

SUPREME COURT OF QUEENSLAND

CITATION: *R v Legradi & Lombaard* [2010] QCA 364

PARTIES: **R**
v
LEGRADI, Denis
(appellant)

R
v
LOMBAARD, Morne Ricardo
(appellant)

FILE NO/S: CA No 152 of 2010
CA No 160 of 2010
SC No 579 of 2009

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 26 November 2010

JUDGES: Holmes, Fraser and White JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **In CA No 152 of 2010:**
1. The appeal is allowed.
2. The verdict is set aside.
3. A verdict of acquittal is entered.

In CA No 160 of 2010:
1. The appeal is allowed.
2. The verdict is set aside.
3. A verdict of acquittal is entered.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
VERDICT UNREASONABLE OR INSUPPORTABLE
HAVING REGARD TO EVIDENCE – APPEAL
ALLOWED – where appellants convicted of manslaughter –
where appellants restrained the deceased while acting as
security officers – where there was evidence that the
appellant, Legradi, had applied a “choker” hold to the
deceased – where there was evidence that the appellant,
Lombaard, had kicked and punched the deceased – where

there were multiple possible causes of death – whether appellants’ acts a substantial or significant cause of death – whether the jury could exclude other reasonable hypothesis as to causes of death consistent with innocence of the appellants

Criminal Code 1899 (Qld), s 293

Campbell v The Queen [1981] WAR 286, cited
R v Sherrington & Kuchler [2001] QCA 105, cited
R v Summers [1990] 1 Qd R 92, considered
Royall v The Queen (1990) 172 CLR 378; [1991] HCA 27, applied

- COUNSEL:**
- In CA No 152 of 2010:**
 B Farr SC for the appellant
 M J Copley SC for the respondent
- In CA No 160 of 2010:**
 A Kimmins, with Y Chekirova, for the appellant
 M J Copley SC for the respondent
- SOLICITORS:**
- In CA No 152 of 2010:**
 Guest Lawyers for the appellant
 Director of Public Prosecutions (Queensland) for the respondent
- In CA No 160 of 2010**
 Rostron Carlyle for the appellant
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **HOLMES JA:** The appellants were convicted of the manslaughter of Terii Tararo, whom they had restrained while acting as security officers outside a tavern. Both appeal their convictions on the ground that the verdicts were unsafe and unsatisfactory and, more particularly, that the Crown could not prove that their actions contributed significantly or substantially to Mr Tararo’s death. Legradi also appeals against the sentence of seven years imposed on him.
- [2] The appellants went to trial with another man, Tepaukonui, who was acquitted of the murder of Tararo but was found guilty of assaulting one of Tararo’s companions. Tepaukonui, like Legradi and Lombaard, was working on the evening of 18 May 2008 as a security officer at the Fisherman’s Wharf Tavern on the Gold Coast. Tararo arrived there with three friends, Colin Loseby, Mitchell Robert and Ken Maka. Tararo, Robert and Loseby joined the line to get into the tavern; Maka had returned to his vehicle to get something. Tararo, having reached the front of the line, was denied entry, having previously been ejected from the premises a few weeks earlier. He punched Lombaard. That led to an altercation with security officers and Tararo’s restraint over a period of about 11 minutes before police arrived at 10.50 pm.

The initial altercation

- [3] Lombaard’s partner, Lindon Robey, saw Lombaard move towards Mr Tararo, but was then distracted by one of Tararo’s friends, Colin Loseby, who he thought was

about to assault him. A patron, Mr Grover, saw Tararo charge at a group of security officers, all of them falling to the ground. They got up and Tararo assumed a fighting stance. Maka, arriving on the scene, saw Tararo still on his feet, wrestling with two or three security providers and apparently trying to get away from them. However, he, Maka, went to Loseby's assistance. He could hear Tararo for a while, but at some point before the police came, which might have been a couple of minutes or five minutes, he could no longer hear him. He was himself tackled by security officers and saw nothing more of Tararo.

