SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lennox* [2007] QCA 383
PARTIES:	**R** **v** **LENNOX, Craig Anthony** (appellant)
FILE NO/S:	CA No 284 of 2006 SC No 792 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2007
JUDGES:	Williams and Holmes JJA and Dutney 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 murder and stealing – where appellant pleaded guilty at trial to stealing and manslaughter – where plea of guilty to manslaughter not accepted – whether evidence led at trial could support a finding of the relevant intent – whether counsel for the appellant at trial failed to properly advise the appellant in relation to entering a plea of guilty to manslaughter CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – where police interview was conducted with the appellant – whether objection should have been taken to the admission of video evidence of interview in circumstances where there was not strict compliance with s 249 *Police Powers and Responsibilities Act 2000* – whether there was substantial compliance when advising the appellant of his

rights

Police Powers and Responsibilities Act 2000 (Qld), s 249, s 253
Police Powers and Responsibilities Regulation 2000 (Qld), reg 34(1)

Edwards v The Queen (1993) 178 CLR 193, cited
Peacock v The King (1911) 13 CLR 619, cited
Plomp v The Queen (1963) 110 CLR 234, applied
R v Ali [2001] QCA 331, cited
R v Box & Martin [2001] QCA 272, cited
R v Burdett (1820) 4 B & Ald 95; 106 ER 873, cited
R v Ciantar [2006] VSCA 263, cited
R v Makin (1893) 14 LR(NSW) 1, applied
R v Rice (1996) 2 VR 406, applied
R v Ryan (1906) St R Qd 15, cited
R v Wehlow (2001) 122 A Crim R 63; [2001] QCA 193, cited

COUNSEL: J A Griffin QC, with D F Mylne, for the appellant (pro bono)
M J Copley for the respondent

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

[1] **WILLIAMS JA:** The appellant was convicted after a trial in the Supreme Court of murder. He appeals against his conviction and was given leave to amend his grounds of appeal so that they read:

> "1. That the conviction of the appellant on 21st September 2006 was unsafe and unsatisfactory and the verdict ought to be set aside on the ground that it is unreasonable and cannot be supported by the evidence.
>
> 2. That the trial was rendered unfair and a miscarriage of justice occurred because:-
>
> (a) no objection was taken to the admission into evidence of the record of interview conducted on 29th November 2004;
>
> (b) the appellant was not properly advised as to the strength of the Crown case in respect of the alternative verdict of manslaughter in the event that the record of interview conducted on 29th November 2004 was not admitted into evidence by the trial judge;
>
> (c) The appellant was not properly advised in relation to entering a plea of guilty to manslaughter."

[2] It should be noted at the outset that the appellant, when arraigned, pleaded guilty to manslaughter but that was not accepted by the prosecution.

[3] The issues raised on the appeal can be best understood if relevant facts are set out roughly in chronological order as they became known.

[4] The deceased, an Asian women who worked as a prostitute, booked into the Caboolture Motel for the purpose of plying her trade there. The booking was for 16 and 17 November 2004. She was seen by a cleaner at the motel on the morning of 17 November and at about midday she took a taxi from the motel to the Commonwealth Bank which was a short distance away. She asked that cab driver to quote a fare for taking her to Kawana. The evidence is that the driver quoted $70, she then asked would he do it for $60, to which he replied no. The driver left her at the Bank. The motel manager on 18 November went to the room which had been allocated to the deceased; she had not checked out of the motel on the 17th in accordance with her booking. Items of personal property belonging to the deceased were seen in the room. The manager dialled the mobile telephone number the deceased had put on her booking slip but there was no answer; the service provider said the number was unobtainable or switched off.

[5] The manager notified the police and on 20 November police attended at the motel and took possession of the deceased's property. Thereafter they began a missing person's investigation with respect to her.

[6] That investigation revealed that a Commonwealth Bank credit card belonging to the deceased had been used subsequent to her disappearance. That led investigating police to Anthea Dale Schirripa and Michael Dominic Schirripa on 23 November. Anthea Schirripa gave evidence that on 17 November the appellant (who was a friend of her husband and herself) arrived at her house and "handed over a couple of cards, credit cards and a key card". A woman named Halie McAleese was also present and the appellant gave her a watch. The appellant then asked could he have a shower. The witness said there were two cards, a Mastercard and a key card. In her evidence Schirripa said "we were talking about credit cards and how they can be used, and he just pulled it out and said, "this won't be reported for awhile", "for a long time", actually he said, "here, see what you can do".

