

SUPREME COURT OF QUEENSLAND

CITATION: *R v Walmbeng* [2010] QCA 365

PARTIES: **R**
v
WALMBENG, Bill Morris
(appellant/applicant)

FILE NO/S: CA No 145 of 2010
SC No 10 of 2010

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction & Sentence

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 21 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2010

JUDGES: Margaret McMurdo P, Muir and Fraser JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal against conviction dismissed.**
2. Application for leave to appeal against sentence refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
VERDICT UNREASONABLE OR INSUPPORTABLE
HAVING REGARD TO THE EVIDENCE –appellant found
guilty of murdering his wife – death caused by a single stab
wound – pathologist considered infliction of stab wound
required only mild to moderate force – evidence tendered
indicated a motive for offending – whether jury could be
satisfied beyond reasonable doubt that appellant intended to
seriously injure the deceased – whether jury verdict
insupportable or unreasonable having regard to the evidence
Criminal Code 1899 (Qld), s 302(1)(a)
Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56,
cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53,
cited

COUNSEL: D C Shepherd for the appellant/applicant
M J Copley SC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
 Director of Public Prosecutions for the respondent

[1] **MARGARET McMURDO P:** The appellant, Bill Morris Walmbeng, was convicted on 26 May 2010 in the Supreme Court at Cairns of murdering his de facto partner at Aurukun on 25 November 2008. He has appealed against his conviction and applied for leave to appeal against sentence.

[2] His ground of appeal against conviction is as follows:

"The verdict of the jury was unreasonable. Background is particularised as follows:

1 The appellant, at Aurukun in Cape York, unlawfully killed his de facto wife by fatally wounding her with a 15 centimetre bladed knife,

2 The fatal wound penetrated some 8 centimetres rupturing organs,

3 There was 'rather limited evidence ... bearing on intent (to adopt the words of the trial Judge ...)

4 The only issue at trial was that of competing inferences as to an intent to do grievous bodily harm.

3 Only one of some 6 of seven cuts was deep so as to cause the blood loss which resulted in her death.

4 The inference was open that the difference between the fatal wound and the other wounds was unintended."

[3] The application for leave to appeal against sentence is only pursued if the appeal against conviction is allowed, the conviction for murder set aside and a conviction for manslaughter substituted. The appellant contends that a sentence of nine years imprisonment should be imposed for the offence of manslaughter.

The evidence at trial

[4] The appellant's sole ground of appeal requires this Court to review the significant evidence at trial.

[5] Detective Sergeant Graham Camp investigated the death. Through him, exhibits, including the knife used to stab the deceased;¹ a second knife the appellant used to threaten the deceased the day before the death;² a video of the scene; photographs and a map; and a video of an interview with a child witness, were tendered.

[6] He also conducted a video recorded interview with the appellant in the presence of a support person, Ms Janine Chevathun. The interview took place at Aurukun police station from 11.58 pm until 1.36 am on 25 November 2008, the day of the death. The appellant was 36 years old and was then working as a labourer with the Aurukun Council. The appellant became distressed when police informed him that the complainant had died. The recording was interrupted for almost two hours to allow Ms Chevathun to discuss the death with the appellant. The appellant then told

¹ Ex 4.

² Ex 6.

police he no longer drank alcohol and had not done so since January 2008. He was not taking any prescribed medication at that time, although he had a prescription for sleeping pills and had taken some the previous week. On the day of the death, he went to work until smoko (about 10 am) when he returned home. He could not remember much of the day. In the afternoon he went to Richard Bowenda's place where the police found him. He gave the police a white handled knife. The knife belonged to him. He used the knife to stab the deceased.

[7] The following questions and answers are particularly pertinent:

"POLICE OFFICER: When you say that you, um – it was the same knife that you used to stab [the deceased], what was – what was your intention today in stabbing [the deceased]?"

APPELLANT: I dunno.

POLICE OFFICER: You don't know?

APPELLANT: I just don't know, no.

POLICE OFFICER: OK. Was there a reason that – something that you'd been talking to her about or something that led up to it?

APPELLANT: No."

