SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mitchell* [2008] QCA 394
PARTIES:	**R** **v** **MITCHELL, Curtis Lloyd** (appellant)
FILE NO:	CA No 174 of 2008 SC No 29 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court in Cairns
DELIVERED ON:	9 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2008
JUDGES:	McMurdo P, Holmes JA and McMeekin J Separate reasons for judgment of each member of the Court, Holmes JA and McMeekin J concurring as to the order made, McMurdo P dissenting in part.
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – where the trial judge gave re-directions in regards to circumstantial evidence – whether the trial judge placed too much emphasis on circumstantial evidence – whether the re-directions incorrectly influenced the jury *Criminal Code* 1899 (Qld), s 668E *Cesan v The Queen; Mas Rivadavia v The Queen* (2008) 250 ALR 192; [2008] HCA 52, considered *Gassy v The Queen* (2008) 245 ALR 613; [2008] HCA 18, followed *The Queen v Holman* [1997] 1 Qd R 373; [1996] QCA 262, followed *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, followed
COUNSEL:	J A Hunter 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] **McMURDO P:** McMeekin J has set out the relevant issues and most of the pertinent facts so that my reasons for allowing the appeal against the murder conviction can be more briefly stated than otherwise.

[2] The appellant was convicted of murdering the deceased and of assault occasioning bodily harm whilst armed with an offensive instrument in respect of both Luke Hudson and Vandra Lorraine Diamond.

[3] There was a persuasive body of evidence, uncontradicted by contrary sworn evidence, that after the appellant and the deceased returned home the appellant assaulted the deceased, Mr Hudson and Ms Diamond. The deceased died some time later without leaving the house.

[4] Pathologist Dr David Williams gave evidence that the cause of death was a head injury due to repeated trauma to the head. Dr Williams agreed that it was possible that the deceased suffered damage to the brain without dying instantly. The deceased's urine alcohol levels suggested that he was very drunk prior to lapsing into unconsciousness; at that time his blood alcohol level would have been above 0.2. He would therefore have been stumbling and slurring his words so that, Dr Williams considered, it would have been very hard to detect, even for a skilled professional, whether the deceased was suffering the effects of the head injury or the intoxication. The deceased also suffered a number of recent (within 24 hours of death) injuries to the knuckles on his right hand, arms, shoulders and knees and a large area of bruising to the left thigh, buttock and forearm, consistent with defending himself from assault with a blunt instrument or being caused in a heavy fall.

[5] Mr Hudson gave evidence in cross-examination that his memory was affected by alcohol abuse, which had caused him minor brain damage, and by previous significant head injuries unrelated to the present episode. He agreed that he told police that he and the deceased "must have been bashed downtown" before they returned to the house where the deceased later died, either that night or early the next morning. Mr Hudson also agreed that it was "entirely possible" that he and the deceased were assaulted on their way home that evening.

[6] The appellant did not give evidence but a statement that he provided to police shortly after the death was tendered. It recorded the following information. He was blind drunk that evening. He staggered home, fell over and hit something and must have twisted his ankle. He saw some blood in the lounge room but this was not especially unusual and he did not take much notice because he was drunk. He went into his room and went to sleep. When he woke up the next morning he saw that Ms Diamond was injured and Mr Hudson was trying to wake up the deceased. The deceased had dried blood on his head and blood on his face. His body was stiff. He considered from his ambulance officer training that rigor mortis had set in. He arranged for an ambulance to be called. He waited with the others who were living in the house for the police to arrive.

[7] The defence case was that the prosecution had not proved beyond reasonable doubt that the appellant killed the deceased; there was a real possibility that the

deceased had died from injuries received in an assault by someone unknown prior to him returning to the house.

[8] The judge rightly directed the jury that the case against the appellant in respect of the deceased was circumstantial. The judge's original jury directions on circumstantial evidence[1] were appropriate and in accordance the customary direction referred to by Dawson J in *Shepherd v The Queen*:[2] "… where the jury relied upon circumstantial evidence, guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances".