[7] That witness also said with respect to the appellant:

> "Normally he's really quiet, really polite. That day he was quite erratic, quite talkative, quite nervous. I ask him – he had a scar – like, busted knuckles. I asked him what happened and he just – he avoided the question and asked if he could have a shower. And then – yeah, he was acting just different, just not normal, yeah."

[8] Schirripa admitted that the credit card was used on some three occasions. The police took possession of the card on 23 November.

[9] Under cross-examination the witness conceded there were some variations between her evidence in court and her initial statements to police officers. There was no reference in those initial statements to her seeing "busted knuckles". Those statements did contain a passage, which she agreed to in evidence, in which she recalled the deceased's name being on the credit card and asking the appellant who the person was; the appellant responded to that that he did not know who the person was.

[10] Under cross-examination she said the appellant "used to have cuts on his hands from work, but this day it was quite bad ". She also said: "I wouldn't say completely busted but they were quite bruised and there was a little bit of cuts on his hands".

[11] Michael Schirripa also gave evidence that the appellant came to his residence on 17 November 2004 and handed over a credit card and another document. The witness said: "I asked Craig where he got the card, and he said there was no chance of it being reported …". Under cross-examination he conceded that in his initial statement he said: "He gave me the impression that he knew the person, because he said the card wouldn't be reported stolen for two or three days".

[12] McAleese gave evidence that on the 17th the appellant gave her a watch and a phone. She "hocked" the watch at Kippa-Ring Cash Converters.

[13] As a consequence of the information the investigating police obtained from the Schirripas and McAleese, Senior Constable Howard interviewed the appellant on 23 November 2004 at the Caboolture police station. That interview was video recorded. It was not disputed that in conducting that interview the police complied with s 249 of the *Police Powers and Responsibilities Act 2000* (Qld). He was told that the police wished to ask him some questions about a Commonwealth Bank key card in the name of the deceased. One of his initial responses was: "Yeah if I handed it to yous, if I didn't give the card to them well then I wouldn't be in the shit." He clearly admitted giving the card to the Schirripas. He was then asked how did he come by the card and the following is a summary of his relevant answers:

> "Oh next doors to the um poker machine. … Um just where the ashtray was there's um oh just a piece of paper a um, oh what do you call it, a keno piece of paper and there was card. … Um I just had a look at it and then just put it back down and things … machine and then picked the card up and just put it on the um … father's, put it in the ute … I'm still thinking about it like when I was sitting in there, it was a stupid thing to do. Um should have just handed it straight over to the um counter at the tavern management."

[14] He then went on to state that the place he was talking about was the Captain Cook Tavern at Kippa-Ring.

[15] There is no need to refer to other parts of that lengthy record of interview other than to the fact that towards the end the police informed the appellant that the "card actually belongs to a woman that's gone missing" and asked him whether he knew "anything about this missing woman". The reply from the appellant was: "No I don't". He said that he had heard nothing about a woman being missing. Then came the question: "Now mate just one other thing. Um in relation to um a paper we found in your car. Um there's some, in the personal columns you've got certain things cut out of it that relate to prostitutes. … What's the story with that?" The appellant's response generally indicated some desire to contact a prostitute. Then again the question was asked: "Your saying you don't know anything about the woman that owned the card" to which he replied "No I don't. Na."

[16] On the afternoon of 27 November 2004 two men were riding motorcycles through the Elimbah State Forest. They were initially attracted by a smell and on making investigations found a body wrapped in a roll of carpet. They immediately contacted police, and the body was eventually identified as that of the deceased.

[17] Police officers attended the scene where the body was located. It was then noted that there was a garbage bag around the head of the deceased and that it was tied

with grey duct tape. Protruding from beneath the garbage bag was portion of a towel.

