SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lester* [2008] QCA 354
PARTIES:	**R** **v** **LESTER, Jim** (appellant)
FILE NO/S:	CA No 326 of 2007 SC No 1015 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2008
JUDGES:	Fraser JA, Mackenzie AJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Verdict of guilty and conviction set aside** **3. Re-trial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – GENERAL PRINCIPLES – where appellant convicted of murder of his estranged wife – where appellant allegedly recruited another man, Kinsella, to murder his estranged wife – where Kinsella gave evidence that the appellant had recruited him to commit the murder – where evidence was also given by various witnesses which recounted statements allegedly made by the deceased to the effect that she had been told that an unidentified person had been hired by the appellant to kill her – whether the evidence given by the various witnesses was admissible EVIDENCE – ADMISSIBILITY AND RELEVANCY – FACTS SHOWING STATE OF MIND – IN GENERAL – where s 93B of the *Evidence Act* 1997 (Qld) provided an exception to the hearsay rule if the person who made the representation was unavailable to give evidence – where the provision made reference to an asserted fact – whether asserted fact included an asserted state of mind

EVIDENCE – ADMISSIBILITY AND RELEVANCY – HEARSAY – STATEMENTS – OTHER STATEMENTS – where evidence given by various witnesses attesting to statements allegedly made by the deceased to the effect that she had been told than an unidentified person had been hired by the appellant to kill her – where the statements had never been communicated to the appellant – where the evidence was admitted on the basis that it spoke to the nature of the relationship between the appellant and the deceased – where the evidence was not used as evidence that the appellant had in fact hired someone – whether the evidence directly or indirectly bore upon the appellant's past or likely future state of mind or conduct – whether the evidence bore upon whether or the not the appellant was implicated in the murder of the deceased – whether the evidence was admissible – whether the evidence was relevant

Criminal Code 1889 (Qld), s 590AA, s 668E(1A)
Evidence Act 1977 (Qld), s 17, s 93B, s 98, s 130, s 132B

Edgington v Fitzmaurice (1885) 29 Ch D 459, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, cited
R v Ambrosoli (2002) 55 NSWLR 603; [2002] NSWCCA 386, cited
R v Anderson (2000) 1 VR 1; [2000] VSCA 16, cited
R v Clark (2001) 123 A Crim R 506; [2001] NSWCCA 494, distinguished
R v Frawley (1993) 69 A Crim R 208, followed
R v Gojanovic (No 2) (2002) A Crim R 179; [2002] VSC 118, cited
R v Lester [2004] QCA 34, cited
R v Lester [2007] QSC 229, varied
R v Matthews (1990) 58 SASR 19, cited
R v Swaffield (1998) 192 CLR 159; [1998] HCA 1, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, applied
Wilson v The Queen (1970) 123 CLR 334; [1979] HCA 17, distinguished

COUNSEL: A J Glynn SC for the appellant
R G Martin SC for the respondent

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

[1] **FRASER JA:** On 9 November 2007 the appellant was convicted of the murder of his estranged wife, Ingrid Lester, and sentenced to life imprisonment.

[2] Ms Lester was murdered by Michael Kinsella at Hervey Bay on 19 November 2002. He confessed and was convicted of the murder. The Crown case against the appellant was that Kinsella killed Ms Lester because the appellant offered him $10,000 to do so.

[3] The appellant complains of the admission of what was characterised as "relationship" evidence. The impugned evidence was given by three witnesses. Mr Browning and Mr Catalano (who gave evidence of an occasion when both were present with Ms Lester) and Mr Neilsen (a solicitor who had acted for Ms Lester in Family Court proceedings between her and the appellant) each gave evidence of various statements allegedly made by Ms Lester to the effect that she had been told by an unidentified person or persons that someone had been hired by the appellant to kill her.

[4] The appellant contends (ground 3(a) of the notice of appeal) that the trial miscarried because evidence was wrongly admitted of statements allegedly made by the deceased to the effect that she had been told that an unidentified person had been hired by the appellant to kill her; (ground 3(b)) that the trial miscarried because even if that evidence was technically admissible, it should have been excluded on the basis that its prejudicial effect far outweighed its probative value; (ground 3(c)) that the trial miscarried in that the learned trial judge did not specifically direct the jury that they could not use the statements as evidence that the appellant had hired a person unknown to kill the deceased; and (ground 3(d)) that the trial miscarried in that evidence was admitted, pursuant to s 93B(2)(b) of the *Evidence Act* 1977 (Qld), of statements by the deceased that she was in fear of the appellant, when such statements were neither an "asserted fact" in terms of that provision nor was the evidence made in circumstances that made it highly probable that the representation was reliable.[1]

[5] The respondent contends that the evidence was admissible, that there was no error in the decision not to exclude the evidence, and that the trial judge gave appropriate directions to the jury about the limited use to which the evidence could be put. In an alternative submission, the respondent contends that if the Court considers that the evidence was inadmissible or should have been excluded, nevertheless the appeal should be dismissed on the ground that no substantial miscarriage of justice was occasioned by the admission of the evidence.

Outline of the case

[6] Kinsella gave evidence that he murdered Ms Lester on 19 November 2002 because the appellant offered him $10,000 to do so in a conversation between them on 16 November 2002. The reliability of that evidence was a critical issue in the trial and later in these reasons I will elaborate upon it and other evidence which the respondent submits supports the Crown case. At this point it is necessary only to refer to so much of the evidence and the issues as is necessary to explain the context for the competing arguments about the admissibility of the impugned "relationship" evidence.

[7] In 2001 the appellant and the deceased (who had by then been married for some 16 years) were living in Hervey Bay with their two children Troy (then about 15 years old) and Shaun (then about 13 years old), but the marriage had broken down by October of that year. On 6 November 2001 Ms Lester left the matrimonial home and moved into a flat.

[8] Ms Lester formed a relationship with a family friend, Alisdair Morrison which, according to them, commenced after Ms Lester's separation from the appellant; but it appears that the appellant formed the view that their relationship had been on foot before the separation.

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1 The other grounds of appeal were insubstantial and they were not argued.

[9] According to formal statements given by Ms Lester to the police and to her solicitor for use in Federal Magistrates Court proceedings concerning a dispute between her and the appellant about the division of their property, on 13 December 2001 the appellant invaded Ms Lester's new home and assaulted her. Police were called and charges were laid. Later, on Christmas Day 2001, the appellant went to a camping ground where Ms Lester was staying with Morrison and the appellant violently assaulted Morrison in an attempt to murder him. After Ms Lester's death the appellant was convicted of that attempted murder.[2]

[10] The appellant was arrested for his attempted murder of Morrison. Whilst in custody awaiting trial for that offence he had various telephone conversations with friends of his, Kalisperis and Challender. The transcripts of those telephone conversations reveal that the applicant sought to persuade Kalisperis and Challender to speak to Ms Lester with a view to persuading her to agree to a reconciliation with the applicant and that the applicant hoped that this would lead to the charges against him being dropped.

[11] Whilst the appellant was in custody, Ms Lester moved back to the former matrimonial home in Hervey Bay with both sons. On about April 2002 Troy was riding the appellant's motorcycle without any permission when he was involved in a traffic accident. He died from his injuries on 18 April 2002. The appellant was permitted to leave prison to attend at the bedside of his dying son. The evidence of a social worker, a correctional officer, and in a statement by Ms Lester admitted at trial was to the effect that the appellant demonstrated hostility to Ms Lester at that time and blamed her for the death of their son. Evidence to the same effect was also given by witnesses who were present at Troy's funeral.

[12] The appellant was released on bail on 26 April 2002 on conditions which required that the appellant reside in Melbourne, not come to Queensland except for court purposes, and not have any contact with Ms Lester or Morrison.

[13] In June 2002 two events occurred which the Crown asked the jury to infer had been organised by the appellant. First, on 18 June 2002, Ms Lester arrived at her home in Hervey Bay to discover three large bags of marijuana plants in her backyard. She told police, who removed them. On 21 June 2002, whilst Ms Lester was with Morrison at his Brisbane home, police arrived, acting on an anonymous tip, looking for drugs which were said to have been transported from Pialba to Brisbane. No drugs were found and the police did not pursue the matter.

[14] The Crown called one Sydney Bartlett, who had known the appellant for about 13 years and had worked for the appellant as a truck driver in a fruit and vegetable business once owned by the appellant. In Bartlett's evidence-in-chief, when Bartlett was asked about letters he had received from the appellant whilst the appellant was in prison, Bartlett said that the appellant had mentioned Ms Lester's name in letters, "but that’s about all". Bartlett also gave evidence that in the months leading up to Ms Lester's death in November 2002 Bartlett and a friend of his impulsively visited Ms Lester in the matrimonial home in Hervey Bay. Bartlett said that in a general discussion with Ms Lester he told her that the appellant "was a very dangerous person", he mentioned some letters he had received from the appellant, Ms Lester asked him if she could have copies of them, and he agreed that he would give her copies if he still had them.

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[2] See *R v Lester* [2004] QCA 34.