[9] The jury originally retired to consider their verdicts at 3.53 pm on the fifth day of the trial. Shortly afterwards, some further directions were given and they retired again at 3.59 pm. At 7.22 pm the court reconvened because the jury had sought "clarifications on points of law regarding circumstantial evidence". His Honour then gave the redirections set out by McMeekin J at [30]. The jury again retired to consider their verdicts at 7.28 pm and returned with their guilty verdicts on all three counts at 7.52 pm. It therefore seems likely that the last redirection removed whatever obstacles prevented the earlier return of the jury verdicts: cf *Gassy v R*.[3]

[10] The last paragraph of his Honour's transcribed final redirections to the jury are confusing and concerning. For that reason, I have obtained the original recording of the directions and listened to it carefully on about six occasions. The transcription is accurate in recording the following:

> "But if you draw a rational conclusion that's consistent with guilt or simply nothing to do with it or not,[4] but you[5] find that fact on the circumstances, then that is[6] the fact that you find to have existed based on the circumstances[7] as you accept them to be."

[11] It is true that the judge, in the body of his original summing-up to the jury and twice earlier in this impugned final redirection, told the jury, consistent with the customary direction, that the defendant was entitled to the benefit of any reasonable and rational conclusion from circumstantial evidence consistent with innocence. But his Honour's final word to the jury on this aspect of the case which plainly concerned the jury was that if they drew *a* rational conclusion consistent with guilt then that is the fact they would find. This direction contradicted the judge's earlier directions and could only have confused the jury. It was plainly wrong in law.

[12] Mr R G Martin SC, who appeared for the respondent in this appeal, argued that no error of law had occurred in the redirection. He did not contend that, if the appellant successfully established an error of law in this respect, the court should nevertheless dismiss the appeal on the basis that it considered that no

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1 See out in McMeekin J's judgment at [25].

2 (1990) 170 CLR 573; [1990] HCA 56 at 578 (Dawson J, Toohey and Gaudron JJ agreeing); see also 576 (Mason J).

3 [2008] HCA 18 at [94] (Kirby J).

4 I found the words "it or not" unclear.

5 The word transcribed as "you" may be "you'd".

6 I heard the additional word "your" followed by a brief pause at this point in the recording.

7 I heard the additional word "you've" followed by a brief pause at this point in the recording.

substantial miscarriage of justice had actually occurred within the terms of s 668E(1A).

[13] Despite the strengths of the prosecution case against the appellant, the misdirection concerned a fundamental aspect of the judicial process so that the trial process in respect of the murder count was incurably flawed: *Cesan v The Queen; Mas Rivadavia v The Queen*.[8] There is a real danger that the jury, in returning a guilty verdict on murder so soon after the flawed direction, acted on the basis that they could convict if there was *a* rational conclusion from the evidence consistent with guilt. The appeal against conviction on the count of murder should be allowed. The directions on circumstantial evidence were not pertinent to the counts of assault occasioning bodily harm on which there was uncontradicted direct evidence from Ms Diamond. The appeals against conviction on those counts should be dismissed.

[14] I would allow the appeal against conviction only in respect of the count of murder, set aside that conviction and order a re-trial on it. I would dismiss the appeals against conviction in respect of the two counts of assault occasioning bodily harm.

[15] **HOLMES JA:** I agree with McMeekin J's reasons and proposed order. As to whether any miscarriage of justice was produced by the last part of his Honour's direction, it is of some importance that the contentious sentence (which, with respect, does seem meaningless) was immediately prefaced by the unequivocal statement "And you look at the rational conclusions and if there is any consistent with innocence, then the defendant gets the benefit of that". Although what followed would not have advanced the jury's understanding, I do not think, in light of the earlier, clear and comprehensive directions, that it would have been left in any doubt that it should not convict unless guilt was the only rational inference.

[16] **McMEEKIN J**: On the morning of 11 April 2004 David Rolley was found dead in a room of the apartment he shared with, amongst others, the appellant. He had skull fractures indicative of having received multiple blows. Those blows caused his death. They, and other injuries, were consistent with having been inflicted with a blunt instrument. A broken didgeridoo with the deceased's blood and hair on it was found in the unit.

[17] On 16 June 2008 the appellant was convicted in the Supreme Court at Cairns of David Rolley's murder. He was also convicted of unlawfully assaulting Luke Hudson and Vandra Diamond and doing them bodily harm whilst armed with an offensive instrument. The complaint made on the appeal relates to the re-directions given by the learned trial judge concerning the approach that the jury should take to circumstantial evidence. The appellant seeks a retrial on the count of murder.

[18] Any direction must of course be considered in the context of the evidence led at trial and the issues raised. I will briefly review those issues.

[19] The prosecution case was that the appellant had returned home on the evening of 10 April 2004, was angry, entered the room in which the deceased was

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[8] [2008] HCA 52 at [87]-[89] (French CJ), [125]-[129] (Hayne, Crennan and Kiefel JJ, Gummow and Heydon JJ agreeing).

located along with Diamond and Hudson and commenced to strike the three of them with various implements including the didgeridoo.