[18] The pathologist who performed the post mortem was Dr Milne. He went to the Elimbah State Forest on 27 November and saw the body where it was located and before it was moved. He then noted that parts of the body were skeletonised so that a lot of the bones were exposed and a lot of soft tissue was absent. The body was wrapped in carpet underlay. He noted that the head was wrapped with a plastic bag over a towel. Because of the state of decomposition no attempt was made to move the body to any significant degree before it was carefully transported to Brisbane for post mortem. That post mortem was performed on 28 November 2004. Observations by Dr Milne and a police officer, Karen Murray, who was also present, outlined how the body was trussed up. The head was covered with two towels, over which there was a garbage bag, and those items were secured with grey duct tape. Constable Murray wished to take possession of those items and she attempted to remove the coverings without cutting the tape. The grey duct tape was however so tight that she had to cut it in three places in order to remove the garbage bag and the two towels. It was confirmed that there was no tape actually affixed to the head. The constable was able to state that the tape was above the jaw or the neckline and round roughly the rear of the head; she was unable to be specific as to where it was in relation to eyes and nose. Photographs were taken during the time Constable Murray was removing those items; those photographs were tendered.

[19] The following is a summary of the evidence in chief of Dr Milne. The body was clothed in a blouse and knee length dress; there were no tears or damage to either the blouse or the dress. The head was wrapped in a towel and over the towel was a dark green polyethylene bag. Two grey masking tapes were tied around the mouth of the plastic bag, with parts of the tapes involving the towel. The body was in a state of advanced decomposition. Because of that it was not possible to assess the brain for any injuries or haemorrhages; there was no skin on the face. There were no obvious fractures of the facial bones but "the nasal aperture appears to be asymmetrical with a possible defect on the right nasal bone. This may represent a chip fracture of the right nasal bone." A mild traumatic injury could cause such a fracture, including a punch or an elbow to the face. The hyoid bone and thyroid cartilage were intact; there were no injuries to those structures and that was of significance because strangulation could cause an injury to those structures. There were no recognisable body organs. The period of decomposition was consistent with death occurring about 10 days prior taking into account weather conditions and the amount of insect infestation of the body. No further injuries were detected in the body and no cause of death could be identified. A natural cause of death could not be ruled out. Death could be occasioned by smothering through several potential mechanisms. Smothering can leave little or no sign of injury.

[20] During cross-examination it was put to Dr Milne that if some 11 or 12 blows were delivered to the head of the deceased he could not rule out that she suffered as a result of those blows a cardiac arrest. The doctor replied: "The lady would have to have had an underlying heart condition for that to occur, and because the heart was not there that can't be excluded." It was then put to the doctor that he could not exclude the possibility that she died from the bursting of a brain aneurysm. In the course of his reply the doctor said that "if someone is involved in an altercation it's theoretically possible that would put the blood pressure up [and] predispose to

rupture". He went on to say it was "an extremely unlikely scenario: but one he could not "completely exclude".

[21] Police again interviewed the appellant on 29 November. One of the contentions raised on the hearing of the appeal was that the interview was conducted in breach of s 249 (and/or perhaps s 253) of the *Police Powers and Responsibilities Act 2000*, and in consequence it ought not to have been admitted at trial. Because of that I will not at this stage detail relevant contents of that interview.

[22] Police took photographs of items in the appellant's vehicle on 23 November; those photographs were tendered. Amongst other things they show a copy of a newspaper on the front seat of the vehicle. That would have enabled the police, if necessary, to establish that the newspaper carried an advertisement from the deceased in the "personal column" offering sexual services. On 29 November police also went to the appellant's residence and located some carpet underlay in the garage and a roll of garbage bags in the lounge. Detective Sergeant McNab who located the underlay had also observed the body wrapped in underlay in the Elimbah State Forest. His evidence was that the underlay in the garage was "similar" to the underlay in which the body was wrapped. Sergeant Tysoe, a scientific officer, examined the appellant's vehicle on 30 November at the Hendra Police Station. On that occasion she located two rolls of silver grey duct tape in a tool box in the rear of the utility and also took possession of some grey duct tape from under the bonnet of the car, and a knife wrapped in duct tape. She also located two areas in the vehicle which gave a positive indication for the presence of blood. That was a presumptive test but no further tests were carried out with respect to that finding. Senior Constable McGregor, another scientific officer, examined the various pieces of duct tape located by Tysoe, and compared them with the duct tape taken from the body of the deceased. The evidence from McGregor was that there was a "similar consistency" [between the] tape taken from the vehicle [and the] tape taken from the body at the time of the autopsy. It had the "same diameter", and "same embossing" on it; the brand embossing was Nitto.