Legradi's actions

- [4] A security officer, Smith, said that he and another security officer, Hibel, went to grab Tararo. The three of them fell. When he got back to his feet, he saw that Tararo was being restrained on the ground, initially, by Tepaukonui and then by Legradi. Tararo was on his stomach on the ground. Smith sought to hold his legs by crossing them over and putting his chest against them, while holding Tararo's belt. He thought he did so for about five minutes. Tararo kicked him off and Hibel replaced him, again crossing Tararo's legs and holding them. A director of the security company, Bennett, was also on the scene. He said that he too took a role in holding Tararo's legs; it seems after Smith was kicked off and before Hibel took hold. Another security officer, Satae, said that he also held one of Tararo's legs, at Bennett's direction, and was still holding it when the police arrived.
- [5] Descriptions of the position Legradi adopted in holding Tararo down varied. Hibel said that Legradi was straddling Tararo, sitting in the middle of his body with a thigh either side of him. He could not see where his hands were. Another of the security personnel, Papistock, also said that Legradi was in a straddling position, with a knee either side of Tararo's body. He did not see what Legradi did with his hands, although at one point, he saw him pull up Tararo's shirt and use it to mop some blood from a wound on Tararo's head. A bystander who gave evidence, Ms Kocovska, said that one of the security guards was straddling Tararo and pushing his neck down, while yet another was sitting lower down his body. Four other patrons (Cooke, Alexander, Mlalazi and Huxley) described one or more of the "bouncers" sitting on Tararo's back.
- [6] By contrast, Bennett thought that Legradi was lying beside Tararo holding him around the shoulders; he recalled that when police arrived, Legradi was at Tararo's arm and shoulder area. Tararo was still struggling at that point and police wrestled with him to get handcuffs on. Another security officer, Turner, said that Legradi was restraining Tararo by holding his arm behind his back in a shoulder-lock position with some weight on Tararo. He saw Legradi across the top of Tararo's back with his arm around his neck applying what he described as a "choker" hold for five to 10 seconds. Tararo was still moving at that point. In cross-examination, Turner accepted that it was possible that what he had seen was an occasion when Tararo was kicked by Lombaard, moved his head and caught Legradi's arm under his neck.
- [7] Smith said that Legradi's body was not on top of Tararo; he was more to the side holding Tararo's right arm in a shoulder-lock. Later, Legradi had said something to him about "having a choke with his arm", but he had not been listening carefully and was uncertain as to what was said. The pronoun Legradi used was "his", however, so he was referring to another's arm, not his own. Another of the security

guards, Rendall, also described Legradi as restraining Tararo by holding what Rendall thought was Tararo's left arm and shoulder, probably with some body weight applied to Tararo's back. Another security officer, Fuimaono, described Legradi as holding Tararo's left arm on the side, putting no weight on his body.

- [8] To complicate matters further, one of the bystanders, Seyoum, said that Tararo was facing down with a security officer sitting on his legs and another sitting on his back using his hands to push Tararo's head down, with his feet on Tararo's arms. His description of the man sitting on Teraro's body as Maori or Islander in appearance, however, fitted Tepaukonui, not Legradi. That man had punched Tararo on the back at the same time as he was being punched and kicked by another security officer. Tararo had continued moving for about two minutes and then stopped. He thought there was another guard sitting on Tararo's left side. In a vaguely similar description, another witness, Berry, described seeing a security officer leaning on Tararo's back with his torso and punching him two or three times in the back of his shoulders.
- [9] Another of the tavern's patrons, Huxley, described one security officer on Tararo's back and another near his shoulders, holding him down. One of the first police on the scene, Tonges, saw Tararo face-down on the ground with three security guards about him. Two were kneeling with one knee on his shoulders, their own shoulders touching, while another was holding his legs, which were crossed.
- [10] Legradi's left shoe was found on forensic examination to have a stain matching Tararo's DNA profile, although it was not possible, from its appearance, to say whether it was blood, while the sleeves of his jacket had similar stains and the right knee and upper back of the leg of his trousers also bore stains matching Tararo's DNA profile.