[20] Direct evidence of this was given by Hudson and Diamond. Both were drinking with the deceased in his room before the appellant arrived. Both gave evidence consistent with not observing the deceased to have any injuries before the appellant arrived. Both gave evidence that the deceased was struck by the appellant. Both were knocked unconscious by the blows received and that they asserted were inflicted by the appellant. Both had significant injuries the next day. Only the appellant emerged from the room without injury. The morning after these events the deceased was found sitting on the floor of the unit dead. Neither Hudson nor Diamond asserted that they observed the fatal blow being struck, or that they saw the deceased collapse after a particular blow to the head delivered by the appellant. Thus the prosecution case was a circumstantial one in the limited sense that causation of death depended on an inference to be drawn from the circumstances proved.

[21] A security guard and the appellant's daughter gave evidence of hearing a disturbance during the evening in the living quarters where Hudson and Diamond said these assaults occurred and where the deceased was found. Photographs of the room in which the deceased was found showed signs of there having been a disturbance. Thus there was some independent confirmation of the evidence of Hudson and Diamond.

[22] The appellant elected not to give or call evidence at the trial. A statement that he had provided to the police was tendered.[9] Effectively the appellant, whilst admitting his presence in the unit the night before, contended that he knew nothing of how Hudson, Diamond or Rolley came by their injuries.

[23] The defence case, or at least one aspect of it, was that although there may have been an argument or fight at the home it was entirely possible that the deceased had suffered the fatal injuries at some earlier time. The defence pointed principally to three pieces of evidence – the metabolising of alcohol after the deceased ceased drinking indicating that the deceased was alive for a period following such cessation; a statement by Hudson to police that he and the deceased may have been assaulted in the town; and the evidence of a pathologist concerning the possible capacities of the deceased after receiving the fatal blow or blows.

[24] The defence hypothesis involved acceptance of two propositions that the prosecution argued indicated its fanciful nature. First, the hypothesis involved the proposition that the deceased was attacked twice in the evening, presumably with both assailants wielding a blunt instrument. Secondly, it required acceptance of the proposition that having received a blow sufficient to fracture his skull he then walked home from town, went upstairs to his room, engaged in talking and drinking with his companions for some period of time whilst both he and his drinking companions remained unaware of his significant injury.

[25] The learned primary judge considered that a direction on circumstantial evidence was essential to a fair trial and proceeded to give the following direction in the course of his summing up:

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9 See exhibit 16 at R 435-441.

> "Circumstantial evidence is simply evidence of circumstances which can be relied upon. It is not proving a fact directly but instead point to its existence. It differs from direct evidence which tends to prove a fact directly. For example when Vandra Diamond said, "I saw Curtis Mitchell hitting Dave Rolley" if you accept that to be so, and it is a matter for you whether you do or not, that is direct evidence. The prosecution argues that in addition to that sort of direct evidence there is things like blood on the didgeridoo or the piece of wood, flesh (*sic*) blood on other places, and these with all the other circumstances would cause you to conclude that the assault occurred in the residence and not down town. So it is a combination, in those circumstances, of using direct evidence together with circumstantial evidence.
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> ...In relation to circumstantial evidence there is a special direction which I must give you. That is, to bring in a verdict of guilty based entirely or substantially upon circumstantial evidence it is necessary that guilt should not only be the rational conclusion but it should be the only rational conclusion that could be drawn from these circumstances. But there is any reasonable possibility consistent with innocence it is your duty to find the defendant not guilty of the charge you are considering. That simply follows from the requirement that guilt must be established beyond reasonable doubt."[10]

[26] No exception is taken to this aspect of the summing up.

[27] The jury retired at 3.53 pm on the fifth day of the trial. It returned a few minutes later for a short re-direction before retiring again at 4.02 pm. At 7.23 pm the court resumed in response to a request by the jury for:

> "Clarification on points of law regarding circumstantial evidence."[11]

[28] The learned trial judge then gave further directions on circumstantial evidence, which are the subject of this appeal, and the jury again retired 7.28 pm. At 7.51 pm the jury indicated that it had reached its verdict. The appellant points to this time sequence as indicating that circumstantial evidence was of significance to the jury and that the impugned directions proved decisive in enabling the jury to reach its verdict. The appellant asks that the same inference be drawn here as was drawn by Kirby J in *Gassy v The Queen* [2008] HCA 18 at [94]. His Honour said, after referring to the time sequence in that trial:

> "Contrary to the opinion of the majority in the court below, the inference is inescapable that the supplementary direction had the almost immediate effect of removing whatever obstacles had, until then, existed to agreement upon a verdict."