[23] Detective Gibbon said in evidence that on 29 November, when he conducted the interview with the appellant, he did not observe any injury to the appellant's hands. The prosecution admitted by consent that on a medical examination on 30 November there was no sign of injury to the appellant's fingers or hands; x-rays were also clear.

[24] Gibbon also gave evidence, by consent, that the police recovered the watch from Kippa-Ring Cash Converters and it was identified by one of the deceased's daughters as belonging to the deceased.

[25] It is now necessary to consider grounds 2(b) and (c) of the Notice of Appeal on the basis of what is outlined above (that is without taking into consideration the record of interview conducted on 29 November 2004).

[26] In those circumstances the case against the appellant would be as follows. Given the state of decomposition of the body of the deceased no cause of death was ascertainable. The deceased was found wrapped in carpet underlay similar to carpet underlay found at the residence of the appellant. The deceased was tied up with grey duct tape having marked similarity to duct tape found in the appellant's car. The appellant disposed of a credit card and watch belonging to the deceased and

advised the persons to whom he gave the card that it would not be reported for some time (or words to similar effect). The appellant lied to police as to how he came to be in possession of the credit card. The appellant lied to police when he said he had no contact with the woman who owned the card. Relying on the advertisement taken from the newspaper and found in the appellant's car, which included the deceased's phone number, a link could be established between the appellant and the deceased prior to her death. There was some evidence (possibly of little weight) that there was bruising observed to the appellant's knuckles at the time he handed over the credit card and watch.

[27] If the case was so presented to the jury there would have been a clear basis for the prosecution relying on the lies told by the appellant in the interview of 23 November as evidencing a consciousness of guilt as explained in *Edwards v The Queen* (1993) 178 CLR 193. Properly directed it would have been open to the jury to conclude the lies evidenced a consciousness of guilt to the crime of murder rather than manslaughter (see *R v Rice* (1996) 2 VR 406, *R v Wehlow* (2001) 122 A Crim R 63; [2001] QCA 193, *R v Box & Martin* [2001] QCA 272 at [7] and *R v Ali* [2001] QCA 331 at [43]).

[28] Against that background I have come to the conclusion that counsel for the appellant, prior to trial, was justified in concluding that the prosecution case against the appellant was strong, at least with respect to the alternative verdict of manslaughter, in the event that the record of interview of 29 November 2004 was excluded.

[29] An evaluation of the conduct of trial counsel is complicated by the fact that in his signed instructions prior to trial the appellant said: "The reason I have decided not to give or call evidence is that I have already provided my account of what happened in the interview to police and also the reconstruction." As trial counsel said in his affidavit, the "appellant had, from the beginning, given instructions that he had caused the death of the deceased." Trial counsel also said in his affidavit:

> "I advised him that these instructions were consistent with guilt to a charge of unlawful killing. He accepted this advice and indicated that he was willing to enter a plea to that charge but instructed me that he did not intend to kill her or do grievous bodily harm when he assaulted her. … I advised the appellant that a jury could convict him of murder by concluding that he caused the death of the deceased by smothering her or, if already unconscious, ensuring she was dead, thus showing that he intended to kill her or do grievous bodily harm. … I advised the appellant that it was imperative, in those circumstances, for the jury to consider evidence, consistent with his plea of guilty to unlawful killing, to show that he caused the death without either an intent to kill or do grievous bodily harm, and that the deceased was already dead when he wrapped the body of the deceased in the felt underlay, covered her face and head, and left her body in the forest. The second interview provided that evidence..."

[30] It is clear that, without the interview of 29 November 2004, the prosecution had a strong circumstantial case against the appellant and he was clearly at risk of being convicted in those circumstances of murder. It follows, in my view, that it cannot be said that the appellant was not properly advised in relation to his entering a plea of guilty to manslaughter. Nor can it be said, in my view, that the appellant was not

properly advised as to the strength of the prosecution case in respect of the alternative verdict of manslaughter if the record of interview of 29 November 2004 was excluded.