Lombaard's actions

- [11] Bennett said that while Legradi was holding Tararo by the shoulders, Lombaard swore at Tararo, then got down on one knee and punched him three or four times in the face. He also saw Lombaard kicking Tararo in the head, he thought in the face region, but could not remember the order in which those assaults occurred. He grabbed Lombaard and walked him away. Subsequently, he saw Lombaard on his hands and knees holding Tararo's fingers and apparently trying to break them. He heard him say,

“Two down and three to go.”

Again he, Bennett, took hold of Lombaard and pulled him away. Later, Lombaard told him he had been punched in the face and showed him a small mark on his cheek. He identified a section on some video footage as showing Lombaard punching Tararo in the way he had seen, although he could not be sure if it was the same incident. In cross-examination, Bennett accepted that the order of events he had given police was that the punches followed the kick; after them, about eight or nine minutes had elapsed before the police arrived, during which Tararo continued to resist restraint.

- [12] Smith said that when he was holding Tararo's legs, he saw Lombaard reaching down towards Tararo, but he could not say whether he was punching him because Legradi's head was in the way. He saw his hand move twice and he heard him say

that Tararo “punched like a girl”. Bennett pushed Lombaard away and there was some conversation between the two. Hibel, who took over Smith’s position, said that while he was holding Tararo’s legs, Lombaard pushed between Bennett and Turner, who were standing to the front and left of Tararo, and made a kicking motion towards Tararo’s head area. He did not see it connect. Lombaard was angry, saying,

“You couldn’t even knock me out ... I’ll kill you, kaffir.”

Tararo was still fighting to get up. The police arrived shortly after that, although he could not be specific as to how long it was.

[13] Turner described two incidents of punching. He saw Lombaard kneeling and punching towards the head of Tararo with some force, although he could not see if the punches were making contact. He pushed Lombaard away, but the latter, saying “He punched me” returned and started punching Tararo again with the same force. The two incidents of punching were a matter of seconds apart and the second ended when Bennett pushed Lombaard away.

[14] Other security guards witnessed Lombaard’s conduct. Rendall saw Lombaard aim a kick towards Tararo’s upper body and then saw Bennett push him away. Fuimaono saw the kick, which he said made contact with the facial area, and heard Lombaard say to Tararo,

“You punched me but you couldn’t drop me.”

Papistock could recall seeing Lombaard throwing perhaps three punches at Tararo, but he did not see whether they landed. He thought they might have been directed at his arm rather than his head. He also saw a kick but did not see it make contact; it was up around the head area. Lombaard got on his hands and knees and he heard him say,

“It was me kaffir, can you see me?”

Bennett pulled Lombaard up and told him to go away.

[15] Members of the public also saw the assault, but were not able to identify the perpetrator. Ms Kocovska said that she saw a security guard stomp on the hand of the man on the ground and kick him twice in the head, hard. She agreed that the kicking occurred soon after the man was restrained. A patron called Nyandoro saw three or four kicks in the direction of the restrained man’s head. The person kicking then knelt down and started to punch in the direction of his head. Mlalazi saw one of the security guards kneeling on the ground, punching the restrained man.

[16] Grover described a security guard aiming kicks at the head of the man on the ground and half a dozen punches, some of which landed on his head. Huxley saw a security guard deliver two kicks to the man’s head; he continued to struggle while he was being kicked. There was probably five minutes between the kicking and the arrival of the police, during which the man was lying without moving, still being held down, but he was unable to say how long after the kicks he ceased to move.

[17] Seyoum heard one of the security guards yelling, “Can you see my face now?” and then saw him kicking the man on the ground in the ribs three or four times and punching him with hard blows, although he could not see if they all landed.

After the punching, the man on the ground moved for two minutes or so but then ceased to move. Other patrons of the tavern who saw the events were Alexander, who saw more than one kick from a man with a red mark on the side of his face, but did not see the kicks land; Scott, who saw someone punching the man on the ground in a downward motion with a closed fist, but did not see the punches land; Luvis, who saw one security guard kicking someone and another punching; and Broderick, who saw a security guard bend over the man, knee him in the head and then punch him in the head.

