SUPREME COURT OF QUEENSLAND

CITATION:	*R v Weston* [2009] QCA 331
PARTIES:	**R** **v** **WESTON, Radan Noel** (appellant)
FILE NO/S:	CA No 100 of 2009 SC No 97 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	30 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2009
JUDGES:	Keane and Holmes JJA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant admitted unlawfully killing deceased – where issue at trial whether appellant intended to cause death or grievous bodily harm to deceased – where evidence that appellant departed place of killing and manner of that departure admitted – whether evidence properly admitted *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited *Shepherd v The Queen* (1990) 170 CLR 573; [1990] HCA 56, cited *Tofilau v The Queen* (2007) 231 CLR 396; [2007] HCA 39, cited *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, cited
COUNSEL:	J R Baulch SC for the appellant (pro bono) M J Copley SC for the respondent
SOLICITORS:	Aboriginal and Torres Strait Islander Legal Service for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 21 April 2009 the appellant was convicted upon the verdict of a jury of one count of murder. He was sentenced to life imprisonment with 54 days pre-trial custody being declared to be time served under his sentence.

[2] At the commencement of the trial, the appellant acknowledged that he had unlawfully killed Jessica Janet Turner ("the deceased"). Accordingly, the only issue in the trial was whether the appellant intended to cause death or grievous bodily harm to the deceased.

[3] The appellant seeks to challenge his conviction on a number of grounds. While the grounds on which principal reliance is placed concern what are said to be irregularities in the conduct of the trial, one ground raises an issue as to the sufficiency of the evidence on which the appellant was convicted. Accordingly, it will be convenient to discuss the appellant's arguments in this Court after first summarising the cases advanced at trial for the prosecution and defence respectively.

The case at trial

[4] On 31 December 2007 the appellant and the deceased were attending a new year's party at the home of the appellant's brother, Grant Weston. The appellant was then 30 years old. He and the deceased had formerly been in a relationship, but the deceased had a new boyfriend. The appellant began drinking alcohol at 1.30 or 2.00 pm. He received a telephone call and left the premises for some time, returning at about 9.00 pm.

[5] At the time when the deceased was stabbed by the appellant, there were three other people present: Grant Weston, Ashley Chapman and Bruce Kenyon.

[6] The evidence was that during the course of the evening, the appellant and the deceased commenced to argue. Grant Weston said that he told the deceased to go home: the deceased said that she wanted a cigarette and he, Grant Weston, rolled a cigarette for her. The appellant, who had been standing near the deceased, walked away and returned. Grant Weston's evidence was not clear as to where the appellant went: he seemed to suggest that the appellant walked "out to the kitchen part" but said that he did not actually see him go into the kitchen. To the extent that this evidence was relevant to the possibility that the appellant obtained a knife from the kitchen, it was possible that he might have obtained a knife from a nearby table.

[7] Grant Weston said that he heard the appellant say to the deceased that he wanted to talk to her and that he, Grant Weston, said that they should let it go until the next day. Grant Weston said that he saw the appellant grab at the chest of the deceased. He then saw a knife protruding from her chest, and she said: "He stabbed me in the heart."

[8] According to Chapman, the appellant asked the deceased to come to him because he wanted to talk to her, and when she refused he said: "Well, here then." The deceased then said: "Oh, fucking, Ashley, he stabbed me" and fell to the floor. Chapman gave evidence that after the deceased fell to the floor, she pulled a knife out of her body.

[9] Kenyon said that he heard the appellant and the deceased arguing. He heard the appellant ask the deceased to come outside to talk but she refused and said that she was going. The deceased put a coat on and the appellant walked up to her at which

point the deceased said: "Bruce, he stabbed me." Kenyon gave evidence that he thought the appellant then said: "Fucking bitch." In cross-examination, Kenyon conceded that it may have been Grant Weston who said something rather than the appellant.

[10] Grant Weston forced the appellant out of the house, repeatedly punching the appellant, who did not retaliate, until the latter was out of the house and in the street. Chapman said that the appellant then "just got up and done the bolt, just ran off".