[15] Bartlett spoke of a conversation he had had with the appellant in which the appellant had asked him to "keep an eye on her so she wouldn't leave Hervey Bay": he said that the appellant used the words "keep an eye on the slut". When Bartlett was asked whether anything else was said about Ms Lester he answered:

> "Yes. There were umm, that if he got anymore time he'd have to get someone to do – do something or do it himself."

[16] Bartlett subsequently claimed that he did not know what "it" referred to and that there was no other indication of what the appellant was talking about. On application by the prosecutor the trial judge gave the prosecutor leave to prove that Bartlett had made a statement which was inconsistent with his evidence in chief.[3] The prosecutor was then permitted to cross-examine Bartlett, who agreed that in a statement he provided on 11 December 2002 he said:

> "Jimmy also wrote about Ingrid and said, 'she'll get what she deserves. If I get time I'll have to get someone to do it for me,' or words to that effect."

[17] Bartlett then agreed that the appellant had said words to that effect. Bartlett also agreed that he had told police that the appellant "was still blaming Ingrid for Troy's death and having an affair" and that was the import of what the appellant had told him, whether by letter or telephone conversation.

[18] In cross-examination by defence counsel Bartlett said that the appellant had not ever asked him to harm Ms Lester and had never approached him in any way to do anything bad to her, in a letter or on the phone. Bartlett also agreed that he could recall the appellant speaking or writing something about: "If I get any more time something will happen?" and "She'll get what she deserves"; but Bartlett said that the appellant did not say what he meant by that.

[19] Morrison gave evidence that he was present at the Hervey Bay house when someone named Syd arrived in company with another person on a day which was after some committal proceeding. (This appears to tally with the evidence of the visit by Bartlett).

[20] There was evidence from a number of sources that the appellant and Ms Lester were in dispute about the division of the matrimonial property and the custody of Shaun up until the death of Ms Lester. That was confirmed, for example, in the evidence of a friend of the deceased and the appellant (Charalambous) who gave evidence that in a telephone conversation only hours before Ms Lester's death, she spoke of the appellant having rejected an offer to resolve the proceedings and that she was upset that it was all being dragged out and would have to go to court. Similarly, Ms Lester's solicitor, Neilsen, gave evidence about failed negotiations on the afternoon of Ms Lester's death in which he had obtained instructions and rejected an offer made by the appellant's solicitor to resolve proceedings.

[21] The Crown relied upon motives it attributed to the appellant for wanting Ms Lester dead (that the appellant was angered by his wife's rejection of him and her preference for Morrison; the dispute about the family home; the appellant's blame of his wife for the death of their son and the break-up of their marriage) and the absence of any

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[3] *Evidence Act* 1977 (Qld), s 17(1).

apparent motive in Kinsella to murder Ms Lester other than Kinsella's evidence that the appellant promised to pay him to do so.

The evidence in contention in this appeal

[22] The prosecutor adduced evidence concerning the nature of the relationship between the appellant and his wife in the months prior to her death. This evidence included the evidence of Browning, Catalano and Neilsen the admissibility of which is in issue in this appeal.

[23] Ms Browning and Mr Catalano both gave evidence of statements made to them by Ms Lester at Ms Browning and Mr Catalano's house in Hervey Bay about two weeks before Ms Lester was murdered on 19 November 2002.

[24] Ms Browning said that Ms Lester told them that two people came to her house (in Hervey Bay); that they came separately; that "they came to see her about knocking her off"; that "they did come to see her, but they couldn't go through with it"; and that one of the people who came used to work with the appellant on a fruit and vegie run many years ago. (The last statement is consistent with one of the men having been Bartlett). The second part of Ms Browning's relevant evidence was that she asked Ms Lester whether or not the appellant would have paid "to have her knocked off", in response to which Ms Lester said "yes". In cross-examination Ms Browning agreed that Ms Lester told her that the person who worked on the fruit run said "I was asked by Jim to … knock you off … but I'm not going to do it."

[25] Mr Catalano gave evidence that Ms Lester said that "two friends had gone around and warned her about that Jim had sent somebody to knock her off, or whatever"; that "she was frightened"; and that she said "I think Jim is going to kill me one day." Mr Catalano added that Ms Lester said "that Jim had sent these two blokes and – yeah, they were good friends of both sides, anyway, of Jim and Ingrid." He also gave evidence that he told Ms Lester to "Just go. Leave everything." In cross-examination Mr Catalano indicated that Ms Browning was not present when that conversation occurred, she having earlier gone to bed, but that he told her about it afterwards. Mr Catalano's evidence was that Ms Lester said that her two friends had come around together, rather than separately.

[26] The evidence given by Neilsen which is in issue in this appeal was that Ms Lester made the following statements to him:

> "(a) On 9 January 2002: that Ms Lester was in fear of the appellant and there was no chance of reconciliation;
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> (b) On 18 July 2002 (with reference to Mr Neilsen's contemporaneous note) that Ms Lester had spoken to a family friend in Bundaberg who said that he had received a letter from the appellant that the appellant had written whilst he was in jail asking the family friend whether he would be prepared to kill Ms Lester and to kill her boyfriend Alisdair Morrison. (Mr Neilsen said that he warned Ms Lester to be careful for her own safety and recommended that she attempt to get a copy of the letter);

(c) On 19 September 2002 (with reference to a contemporaneous note) that Ms Lester had received a warning that the appellant had 'put a hit out on her'."

Rulings and directions before and during the trial

[27] Questions concerning the admissibility of this and a great deal of other evidence were agitated at a pre-trial hearing. A judge of the Trial Division made a ruling pursuant to s 590AA of the *Criminal Code* that the contentious evidence was admissible evidence of Ms Lester's fear of the appellant but that the evidence was not admissible evidence of the truth of the statements attributed to Ms Lester.[4]

[28] Section 590AA(3) provides that such a ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to re-open the ruling. The appellant did seek to re-open those rulings at the beginning of the trial. His counsel advanced arguments which were similar to those advanced on his behalf in this appeal. The trial judge was not persuaded that there was a special reason for re-opening the pre-trial rulings and declined to do so.

[29] The evidence of Ms Browning and Mr Catalano was given on day 4 of the trial. Immediately after Ms Browning gave evidence the trial judge told the jury that he would give an explanation to the jury of the use it could make of the evidence of Ms Browning and Mr Catalano when it came to summing up. His Honour added that what Ms Browning said was hearsay; she could not give evidence that two men on separate occasions went to Ms Lester's house and said something about being there to kill her; she was recording what Ms Lester said to her, that is hearsay, and the law normally disregards hearsay. The trial judge said that the evidence could have some relevance which would be explained more fully in the summing up, but essentially the evidence was led for the jury to gain some impression of the nature of the relationship between the applicant and Ms Lester which might be relevant in deciding whether or not the jury was satisfied that it was the appellant who approached Kinsella to have Kinsella kill Ms Lester. His Honour added that the evidence was not led to prove that the two men in fact went at the instigation of the applicant, but rather it was evidence from which the jury could piece together an idea of the relationship; whether Ms Lester feared her husband and whether she had reason to fear him, which could assist the jury in deciding whether the Crown had made out its case.

[30] Neilsen gave evidence on day 6 of the trial. The trial judge did not at that time give the jury any direction about the use it could make of his evidence.

[31] The trial judge started summing up on the afternoon of day 10 of the trial. Early in the summing up the trial judge described the contentious evidence as being one category of evidence that concerned the relationship between the appellant and Ms Lester. The trial judge said that the point of the evidence that had been given by various witnesses of things the accused had said or Ms Lester had said before her death was to explain the nature of the relationship between the applicant and his wife in the months prior to her death. His Honour said that the evidence was relevant for two interrelated reasons. The first aspect of its relevance was that it might show that the applicant had a motive for having his wife killed.

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[4] *R v Lester* [2007] QSC 229.

[32] After expanding on that the trial judge observed that the second aspect in which the evidence was relevant was that "it may help you to decide whether the accused did, in fact, offer Kinsella money to kill Mrs Lester." The trial judge observed that the jury might think such a thing was more likely in the case of a fractured, bitter and hostile relationship than in a harmonious relationship. His Honour said that if the jury thought that it was a fact that the applicant harboured feelings of anger or dislike towards his wife and felt betrayed by her "and was prepared to be violent towards her", that might persuade the jury that Kinsella told the truth about why he murdered Ms Lester. The judge said that these background facts "may assist you to decide whether Michael Kinsella acted on his own and killed Mrs Lester for his own motives or whether he killed Mrs Lester because the accused asked him to."

[33] After referring to the subject matter of some such evidence the trial judge said that the evidence fell into four categories. No issue is raised in this appeal about the first category, which concerned witnesses who themselves observed interchanges between the applicant and Ms Lester from which the nature of their relationship might be inferred. (That included the evidence of the appellant's hostility towards Ms Lester at the hospital when their son was dying and at his funeral and Morrison's evidence of being attacked by the applicant on Christmas Day 2001). Nor is any issue raised about the third category of evidence, which came from Bartlett, Kalisperis and Challender of things the appellant said to them about Ms Lester from which it was open to the jury to infer that his attitude was one of animosity and anger. Nor does the appellant complain of the trial judge's directions concerning the fourth category of evidence, the formal statements given by Ms Lester to police following the applicant's attacks in December 2001, or her statements concerning the property dispute between her and the applicant.