- [18] Another patron, Mr Cooke, saw a security guard assaulting the restrained man, delivering between seven to 10 punches to his head area, but he identified that individual as Tepaukonui.
- [19] Forensic testing showed the presence of stains matching the DNA profile of Tararo on the sleeves of Lombaard's jacket, on the right knee and back right leg of his trousers, on the sleeves of his polo shirt and on his shoes. The shoe stains appeared to be blood.

The arrival of the police

Three police officers arrived at 10.50 pm, joined soon after by four other officers in a police van. Accounts of Tararo's condition at that point varied. Kocovska said that he was motionless. Grover similarly said that Tararo was not moving when the police officer arrived to put handcuffs on him, although he had been offering resistance shortly before. Tonges, the police officer who went to handcuff Tararo, also said that he was not moving, and security guards raised his arms to enable Tonges to handcuff him. He did not feel any resistance in Tararo's arms, apart from the sheer weight of them. When he let go of the handcuffs, the arms dropped. He was not able to say whether Tararo was alive or not at that point. He took another person to the police van; while he was doing that, Tararo was still lying on his stomach.

- [20] The security officers gave a different version. According to Hibel, Tararo was resisting as police officers attempted to handcuff him; Hibel said that he assisted the officer in getting the handcuffs on. Bennett's account too was that Tararo was alive and well at the point he was handcuffed. After that, for a short period of some three to five minutes, Bennett said, Tararo was left handcuffed on the ground. He and a police officer went to pick him up and realised that he could not stand. Bennett described rolling Tararo onto his side to take the weight off his stomach, after which the police removed the handcuffs.
- [21] A police constable, Allan, said that she saw another officer, Daniels, and a security officer trying to lift up Mr Tararo. When she reached them, he had been placed back on the ground and she saw that there was blood around his mouth and nose and he seemed unresponsive. She checked his carotic pulse and could feel nothing. She flashed her torch in his eyes and got no response. His handcuffs were removed and she could see no sign of breathing. They commenced cardiopulmonary resuscitation, which they continued until paramedics arrived and he was taken away by ambulance.

The pathologist's evidence

- [22] Dr Urankar, a forensic pathologist, performed a post mortem examination on Tararo. Weighing 133.8 kilograms and measuring 181 centimetres in height, he

was in the range of morbid obesity. His eyes exhibited some subconjunctival bruising and a conjunctival haemorrhage, which she regarded as the result of blunt force trauma. There were some petechiae, or burst blood vessels, in the eyes which might be the result of airway obstruction, but it was difficult to be specific. There was a vertical bruise, five by two centimetres, over the mid region of Tararo's forehead, indicating a blunt force had been applied while he was alive; an abrasion between his eyebrows, again inflicted during life; bruising and swelling over the right upper eyelid; abrasions in the right eyebrow; bruising around the right orbit; a large area of bruising and swelling on the upper and lower left eyelids; small dot abrasions over the nose from bridge to tip; a linear bruise on the left cheek; and bruising on the inside of the lips.