[11] Grant Weston said that the appellant was "pretty far gone" on alcohol and drugs. Grant Weston said that the appellant's speech was slow and slurred and he did not appear to know what he was saying. Chapman and Kenyon also said that the appellant was substantially affected by liquor or drugs.

[12] A post-mortem examination of the deceased revealed that she had suffered a 1.8 centimetre wide stab wound to the left side of her chest passing upwards to penetrate the left lung and pericardial sac and into the heart. The knife travelled five to 10 centimetres.

[13] The Crown Prosecutor, urged the following points on the jury:

(a) That the accused went from the living area to the kitchen to get the knife;
(b) That there was an intentional stabbing in the area of the heart;
(c) That the stabbing was accompanied by the words "fucking bitch";
(d) That the accused fled the scene.

[14] As to the second last of these points, the Crown Prosecutor said to the jury:

> "… and you may think the fact that he's left the knife in, he's achieved his aim and he's stood back, if you accept he says the words, 'Fucking bitch', you may conclude that he's almost admiring his work at that stage …"

[15] As to the last of the points referred to in paragraph [13] above, the Crown Prosecutor said to the jury:

> "Look at where he went straight afterwards. He didn't hang around as other people did for the emergency services, he departed. Now, that is a conscious thought process to remove himself from a scene. And people who are in a catatonic state, who are so intoxicated, you may think as a matter of fact don't just snap out of it."

[16] The appellant did not give evidence. The case put for him at trial was that the jury could not be satisfied beyond reasonable doubt that the appellant intended to kill or cause grievous bodily harm to the deceased because of his intoxication through the consumption of drugs and alcohol.

The appellant's arguments in this Court

[17] The appellant's grounds of appeal are that:

"1. The conviction is unsafe and unsatisfactory.

2. That evidence of the fact that the appellant departed from 52 Herbert Street Bowen and the manner of that departure was irrelevant and inadmissible.

Particulars

That evidence of departure was incapable of proving that the appellant intended to kill or do grievous bodily harm to the deceased.

3. Alternatively, if the evidence referred to in ground two is admissible then the learned primary Judge erred in failing to properly direct the Jury how they should approach the evidence of departure.

4. The learned Primary Judge erred in failing to properly direct the jury
   (a) The approach to be taken when considering circumstantial evidence.
   (b) As to which parts of the evidence before them was circumstantial evidence."

Unsafe and unsatisfactory verdict

[18] The first ground of appeal must be regarded as raising the question whether the jury could not have been reasonably satisfied of the appellant's guilt beyond reasonable doubt on all the evidence.[1] This argument cannot be sustained.

[19] There was no room for doubt that the appellant stabbed the deceased in the left side of her chest. There was no suggestion that this was not a willed act. The appellant was conscious when he stabbed his victim in the chest with a knife. He was guilty of murder if he intended to inflict grievous bodily harm on the deceased when he stabbed her. If the jury were satisfied that the appellant understood what he was doing when he stabbed his victim in the chest with a knife, then it was reasonably open to the jury to conclude that the element of intent necessary for the crime of murder was established.

[20] In my opinion, it was reasonably open to the jury to conclude that the appellant understood what he was doing when he stabbed the deceased. The relationship between the appellant and the deceased had terminated and the deceased had a new boyfriend. The appellant and the deceased had been arguing. She had rebuffed him. His action was intelligible (though not excusable) as a reaction to her rebuff. He chose to arm himself with a knife before he struck at her. And he chose not to wait for the arrival of medical assistance after he had stabbed her. Against these considerations, the jury were required to weigh the impressionistic evidence of Kenyon, Chapman and Grant Weston as to the appellant's state of intoxication. While the jury were required to have regard to this evidence as evidence that the appellant was intoxicated for the purpose of ascertaining whether the appellant intended to kill or cause grievous bodily harm to the deceased, it was entirely reasonable for the jury to regard this evidence as of little weight.

[21] I would reject the first ground of appeal.