[34] The issue in this appeal concerns evidence in what the trial judge described as the second category. The trial judge directed the jury as follows:

> "The second category of evidence comes from people to whom Mrs Lester told things about her attitudes or her beliefs about what the accused had done or was doing. This evidence was given by Gail Browning, Biagio Catalano, Anabel Smith, Eros Charalambous, Mr Neilsen, the solicitor, and Cindy Klienhans.
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> Now, this evidence from those witnesses in this category is hearsay, and cannot prove the truth of what Mrs Lester is reported to have said. For example, Mr Neilsen and Ms Browning both gave evidence that Mrs Lester told them she believed the accused had arranged for someone to kill her. Now, this evidence does not prove or tend to prove that the accused made such arrangements or that indeed anyone approached Mrs Lester and told her that they had been asked by the accused to kill her. The evidence can only be used as an indication of what Mrs Lester thought or believed about the state of her relationship with the accused because she said those things.
>
> Usually the best indication of what people think is what they say. If Mrs Lester said that the accused wanted her dead, you may think that is evidence that she believed it, and if she believed that her husband wanted her dead, you may infer that the relationship between them was deeply unhappy, bitter and hostile. If you come to this conclusion, the evidence has the relevance that I mentioned: that it

> may assist you to decide whether the accused is implicated in the death of his wife."

[35] The trial judge returned to the topic in the course of summarising the submissions for the Crown:

> "Mr Byrne also refers to the evidence by Gail Browning and Neilson about Mrs Lester's fears for her life at the accused's hands. He refers to the evidence that she told those witnesses that the accused had arranged to have her killed.
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> Now, I have told you what limited use you can make of that evidence. The fact that Mrs Lester's statements show her fear do not by themselves prove that her fear was well founded i.e. that she had anything to fear, in fact, from the accused. You can, of course, rely on other evidence in the case to decide whether her fear was well founded."

[36] The jury retired at mid-morning on day 11 of the trial. Late in the afternoon of day 12 of the trial the jury delivered a note to the trial judge which said:

> "In your summing up you discussed four types of evidence and how we can use this to help us come to a verdict. Can you please reread or clarify further."

[37] In response the judge directed the jury that although his Honour had divided the evidence into four categories it was really of one type "what is called relationship evidence, that is it concerns accounts of how the accused and Mrs Lester behaved to each other and how they regarded each other and that has the relevance I mentioned to you." The trial judge then repeated that the evidence might help the jury to decide whether Kinsella acted as he did because of the offer of money to kill Mrs Lester or whether he acted on his own for some reason or motive of his own. The trial judge then gave the jury directions about the four categories of evidence which were very similar to those his Honour had earlier given. In relation to the second category his Honour said:

> "Category 2 was the evidence of people like Gail Browning and Mr Neilson to some extent who told you things that Mrs Lester said to them. Now, that - and it particularly was, I think, that Mrs Lester said that she believed that the accused had sent or was sending or would send someone to kill her. Now, that is no evidence of that fact. It is evidence only that Mrs Lester said those things and from the fact that she said those things you can, if you want, infer that she believed them, and if she believed them, it might tell you something of the relationship between her and her husband. That is the only use you can make of that evidence."

[38] The jury returned a guilty verdict shortly after 5.00 pm on the following day.

Admissibility of the contentious evidence

[39] In relation to criminal proceedings against a person for offences including murder, s132B(2) of the *Evidence Act* 1977 (Qld) provides that “relevant evidence” of the

history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding. That section leaves open for decision in each case the question whether particular evidence of that general kind is relevant. Accordingly, and as the judge at the pre-trial hearing held,[5] evidence of the relationship between Ms Lester and the appellant was admissible if a relevant inference might logically and reasonably be drawn from that evidence.[6]

[40] The judge at the pre-trial hearing referred to the distinction between evidence tending to establish matters relevant to the relationship between parties (as in *Wilson v The Queen*) and propensity or similar fact evidence (as in *Pfennig v The Queen*[7]), and consequences flowing from that distinction, and to the submission on behalf of the Crown that it wished to lead evidence of the relationship between the deceased and the appellant in order to establish motive and that the killing was not just a frolic of Kinsella's own.[8]

[41] After observing that the prosecutor did not rely on s 93B as authorising the admission of evidence of the truth of what other persons said to the deceased but rather merely as authorising the admission of evidence that those things had been said to the deceased, the judge at the pre-trial hearing concluded:[9]

> "If evidence of the relationship between the deceased and the defendant is admissible to prove motive and that the killing was not just a frolic of Kinsella's own, [In *R v Frawley* (1993) 69 A Crim R 208 evidence of fear was held inadmissible because it did not tend to prove that the defendant killed the deceased, or that he acted towards her with a certain intent. See p 223. Here the evidence is relevant to other matters] as I think it is, then evidence that the deceased was in fear of the defendant is admissible because it is evidence of an aspect of that relationship: [Transcript of the hearing, pp 52-53] *R v Clark* [(2001) 123 A Crim R 506, 576-577] *R v Gojanovic* [(2002) 130 A Crim R 179, 184]."

[42] It should be noted here that there is no contest in this appeal as to the relevance of the evidence that the appellant and Ms Lester were in a matrimonial dispute, that the appellant had attacked Ms Lester, that the appellant had expressed other hostility towards Ms Lester, and that there was fear on Ms Lester's part resulting from the appellant's expressed hostility and attack upon Ms Lester. In terms of s132B(2) of the *Evidence Act* 1977 (Qld), such evidence was "relevant evidence" of their "domestic relationship". Regardless whether evidence of the fracturing of the relationship between the appellant and Ms Lester was directly related to the question whether the appellant had a motive, that evidence was relevant because it went to the probability or otherwise that the appellant had procured the murder of Ms Lester.[10] It was more likely that he would have done so if their relationship had broken down than if they lived amicably together. Such evidence is admissible because it tends to "assist the

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5 *R v Lester* [2007] QSC 229 at [17].

6 *Wilson v The Queen* (1970) 123 CLR 334, 339 per Barwick CJ; [1970] HCA 17; *R v Anderson* (2000) 1 VR 1 at 13 per Winneke P; [2000] VSCA 16.

7 *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7.

8 *R v Lester* [2007] QSC 229 at [18]-[19].

9 *R v Lester* [2007] QSC 229 at [26].

10 *Wilson v The Queen* (1970) 123 CLR 334 at 337 – 339 per Barwick CJ and at 343-344 per Menzies J, with whom McTiernan and Walsh JJ agreed; [1970] HCA 17; *R v Heath* [1991] 2 Qd R 182 at 203-205 per Cooper J.

choice between the two explanations of the occurrence".[11] The appellant contends, however, that the impugned evidence was not in that category. I will return to that issue.

Section 93B of the Evidence Act 1977 (Qld)

[43] The judge at the pre-trial hearing referred to the heavy reliance by the Crown on s 93B of the *Evidence Act* 1977 (Qld), which provides[12]:

> "93B Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable
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> (1) This section applies in a prescribed criminal proceeding if a person with personal knowledge of an asserted fact—
>
> (a) made a representation about the asserted fact; and
>
> (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.
>
> (2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—
>
> (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication; or
>
> (b) made in circumstances making it highly probable the representation is reliable; or
>
> (c) at the time it was made, against the interests of the person who made it.
>
> (3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—
>
> (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;
>
> (b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.

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11 *R v Clark* (2001) 123 A Crim R 506; [2001] NSWCCA 494 per Heydon JA at 555.

12 *R v Lester* [2007] QSC 229 at [21].

> (4) To avoid any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.
>
> (5) In this section—
>
> *prescribed criminal proceeding* means a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 32.[13]
>
> *representation* includes—
>
> (a) an express or implied representation, whether oral or written; and
>
> (b) a representation to be inferred from conduct; and
>
> (c) a representation not intended by the person making it to be communicated to or seen by another person; and
>
> (d) a representation that for any reason is not communicated."

[44] No issue arises with respect to s 93B(1). In relation to ss 93B(2)(a) and (b) her Honour applied the interpretation of equivalent statutory provisions in *R v Ambrosoli*[14] in concluding that:

> "(a) The statutory test is not whether, in all the circumstances, there is a probability [Qld s 93B(2)(a)] or a high probability [Qld s 93B(2)(b)] of reliability, but whether the circumstances in which the representation 'was ... made' determine that there is such a probability.
>
> (b) Evidence tending only to prove the asserted fact may not be considered.
>
> (c) Prior or later statements or conduct of the person making the previous representation may be considered to the extent that they touch upon the reliability of the circumstances of the making of the previous representation - but not if they do no more than tend to address the asserted fact or ultimate issue. …"

[45] The judge held that a statement of fear can be "a representation about [an] asserted fact" within s 93B of the *Evidence Act*, a person's state of mind being a matter of fact. On that basis the judge ruled that the evidence of Catalano, Browning and Neilsen was

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13 Criminal Code, chapters 28 (Homicide—suicide—concealment of birth), 29 (Offences endangering life or health), 30 (Assaults) and 32 (Rape and sexual assaults).