[8] During the day he visited Beatrice's³ house looking for the deceased. The following exchange occurred:

"POLICE OFFICER: OK. When you were, um, when you were going to, ah, Beatrice's house, were you carrying that knife at that time, the one that you said, um, was yours?"

APPELLANT: Yeah.

POLICE OFFICER: When you were going to look for [the deceased], what did you want to talk to her about?

APPELLANT: Just talk.

POLICE OFFICER: Just talk? OK, and what, and what happened when you go to the house? Do you remember what you talked about? Is that – you – you don't remember what you were talking about there, Bill, or you – you prefer not to say?

APPELLANT: Yeah, don't wanna talk about it.

POLICE OFFICER: You don't wanna talk about it, OK. When you say that you, um you – you had the knife on you when you were going there, do you remember why – why, what the reason was you were carrying the knife?

APPELLANT: I dunno why I was carrying a knife.

³ Beatrice Koongotema.

POLICE OFFICER: Do you normally carry that knife with you?

APPELLANT: No.

POLICE OFFICER: Had you been using it for anything through the day?

APPELLANT: No.

POLICE OFFICER: Fishing? Hunting? Had you been fishing or hunting today?

APPELLANT: No."

[9] The appellant said that the deceased was sitting on the steps of the house. After the stabbing he first went to his mother's house where his mother and Sandra⁴ were present. He did not talk to them about what had happened. He then went to Richard's place where the police found him. He did not talk to Richard about what had happened.

[10] The interview continued:

"POLICE OFFICER: The – the big thing we want to know is exactly what you said earlier in the interview, um, you know, you had that knife to stab [the deceased] with it, your words were something like that. And what I want to find out is everything you remember about stabbing [the deceased]. Can you tell me about that? If you – if you don't wanna tell me, Bill, just say, 'I don't wanna tell ya'. But if you – if you wanna tell me, of course, I'd love to hear.

APPELLANT: I stabbed her. I don't know how many times.

POLICE OFFICER: You dunno know how many times? OK. Do you remember what part of her body that you stabbed her to?

APPELLANT: Her back.

POLICE OFFICER: Her back? Do you remember, um, um, like I think you said at some stage it, it's come out that she was sitting on the step; is that right?

APPELLANT: Yeah.

POLICE OFFICER: Was she facing towards you or –

APPELLANT: Yeah.

POLICE OFFICER: -- away from you? Towards you?

APPELLANT: Yep.

POLICE OFFICER: she's facing towards you – I – I believe you when you say you stabbed her in the back, because I – I know that to be true – but if she's facing towards you, how did it – how did it come that you stabbed her in the back?

⁴ Sandra Bowenda (the appellant's Aunty).

APPELLANT: She – she stood up.

POLICE OFFICER: She stood up? Hmm, and what happened then?

APPELLANT: I grabbed her hair.

POLICE OFFICER: Grabbed her hair? Hmm, and what happened then?

APPELLANT: Stabbed her.

POLICE OFFICER: How many – oh you said before you don't remember how many times?

APPELLANT: No.

POLICE OFFICER: Yep.

APPELLANT: Well, I thought once.

POLICE OFFICER: You thought one? OK. When you stabbed her what were you trying to do? You shook your head then, do you know what you were trying to do?

APPELLANT: I don't know what I was – try to do.

POLICE OFFICER: ... Before you got there, did you know that you were going to stab her? Had you – had you made up your mind that you would stab her if you found her there. You're shaking your head? No?

APPELLANT: No.

POLICE OFFICER: OK, um, was there anything that she said or did that made you want to stab her?

APPELLANT: No.

POLICE OFFICER: No? Um, did she say anything nasty to you?

APPELLANT: No.

POLICE OFFICER: No? Did she try and hurt you or hit you?

APPELLANT: No.

POLICE OFFICER: No? Um, had youse had an argument?

APPELLANT: Can't remember."

[11] The appellant told police he smoked a foil of cannabis the previous day but he was not under the influence of cannabis at the time he stabbed the deceased. In response to a question as to whether he suffered from any mental illness, he responded "Yeah"; he had "been seeing the counsellor ... two weeks back ... at the clinic". He

told police he did not want to talk about his mental state generally or at the time of the stabbing. He confirmed that he had not had any arguments and there was no jealousy between them; he was not angry at her. He could not remember the deceased yelling before the stabbing.

