SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dalton* [2020] QCA 13
PARTIES:	**R** **v** **DALTON, Theresa Kenella** (appellant)
FILE NO/S:	CA No 66 of 2019 SC No 1332 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court of Queensland – Date of Conviction: 8 March 2019 (Brown J)
DELIVERED ON:	Date of Orders: 31 January 2020 Date of Publication of Reasons: 7 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2019
JUDGES:	Sofronoff P and Morrison JA and Buss AJA
ORDERS:	**Date of Orders: 31 January 2020** **1. The appeal is allowed.** **2. Grant leave to adduce evidence of the report of Caroline Hare dated 29 August 2016.** **3. The judgment of conviction is set aside.** **4. A re-trial is ordered.**
CATCHWORDS:	Criminal law – Appeal against conviction – Appellant convicted after trial of procuring another (Werner) to attempt to procure the murder of the complainant – Crown alleged the appellant was criminally responsible as an aider under s 7(1)(b) or as a procurer under s 7(1)(d) of the *Criminal Code* (Qld) – Werner convicted prior to the appellant's trial on his plea of guilty in the District Court of New South Wales of the offence of soliciting the complainant's murder – The offence to which Werner pleaded guilty included as an element that Werner intended to procure the complainant's murder – Werner a Crown witness at the appellant's trial – Werner denied in evidence that he in fact intended to procure the complainant's murder – Trial judge directed the jury that regard could be had to Werner's plea of guilty in the District Court of New South Wales in proof of the Crown's case against the appellant – Whether the direction was erroneous or occasioned a miscarriage of justice – Late disclosure by the Crown of a document concerning Werner – Whether late

disclosure occasioned a miscarriage of justice – Whether the verdict of guilty was unreasonable or could not be supported having regard to the evidence.

Criminal Code (Qld), s 7(1)(b), s 7(1)(d)

Andelman v The Queen (2013) 38 VR 659; [2013] VSCA 25, cited
Bannon v The Queen (1995) 185 CLR 1; [1995] HCA 27, cited
BCM v The Queen (2013) 88 ALJR 101; [2013] HCA 48, cited
Dunn v The Queen (2015) 252 A Crim R 147; [2015] WASCA 126, cited
Fitzgerald v The Queen (2014) 88 ALJR 779; [2014] HCA 28, cited
GAX v The Queen (2017) 91 ALJR 698; [2017] HCA 25, cited
Humphries v The Queen [2015] NSWCCA 319, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, followed
Morris v The Queen (1987) 163 CLR 454; [1987] HCA 50, cited
Nominal Defendant v Clements (1960) 104 CLR 476; [1960] HCA 39, cited
Romeo v The Queen [1988] WAR 304, cited
R v Carter and Savage, *ex parte Attorney-General* [1990] 2 Qd R 371, cited
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, followed
R v Fountain (2001) 124 A Crim R 100; [2001] VSCA 200, cited
R v Gallagher [1986] VR 219; [1986] VicRp 25, cited
R v HAU [2009] QCA 165, cited
R v Hill [1979] VR 311; [1979] VicRp 33, cited
R v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
R v Hutton (1991) 56 A Crim R 211, cited
R v Kirkby [2000] 2 Qd R 57; [1998] QCA 445, cited
R v Nguyen (2010) 242 CLR 491; [2010] HCA 38, followed
R v Richards [2017] QCA 299, cited
R v Simpson [2008] QCA 413, cited
R v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
R v Windsor [1953] NZLR 83, cited
Schugman v Menz [1970] SASR 381, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed
Transport and General Insurance Co Ltd v Edmondson (1961) 106 CLR 23; [1961] HCA 86, cited
Zaburoni v The Queen (2016) 256 CLR 482; [2016] HCA 12, cited

COUNSEL: M J Copley QC for the appellant
M A Green for the respondent

SOLICITORS: Bamberry Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with Buss AJA.

[2] **MORRISON JA:** I have read the reasons of Buss AJA and agree with those reasons and the orders His Honour proposes.

[3] **BUSS AJA:** The appellant appeals against conviction.

[4] The appellant was charged on indictment with one count. The indictment pleaded, in essence, that on various dates between 12 January 2010 and 14 February 2010, at Burleigh Heads or elsewhere in Queensland, the appellant attempted to procure another to murder Malcolm Stewart in Queensland, which, had it been done, would have been an offence committed under the laws of Queensland, contrary to s 539(1)(a) of the *Criminal Code* (Qld) (the Code).