14 *R v Ambrosoli* (2002) 55 NSWLR 603 at 616, per Mason P (with whom the other members of the court agreed); [2002] NSWCCA 386.

relevant evidence going to Ms Lester's fear of the appellant and her Honour concluded that s 93B(2)(b) was satisfied in each case.

[46] The judge made separate, consequential rulings about the admissibility of each part of the contentious evidence. (The form of the contentious evidence differed a little from that which was later given at the trial but the differences are not significant in the present context.) In summary, her Honour concluded that Ms Lester's reported statements of what the two men (on Catalano and Browning's evidence) and the "family friend" (on Neilsen's evidence[15]) had told her was not evidence of the truth of anything said by the men (or family friend); that Ms Lester's reported statements were "representations" of what the men (or family friend) said; that those representations went to Ms Lester's fear; and that they, and Ms Lester's express representations of her fear, were relevant evidence of an aspect of the relationship between the appellant and Ms Lester.

[47] The appellant contends that the judge at the pre-trial hearing erred in concluding that Ms Lester's state of mind (her alleged fear of the appellant) was a "fact" within the meaning of that word in s 93B of the *Evidence Act* 1977 (Qld) and in concluding that Ms Lester's alleged statements about that "fact" were made in circumstances making it highly probable that those statements were reliable, as s 93B(2)(b) requires.

[48] No authority was cited for the appellant's proposition that a state of mind is not a "fact" within the meaning of s 93B. It is a perfectly ordinary use of language to say that an assertion that a person believes something is an assertion of a fact, and the law has long regarded a state of mind as a fact for many purposes.[16] It is commonplace for people to make statements ("representations") about their states of mind ("asserted facts"). As the numerous authorities cited in this appeal demonstrate, evidence of a deceased's state of mind may often be relevant in murder cases (which are "prescribed criminal proceedings") within the meaning of s 93B. Why should we assume that that s 93B was not intended to comprehend relevant evidence of that kind?

[49] The appellant's counsel pointed out that, unlike statutory provisions in other jurisdictions[17] s 93B does not expressly refer to states of mind. But that does not suggest that the legislature intended to exclude states of mind from the reach of the very general phrase "asserted fact" in s 93B. In my opinion the natural and literal meaning of s 93B comprehends evidence of any "asserted fact" including any asserted state of mind.

[50] The argument advanced in the pre-trial hearing against that construction focussed on the phrase "the asserted fact happened" in s 93B(2)(a). The quoted phrase does appear somewhat clumsy when it must be applied to a state of mind that continues for a substantial period (such as continuing fear); but that is also so when s 93B is applied to any state of fact that continues for an appreciable period. Plainly s 93B was not intended to be confined to proof of evanescent facts.

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15 The jury might have concluded that the "family friend" was Bartlett and that (despite the conflicts in the evidence concerning the time at which various statements were made and their precise terms) Ms Lester's reported statements to Neilsen quoted in paragraphs (b) and (c) in paragraph 26 above reflected things Bartlett said in the meeting or meetings of which Browning and Catalano gave evidence.

16 See, for example, *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ.

17 For example, *Evidence Act* 1995 (NSW), s 72.

[51] I would also reject the appellant's contention that s 93B(2)(b) was not satisfied. The test applied by the judge at the pre-trial hearing in concluding that s 93B(2)(b) was satisfied is set out in paragraph [44] above. It was not submitted that the wrong test was applied. And, contrary to the appellant's contention, that there were differences in detail between Mr Catalano and Ms Browning as to what Ms Lester said to Mr Catalano and Ms Browning, that Mr Catalano gave evidence that Ms Browning was not present when Ms Lester made the alleged statements, and that Mr Catalano's and Ms Browning's evidence does not precisely tally with the evidence of Bartlett (who the jury might have inferred was the source of Ms Lester's various reported statements) does not falsify the judge's conclusion that Ms Lester's statements were made in circumstances making it highly probable that they were reliable. Those inconsistencies do not affect the substance of what Ms Lester was said to have communicated. Mr Catalano was an old friend of Ms Lester's. There is every reason to think that Ms Lester would have accurately conveyed her state of mind when she spoke to him and Ms Browning. There is also every reason for thinking that Ms Lester could be relied upon to have given her solicitor, Neilsen, an accurate rendition of the statements made by Ms Lester to him as to her state of mind. The points agitated by the appellant arguably support challenges to the reliability of the evidence that Ms Lester made the particular statements attributed to her but they do not detract from the judge's conclusion that what Ms Lester in fact said was a reliable indication of her state of mind.

[52] I conclude that if the contentious evidence given by Browning, Catalano and Neilsen of Ms Lester's fear and belief was otherwise hearsay, then s 93B provided an exception to the hearsay rule for that particular evidence.

Was the evidence inadmissible for a reason other than its hearsay character?

[53] Subsection 93B(4) makes it clear that s 93B(2) does not make admissible any evidence which is inadmissible for a reason other than its hearsay character. The challenged evidence was admissible if a relevant inference might logically and reasonably be drawn from it. It is therefore necessary to articulate the inference sought to be drawn from the evidence. As to that, the effect of Neilsen's evidence quoted in paragraph (a) in paragraph [26] of these reasons differs markedly from his evidence quoted in paragraphs (b) and (c). The latter was to similar effect to the evidence of Browning and Catalano: that evidence was to the effect that Ms Lester told them that someone had told her that the appellant had arranged for someone to kill her. I will therefore discuss that evidence (Browning and Catalano's evidence and Neilsen's evidence quoted in paragraphs (b) and (c) of paragraph [26] above) before considering the balance of Neilsen's contentious evidence.

Relevance of deceased's alleged statements that an unidentified person told her that the appellant had arranged for someone to kill her

[54] The judge at the pre-trial hearing did not hold and it is not the case that the state of mind of Ms Lester was relevant to an issue concerning her own conduct, as was the case, for example, in *R v Matthews*[18] and *R v Gojanovic (No 2)*[19] (which the judge cited in the passage quoted above). In *Matthews* the deceased's state of mind was relevant to the issues whether she had consented to intercourse with the accused and

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18 *R v Matthews* (1990) 58 SASR 19.

19 *R v Gojanovic (No 2)* 130 Crim App R 179; [2002] VSC 118.

permitted him entry into her home. Evidence that the deceased in that case was in fear of the accused and wished to have nothing to do with him was held to be relevant to those issues. Similarly, in *Gojanovic* (upon which the respondent relies in this appeal) evidence that the deceased feared the accused was held to be relevant to the issue whether she had initiated any wrestle with the accused or had used words likely to provoke him into attacking her. No issue of that kind arises in this case.

[55] Rather, the judge ruled that Ms Lester's state of mind was relevant to an aspect of her relationship with the appellant, which was itself said to be relevant to an issue. Similarly, the effect of the trial judge's directions to the jury was that the jury might accept that Ms Lester had said to Browning, Catalano and Neilsen that she believed that the accused had arranged for someone to kill her; if the jury accepted that it might infer that Ms Lester believed that the appellant wanted her dead; if the jury accepted that it might infer that that the relationship between them was "deeply unhappy, bitter and hostile"; and that might assist the jury to decide whether the appellant was implicated in the murder of Ms Lester.

[56] Thus the jury was directed that an inference that the appellant had procured Kinsella to murder Ms Lester might be derived indirectly from otherwise inadmissible evidence to the effect that Ms Lester said that someone told her that the appellant had asked that person (or, perhaps, someone else) to kill her. An essential step in the reasoning towards that conclusion was that the jury might infer that the relationship between the appellant and Ms Lester was a very unhappy one from evidence that Ms Lester believed statements allegedly made to her that the appellant had arranged for someone to murder her. In my respectful opinion the suggested inference could not logically or reasonably be drawn from that evidence.

[57] If the jury accepted that Ms Lester believed statements that the appellant had arranged for someone to kill her that might justify an inference that their relationship was a very unhappy one **if** it is first assumed that those statements were true. But that assumption could not be made because this evidence was not admissible to prove that those statements were true.

[58] The basis upon which the evidence was admitted resembled that in *Wilson*, [20] but that decision is distinguishable. The issue in *Wilson* was whether the accused had shot his wife in the back of her head or whether, as he claimed, his gun had discharged accidentally. The High Court held that the trial judge had correctly admitted evidence by two witnesses that the deceased had said to the accused that the deceased knew that the accused wished to kill her. It is clear that the fact that the statements were made by the deceased to the accused during a quarrel between them was material to the High Court's decision. In that respect Menzies J (with whom McTiernan and Walsh JJ agreed) said that[21] "nothing spoke more eloquently of the bitter relationship between them that the wife, in the course of a quarrel, should charge her husband with the desire to kill her." Barwick CJ made similar observations and added that[22] it "may at once be conceded that, if the statement attributed to the deceased had not been part of the evidence of a quarrel of a significant kind, the statement of her opinion of the applicant's attitude or intention towards her would have been inadmissible." In this case Ms Lester's alleged state of mind was not communicated to the appellant.

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20 *Wilson v The Queen* (1970) 123 CLR 334; [1979] HCA 17.

21 *Wilson v The Queen* (1970) 123 CLR 334 at 344 per Menzies J; [1979] HCA 17.