[31] I now turn to the record of interview of 29 November 2004. After some introductory questions the following exchange occurred between Detective Sergeant Gibbon and the appellant:

> "I warn you that you have the right to remain silent which means that you don't have to say anything, you don't have to answer any of our questions or make any statement as anything you do say or questions that you do answer or any statement that you do make will be recorded on the tape recorder.
> Yep.
> And that may be later given in evidence in court. Do you understand that?
> Yes.
> Okay. You also have the right to contact a friend or relative or a lawyer prior to any interview being conducted. Do you wish to speak to any, anyone at all?
> Na.
> Do you wish to consult a solicitor or lawyer before we conduct any interview?
> No.
> Do you wish to have, you have the right to have a friend or relative present in the interview. Do you wish to have someone else present here?
> No.
> Okay mate have I missed anything?"

[32] I have set out the above in accordance with my appreciation of what is on the video tape. The transcript placed before the jury does not show the appellant answering the question whether or not he wished to have anyone present at the interview; but it is clear that he gave a negative answer whilst the police officer was still speaking. Further, in my view it is reasonably clear from watching and listening to the video that the appellant clearly appreciated what was being put to him.

[33] It was submitted by counsel for the appellant that the quoted passages did not comply with the requirements of s 249 of the *Police Powers and Responsibilities Act 2000*. Relevantly that provides:

> "(1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may –
> (a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
> (b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning."

[34] Regulation 34(1) of the *Police Powers and Responsibilities Regulation 2000* (Qld) relevantly provides:

> "If a police officer must advise a relevant person of his or her right to contact a friend, relative or lawyer, the advice the police officer gives must substantially comply with the following –
> 'You have the right to telephone or speak to a friend or relative to inform that person where you are and ask him or her to be present during questioning.
> You also have the right to telephone or speak to a lawyer of your choice to inform the lawyer where you are and arrange or attempt to arrange for the lawyer to be present during questioning.
> If you want to telephone or speak to any of these people, questioning will be delayed for a reasonable time for that purpose.
> Is there anyone you wish to telephone or speak to?'"

[35] It was submitted that the questioning in this case failed to comply with the statutory requirements because the appellant was advised he could "contact" a friend, relative or lawyer rather than that he could "telephone or speak to" such a person. It was also said that the statement by the police officer was insufficient because it did not refer to "lawyer of your choice" and did not indicate that questioning would be delayed for a reasonable time to enable that to be done.

[36] The contention of counsel for the appellant is that if objection had been taken at trial to the admissibility of the interview that objection would have been upheld. It was submitted that there was a compelling case for the exclusion of the record of interview in the exercise of the court's discretion on the ground of unfairness. Section 10 of the Act recognises the continuing power of the court to exclude a record of interview on that basis.

[37] It is true there was not strict compliance with the requirements of s 249. But there could be no unfairness to the appellant arising from the fact that the police officer used the term "contact" rather than the words "telephone or speak to" a friend, relative or lawyer. Nor could there be unfairness arising from the fact that the police officer referred to "lawyer" rather than "lawyer of your choice". It is obvious that the appellant gave a very forceful negative response to that question which was asked of him. Further, there was no point in saying that the interview would be delayed to enable a friend, relative or lawyer to be present when the appellant was adamant he did not wish any such person to be present. In the circumstances the appellant has not demonstrated such unfairness as would justify the exclusion of the record of interview. The instructions given by the appellant to trial counsel provide an even stronger reason for saying that there was no ground for seeking to have the record of interview excluded. The appellant maintained that the record of interview contained his version of relevant events and it was that the version which provided a basis for submissions that the correct verdict was manslaughter rather than murder. Those considerations clearly outweighed any argument for the exclusion of the record of interview.