Leaving the scene

[22] The second and third grounds of appeal can be discussed together. On the appellant's behalf it is submitted that the evidence of the appellant's departure from the house after the stabbing was irrelevant to the question of intention: evidence

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1 *MFA v The Queen* (2002) 213 CLR 606 at 614 – 615 [25] and 624 [59].

about these events was therefore inadmissible. Alternatively, it is said there should have been clear directions from the learned trial judge directing the jury that the appellant's departure might be explicable by reasons which were not inculpatory of him.

[23] At trial this evidence was not objected to by the defence. The absence of objection may well have been due to a forensic decision to allow the evidence to be adduced in order to allay any suggestion that the appellant's intention in stabbing the deceased could be inferred from a failure on his part to seek to render assistance to the deceased. It may also be doubted whether it was, in all the circumstances, likely to adversely affect to any material extent the appellant's prospects of an acquittal. But in any event, the evidence as to how the appellant left the scene of the killing was relevant to the issue of the appellant's ability to form the requisite intent.

[24] It was also argued on the appellant's behalf that the evidence showed that the appellant did not choose to leave but was forced from the premises; but the prosecution's point was based on the evidence that after he was in the street outside the house he chose to run off. The point being made by the prosecutor here was not that the appellant's flight revealed a consciousness of guilt, but that he was capable of making the choice to run off and of acting upon that choice.

[25] It may be said here that there can be no doubt that the jury understood that they had to determine whether the appellant acted with the proscribed intention, not merely whether he was capable of forming that intention. The learned primary judge directed the jury as follows:

> "The fact that a person is intoxicated whether by drink or drugs or a combination of both may be regarded for the purposes of ascertaining whether the specific intention to kill or to do grievous bodily harm existed.
>
> If, because of the evidence as to the effect of the intoxication or otherwise you are not satisfied beyond a reasonable doubt that the accused did in fact form the necessary intention you must find him not guilty of murder. After all, that is the issue here so far as the count of murder is concerned and you have regard to all of the evidence.
>
> I'm speaking now about the specific regard you would have to evidence of intoxication as a result of the consumption of alcohol or drugs or both. The evidence that the accused was intoxicated will not of itself entitle him to a verdict of not guilty of murder because a person when intoxicated may form the necessary intent, and one who has formed the necessary intent does not escape responsibility because intoxication has diminished his power to resist the temptation to carry it out.
>
> I'm sure you will as a matter of common experience have seen people when intoxicated do silly things, but do so intentionally, although doing it in circumstances where if the person had been sober they wouldn't have acted in such a way.
>
> If because of the evidence as to the effect of the intoxication or otherwise you are not satisfied beyond a reasonable doubt that the

> accused did in fact form the necessary intent then you must find him not guilty of murder."

[26] As to the contention that the learned trial judge should have directed the jury to consider that there could have been many reasons for the appellant to leave the scene other than a consciousness of guilt, no such direction was sought. That is hardly surprising: the prosecution did not seek to rely on this conduct as a basis for an inference of consciousness of guilt; and the learned trial judge had not himself suggested that the evidence could be relevant in this way.

[27] As to the complaint that the jury should have been given a specific direction in relation to the inferences which might legitimately be drawn from the appellant's post-offence conduct, once again no redirection was sought on this point at trial. That is understandable: to have sought a direction on this point would have raised the very difficulty which the appellant now says was to be avoided.[2]

[28] In my respectful opinion, the arguments advanced in support of these grounds of appeal are apt to inject retrospectively into the case complications which were not raised at trial and which did not need to be raised to ensure that the appellant had a fair trial of what was a relatively uncomplicated case. I would reject these grounds of appeal.

Circumstantial evidence

[29] As to the fourth ground of appeal, the learned trial judge directed the jury:

> "So the elements are an unlawful killing and an intention to kill or to do grievous bodily harm. One or other of those intentions is necessary. If you're not satisfied beyond a reasonable doubt that the accused had one or other of those intentions then he must be found not guilty of murder.
>
> If, for example, you thought it possible that he intended to strike with the knife at the deceased without any particular aim in mind or that he intended to frighten her or something of that kind then that would not be sufficient. It must either be an intention to kill or to do grievous bodily harm.
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> …"

[30] On the appellant's behalf it was submitted in the appellant's written outline that the learned trial judge should have directed the jury:

(a) That they had to be satisfied beyond a reasonable doubt that the appellant had obtained the knife from the kitchen.