22 *Wilson v The Queen* (1970) 123 CLR 334 at 339-340 per Barwick CJ; [1979] HCA 17.

[59] The nature of the contentious evidence is indistinguishable from evidence held to be inadmissible by the New South Wales Court of Criminal Appeal in *Frawley*.[23] The issue in *Frawley* was whether the accused was so intoxicated when he killed the deceased that he did not have and was incapable of forming an intent to kill or cause grievous bodily harm. The trial judge admitted evidence of a diary note written by the deceased headed "Reasons for Ending Relationship with [the accused]". The note recorded, amongst other things, that the accused was a potential threat to the deceased. The argument in support of the admissibility of the note, which was very like that advanced here by the respondent, was summarised in the judgment of Gleeson CJ, with whose reasons Carruthers J agreed:[24]

> "The argument put at the trial in support of the admissibility of this evidence was to the following effect. This was not an attempt to lead hearsay evidence of the truth of the facts recorded by the deceased in her handwritten note, nor was it an attempt to prove that the deceased's opinions as to the appellant's mental state or as to her own lack of safety were well founded. Rather, it was an attempt to prove the fact that the deceased was writing and saying these things about the appellant, a fact which evidenced a bad relationship between them. Put slightly differently, the argument was that evidence of what one party to a relationship says about the other may, as here, be eloquent testimony to the state of that relationship.. . ."

[60] In the course of rejecting that argument Gleeson CJ observed:[25]

> ". . .What, however, of her fear of the deceased and her apprehension of violence? The fact that the deceased feared the appellant does not tend to prove that he killed her, or that he acted towards her with a certain intent. What would tend to prove that would be evidence that the fear was well-founded on the basis of past happenings, but that is the very matter which the document cannot be used to prove. . . ."

[61] The judge at the pre-trial hearing distinguished *Frawley* on the ground that the contentious evidence of Ms Lester's reports of unproved statements attributed to the appellant was relevant to matters other than those in issue in *Frawley*.[26] The respondent's senior counsel argues that *Frawley* should be distinguished on the ground that the issue there was the narrow one concerning the accused's intent, whereas the issue here is whether the appellant was implicated in Kinsella's murder of Ms Lester. That strikes me as being a distinction without a difference. Applying Gleeson CJ's logic, merely because Ms Lester believed statements that the appellant had asked someone to kill her and therefore feared the appellant does not tend to prove that the appellant (then or later) asked someone to kill her. The evidence was not referable to any "acts or statements occurring within" their relationship or any consequential state of mind of the appellant.[27]

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23 *R v Frawley* (1993) 69 A Crim R 208.

24 *Frawley* at 221.

25 *Frawley* at 223.

26 See paragraph [41] above.

27 Compare *R v Anderson* (2000) 1 VR 1 at [33]-[34] per Winneke P; [2000] VSCA 16.

[62] The respondent argues that the significance of Ms Lester's fear was that it established the "mutuality of the adverse relations between the parties". But for the reasons I have given the contentious evidence established nothing about the relations between the appellant and Ms Lester. It went only to the state of mind of Ms Lester in response to statements said to have been reported by her, a state of mind which was not proved to be referrable to anything said or done by the appellant or communicated to him. As I mentioned earlier, Ms Lester's state of mind was not itself relevant to any issue in the case.

[63] It is submitted for the respondent that a basis for Ms Lester's fear is to be found in other evidence, such as the evidence that the appellant had attacked Ms Lester and Mr Morrison in December 2001, that he had displayed hostility to the appellant at the bedside of their dying son, and the evidence concerning the cannabis incident to which I have referred. The respondent argues that support for the admissibility of the contentious evidence is found in the New South Wales Court of Criminal Appeal's decision in *R v Clark*,[28] a decision that senior counsel for the respondent argues "liberalised" the principles governing the admission of evidence of this character. In order to explain my reasons for rejecting these arguments it is necessary briefly to summarise so much of the issues and rulings in *Clark* as are relevant to the issues in this appeal.

[64] In *Clark* the accused, who owned the franchise of a post office in a small village, was found guilty of murdering a woman who owned the franchise for delivering mail in the village and who lived in the accused's mother's house. She had been asked to leave but the accused perceived that she had made no effort to do so and that her failure to do so was adversely affecting his mother's health. The evidence showed that the deceased's killer had driven her to the place where she was killed. The appellant admitted that he had taken the deceased for a drive within a few days of her disappearance for the purpose, he said, to stop her walking off in the course of his intended discussion to discover whether she had made arrangements to leave his mother's house. He told police that he was getting on alright with the deceased although he admitted having struck her more than six months earlier for a reason he claimed to have forgotten. In the accused's evidence in chief he relied upon the fact that the deceased got into his car, happily as he said, to support his claim that his relations with the deceased were not bad.

[65] The appellant contended in *Clark* for the inadmissibility of various passages in the evidence of five Crown witnesses as to statements by the deceased concerning the accused's hostility towards her and her fear of him.

[66] Heydon JA (as his Honour then was), with whose reasons Dowd and Bell JJ agreed, held that the impugned evidence was admissible. Heydon JA identified the issues to which the evidence was relevant in the following passage: [29]

> "134 An issue thus arose whether the dealings and mutual attitudes of the appellant and the deceased were generally cordial or tense and violent. Though the evidence was not tendered by the Crown to prove motive or a particular intent, it had relevance independent of those issues. The relevance of the evidence arose in three ways.

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28 *R v Clark* (2001) 123 A Crim App R 506; [2001] NSWCCA 494.

29 *Clark* at [134] – [141], pp 575 – 576.

135 First, to exclude all evidence of tension and violence but leave in only evidence of cordiality would be misleading. The evidence was relevant because it prevented the issues from being considered in a "vacuum" (*Wilson v R* (1970) 123 CLR 334 at 344 per Menzies J). It avoided the jury having "quite an artificial picture": *R v Peake* (1996) 67 SASR 297 at 300 per Millhouse J (Williams J concurring). It enabled presentation of the case "in an intelligible and real fashion": *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120 at 123 per Sugerman J. The evidence was "the key to an assessment of the relationship between the [accused] and the [victim] and, as such, constituted part of the essential background against which the … [accused's] evidence … necessarily fell to be evaluated": *B v R* (1992) 175 CLR 599 at 610.

136 Secondly, the jury's task was to assess what happened on the drive which the appellant admitted from the start he had taken with the deceased. He went on it at a time when he had an opportunity to kill her. He went on it, according to him, for the purpose of discussing a matter of some distress and difficulty, namely the attempt to get the deceased to leave the house occupied by the appellant's mother. The issue was whether the drive ended in him killing her. It was material to consider whether the past dealings and mutual attitudes of the parties were such as to create a reasonable doubt in the appellant's favour or whether they were such as to increase the probability that a killing resulted.

137 The relationship was capable of casting light on whether the appellant killed the deceased, and, if he killed the deceased, what his mental state was: *R v Hissey* (1973) 6 SASR 280 at 289. The existence of a bad relationship increased the chance of a relaxation of normal inhibitions against killing. It thereby offered a potential explanation for any criminal conduct by the appellant. It established "an atmosphere which would render it less unlikely that the offence charged would have been committed in the circumstances which arose on the occasion of [the accused's drive with the victim], having regard to the past relationship of the principals": *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120 at 129 per Maguire J.

138 As a motive, the Crown relied on the appellant's exasperation with the deceased because of his resentment over trouble caused to him by her failure to carry out postal deliveries properly, which caused complaints to be made to him even though he was not responsible for them, and frustration at the deceased's failure to leave the house of his mother, whom she was upsetting, whose friends had ceased to call in order to avoid meeting the deceased, and whose health, according to medical opinion, was being adversely affected. The deceased was frequently affected by alcohol and was disruptive, in the perception of the appellant. Even though the relationship evidence was not tendered as going directly to motive, an evaluation of the motive issue and an evaluation of the probabilities in relation to whether the appellant killed the deceased, after a sudden quarrel or otherwise, would be carried out less realistically if there were an exclusion of all evidence of the bad terms existing between the appellant and the deceased. Evidence of a hostile relationship would enable the jury to draw adverse inferences from the circumstantial evidence pointing to the

> appellant's guilt; evidence of a good relationship, foreshadowed by the appellant in his records of interview and actually given in the witness box, would cause them to hesitate in doing so.
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> 139 Thirdly, the Crown was entitled to predict that the appellant would raise a particular version of his dealings with and attitudes to the deceased, and was entitled to endeavour to deal with it in its own case.
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> 140 Thus the evidence was also relevant because it contradicted the appellant's own version of the relationship given to the police and thus amounted to an "anticipation of possible defences": *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120 at 123 per Sugerman J. Similarly, in *Plomp v R* (1963) 110 CLR 234 at 251 the High Court accepted the admissibility of evidence that despite a statement by a husband that "he and his wife were 'very happily married', [he] was not on good terms with her and that he had on one occasion at least treated her with violence".
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> 141 The evidence against the appellant was, apart from his confession to Mr Brown, entirely circumstantial: he made no direct admissions to the police and there was no direct witness of the crime. Where a case is entirely circumstantial, it is common for relationship to be considered as one of the circumstances."