[38] There was also an attempt by counsel for the appellant to rely on s 253 of the Act which deals with the questioning of persons with "impaired capacity". That section only has operation if the police officer conducting the interview "reasonably suspects the person is a person with impaired capacity". Counsel at trial was in possession of a report from a psychologist that testing of intellectual functioning in May 2004 revealed some scores in the "borderline deficit" range. But there was also a report from Dr Fama, a psychiatrist, who examined the appellant on 8 June

2006. In that report Dr Fama said: "At interview, Craig has a normal range of emotional responsiveness. He conducts a conversation relevantly and coherently. In short, at this time he shows no signs of psychiatric disorder. . . . I would have thought his intellectual capacity to be from these tests in the low average range." Given the evaluation by Dr Fama it would have been virtually impossible for counsel at trial to establish that an interviewing police officer should have reasonably suspected that the appellant was of impaired capacity. The segment of the video recording I have viewed would not give rise to a reasonable suspicion that the appellant was of impaired capacity. In the circumstances the appellant would not have been able to mount an argument that the record of interview should have been excluded because of failure to comply with s 253.

[39] I now turn to the contents of record of interview of 29 November 2004. When asked what he could tell the police about the "missing lady" he replied, in effect, that he saw her the Wednesday of the previous week and was driving her to Kawana. He made an arrangement to have sex with her at the motel and did so, but she declined payment on the basis he would drive her to Kawana. The appellant said they met about 2.00 pm and left the motel 15-20 minutes later. Relevantly he said:

> "When we were driving I don't know what she's saying and I just kept on saying I can't understand you and she started getting um, depressive or whatever the word is. … And she wanted, I mean I pulled up and told her to get out and she started yelling and screaming. We argued and I couldn't understand her but one part was she, she said that she … I heard … I heard Toowoomba … and Toowoomba and from there I hit her several times and then realised she wasn't breathing. I panicked and put her w[h]ere yous found her."

[40] He indicated that he had driven a couple of kilometres north from Caboolture towards Kawana before stopping. That is when the deceased started an argument. Then came an answer in the interview to similar effect to what he had said previously:

> "Told her to get out and… She started um going off and but in that argument she was saying about Toowoomba. I don't know what she was talking about in Toowoomba and when I thought I heard say I'll kill you I said what did you say and she said I'll kill you so I smacked … in the head."

He said that he hit her four times when they were out of the car. He said that she went to throw her bag at him before he punched her. He said he just "hit her in the head" and "she went down". At a later point in the interview he said he hit her "in the jaw and the top of the head." He expanded on that by saying: "Like she collapsed. So I panicked and picked her up and put her in the car and then started … and then um I was elbowing her, she um made her sit up and then she wasn't um breathing." When asked how hard he hit her he replied "hard". He checked her pulse, she wasn't breathing, and he panicked. Then he drove towards Elimbah. He was then asked what he did when he got to the State Forest. He said he "wrapped her up and put her there". He said he used an "old packing, packing blanket" which was called "underlay". He got that from the back of his utility. He then got a garbage bag from the back of the ute (one of those you put your rubbish in) and put it "over her head". He then used some grey duct tape which he got out of the

toolbox and indicated he wrapped it around the general area of the deceased's jaw. He said he wrapped it around "say a half a dozen" times. A little later on he was again asked about punching the deceased and his answer was: "I hit her a couple of times um in the car; I pulled up, when she started to get aggressive. So I probably hit her probably a dozen times all up." He indicated that it when he first put her back in the car after punching her she was conscious but just collapsed a couple minutes after that.

[41] The appellant then indicated that after he hit her "a bit of blood came out of her nose. I had a um, a um little oh sweat towel in there, used that and she . . . and then she um collapsed about two minutes after." When asked what was the purpose of putting the bag over the deceased's head he replied he didn't know: "I just panicked". When asked what was his intention whilst hitting her, he replied: "I don't know just snapped and just hit her."

[42] The appellant then admitted that he took the deceased's handbag and ultimately put it in the rubbish bin at his home after taking the credit cards out of it. In subsequent questioning he admitted ultimately giving the credit card to Anthea and Michael Schirripa.

[43] The appellant, in answer to questions, outlined how he wrapped the body and trussed it up. He was asked "was there a practical reason for putting a bag over her head" to which he responded "no". He indicated that he thought she was dead when he wrapped her up.

[44] Finally in the record of interview the appellant admitted that an advertisement with the deceased's phone number taken from the personal column of a newspaper was located in his car. He admitted that he rang the number in that advertisement to make the arrangement to meet the deceased.