- [12] Dr Amanda Blinco was stationed at the Aurukun Health Centre on 25 November 2008. The 25 year old deceased was brought to the centre by ambulance at 3.45 pm. She was conscious. She had four wounds on her back, three across the top of her back which were quite superficial and another just below the rib cage adjacent to the spine. This wound was at least 5 cm deep although the skin cut was not very wide. It was not actively bleeding externally. An ultrasound of her abdomen revealed a quantity of internal bleeding. Despite attempts at resuscitation, she had a cardiac arrest at 5.20 pm and ultimately died at about 6.20 pm. Dr Blinco later examined the appellant and found that he had no injuries.
- [13] Pathologist Dr Paull Botterill conducted the autopsy. He noted a 2 mm linear abrasion to the right side of the neck and a 63 mm long linear abrasion to the top of the right front of the chest wall. It was impossible to say what had caused the long abrasion: it could have been caused by the tip of a knife or by any other projecting surface. He saw a 95 mm superficial incised wound cutting into but not completely through the skin on the rear left shoulder. It was consistent with being caused by an item with a sharp surface such as a knife. He saw an 8 mm long roughly horizontal superficial incised wound closer to the centre of the back on the left shoulder. This was consistent with having been made by contact with a sharp surface such as the edge of a knife. He saw a 2.6 cm graze and a 1.4 cm cut, both probably made by contact with a sharp or protruding surface. The two marks could not have been made with one contact. On the lower back close to the spine, he saw a 2.3 cm long stab wound moving in a direction more downwards than upwards. Unlike the other shallow incised wounds, this was a deep stab wound clearly caused by a sharp thin implement such as a knife. Each of the injuries described by the pathologist would have been caused by a separate contact although it was impossible to age the minor wounds: some could have been caused a day or so before death.
- [14] He also noted some bruising over the left parietal skull area and left forehead area under the skin surface. It was typical of some form of blunt force contact, whether a blow or by falling against a surface or the floor and could have been caused on the day before the death.
- [15] The deep internal wound went through the skin into the underlying tissues and muscles of the back next to the vertebral column at about the second and third lumbar vertebral bodies, through the right kidney, into the cavity space of the gut and through the right lobe of the liver. There was blood in the tissues behind and in the belly cavity. At its deepest point, the wound was in excess of 8 cm.
- [16] The deceased was 1.61 m tall and weighed 41 kg, small in height and slight in build. The cause of death was the deep stab wound to the back.
- [17] In cross-examination, he agreed that a stab wound of this kind could be the result of a body moving against a knife as well as a knife moving against a body. The path of the knife in this case did not touch any bones. Whilst mild to moderate force was required for the tip of a knife to penetrate the skin in this way, once that had occurred, the remaining injuries received in this wound could have been inflicted

with not much force at all. The sharper the point of the tip of the knife, the less the force required to break the skin. Dr Botterill had not examined the knife used by the appellant in stabbing the deceased.