[5] The principal offence relied upon by the prosecution, for the purposes of s 7(1)(a) of the Code, was that Anthony Werner had committed an offence under s 539 of the Code in that he had attempted to procure Matthew Neels to murder Mr Stewart.

[6] The prosecution asserted three alternative pathways to guilt in respect of the charged offence against the appellant. First, the appellant was criminally responsible, pursuant to s 7(1)(d) of the Code, in that she procured Mr Werner to attempt to procure the murder of Mr Stewart. Secondly, the appellant was criminally responsible, pursuant to s 7(1)(d) of the Code, in that she counselled Mr Werner to attempt to procure the murder. Thirdly, the appellant was criminally responsible, pursuant to s 7(1)(b) of the Code, in that she did acts for the purpose of enabling or aiding Mr Werner to attempt to procure the murder, those acts being providing Mr Werner with $20,000 cash and documents containing particulars of Mr Stewart's identity.

[7] After a trial before Brown J and a jury between 4 and 8 March 2019, the appellant was convicted as charged.

[8] In my opinion, the trial judge misdirected the jury. The appeal should be allowed, the judgment of conviction be set aside and a new trial be had.

Relevant provisions of s 7 of the Code with respect to criminal responsibility

[9] Relevant provisions of s 7 of the Code with respect to criminal responsibility are as follows:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say -
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) …

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.

(3) …

(4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission."

Discourse between the trial judge, the prosecutor and defence counsel before the commencement of the trial

[10] On 4 March 2019, before the commencement of the trial, the prosecutor informed the trial judge that:

(a) Mr Werner may give evidence that "despite him having pleaded guilty to the charge and despite the acts he did … it was not his intent to actually attempt to procure the murder of [Mr Stewart]" (ts 1 5).

(b) Mr Werner's intent would be a matter for the jury, having assessed Mr Werner's evidence, because "there is obviously a clear argument that he had the intent, given that he's actually pleaded guilty in New South Wales to a charge where the intent was required and there were acts consistent with him, of course, having that intent" (ts 1 6).

(c) On the other hand, "from a conference I've had with [Mr Werner], and consistent with his statement, [Mr Werner] asserts he did not have the actual intent and thought it … essentially was teaching [the appellant] a lesson and thought that Neels would never do it" (ts 1 6).

(d) By s 7(4) of the Code, the appellant would have procured Mr Werner to commit an offence, even if Mr Werner lacked the intent to commit that offence (that is, the offence of attempting to procure the offence of murder), because the appellant held that intent and her intent would be sufficient for criminal responsibility (ts 1 7).

(e) However, in relation to the Crown's case against the appellant based on s 7(1)(b) of the Code, the Crown had to establish that Mr Werner committed the offence of attempting to procure Mr Stewart's murder and, as part of that case, that Mr Werner had the requisite intent (ts 1 7).

[11] Defence counsel told her Honour that he did not have any submissions arising out of the prosecutor's exchange with her Honour. Defence counsel said he "fully appreciated the nature of the [Crown's] case" and he "might say something more at the end of the prosecution case" (ts 1-11).

The prosecutor's opening address

[12] The prosecutor told the jury, in his opening address, that it was the Crown's case that "whilst in the midst of a very bitter and hostile battle over property" with her former husband, Mr Stewart, the appellant "procured and/or counselled and/or aided her then boyfriend, Anthony Werner, in the hiring of a hitman, Matthew Neels, to do or arrange a hit on [Mr Stewart]" (ts 1-2).

[13] However, the attempt to procure Mr Stewart's murder failed. Mr Neels did not fulfil his part of the bargain. Ultimately, he was a thief and not a killer. Mr Neels took a part payment of $20,000 cash that had been given to him, made an excuse and left Queensland.

[14] The prosecutor related to the jury that Mr Werner had pleaded guilty to the role he played in soliciting Mr Stewart's murder. In particular, on 28 August 2015 Mr Werner had pleaded guilty in the District Court of New South Wales to the offence of soliciting Mr Stewart's murder. His sentence had been discounted by 25% because he undertook to give evidence as a Crown witness at the appellant's trial. It was Mr Werner's understanding that if he were to give evidence materially different from the evidence he undertook to give, he would be liable to have his sentence re opened and to lose the 25% discount. The prosecutor said that fact would clearly be an important matter for the jury to consider when assessing Mr Werner's credibility and reliability as a witness.

