and had threatened to kill her in the presence of two police officers, should those police officers do what was possibly their duty under the appropriate legislation protecting people from domestic violence at the hands of others. When in Mr McDowell's presence, Mr Glattback had struck Ms Scipione, and had appeared not to comprehend that he had done that. His expressing that unguarded hostility in the presence of those police officers had exposed him to the risk of immediate removal from the premises by the police; his assaulting Ms Scipione in Mrs Draper's presence had exposed him to the risk of prosecution for assault; yet he made no apparent attempt in either situation to control himself.

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5 [1988] Crim LR 335 at 344

6 (1999) 110 A Crim R 198 at 207

[51] Thirdly, that he would not have acted on 12 July in the manner in which he claimed to have done. That is, he would not have acted in the reassuring, calming way, attempting to assist Ms Scipione, that he described. He had not been described as acting in that fashion towards her on any other occasion.

[52] Mr Callaghan accepted that the jury could legitimately use the evidence they had heard to draw those three described inferences, and that it was not appropriate to give any warning that would prevent them from drawing them. Mr Callaghan accepted as well that on 12 July an issue existed between Mr Glattback and Ms Scipione, namely her conduct on 11 July when she went to the premises of the other woman with whom Mr Glattback had formed a relationship and made that woman aware that Mr Glattback and Ms Scipione were then living together and had a child. Mr Callaghan also accepted that the jury could conclude that Mr Glattback had expressed lethal anger about that conduct on 11 July, when he learnt of it.

[53] Focusing on those last mentioned matters of fact, which were well established, a fourth inference – and one Mr Callaghan agreed was open to the jury to draw – was that there was a probability that on 12 July Mr Glattback would have been extremely violent to Ms Scipione; and a fifth inference was that he would have thought on that date that a lethal attack on her was justified. Mr Callaghan accepted that all of those five inferences could be urged by the Crown upon the jury, as inferences which had a basis in logic and from the evidence described. He also, of course, quite correctly submitted that there were arguments to be made against drawing each described inference. Accepting that submission, the conclusions suggested were ones open to the jury, and critically relevant to proof of intent. The evidence entitled the jury to be satisfied beyond reasonable doubt that death was caused by neck compression or asphyxiation, and was accompanied by an intent to kill, and ground of appeal number 1 should be dismissed.[7] Likewise ground 2, an amended ground of appeal should be dismissed: it reads

> "His Honour the learned trial judge erred when he failed to disabuse the jury as to the prosecution contentions that the offence of murder could be proven on the basis that:-
> - neck compression was a cause of death;
> - an intent to do grievous bodily harm may have co-existed with the act or acts which caused the death."

[54] The third ground of appeal was in these terms:

> "Given the nature and extent of the evidence about the Appellant's abusive disposition, His Honour the learned trial Judge erred when he failed to:
> (a) inform the jury as to the basis upon which this evidence was admitted; and
> (b) warn the jury 'against too readily making an assumption of the murderous intent that is necessary before a person is guilty of murder.'"

The directions the learned trial judge did give included:

> "If you have developed any sort of personal dislike of the accused – and you may have, as counsel didn't shrink from telling you, he's not, on the evidence, a very nice person – you have to put that to one side.

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7 That ground is described in [10] herein

> He's on trial for murder, not for being an unpleasant person, not for domestic violence."[8]

The argument put to the jury

[55] When listing the circumstantial matters upon which the prosecution relied, the learned judge repeated for the jury the Crown counsel's argument that one circumstance included Mr Glattback's apparent silence during the critical 15 minutes, which silence the Crown contended was abnormal and which indicated that something out of the usual was happening. That submission presumably relied on Mrs Draper's evidence that she normally heard Mr Glattback rather than Ms Scipione. The learned judge also repeated the argument the Crown made, that Mr Glattback and Ms Scipione had a fractured relationship and that that was a matter upon which the jury could rely, in that the jury could conclude there had been an earlier assault upon Ms Scipione in the small hours of the morning, evidenced by the broken cartilage, the black eye and the stippling injury, the noises heard by Mr Draper, the cancellation of the dental appointment, and the fact that Mr Glattback took the child to preschool that day. The judge also reminded the jury of an argument that they might find that more than usual fury existed on the part of Mr Glattback towards Ms Scipione, and that that fury might loosely be called motive; and of the fact that the Crown relied on the statement made to Ms Jury, not as evidence that Mr Glattback at that moment had an actual intention to kill Ms Scipione on 11 July at 4.30 pm, but as evidence of his general loathing towards Ms Scipione.

[56] Mr Glattback's experienced senior counsel who conducted the trial was quoted by the learned judge as having submitted that the violence described in the relationship had been "low grade", not of the sort that would lead to the conclusion that Mr Glattback was likely to commit murder, and that it was no consequence that there was yelling or abuse heard by neighbours at any particular time, because that was normal in that relationship. Towards the end of the directions the judge repeated that the jury should not be swayed by emotion, and that Mr Glattback was on trial for murder, and not for domestic violence.

[57] Neither the Crown counsel nor Mr Glattback's counsel asked the learned judge to give the jury any further directions about the relationship evidence or how it might be used, or to give either of the directions which it is now submitted on appeal should have been given. Rather, defence counsel sought to gain some forensic advantages from that relationship evidence. Those advantages were all legitimate, including establishing Mr Glattback's apparently quite calm demeanour at the preschool that morning, and the proposition that from Mr Glattback's perspective, his relationship with Ms Scipione was over, and that she was by then the only uncontrollably angry one.