- [18] Daniel Hudson gave evidence that he knew both the appellant and the deceased, whom he thought were in a de facto relationship. On 25 November 2008, he heard Aunty Beatrice scream. He lived next door to Beatrice and had a good view of her house from his. Sometime after 3.30 pm, he saw the appellant and the deceased "having a rustle". The appellant was holding the deceased about the shirt or the hair. Mr Hudson saw the appellant's hand move in a punching motion. It all happened very quickly. He thought he saw the punching motion more than once, perhaps twice, but he was not sure. Everybody was screaming. He left and got police assistance. He saw the appellant leave the back gate of Beatrice's house with a knife in his hand. The deceased was lying down being held by Mr Hudson's de facto partner, Lucille Ludwick.
- [19] In cross-examination, Mr Hudson agreed that, when he saw the appellant holding the deceased and punching her, she was "kicking about" and "moving around". She was facing away from the appellant.
- [20] Ms Kailung Hudson also knew the appellant and the deceased. On 25 November 2008, she was on her way home from the store when she pulled into the house of her uncle, Mr Hudson, who lived across the lane from Beatrice's house. Ms Hudson was enjoying a cigarette and a soft drink and having a yarn when she saw a crowd running from Beatrice's house. She had a good view. It was dry season and there was not much grass around the fence. Near the front steps on the cement, she saw a male figure punching another figure in a bent position. She did not know who these figures were at that time. She thought the hand of the figure punching moved up and down about four times, maybe more. Ms Hudson started to panic. Then she saw someone on the ground and the appellant walk out carrying a knife which he wiped on his jeans. She recognised him. She went to Beatrice's house. The deceased was on the ground crying. She was bleeding but she was alive. As the appellant walked out the gate and down the street, she heard him say "Merry Christmas, Happy New Year".
- [21] Beatrice Koongotema knew the deceased as Moira. She also knew the appellant. On 25 November 2008, she was home with her little grand-daughter, Francine Sophie. Beatrice was upstairs and the deceased was downstairs. At about 4.00 pm the appellant arrived at her place and came in without permission. He was standing near the step. He said to the deceased, "... where's my jeans?" The deceased responded, "I throw it in the bin." The appellant said, "Where did you sleep last night?" The deceased answered, "At my dad's." She did not hear other conversation but she thought there was conversation "from the jealousy". The appellant lifted his head up, pulled the knife out from his side and stabbed at the deceased on the back three times. The deceased was sitting on the step. Beatrice moved away and was crying as she had "nerves". When Ms Koongotema ran from her home, the deceased was lying on the concrete at the bottom of the stairs.
- [22] Lucille Ludwick is the de facto partner of Mr Hudson. She knew both the appellant and the deceased who was her niece. She also knew Beatrice Koongotema, a neighbour who lived at the back, two houses down. On 25 November 2008, she got home at 3.00 pm. She heard screaming for about five to ten minutes from

Ms Koongotema's house and came outside to see what was going on. The appellant walked out of the back yard of Ms Koongotema's house into the lane. Ms Ludwick went to Ms Koongotema's house. She saw the deceased lying down at the front step on the cement. She was curled up and there was blood pooled around her, but she was moving and breathing. The deceased usually called Ms Ludwick "mum" and said, "Mum, help me." The ambulance arrived.

- [23] Coralee Grace Wolmby knew both the deceased and the appellant. Her sister, Selena, had previously been in a de facto relationship with the appellant before his relationship with the deceased. On 24 November 2008, she was walking to the library with her sister, Selena, when the deceased yelled out to Selena. The deceased and Selena argued about the appellant and punched each other. The appellant then came along on a push bike. He stopped and dismounted. Selena and the deceased had stopped fighting by then. The appellant "started growling at the deceased". He had a white handled knife in his hands which he took from the side of his pants and swung it towards the deceased three or four times. He pushed her against the fence. Ms Wolmby's niece, Charene Wolmby, asked the appellant to give her the knife and he did.
- [24] In cross-examination, she described the appellant's action in swinging the knife towards the deceased. He moved it around in a circle, swung it out in front of him from side to side, with his arm pretty much stretched out, as she was sitting down against the fence. He held the knife against the deceased's neck under her chin. In re-examination, she added that when the appellant was doing this, the deceased said, "Bill, could you please leave me alone?"
- [25] Charene Wolmby also gave evidence of the incident on 24 November 2008. The appellant got off his bike and walked towards the deceased and lent her on the fence. He put the knife on her neck and held it against her neck. Charene told him to give her the knife and he did. She did not see any injuries to the deceased. She subsequently gave the knife to her Auntie Yvonne. (It was common ground that police obtained this knife from Auntie Yvonne).⁵ In cross-examination she said she put a spell on the knife, "koja", and she agreed that "it would be poison to touch it".
- [26] Other witnesses gave evidence but they added little of relevance to the narrative and it is not necessary to summarise their testimony.
- [27] At the close of the prosecution case, defence counsel submitted there was insufficient evidence to allow the case to go to the jury on the offence of murder. The absence of evidence as to the intention of the appellant meant that the evidence could sustain only a verdict of guilty of manslaughter. The trial judge rejected that contention, noting that the way the knife was used could provide a foundation from which to draw the requisite inference of an intent to kill or do grievous bodily harm.
- [28] The appellant did not give or call evidence.