(b) That if they were so satisfied of that fact, the obtaining of the knife did not of itself prove that the appellant intended to cause either the death or some grievous bodily harm to the deceased.

(c) That the learned trial judge should have directed the jury that they should guard against a process of reasoning along the lines that because the appellant deliberately obtained the knife from the kitchen that proved that his intention when he delivered the stab wound was to kill or do grievous bodily harm.

[31] Similarly, it was argued that his Honour should have directed the jury that they could act on the evidence that the appellant said "fucking bitch" after he had stabbed

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[2] Cf *Zoneff v The Queen* (2000) 200 CLR 234 at 244 [16] – [17].

the deceased as evidence of his intention only if they were satisfied beyond reasonable doubt that he had said those words.

[32] In oral argument Mr Baulch SC, who appeared for the appellant, did not press the contention that the jury should have been instructed that proof beyond reasonable doubt was required of these matters. Mr Baulch was right to take that course. Such directions are required in cases where the evidence in question goes to an indispensable intermediate step in the process of reasoning to a conclusion of guilt.[3] Neither the source of the knife, nor the uttering of the words "fucking bitch" was an indispensable intermediate step on the way to a conclusion that the appellant intended to inflict grievous bodily harm on the deceased.

[33] On the appellant's behalf it is submitted that the evidence that the appellant said the words "fucking bitch" as he stabbed the deceased was equivocal and should not have been admitted having regard to its likely prejudicial effect upon the jury. Only Kenyon said that the wounding was accompanied by the words "fucking bitch", and he was shaken on this point in cross-examination.

[34] The evidence as to the source of the knife and as to the appellant's expostulation did tend to inculpate the appellant if the jury accepted the evidence. It showed that the appellant was able to organise his thoughts and actions and to react to his environment in a way which demonstrated his ability to understand that environment and to respond to it.

[35] So far as concerns the evidence as to where the appellant obtained the knife with which he stabbed the deceased, the important point is that the appellant chose to arm himself with a knife before striking at the deceased. Whether he obtained the knife from the kitchen or a nearby table is less significant to the resolution of the issue in the case than the fact that he chose to arm himself.

[36] If the jury did not accept the evidence as to the expostulation by the appellant, it could not enure to his prejudice and it would simply not matter.[4] It was only if the evidence were accepted as true that it could disadvantage the appellant and that disadvantage flowed from the probative effect of the evidence or the issue of his intent. And once again this evidence was admitted without objection, and no redirection was sought from the learned trial judge.

[37] In these circumstances, the learned trial judge's direction was sufficient. It was in the following terms:

> "Evidence may be direct or it may be circumstantial. Direct evidence is evidence which, of its own force, proves or disproves or tends to prove or disprove a relevant fact. Circumstantial evidence is of a different character. It is evidence that allows you to draw an inference about a relevant fact. If there is more than one inference reasonably open on the evidence and any of those inferences is consistent with innocence, you are obliged to draw the inference consistent with innocence.
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> Here, as you know, murder has, as one of its elements, an intention. We cannot look inside a person's brain and see what was intended or

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3 Cf *Shepherd v The Queen* (1990) 170 CLR 573 at 579 – 580, 585.

4 Cf *Tofilau v The Queen* (2007) 231 CLR 396 at 402 [3].

> whether there was any intention. So it is something that can be inferred only from surrounding circumstances; action, words and the like, so that circumstantial evidence has a real relevance in this case."

[38] I would reject the fourth ground of appeal.

Conclusion and order

[39] In my respectful opinion, none of the grounds of appeal are made out.

[40] The appeal should be dismissed.

[41] **HOLMES JA:** I agree with the reasons of Keane JA and the order he proposes.

[42] **A LYONS J:** I agree with the reasons given by Keane JA that the appeal should be dismissed.