[58] The redirection counsel did seek, and which was given, was a direction that unless the jury was satisfied beyond reasonable doubt that Mr Glattback's version given to the police was not correct, then they should acquit. The further directions Mr Callaghan submits the judge ought to have given were ones Mr Callaghan had difficulty in formulating, but were essentially that the jury should have been warned not to reason that because Mr Glattback was shown to be a bully, a misogynist, and

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8 At AR 570

a domestic tyrant, that he was the type of person who kills their partner and that therefore that was what he had done.

[59] The lack of any application for directions about the evidence of the party's relationship means that this appeal falls within that class described in the joint judgment of McHugh and Gummow JJ in *Dhanhoa v R* (2003) 199 ALR 547 at 555. Their Honours wrote there that when no redirection concerning evidence is sought at a criminal trial, and where a convicted person then seeks to quash a conviction on the ground that the trial judge failed to direct the jury concerning some part of the evidence, that appellant could only rely on a failure to direct the jury if he or she established that that failure constituted a miscarriage of justice. None would have occurred unless that appellant demonstrated that the directions should have been given, and that it was reasonably possible that the failure to direct the jury may have affected the verdict.

[60] As to whether the direction should have been given, Mr Callaghan relied on a number of decisions, including *R v W* [1998] 2 Qd R 531 at 534, where no warnings had been given against the possible misuse of evidence of other uncharged acts of sexual misconduct, this court remarking that "one can only guess what the jury thought they were supposed to make of that evidence". The court cited McHugh J in *BRS v R* (1997) 191 CLR 275 at 305 where his Honour had written that if evidence revealing a criminal or reprehensible propensity is admitted, the trial judge must give the jury careful directions concerning the use which they can make of it; if the evidence was admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use it for the relevant purpose and none other. Mr Callaghan submitted that those remarks by McHugh J in *BRS v R*, and observations by Kirby J in the same case at CLR 329, accorded with the statement of Hayne J in *KRM v R* (2001) 206 CLR 221 at 264 that:

> "As McHugh J points out in his reasons, the circumstances in which propensity evidence may be adduced are limited, and the use to which a jury may properly put propensity evidence is also limited. If evidence is led of misconduct by an accused which does not form the subject of a charge being tried, a warning against the danger of propensity reasoning will ordinarily be required."

[61] Mr Callaghan pointed to the fact that of the 55 witnesses called for the Crown, almost a third of them gave evidence relevant only to the relationship; others, who gave evidence of direct relevance to the commission of the offence, added to the considerable volume of testimony on the topic. He reminded the court of its observations in *R v Chevathen & Dorrick* [2001] QCA 337, at [42], where the court wrote that in that case it was necessary that some warning be given against misuse of "the evidence of the earlier assaults, and in particular to warn the jury against convicting them of murder merely because they thought that they were bad or callous people".

[62] The difficulty for a judge in this case in fashioning any further directions to the jury in the terms argued for by Mr Callaghan is that no directions could properly be given which prevented the jury drawing the inferences described in [50] - [53] herein, which Mr Callaghan accepted that the relationship evidence could establish. The trial judge did give one very general direction, and it is difficult to see that there was much room for anything more. The Crown did rely on Mr Glattback's past words and acts to persuade the jury to infer intent in the circumstances, and to

convict him of murder, not because he was the type of person who would murder his partner, but because the jury could properly infer that he had. That ultimate inference that he had did derive in part from the relationship evidence, because of the described inferences legitimately available from it.

[63] The remarks of this court, given by Thomas JA in *R v Self* [2001] QCA 338 are relevant. His Honour there wrote[9] that:

> "In my opinion the use of evidence of the appellant's previous aggressive acts to the child was not limited to 'background facts'. This evidence showed a recurring antipathy or animosity towards the child which might properly assist a jury to infer intent to cause grievous bodily harm. In offences of violence, and particularly in homicide cases, evidence of previous dealings between an offender and the victim and of his attitude toward the victim commonly assists in the drawing of such an inference. Sometimes evidence of previous acts of hostility to the victim is received as evidence of motive, sometimes under the more general guise of relationship between the parties, and sometimes as evidence of state of mind."

A little later he wrote:[10]

> "In the context of such a case, a warning that such evidence should not be used to conclude that the accused was the kind of person likely to commit the offence has the capacity to confuse. For example a direction that 'you can use this evidence to show antipathy but not propensity' might seem a little precious, and might be taken to contradict or obfuscate the legitimate use of the evidence."

A little later again his Honour wrote that what is prohibited by the decisions in the High Court in *BRS* and *Gipps v R*[11] is:

> "reasoning from stereotype and the use of prejudice based on a general character trait. That is to say a jury must not reason along the line that an accused person is likely to be guilty of a particular offence because he is shown to have a sexual propensity or because he is generally violent or as the case may be."[12]

[64] I respectfully agree with what Thomas JA therein wrote, and that the appropriate direction in this matter was limited to one that the jury should not reason that Mr Glattback was likely to commit murder because he was shown to be generally violent and abusive towards Ms Scipione. That was not how the Crown put its case, which particularly depended upon Mrs Draper's evidence of the events of 12 July 2002, and its implications, which specific implications were considerably strengthened by the inferences properly available from the relationship evidence generally. The direction actually given was much the same as that which I accept needed to be given, and senior counsel at the trial was correct in the view apparently taken that no further direction was needed or warranted. I am therefore satisfied that the appellant has not established that further directions should have been given, and nor that any failure to give them may have affected the verdict. I would dismiss that ground of appeal.

[65] It follows that the appeal against conviction should be dismissed.

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9 At [31]
10 At [32]
11 (1998) 194 CLR 106
12 At [33]