- [23] Across the left side of the neck there was a set of bruises, 6.8 centimetres by 10 centimetres. There was a handcuff type mark on the right wrist. It had left no bruise, which suggested either that he was not alive when they were administered or that if he was alive, he was not struggling against the handcuffs. There was a large area of bruising on the back of the right hand and over the fingers. There was a similar handcuff impression on the left wrist. The left hand was also bruised with a cut on the palm. There was a number of bruises on the right forearm, right upper arm and left upper arm and abrasions on the abdomen, back and legs.
- [24] On internal examination, Dr Urankar found that there was blood and bleeding under the scalp in the left temple region and the parietal region, indicating blunt force trauma to the scalp on each side of the head. There was extensive internal bruising under the surface of the face and around the jaw reaching around to the back of the head. The bruising indicated multiple applications of blunt force. The bruising on the jaw was consistent with a punch or a kick. There were no fractures. There was another set of internal bruising to the neck, indicating a broad compressive force consistent with an arm being placed across the neck and pressure applied, perhaps deeper on the right-hand side, with acute haemorrhage into the muscle. The hyoid bone had not fractured but in a man of Tararo's age – 21 – it was likely to be flexible and would not necessarily be fractured by compression. There was some bruising over the chest walls which might have been the result of cardiopulmonary resuscitation or alternatively, restraint or some other form of trauma.
- [25] Dr Urankar examined Tararo's heart. She saw some fibrosis and scarring. There was an abnormality of the right coronary artery which was unusually placed so as to be susceptible to compression between the aorta and the pulmonary artery. The coronary artery exhibited severe atherosclerosis, or narrowing, which she estimated at about 80 per cent. As the heart increased its pumping, that artery would be compressed, which, combined with the vessel's narrowing, could lead to a critical reduction in blood and oxygen, causing arrhythmia and death. The heart muscle was also abnormal, showing signs of cardiomyopathy, although it was not severe. The consequence of that condition was that the heart, when placed under stress, could go into an abnormal rhythm, resulting in death. In an individual who had suddenly died, those abnormal findings as to the coronary artery and heart muscle would be sufficient to provide a cause of death. More typically, there was exercise, exertion and sudden death in such cases.
- [26] It was not possible, Dr Urankar said, to see evidence of the heart stopping, because absent a period of survival, changes in the heart muscle would not be evident. There was no evidence of injury to the brain, which might mean that there was no

injury, or, alternatively, that there was an insufficient survival period for the injuries to be manifested. A blood sample taken from the body showed a blood alcohol content of .12 per cent. There were petechial haemorrhages over the front and back of the heart, indicative of the heart's struggle to get oxygen, but those could be the result of cardiopulmonary resuscitation.

- [27] There was no single identifiable cause of death, but there was a number of interlinking factors which played a role. Taken in order of significance, the first was Teraro's restraint in a prone position, which might have led to asphyxia and effects on his heart; the second, his obesity which would have compounded the effects of restraint in a prone position; the third, fourth and fifth, were his cardiomyopathy, his coronary artery disease and his aberrant right coronary artery; and the sixth and seventh were the neck compression and the head injuries. As to the last two she observed,

“Number 6 and number 7 which I think are important and for me are very difficult without more history and without - as a pathologist are difficult to pull out from the event at the moment are the fact that I have evidence of neck compression and I can't rule out its role and the fact that he has got evidence of head injuries.”

- [28] Dr Urankar was asked to explain the consequences if Tararo were restrained under the following conditions: with his legs bent up towards his back and an arm or arms behind his back, the weight of a person substantially on his back and the weight of a person against his legs, after a period of exertion involving trading of blows, with neck compression caused by pressure from an arm across his neck, and head injuries from punches and kicks early in the period of restraint. She explained the process as follows: in a man of Tararo's build, being held face-down with the legs bent up into his back would compromise his respiration, which could lead to asphyxia. Compressing structures in the neck could potentially reduce blood flow to the brain leading to a loss of consciousness, slowing down the heart and compounding the asphyxia. His short neck made airway compression more likely.
- [29] The combination of prior exertion, struggle and stressful events would themselves lead to an adrenalin response, acting on the heart to increase its contractions and its output, increasing the likelihood of compressing the right coronary artery and reducing its blood flow, and producing an increased likelihood of arrhythmia and a sudden death. The blows to the head could lead to a further adrenalin release which would increase the blood pressure in the heart and lead to an increase in oxygen demand in an already compromised heart. Those elements would lead to cardiac arrest. It was impossible, however, to establish whether there had been any adrenalin surge, because it would leave no sign post mortem. The head blows were also likely to contribute to the restrained man's desire to struggle, increasing his level of exertion and making the heart pump faster. That in turn would increase the likelihood of compression of the coronary artery.
- [30] The locations of bruising to the head and face were consistent with blows which could result in a loss of consciousness. If Tararo had lost consciousness, that would lead to a loss of his ability to control his airways and to breathe, increasing the likelihood of asphyxiation; a reduction in consciousness would have a similar effect. There was some evidence of aspiration, indicating that Tararo was not able to control his airways; although Dr Urankar later conceded that it could be the product of attempted resuscitation.