[45] Subsequent to the record of interview the appellant went with police officers to the motel and then to the State Forest at Elimbah. He pointed out various features to them which were relevant to the events in question.

[46] The appellant did not give evidence, but his counsel relied heavily on the record of interview of 29 November 2004 in submitting to the jury that the appellant should be acquitted of murder and found guilty of manslaughter. The contention of defence counsel was that the jury could not be satisfied beyond reasonable doubt that the appellant had either the intention to kill or to cause grievous bodily harm, and further, there was sufficient evidence of provocation to reduce what otherwise might have been murder to manslaughter. Those submissions were made in the context that the cause of death was unknown. Following the cross-examination of the pathologist, the proposition was advanced by defence counsel that the deceased died for some unexplained reason in consequence of being hit in the head by the appellant in circumstances where the blows were delivered without intention to cause death or grievous bodily harm and further where the nature of the blow struck was not such as to provide a basis for concluding that the appellant must have had such an intention.

[47] Given that the cause of death was unknown the prosecution did not restrict its case to death in any particular manner. It was left to the jury on the basis that death could have been occasioned either as a direct result of hard blows to the head or in consequence of being suffocated by the garbage bag being placed over the head and

tied with duct tape. It is not necessary for the prosecution to establish the precise way in which death was caused in order to secure a conviction of murder. In *Plomp v The Queen* (1963) 110 CLR 234 at 242 Dixon CJ said: "on the whole case I think it was reasonably open for the jury to be satisfied beyond reasonable doubt that the deceased had been drowned as a result in some way of the conscious agency of the applicant". In that case it was not necessary for the prosecution to identify precisely what the accused had done to cause death. Brooking JA in *R v Rice* [1996] 2 VR 406 discussed numerous cases where for a variety of reason (sometimes no body had been located) the cause of death could not be established yet the jury was entitled to conclude beyond reasonable doubt that the accused was guilty of murder. His analysis at 412 of the reasoning in *R v Makin* (1893) 14 LR(NSW) 1 is instructive on this issue. (See also *R v Ryan* (1906) St R Qd 15, *Peacock v The King* (1911) 13 CLR 619, and the passage from the judgment of Lord Tenterden in *R v Burdett* (1820) 4 B & Ald 95; 106 ER 873 quoted by O'Connor J in *Peacock* at 671.)

[48] The prosecutor in his address also relied on the following. The appellant disposed of the body of the deceased in an isolated place, wrapping it up so that it would be even more difficult to locate. He took from the deceased her handbag and her watch. He disposed of the handbag after removing credit cards from it and giving at least one to a friend with the observation that it would be some time before the true owner was located. He gave the watch to another person. It was for the jury to determine what credence they gave to the version of events contained in the appellant's record of interview of 29 November. His submission was that in all those circumstances the jury could draw the inference beyond reasonable doubt that the appellant murdered the deceased.

[49] All of the issues raised by prosecution and defence were canvassed by the learned trial judge in his summing up and no complaint at all was made with respect to the summing up. The case against the appellant was a circumstantial one and it was for the jury to determine whether or not in the circumstances they were satisfied beyond reasonable doubt that the appellant was guilty of murder.

[50] The jury could well have concluded that nothing in the record of interview afforded the appellant a basis for contending that the defence of provocation to a charge of murder was made out. The jury could well have disbelieved the assertion of the appellant that he believed the deceased to be dead when he placed the bag over her head and tied it with the duct tape. A reasonable juror may well have concluded that the only purpose in placing the garbage bag over the head of the deceased and tying it with duct tape was to ensure death. The jury was, of course, entitled to take into account all of the conduct of the appellant in the days following the events of 17 November in determining whether they were satisfied beyond reasonable doubt that the only inference to be drawn was that the appellant caused the death of the deceased with the requisite intention, be it to cause death or grievous bodily harm.

[51] In all of the circumstances I have come to the conclusion that the verdict of the jury was not unsafe and unsatisfactory as contended for by the appellant. The verdict was supported by evidence, and was not unreasonable. In the circumstances the appeal should be dismissed.