[67] The challenged evidence thus bore upon "the dealings and mutual attitudes of the appellant and the deceased", their "past dealings and mutual attitudes", their "bad relationship", their "hostile relationship", or the appellant's "dealings with and attitudes to the deceased".

[68] In my opinion, in that case as in this, evidence of the deceased's fear could not possibly cast any light on any of those matters unless that fear was attributable to something said or done by, in the presence of, or otherwise communicated to the accused. That Heydon JA regarded the admissibility of the evidence of the deceased's fear as requiring such a link appears from the following passages, in which I have emphasised his Honour's insistence on such a link. In paragraph [143] at p 576 of the judgment his Honour referred to evidence of the appellant's assaults upon the deceased and various difficulties in their relationship and said the expressions of fear "**which were explicitly linked with the appellant by the deceased or were capable of being linked with the appellant by the jury** were not, in point of relevance, in a sharply different category from the relationship evidence which the appellant did not complain about." Again, at paragraph [144] at pp 576 – 577, Heydon JA observed that "direct evidence of [the deceased's] fear, the degree of intensity of that fear, **and direct evidence of an assigned basis for that fear**, coming from the deceased and reported to the court by another witness, were also relevant"; that the rationale of that evidence could be assessed by taking into account other evidence of **tensions in the relationship** between the appellant and the deceased likely to cause the deceased to be scared; and that the "**mutual dealings and attitude**" (of the deceased and the accused) "as illustrated by the impugned evidence and by inferences from it, could rationally affect the assessment of the probability" of the accused having killed the deceased.

[69] It was this part of the decision in *Clark* that the judge at the pre-trial hearing cited in support of her Honour's ruling that the impugned evidence was admissible: see paragraph [41] above. But the rationale there given by Heydon JA for the admission of

the evidence of the deceased's fear as bearing upon her relationship with the accused necessarily involved the proposition that the evidence could be linked by the jury to something said or done by or communicated to[30] the accused. As his Honour later said, "the stuff of a 'relationship' between two people is the mutual dealings between them and the consequential attitudes each has for the other".[31]

[70] So much clearly appears also in Heydon JA's discussion of the admissibility of each of the passages of evidence in issue in *Clark*. It is necessary to give only one example. A Mrs Robertson gave the following evidence of a conversation with the deceased four to five weeks before her death. [32]

> *"Q. Did you from time to time talk to Miss Lock about the accused?*
>
> *A. Only that she was very, very scared of him.*
>
> *Q. How did she come to say that to you, that she was scared of the accused?*
>
> *A. Well, I did see her with a black eye and she did tell me that Nobby, as they used to call him, had given her a black eye.*
>
> *Q. Did she tell you on any occasion that she was afraid of the accused, scared of the accused?*
>
> *A. Yeah, and she said that she was scared Nobby was around the house because she was stopping there on her own."*

[71] Clark contended that the first and third question and answer were inadmissible. In ruling that the evidence was admissible Heydon JA relied upon the evidentiary link between the evidence of the deceased's fear and the appellant:[33]

> "While the two answers of Mrs Robertson complained of by themselves would face hurdles created by statements in *Wilson v R* and *R v Frawley*, when the intervening answer, about which no complaint is made, is read, the basis for the objection to relevance goes. Evidence of injuries caused by acts of violence which are linked with the appellant was relevant. There was much evidence of at least one black eye, and the appellant admitted to the police that he had caused the deceased to have it. The proposition that the appellant had given the deceased a black eye was in any event admissible under s 65(2)(b).[34] A representation by the deceased that she was very, very scared of the appellant was admissible evidence of her

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30 See, in particular, *Clark* at paragraphs [165] – [167].

31 *Clark* at [160]. The same approach appears in the judgment of McPherson J in *R v Mills* [1986] 1 Qd R 77 at 85-87.

32 *Clark* at [81].

33 *Clark* at [159].

34 Section 65(2)(b) of the *Evidence Act* 1995 (NSW) provided that the hearsay rule did not apply to evidence of a previous representation that was given by a person who saw, heard or otherwise perceived the representation being made if the representation was made when or shortly after the asserted fact occurred and in circumstances that made it unlikely that it was a fabrication.

feelings and state of mind under s 72,[35] and hence of one aspect of her relationship with the appellant."

[72] The reference to the statements in *Wilson* and *Frawley* is to the statements to which I referred earlier that would have denied the admissibility of evidence on the ground that it did not evidence anything said or done by the accused or in his presence or otherwise communicated to him. The reasons given by Heydon JA for nevertheless admitting the evidence have no application in this case because the contentious evidence here was to the effect that the evidence of Ms Lester's fear did **not** reflect an aspect of her relationship with the appellant. Whilst one can accept that the jury might have inferred from other evidence that Ms Lester would have been predisposed to believe the statements she reported, it is not a reasonable inference from the impugned evidence of any of Browning, Catalano and Neilsen that Ms Lester's alleged fear was attributable to anything other than the inadmissible statements she reported to them.

[73] On Browning's evidence (quoted in paragraph [24] above) Ms Lester's affirmative answer to the question whether the appellant would pay to have her killed followed immediately upon her evidence that Ms Lester reported statements by two people that they had "come to see her about knocking her off". The only reasonable inference from Browning's evidence was that Ms Lester's asserted belief (the evidence of "fear" admitted under s 93B) that the appellant would pay to have her killed arose from those statements.

[74] Similarly, the only logical and reasonable inference from Catalano's evidence (quoted in paragraph [25] above) that Ms Lester said that she was frightened (the evidence of "fear" admitted under s 93B) is that her fear arose from having been warned by two friends that the appellant had sent somebody to kill her.

[75] If the jury drew an inference from Mr Neilsen's evidence (quoted in paragraph [26] above) that Ms Lester believed the "family friend's" statement that the appellant had written to him asking if he would kill Ms Lester and Mr Morrison then that belief (again, the evidence of "fear" admitted under s 93B) plainly arose from the statement and no other source.

[76] In any case, that Ms Lester's fear arose from the statement allegedly attributed by the unidentified person to the appellant formed the only logical basis upon which that statement was admitted in evidence. Ms Lester's reported belief of the statement constituted her alleged fear of the appellant. That fear was inseparable from the alleged statement. As the contentious evidence was not evidence that the appellant had in fact made any such statement, and there being no evidence that the appellant's alleged reports of such a statement were ever communicated to the appellant, Ms Lester's alleged "fear" conveyed nothing about the appellant's past or likely future state of mind or conduct. In short, the evidence did not directly or indirectly bear on the appellant's attitude towards Ms Lester and thus it did not bear on the question

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[35] Section 72 provided that the hearsay rule did not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind. It therefore operated in *Clark* to provide an exception to the hearsay rule which is relevantly indistinguishable to the operation of s 93B of the *Evidence Act* 1977 (Qld) in this case.

whether or not he was implicated in her murder. It did not "assist the choice between the two explanations of the occurrence".[36]

[77] I conclude that the evidence was irrelevant and inadmissible. In my respectful opinion the appellant's objection to its admission at the pre-trial hearing should have been upheld.

[78] Subsection 590AA(4) of the *Code* provides that such a ruling may not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. In my opinion this ground of appeal has been established. The evidence was of a particularly prejudicial character, including as it did statements that the appellant had asked someone to murder the appellant. That the jury regarded the evidence as significant is a reasonable inference and it clearly appears from its request for a re-direction upon the topic. Subject to the application of the proviso the conviction should be set aside on the ground that the admission of this evidence produced a miscarriage of justice.[37]

Relevance of Neilsen's evidence that on 9 January 2002 the deceased said that Ms Lester said that she was in fear of the appellant and there was no chance of reconciliation

[79] The appellant objected to Neilsen's evidence that on 9 January 2002 Ms Lester told him that that she was in fear of the appellant. The judge at the pre-trial hearing held that Neilsen's evidence of Ms Lester's fear of the appellant was relevant evidence. In so concluding her Honour adverted to other evidence that Ms Lester had told Neilsen of the incidents involving herself and Neilsen. Similarly, when Neilsen gave evidence he first referred to his preparation of Ms Lester's affidavits concerning those incidents before giving evidence of her statement of her fear of the appellant.

[80] Whilst Ms Lester's reported fear was not expressly linked to any event it was plainly open to the jury to infer that it arose out of those incidents. That provided the necessary connection between the statements and conduct of the appellant and Ms Lester's fear. Following the reasoning in *Clark*, I consider that this part of Neilsen's evidence was admissible. No separate argument was addressed to the balance of the statement ("and there was no chance of a reconciliation") either at the pre-trial hearing (where this part of the evidence seems not to have been foreshadowed), at the trial, or in the appeal.

Should the evidence have been excluded in the trial judge's discretion?

[81] I have concluded that the contentious evidence was inadmissible. It is therefore not necessary to consider the further ground of appeal that the trial judge should have excluded that evidence in exercise of the discretion conferred by s 98 or s 130 of the *Evidence Act* 1977 (Qld) or the common law discretion to exclude evidence where its prejudicial effect outweighs its probative value.[38]

The proviso

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36 cf *Clark* (2002) 123 A Crim R 506; [2001] NSW CCA 494 per Heydon JA at 555.