- [31] Under cross-examination, Dr Urankar agreed that forcing Tararo’s legs forward with some weight on the middle of his back was a significant factor in causing asphyxia. It was not possible to say that heart failure resulting from his obesity and heart abnormality, in circumstances where he was struggling, were not the cause of his death. Any one of the identified factors other than obesity, could, on its own, have caused death. Obese people with a heart condition of the kind which Tararo had were, she said,

“at particular risk after physical exertion of having heart attacks and sudden death”.

- [32] Dr Urankar agreed that if the evidence were that Tararo was not unconscious from being hit in the head or from the neck compression, the head injuries and neck compression would have made little or no contribution to the death. If they had not caused loss of consciousness, she was left with the underlying problems which Tararo suffered from. If, after the release of the neck restraint he had regained consciousness, that restraint would have little or nothing to do with the death.

- [33] Dr Urankar conceded that it was possible Tararo could have died through a combination of restraint in the prone position, obesity and the physical characteristic of a short neck. Alternatively, exertion and his increased heart rate combined with the abnormalities of his heart could have caused death. Counsel suggested a combination of being prone, having an occluded artery, cardiomyopathy and an abnormal right coronary artery, combined with obesity, a short neck and physical exertion as a possible cause of death, to which Dr Urankar responded,

“Well, the physical exertion which gets you into the restraint and gets this whole event going is what really throws it over the edge because this man’s been walking around with the cardiomyopathy and the coronary artery disease and the aberrant right coronary for a decent period of time without dying, and that’s, you know, what’s probably pushed him over the edge.”

- [34] In re-examination, Dr Urankar said that although the head injuries might not have been significant in causing a lowering of or loss of consciousness, they might still be significant as causes of stress or exertion for Tararo. The blows to the head involved mild to moderate forces and if they caused unconsciousness, their consequences might not be observable post mortem in the absence of a period of survival; that is to say, if death occurred within half an hour.

The submissions on appeal

- [35] Counsel for Legradi pointed out that the Crown at trial had identified the case against Legradi as being the application of,

“... unnecessary and excessive force ... particularly in applying a choker hold or neck restraint in circumstances where there was already force being applied”

He accepted that there was evidence, albeit not strong evidence, from which the jury was entitled to conclude that Legradi had applied a “choker” hold to Tararo. That evidence was of a choker hold for five to 10 seconds at a time when Tararo was still moving. It was insufficient to allow the jury to conclude beyond a reasonable doubt that neck compression played any significant role in Tararo’s death.

In addition, having regard to the pathologist's concessions, the Crown could not exclude a reasonable inference as to a possible cause of his death consistent with innocence.

- [36] Counsel for Lombaard submitted that the weight of the evidence was that the kicks and punches which his client delivered occurred early in the period of Tararo's restraint. The evidence of Cooke was that the security officer he saw punching Tararo in the head (Tepaukonui) was doing so at a time closer to the arrival of the police officer than Lombaard's assault. Dr Urankar had said that there was no identifiable injury to the brain; there were no fractures to the skull; the bruising observed was consistent with mild to moderate force. There were other people struggling with Tararo, including Tepaukonui, with the result that it was impossible for the Crown to establish what injuries Tararo had suffered as a result of Lombaard's actions; and as counsel for Legradi had submitted, there were reasonable hypotheses consistent with innocence, not excluded by the Crown.
- [37] Counsel for the respondent Crown argued that it was not necessary for the jury to be satisfied beyond a reasonable doubt that Tararo died from a particular cause; the issue for the jury was whether any acts of either appellant significantly contributed to his death. Tararo was an obese man with a compromised heart who had nonetheless functioned satisfactorily before resisting the forces applied during the 11 minute period of restraint. It was open to the jury to conclude that Legradi's compression of the deceased man's neck and Lombaard's punches and kicks to his head were significant contributions to the death.
- [38] As to the timing of Lombaard's assault, both Smith and Hibel spoke of seeing him punching and kicking Tararo. The evidence was that Smith held Tararo's legs for about five minutes before Hibel took over and the entire incident lasted 10 or 11 minutes. It would follow that what Hibel saw occurred within the second part of that period; that is closer to the arrival of the police, when Tonges saw no sign of consciousness. Kocovska had said that the deceased was not moving at all after the police vehicle arrived, while Huxley said that five minutes had passed between when he last kicked and the police attended.