[29] So much can be accepted here.

[30] In response to the jury's question the learned trial judge directed as follows:

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10 R 364-365.
11 R 413/15.

"In my remarks to you I made the difference between direct evidence which is when a person says "I saw this" or "so and so said something" or "I heard such and such." The person who is reporting what they understood from their own senses is speaking directly what they say, what they said. That is called direct evidence. Sometimes however you can reach a conclusion about what happened by knowing all the surrounding facts and then saying, "if these things happened then this must have happened" so it is something you do every day in your life. It is just that when we try to explain it we rather make it sound very complicated. Every day you would say "oh this has happened" not that you saw it happen but because of all the other circumstances that must have happened. That was a rational conclusion. You have worked it out using your own common sense. A rational conclusion that that happened.

We call that circumstantial evidence because you all know, what you have heard or saw, is just the circumstances, but the fact of what happened is something you have worked out in your mind. You have concluded that fact. It is not second class evidence. You do it all the time.

So conclusions that you reach based on the circumstances are every bit as powerful as having direct evidence. It is just that sometimes direct evidence isn't available and so you have to use the circumstances to conclude what happened. But it's not second class evidence. It's every bit as probative and as important as direct evidence.

But in a criminal case sometimes you can reach one or two different conclusions, or three or four different conclusions. Consistently with the need to prove a case beyond reasonable doubt, if there is a conclusion that is reasonable and rational which is consistent with innocence then the defendant is entitled to the benefit of that because it means that it's not without doubt.

But you must exclude fanciful conclusions. You've got to use your common sense and say "these are the circumstances and this is what's happened." Usually there's perhaps only one answer. Sometimes it might be more than one, but you can only draw rational conclusions, not fanciful or extreme ones.

And you look at the rational conclusions and if there is any consistent with innocence, then the defendant gets the benefit of that. But if you draw a rational conclusion that's consistent with guilt or simply nothing to do with it or not, but you find that fact on the circumstances, then that is the fact that you find to have existed based on the circumstances as you accept them to be. Does that help?

SPEAKER: Yes.

HIS HONOUR: Okay. Good. Anyway I just want you to be sure that it's not second rate evidence. Okay. That's every bit

> as important. And when you think about it you do it every day. It's using your common sense. Thank you. If you would like to retire again now."

[31] Mr Lewis, who appeared for the appellant at trial, then said:

> "Your Honour I'm just a little concerned that Your Honour didn't use the expression as is commonly used in the summing-up directions with respect to circumstantial evidence that it must be the only rational inference. ... and that Your Honour perhaps has, with respect, somewhat more equivocally said that, but the general direction does use the term "only rational inference before they can bring in a verdict of guilt."

To which his Honour responded:

> "I thought I made that point clear enough. I was trying to explain it in language differently to what I expressed previously."

[32] His Honour declined to re-direct the jury.

[33] There are three complaints made about His Honour's direction. They are:

(a) The reference to circumstantial evidence not being "second class evidence." The submission is that whilst that might be true as a general rule the cogency or otherwise of circumstantial evidence depends entirely on its nature and the context in which it is adduced. It is submitted that the effect of his Honour's direction was: "to lend weight to the circumstantial evidence, when an assessment of it was entirely a matter for the jury."

(b) The reference made in the phrase "usually there is perhaps only one answer" after his Honour's direction to exclude fanciful considerations and telling the jury to use their common sense. That was then followed by the words "sometimes there might be more than one, but you can only draw rational conclusions, not fanciful or extreme ones." It is submitted that the effect of the direction was to diminish the force of any competing innocent inferences, by suggesting they could properly be regarded as fanciful or extreme;

(c) That his Honour failed to direct the jury in terms that "guilt should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances."

[34] As to the first ground of complaint two things might be said. Firstly his Honour was careful not to make any direct comment on any fact whether it favoured the prosecution or the defence. To my mind his Honour's refraining from making any direct comment on the facts reinforces the directions that he had already given to the jury that it was a matter for them to judge the facts. The second observation I would make is that no complaint of the type now made was made by experienced counsel at trial. In the context of the issues and the evidence led that is understandable. There is nothing in the nature of this case and the context in which the circumstantial evidence was adduced that made his

Honour's remark that such evidence was not "second class" evidence inappropriate.