37 *Weiss v The Queen* (2005) 224 CLR 300 at [18], [36]; [2005] HCA 81.

38 *R v Swaffield* (1998) 192 CLR 159 at 189; [1998] HCA 1.

[82] It remains necessary to consider the respondent's contention that the appeal should be dismissed on the ground that, "no substantial miscarriage of justice has actually occurred": *Criminal Code*, s 668E(1A).

[83] In *Weiss v R*,[39] the High Court held that in applying a provision in this form an appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task of the appellate court is an objective task not materially different from other appellate tasks; it is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; and it is not an exercise in speculation or prediction. It must be borne in mind that the standard of proof of criminal guilt is beyond reasonable doubt. The Court further explained the nature of the relevant function in the following passage:[40]

> "[41]That task is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.
>
> [42]It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.
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> [43]There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not "to speculate upon probable reconviction and decide according to how the speculation comes out". But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was

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39 *Weiss v The Queen* (2005) 224 CLR 300 at [39]; [2005] HCA 81.

40 *Weiss v The Queen* (2005) 224 CLR 300 at [41] – [44]; [2005] HCA 81. I have omitted citations.

> returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt.
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> [44]Next, the permissive language of the proviso ("the Court ... *may*, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal ...") is important. So, too, is the way in which the condition for the exercise of that power is expressed ("if it considers that no *substantial* miscarriage of justice has *actually* occurred"). No single universally applicable description of what constitutes "no *substantial* miscarriage of justice" can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."

The effect of the trial judge's directions

[84] The respondent contends that the directions given by the trial judge obviated any prejudice that might have arisen from the admission of the evidence. I accept that those directions to some extent ameliorated the prejudicial effect of the evidence held to be admissible in the pre-trial ruling, but in my opinion the evidence and the directions remained highly prejudicial to the appellant.

[85] The judge at the pre-trial hearing held that evidence of Ms Lester's statements that someone had approached her and conveyed the reported statements was evidence of representations to that effect within the meaning of s 93B(1): see paragraph [46] above. On that footing the evidence that Ms Lester said that those statements were made to her would be admissible of the truth of that fact, that is, the fact that those statements were in fact made. The trial judge, however, adopted a more restrictive approach, directing the jury that the evidence was not admitted to prove the truth even of Ms Lester's statements that someone had approached her or conveyed the statements she was said to have reported: see paragraph [34] above.

[86] The trial judge nevertheless directed the jury that it could infer from the evidence that the statements attributed to the appellant were made to Ms Lester that she believed them, and from that it could infer that the inadmissible evidence pointed towards the appellant's guilt. The trial judge told the jury when the evidence of Browning and Catalano was given on day 4 of the trial that (see paragraph 29 above) it " was evidence from which the jury could piece together an idea of the relationship; whether Ms Lester feared her husband and whether she had reason to fear him, which could assist the jury in deciding whether the Crown had made out its case"; in summing up on day 10 the trial judge directed the jury (see paragraph 32 above) that all of the impugned evidence "may help you to decide whether the accused did, in fact, offer Kinsella money to kill Mrs Lester" and that it "may assist you to decide whether Michael Kinsella acted on his own and killed Mrs Lester for his own motives or whether he killed Mrs Lester because the accused asked him to", and that (see paragraph 34 above) the impugned evidence " may assist you to decide whether the accused is implicated in the death of his wife"; and (in the re-direction late on day 12

of the trial) the trial judge directed the jury that (see paragraph 37 above) the evidence might help the jury to decide whether Kinsella acted as he did because of the offer of money to kill Mrs Lester or whether he acted on his own for some reason or motive of his own.

[87] That the jury was unclear about the effect of the relevant directions appears from its request for further directions on the topic, but those further directions incorporated and did not add to the directions in the summing up. If, as the trial judge directed the jury, the contentious evidence did not tend to prove even that the prejudicial statements had been made to Ms Lester, then one way in which the jury might have reasoned that Ms Lester's belief tended to prove the appellant's guilt was that it suggested that the appellant was the kind of person who was likely to organise murder. That would of course be an illegitimate mode of reasoning. The judge at the pre-trial hearing held that the jury should be warned that it could not use the evidence for the impermissible purpose of demonstrating a propensity on the part of the appellant to commit the crime.[41] But the trial judge did not give such a direction. The inadmissible evidence of statements that the appellant had asked someone to kill the Ms Lester remained highly prejudicial to the appellant.[42]

The strength of the Crown case

[88] The respondent also contends that the Crown case was so powerful that this Court should not harbour a reasonable doubt that the appellant is guilty. That requires some further reference to the evidence and the issues in the trial.

[89] Kinsella gave evidence that he had only met the appellant and the deceased on two occasions and that the appellant had had no contact with Kinsella for at least a year before the killing. (The appellant came to know Kinsella when a woman called Willett, a friend of the appellant and Ms Lester, introduced them to the Kinsella family). He said that (at a time when the appellant was living in Melbourne whilst on bail) the appellant telephoned him. An admitted schedule of relevant telephone calls in the period leading up to Ms Lester's death indicates that the appellant's first telephone call to Kinsella was on 2 November 2002. The schedule also shows that, with one exception, the appellant made the telephone calls to Kinsella from various pay phones around Melbourne. The exception was that at the time when Kinsella was killing Ms Lester the schedule shows that the appellant used the fixed telephone at his Melbourne residence to ring a man called Gillespie.

[90] 19 November 2002, when Kinsella murdered Ms Lester, was a Tuesday. The Crown alleged that during the preceding weekend, the appellant (in breach of the conditions of his bail) drove from Melbourne to Queensland, met Kinsella near the border at Goondiwindi, and then travelled as a passenger in Kinsella's car to Hervey Bay, from Hervey Bay to Brisbane, and then from Brisbane to Goondiwindi where they parted and returned to their respective residences. The appellant formally admitted at the trial that, contrary to the conditions of his bail, the appellant returned to Queensland from Victoria other than for the purpose of a court requirement and was present in Queensland on 16 November 2002; and that the appellant, in company with Kinsella, travelled by car to the general vicinity of the Hervey Bay house, the Chermside Shopping Centre at Chermside, Brisbane, and the general vicinity of the then residence of Morrison in Brisbane.

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41 *R v Lester* [2007] QSC 229 at [18].

42 See *Pfennig v The Queen* (1995) 182 CLR 461 at 489; [1995] HCA 7.

[91] Kinsella described his trip with the appellant and the conversations they had in very considerable detail. He referred to the places where they stopped, the shops and petrol stations where they bought various items and petrol, and the various phone calls Kinsella said he had with the appellant to arrange the trip and after the trip until Kinsella murdered Ms Lester. Significant aspects of those details were corroborated by other evidence. That included the admitted details of telephone calls from the appellant to Kinsella on various public phones; evidence of other witnesses confirming that during the trip the appellant made phone calls to them as Kinsella had asserted; evidence of a shop assistant in Brisbane that someone had sought to buy a baseball bat at the shop (when Kinsella had asserted the appellant had attempted to do for the purpose of using it to assault Ms Lester), and police evidence that when the appellant's car was eventually seized in Victoria there was a piece of wire near the number plate (which was consistent with Kinsella's evidence that the appellant had wired his key in that position when he had left his car near the Queensland border). In addition, the Crown relied upon evidence that confirmed the accuracy of things the appellant had said to Kinsella that Kinsella otherwise would not have known. That included, for example, some of the details of the appellant's attack on Morrison, some of the appellant's bail conditions which he breached by entering Queensland, details about Ms Lester's car and place of employment, and the location of Ms Lester's mother's residence.

[92] Kinsella gave evidence that he drove to Morrison's place in Brisbane following the appellant's directions, but, as requested by the appellant, pulled up some distance away so that the appellant wouldn't be seen by Ms Lester. After the appellant had checked that Ms Lester's car was at Morrison's place, they bought some takeaway food and ate it while they discussed how the appellant could go back and get Ms Lester. The appellant spoke of hitting his wife and Morrison on the head with a steel pipe that Kinsella had said he had in his boot, which Kinsella then got out and showed to the appellant. The appellant kept breaking down and crying, blaming Ms Lester for the death of their son. He spoke also of other violence he would do to Ms Lester. After the meal was consumed the appellant changed his clothes into something like medical overalls made of a plastic material and he wore a balaclava and gloves. He attributed this to his wish to avoid leaving DNA in the house.

[93] Kinsella drove closer to the house and dropped the appellant off near the driveway. After the appellant walked towards the house, armed with the pipe, Kinsella drove back to a nearby location. After a time the appellant returned to the car, running and complaining that he couldn't get into the house because it was locked and a light had come on. The appellant said "our son's dead" and that Ms Lester was up there "dancing and having a good time"; "playing music and having a whale of a time". The appellant then changed back into his usual clothes.

[94] That account tallied with evidence given by Morrison concerning locations near his house described by Kinsella and also to the effect that Ms Lester was at Morrison's house that night; that he and Ms Lester and another were having a BBQ and playing music; and that there was some dancing, in the course of which they heard a noise outside which they assumed was caused by dogs. When Morrison investigated he noticed that a sensor light had come on and the dogs were agitated, but he saw nobody so returned to their previous activity.