Conclusion

- [29] The prosecution case was that the appellant was guilty of murder under s 302(1)(a) *Criminal Code* 1899 (Qld), that is, that he unlawfully killed the deceased intending to at least do her some grievous bodily harm. Grievous bodily harm in this context is:

⁵ Ex 6.

"any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available."

- [30] The appellant does not contend that the judge's directions to the jury were in any way flawed. His contention is that the jury could not have excluded beyond reasonable doubt a reasonable hypothesis that was open, namely, that the appellant was merely intending to frighten, intimidate, bully or overbear the deceased when he used the knife on 25 November 2008. After all, that was exactly what he did the previous day. His answers in the police interview do not support an intent to seriously injure the deceased. The jury could not be satisfied beyond reasonable doubt that he intended to seriously injure her and should have acquitted him of murder and convicted him only of manslaughter.
- [31] The question for this Court is whether, on the whole of the relevant evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of murder: *M v The Queen*;⁶ *Jones v The Queen*⁷ and *MFA v The Queen*.⁸ The critical issue was whether, when he stabbed the deceased, he intended to at least do her grievous bodily harm.
- [32] A photograph of the knife with which the appellant said he killed the deceased was tendered.⁹ The knife itself was also an exhibit before the jury,¹⁰ although it was not sent to this Court. The photograph depicted a substantial weapon with a 15 cm blade. It resembled what is commonly called a hunting knife. Mr Hudson and his daughter saw the appellant strike at the deceased with a punching motion in the altercation in which she was stabbed. The deceased died of a deep (8 cm) penetrating wound to her back. The jury were entitled to infer beyond reasonable doubt that the appellant stabbed the deceased in a punching motion with the hunting knife and caused the fatal wound. The deceased was diminutive. It is true that the pathologist considered the infliction of the wound required only mild to moderate force. But using such a formidable weapon in a punching motion on a diminutive victim is persuasive evidence of an intent to cause the victim serious injury. Further, the evidence of Beatric Koongotema and Coralee and Charene Wolmby supported the inference that the appellant was angry with or jealous of the deceased at around the time he stabbed her. It is evidence of a motive for him intending to seriously harm the deceased. The finding that the appellant was acting out of jealousy was consistent with the evidence of Mr Hudson who saw the appellant grab the deceased by the hair or shirt as he used a punching motion on her.
- [33] It is true that a reasonable jury could have found the appellant not guilty of murder and guilty only of manslaughter. It is also true that the appellant stabbed the deceased in the open in full view of others; that a high level of force was not necessary to inflict the fatal wound; that the appellant cooperated with the authorities; and that the appellant was distressed when he learned of the death. But in light of the evidence summarised in the preceding paragraph, the jury were

⁶ (1994) 181 CLR 487, 493-495.

⁷ (1997) 191 CLR 439.

⁸ (2002) 213 CLR 606, [25] and [59].

⁹ Ex 5.

¹⁰ Ex 4.

entitled to reject the appellant's statements to police after he had learned of the death, to the effect that he did not know why he stabbed the deceased. After reviewing the whole of the evidence, I am confident that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of murder: *M v The Queen*; ¹¹ *MFA v The Queen*. ¹²

- [34] It follows that the appeal against conviction must be dismissed. As I have noted, the application for leave to appeal against sentence was only to be pursued if the appeal against conviction was successful. The only sentence which can be imposed for the offence of murder is life imprisonment: s 305(1) *Criminal Code*. It follows that the application for leave to appeal against sentence must be refused.

ORDERS:

1. Appeal against conviction dismissed.
 2. Application for leave to appeal against sentence refused.
- [35] **MUIR JA:** I agree with the reasons of Margaret McMurdo P and with the orders she proposes.
- [36] **FRASER JA:** I agree with the reasons for judgment of Margaret McMurdo P and the orders proposed by her Honour.

¹¹ (1994) 181 CLR 487, 493-495.

¹² (2002) 213 CLR 606, [25], [59].