[35] As to the second complaint in my view his Honour's words do not bear the connotation that is sought to be put on them. Taken in context his Honour's words were simply a reminder, and an every day reminder, to the jury that the inferences that they were to bear in mind were rational ones and not fanciful or extreme ones. His Honour's express reminder that "in a criminal case sometimes you can reach one or two different conclusions, or three or four different conclusions" is against the submission. Again the fact that his Honour refrained from any comment on the facts at all at this point in the trial removes any ground for the submission that is made. Again the absence of complaint from trial counsel suggests that the connotation now sought to be put on the words was not then evident.

[36] As to the third ground of complaint the answer is that his Honour twice referred to the defendant receiving the benefit of any conclusion that was reasonable and rational and consistent with innocence. There is no magic in the formula the appellant contends for. His Honour's expression is simply a different way of conveying the same direction as the appellant contends ought to have been made.

[37] In that regard I note that Byrne J (as he then was) commenced his judgment in *R v Holman* [1997] 1 Qd R 373 at 380 in the following words:

> "The direction commonly given to Queensland juries in a substantially circumstantial case includes a statement that, if there is any reasonable hypothesis consistent with innocence, it is the duty of the jury to acquit."

[38] To like effect is a statement in the joint judgment of Gibbs CJ and Mason J (as he then was) in *Chamberlain v The Queen* [No 2] (1984) 153 CLR 521 at 536:

> "When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; ... and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence."

[39] In *Shepherd v The Queen* (1990) 170 CLR 573 at 578 Dawson J pointed out that the formula that the appellant contends for here "is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt". In my view there is no doubt at all that his Honour plainly informed the jury that the burden lay on the prosecution and that they had to be satisfied beyond reasonable doubt. He did so in a general way on more than one occasion in the course of his summing up and in his redirection in relation to circumstantial evidence on the two occasions that I have quoted.

[40] Finally, the appellant is critical of the last sentence of his Honour's re-direction. As the appellant counsel observes in his outline the passage in the transcript seems confusing. However able and experienced trial counsel did not inform his Honour that the last sentence of his summing up confused the issue just discussed. In my view the sentence does not impair the clear direction given on the two previous occasions. The distinction between my view and that of McMurdo P rests on differing views as to the meaning and impact of that last

sentence. The unmistakable fact is that his Honour plainly did not intend to assert that the jury need only be satisfied that "a rational inference" of guilt was all that was needed to find the accused guilty of the charge. He had asserted the contrary in the sentence before the one under discussion. The issue is whether he did in effect contradict what he had said a second before or whether what he said was so confusing as to undo what he had said a second before.

[41] The paragraph when adjusted for what seems can be heard on the tape reads:

> "And you look at the rational conclusions and if there is any consistent with innocence, then the defendant gets the benefit of that. But if you draw a rational conclusion that's consistent with guilt or simply nothing to do with [possibly "it or not"]… but you'd find that fact on the circumstances, then that is your…the fact that you find to have existed based on the circumstances you've… as you accept them to be."

[42] In my view his Honour, in the second of the two sentences, is there going back to his discussion about finding facts drawn from the circumstances. He is not dealing with the issue that he had just completed – that "you look at the rational conclusions and if there is any consistent with innocence, then the defendant gets the benefit of that". All his Honour was attempting to convey was that in drawing a rational conclusion, whether it be consistent with innocence or guilt, then it was necessary that the conclusion depend on the facts found as derived from the circumstances as the jury accepted them to be. His Honour did not say, and in my view a reasonable jury would not think that he said or meant, that the jury could be satisfied of guilt if there was "a" rational conclusion consistent with guilt.

[43] Given the clear direction given a moment before I cannot accept that the jury would have misconstrued the opening words of the next sentence as meaning the opposite of what they had just been told. I am fortified in that view in that neither counsel on appeal nor counsel at trial sought to argue that the sentence bore the construction that is of concern to McMurdo P.

[44] The appeal is brought pursuant to s 668E of the *Criminal Code*. The relevant provision provides:

> "(1) The court on any such appeal against conviction shall allow the appeal if it is opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any case shall dismiss the appeal."

[45] In my opinion there was no wrong decision on any question of law and no miscarriage of justice. No contention was advanced that the verdict of the jury was unreasonable or not supported having regard to the evidence.

[46] I would dismiss the appeal.