[95] After that, according to Kinsella, Kinsella and the appellant went to a service station in Brisbane at which the appellant offered Kinsella $10,000 to kill Ms Lester. The

appellant gave Kinsella a business card on which the appellant wrote a phone number of one of the appellant's friends who could give Kinsella an address and directions of where to go to murder Ms Lester. The appellant suggested to Kinsella that he commit the murder on a Wednesday or a Tuesday because he would be at home and Ms Lester rang their son on Wednesday, so the appellant would have a perfect alibi.

[96] Kinsella said he then drove the appellant back to Goondiwindi. Kinsella said there was further discussion about further contact, in which the appellant said he would ring Kinsella during the week. Kinsella said that he thought that the appellant had rung him either on the Sunday night or the Monday just to let Kinsella know that the appellant was just about home (in Melbourne). After that he did not hear from the appellant again.

[97] Kinsella subsequently described the circumstances in which he murdered Ms Lester. He took the knife into her house and after an amicable conversation, just as they were parting, he killed her with the knife, very violently. Kinsella gave evidence that he murdered her for the money that the appellant had promised him. He said that he was in debt at that stage and he had finance companies threatening to take him to court if he didn't pay. He said that he only took the knife into the house because he saw it in his car (where he had earlier put it after buying it) and he also said that he did not intend to use it.

[98] Kinsella was quickly apprehended for the murder. He initially prevaricated about it. He admitted having been to Ms Lester's house and claimed that he left her alive. Subsequently he admitted having murdered Ms Lester but at first he did not implicate the appellant in the murder. He did so in later statements to police.

[99] The Crown also relied upon a false denial that the appellant gave to police, when questioned, that the appellant did not know Kinsella. The Crown relied upon another lie by the appellant. When he was asked by police to account for his movements in the days before Ms Lester's murder the appellant said that the last time he had been in Queensland was when he attended a court hearing about the custody of Shaun, concealing the fact that he had driven around with Kinsella in Queensland in the weekend before the murder.

[100] The Crown also relied upon evidence that the appellant had been recorded as saying to one Challender: "Go and see Mrs Lester and give her a bashing". (The competing contentions of the parties were that “bashing” meant a physical assault or, to the contrary, an "ear bashing". Other parts of the tape recording referred to the appellant asking Challender to "make her wake up to herself”.) The Crown also relied upon evidence of Challender, who was not cross-examined, as supporting an implied admission by the appellant. Challender spoke to the appellant after Ms Lester's death:

> "Using the words as best you can recall, please? I just asked him if he had anything to do with it.
> And what, if anything, did he say? He didn't. Told me to mind my own business.
> Did you ask him that once or more than once? It could have been a couple of times.
> Did he ever provide you with an answer at all? No."

[101] Counsel for the defence contended that the phrase "he didn't" conveyed (as it was spoken) the meaning that the appellant answered by saying that he didn't have anything to do with the death of Ms Lester. The Crown contended for an implied admission on the footing that what this conveyed was instead that the appellant told Challender, who was a friend of the appellants, to mind his own business in circumstances in which it would be expected that the appellant would deny having been involved if he were not involved in the murder.

[102] In the summing up the trial judge summarised the Crown's contention as being that the evidence as a whole materially supported Kinsella's evidence. The trial judge summarised the defence contention as being that the evidence of Kinsella was critical, there being no other evidence that the appellant procured Kinsella to kill Ms Lester, and that Kinsella had been shown to be unreliable, untrustworthy and dishonest.

[103] The Crown contended that the essence of Kinsella's evidence was corroborated in a large number of facts established by the evidence: the numerous telephone calls made by the appellant to Kinsella; that they came out of the blue and commenced fairly shortly before the murder; that there were many such calls on the night before the murder; the many details corroborating Kinsella's evidence about various aspects of the road trip Kinsella had with the appellant on the weekend of 16 November; that on the evidence the only reason for the appellant to come to Queensland and drive to Hervey Bay, and then to Brisbane was for the appellant to find Ms Lester; that it was significant that the appellant was with Kinsella who later killed Ms Lester; that Kinsella gave the appellant the means of contacting a friend of the appellants who could tell Kinsella if Ms Lester was at Morrison's house in Brisbane; that the appellant chose Kinsella as the person to drive him around Queensland, when Kinsella was not a close friend of the appellant like others with whom the appellant was in contact; that the appellant went to considerable length to conceal the fact that he was in communication with Kinsella, by using a variety of telephone boxes scattered throughout Melbourne suburbs rather than the telephone in his own house or his own mobile phone; and that there was no reason for Kinsella to drive the considerable distance he did to collect and take the appellant to various places unless there was a promise of some reward.

[104] The appellant's conduct in travelling to Queensland in breach of his bail conditions was said to be inexplicable unless his purpose was criminal. That he travelled in an unregistered car he had purchased not long before that trip, which he might have thought could not be traced to him; and that these matters, together with other matters such as the appellant's use of public telephones to conceal the arrangements he was making with Kinsella, supported the inference that the appellant came to Queensland to kill Ms Lester or to have her killed, as Kinsella testified.

The reliability of Kinsella's evidence

[105] On the other hand, the defence emphasised and relied upon numerous inconsistencies contended for in the evidence of Kinsella. The defence also argued that the obvious ferocity of the attack on Ms Lester (there were very many stab wounds and evidence of great violence) was not consistent with what one would expect from a hired killer and as indicating the possibility of an undisclosed motive in Kinsella. The defence relied upon matters indicating that Kinsella was a very unusual person: the very brutal method of the killing, Kinsella's apparent lack of emotion or empathy, the calm and collected manner in which he acted afterwards, and the way in which Kinsella was

hospitable and calm when the police came to arrest him. It was contended for the defence that the evidence of the hostility of the appellant to Ms Lester was insufficient to implicate the appellant in murder. The defence also argued that Kinsella's evidence showed that he did not go to Ms Lester's house to kill her but rather later blamed the appellant when Kinsella was disgusted and ashamed at himself for what he did and the reason for which he would still not reveal.

[106] The prosecutor confined the Crown case to one that the appellant procured (rather than counselled)[43] Kinsella to commit the offence. Therefore, although the prosecutor adduced a great deal of evidence that provided support for the Crown case, a critical issue for the jury was whether Kinsella's evidence that the appellant had offered him $10,000 to kill Ms Lester was true. That being so, the jury's assessment of Kinsella's reliability was significant.

[107] The cross-examination of Kinsella was very lengthy: it occupies about 140 pages in transcript form. The cross-examination exposed various lies he had told the police and inconsistencies in the evidence he had given. For example, the cross-examination emphasised that just before Kinsella was charged, when he was asked whether the appellant had offered him any money in any way to cause any injuries to Ms Lester, Kinsella said "no", an answer which he contended in cross-examination at the appellant's trial was a lie. Kinsella also agreed in cross-examination that when he first implicated the appellant in the murder he told police that the first request by the appellant to harm Ms Lester was not in a conversation at the service station in Brisbane but rather in an earlier telephone conversation which otherwise concerned a possible sale of a tractor. In subsequent evidence in cross-examination Kinsella indicated uncertainty about when the matter was first raised but said he thought it was in a phone call after the visit to Brisbane: that evidence was inconsistent with Kinsella's evidence in chief. Kinsella agreed in cross-examination that he had told police a lot of lies. Kinsella also said at one point in cross-examination that at the time when he told police of the appellant's involvement he wasn't sure how he was going to be paid, he was hoping he would be, and that hope sprang out of his (financial) desperation. He said that this was true "at the time".

[108] The trial judge referred in summing up to the submission by the appellant's counsel at trial that Kinsella was a liar, that the jury could not act on his evidence to convict the accused. Defence counsel stressed the fact that there was no evidence at all which corroborated Kinsella's testimony that he was offered money by the appellant to kill Ms Lester. The only evidence on that particular point came from Kinsella. It must be borne in mind also that Kinsella was, on the Crown case, a co-offender: as the trial judge warned the jury, for that reason and for associated considerations, it would be dangerous to convict the appellant on his evidence unless the jury found that it was supported in a material way by independent evidence implicating the appellant in the offence.

[109] The issues concerning the accuracy and reliability of Kinsella’s evidence cannot be dismissed as being of no account, as is illustrated by the fact that the jury deliberated for some two and a half days before delivering its verdict of guilty. Much depends upon the proper conclusion as to his honesty and reliability, an assessment that must be made against the background of a great deal of other oral evidence. There were issues of credibility in relation to other witnesses, particularly Bartlett. This is a case in

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43 *Criminal Code* s 7(1)(d).

which the natural limitations that exist in the case of an appellate court proceeding wholly on the record render it impossible for this Court to conclude that the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. The proper conclusion is that there must be an order for a new trial.

Disposition

[110] I would allow the appeal, set aside the verdict of guilty and the conviction, and order a re- trial.

[111] **MACKENZIE AJA:** I have had the opportunity to read the reasons of Fraser JA. I agree with his thorough analysis of the issues raised by the parties, and with the conclusions he reaches on them. I agree that the orders he proposes should be made.

[112] **DOUGLAS J:** I agree with the reasons for judgment and the orders proposed by Fraser JA.