[52] **HOLMES JA:** I have had the advantage of reading the judgment of Williams JA. I gratefully adopt his account of the evidence and the issues in the case. I respectfully

disagree with his reasons to this extent: I do not think that the lies told by the appellant in the interview on 23 November – his denial of contact with the deceased and his lie about how he came to have her credit card – could, taken alone, have justified the inference of a consciousness of guilt of murder. That evidence was, in my view, intractably neutral as between murder and manslaughter. That is not to say, however, that those lies could not have been relied on, had the Crown so chosen, as a circumstance to be taken into account in a larger case[1].

[53] So far as the interview of 29 November is concerned, I agree with what Williams JA has said as to the lack of unfairness warranting exclusion in the form of the questioning. Such departures as there were from the requirements of the *Police Powers and Responsibilities Act 2000* (Qld) and *Police Powers and Responsibilities Regulation 2000* (Qld) were insignificant, and, moreover occurred in a context in which six days earlier the appellant had been given the necessary information. Like Williams JA, I do not think that the appellant could successfully have argued at trial for exclusion of that record of interview.

[54] That being so, I agree also with Williams JA that the verdict was not unreasonable. The jury was entitled to take into account the appellant's own admissions of delivering repeated blows to the deceased's head; of hitting her hard; and of hitting her with sufficient force to make her fall. Taken with the other circumstances, including the fact that the victim did indeed die, it was open to conclude that the appellant intended, at the least, to do an injury likely to cause permanent injury to the victim's health. A jury properly instructed, as this was, could reasonably arrive at a verdict of murder.

[55] **DUTNEY J:** I would dismiss the appeal for the reasons given by Williams JA. I agree with those reasons and have nothing to add in relation to ground 2 of the amended grounds of appeal.

[56] In relation to ground 1 of the amended grounds of appeal I wish to add the following.

[57] As I understand the evidence, the facts from which the jury was invited to infer the relevant intention to cause death or grievous bodily harm may be summarised as follows.

[58] The cause of death was not able to be identified.

[59] The appellant struck the deceased a number of times with his fist. There were possibly as many as 12 blows. In the course of his interview with the police the appellant described the blows as hard. There was evidence that the appellant suffered some injury to his knuckles but all visible trace of it had gone by the time of his police interview 11 days later.

[60] The blows were not of sufficient force to cause fractures to the head or body of the deceased with the possible exception of the nasal bone. In the case of the nasal bone the force required would not have been great.

[61] After the deceased collapsed the appellant wrapped her in the carpet underlay and secured the plastic garbage bag about her head with duct tape. The photographs

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1 *R v Ciantar* [2006] VSCA 263 at paras 39-40; *R v DAN* [2007] QCA 66 at paras 133-134.

tendered at trial show that no part of the body was then exposed. The garbage bag secured over the head was not pulled down to cover the shoulders or any part of the deceased other than her head.

[62] The body was then hidden in the State Forest.

[63] Having regard to the positioning of the garbage bag, it seems likely that if the deceased was not already dead she would have been asphyxiated by the bag.

[64] Before disposing of the body the appellant stole the deceased's credit card and watch. While the credit card may have been in the deceased's handbag and could have been taken as an afterthought as the appellant appeared to indicate, the watch would presumably have been on her wrist and would have had to be removed from her before her body was wrapped and disposed of.

[65] The appellant's case as set out in his second interview with the police was that he panicked when he believed the deceased was dead.

[66] Particularly in view of the stealing of property from the deceased's body followed by its apparently careful wrapping, the jury was entitled to reject the appellant's claim that he had panicked.

[67] In my view, none of the factors to which I have referred is sufficient in itself to enable a jury to infer intention to kill or do grievous bodily harm. However, in combination and particularly if the appellant's claim that he had panicked is rejected, a jury could conclude that the actions of the appellant demonstrated a level of calculation. On his own account, having acknowledged that the deceased's condition was serious, proceeding to hide her body rather than seeking out medical assistance might also be a fact on which the jury might rely to conclude that the appellant had the necessary intention. The jury would also be entitled to take into account the fact that if the deceased was not already dead, the placing of the plastic bag over her head would almost certainly have killed her and that this fact was obvious.

[68] In the result, I am satisfied that the verdict of the jury was reasonably open on the evidence.