Causation

- [39] Section 293 of the *Criminal Code* 1899 (Qld) provides that,

“... any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.”

It will suffice if the appellants' acts are “a substantial or significant cause of death”.¹ Juries may properly be told that,

“... the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter”.²

¹ *Royall v The Queen* (1990) 172 CLR 378 at 411 per Deane and Dawson JJ; *R v Sherrington & Kuchler* [2001] QCA 105 at [8].

² *Campbell v The Queen* [1981] WAR 286 per Burt CJ at 290, cited with approval in *Royall* at 387, 411 and 425.

- [40] In Legradi's case, the only mechanism by which it was suggested that the neck compression had contributed to death was by reducing blood flow to the brain, slowing down the heart and leading to loss of consciousness which, in turn, would make it difficult for Tararo to breathe and compounding his asphyxia. (Dr Urankar did not suggest that it played any role in producing an adrenalin surge, for example.) But there was no evidence that the neck hold which Legradi applied did cause Tararo to lose consciousness. The chain of reasoning by which Dr Urankar attributed significance to the neck hold failed at this point for want of evidence that it had the effect she proposed. Indeed, she conceded that if it had not caused unconsciousness or if Tararo had regained consciousness after it, it had little or nothing to do with his death.
- [41] The evidence on which the Crown relied for the proposition that Lombaard's blows produced unconsciousness was slender. Although Hibel saw Lombaard kick Tararo while he was holding him, giving some support to the argument that the assault occurred later in the incident, he also said that he continued to move after the kick as he had done before. The remaining theories advanced by the pathologist as to how the head blows might have contributed to death, either as promoting increased exertion in resistance or as a cause of adrenalin release which would increase blood pressure and cardiac output are somewhat speculative. There was no evidence that Tararo's physical responses were any more pronounced after the kicks and punches than his previous struggling. Whether there had been any adrenalin surge was not something which the pathologist could test, and there were other likely causes of such a surge in the form of Tararo's altercation with the security officers before he was on the ground and his lawful restraint (excluding the actions of Legradi and Lombaard) thereafter.
- [42] The larger problem, however, is that it was not possible for the jury to exclude other hypotheses consistent with the innocence of both men. This case was unlike *R v Summers*.³ There the deceased immediately collapsed after a savage beating, lost consciousness and died because, in the view of the medical witnesses, the blows ruptured a pre-existing aneurism. They conceded a very remote possibility that the aneurism had ruptured spontaneously at the same time as the assault. The Court of Criminal Appeal observed that it was not necessary that the prosecution exclude every possibility of innocence, but only every reasonable possibility; the existence of a very remote possibility was not such as to introduce a reasonable doubt precluding the jury from being satisfied of guilt.⁴
- [43] Here, there were seven possible causes of death, of which the neck compression and head injuries were the least significant. The last were causes which Dr Urankar said she could not rule out; but it did not follow that they were necessarily to be included. Dr Urankar accepted that other combinations of those causes, not including neck compression and head injury, could have caused the death. Those were real, not remote possibilities which the jury could not rationally exclude. The jury could not have been satisfied beyond a reasonable doubt that the actions of either Legradi or Lombaard were a significant or substantial cause of Tararo's death.

Orders

- [44] Given that conclusion, both appeals must be allowed, and the verdicts set aside and verdicts of acquittal entered.

³ [1990] 1 Qd R 92.

⁴ At 98-99.

- [45] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.
- [46] **WHITE JA:** I have had the advantage of reading the reasons for judgment of Holmes JA and agree with the orders which she proposes for those reasons.