Mr Stewart: overview of his evidence

[15] Mr Stewart was a Crown witness and gave evidence, relevantly, as follows.

[16] In 1983 Mr Stewart married the appellant. They had one child together who was born in 1988. In 2007 the marriage disintegrated.

[17] In 2009 Mr Stewart and the appellant were involved in divorce proceedings in the Family Court. The Family Court proceedings were acrimonious. There was a dispute concerning property settlement. The appellant was extremely hostile towards him.

[18] The matrimonial assets had a value of about $3 million. Those assets included the matrimonial home and an adjoining block of land. The adjoining block was given to the appellant by her parents.

[19] About two weeks after Mr Stewart left the matrimonial home, the appellant came to Mr Stewart's business premises and said to him, "I'm going to mentally destroy you. I'm going to financially destroy you and then I'm going to have you killed" (ts 2-16). The appellant then left the premises.

[20] After that incident Mr Stewart's solicitors lodged a caveat against the title to the block of land which adjoined the matrimonial property.

Mr Werner: overview of his evidence

[21] Mr Werner was a Crown witness and gave evidence, relevantly, as follows.

[22] Between 2009 and 2011 Mr Werner and the appellant were in a relationship.

[23] Mr Werner said that in December 2009 he had visited friends in New South Wales. Mr Neels, whom he had met previously, was present.

[24] When he returned to Queensland, Mr Werner told the appellant about Mr Neels. Mr Werner said to the appellant that Mr Neels was "very sleazy, the most sleaziest person" that Mr Werner knew (ts 2-48). The appellant asked Mr Werner whether Mr Neels "could help her get rid of Malcolm?" (ts 2-48). Mr Werner responded, "I don't think so. I doubt it" (ts 2-48).

[25] Mr Werner gave evidence that the appellant raised with him "all the time" getting rid of Mr Stewart because she did not want to share the matrimonial assets with him. She said, "Malcolm's got to go" (ts 2-48). The main topic of discussion was the block of land which adjoined the matrimonial property. The appellant told Mr Werner that "Malcolm's not getting my land" (ts 2-48, 2-49).

[26] Eventually, Mr Werner telephoned Mr Neels, from a telephone box on the Gold Coast, "to get [the appellant] off [his] back" (ts 2 49). Mr Werner told Mr Neels that he had a friend "who [had] a problem with somebody and [wanted] to get rid of them". Mr Werner asked Mr Neels if he could help his friend. Mr Werner mentioned that there would be "money in it" for Mr Neels (ts 2-49). Mr Neels said he could help.

[27] Mr Werner recounted to the appellant his conversation with Mr Neels. Mr Werner then telephoned Mr Neels and said that the person for whom he was acting was willing to pay $20,000. Mr Neels indicated that this amount would be satisfactory. However, the next day, Mr Neels again spoke to Mr Werner by telephone and said the price would have to be $40,000. After speaking to the appellant, Mr Werner telephoned Mr Neels and told him that the person for whom he was acting was willing to pay $40,000.

[28] Mr Werner gave evidence that the appellant provided him with $20,000 cash as a part payment together with a photograph of Mr Stewart and a note containing addresses and motor vehicle details relevant to Mr Stewart.

[29] Next, shortly before Mr Werner and the appellant went to Tasmania on holiday, Mr Werner met with Mr Neels at Burleigh Heads. Mr Werner gave Mr Neels the $20,000 cash, the photograph and the note.

[30] Within a few days, while he and the appellant were in Tasmania, Mr Werner telephoned Mr Neels. Mr Neels told Mr Werner that they had been photographed together at Burleigh Heads. Mr Werner asked Mr Neels to send him a copy of the photograph by facsimile transmission. No copy of the alleged photograph was sent.

[31] Mr Werner said he recounted to the appellant his conversation with Mr Neels. He told the appellant that Mr Neels had "ripped her off" (ts 2-53). The appellant added that Mr Neels had taken her money and run away with it.

[32] Mr Werner gave evidence that on 28 August 2015 he pleaded guilty in the District Court of New South Wales to the offence of soliciting Mr Stewart's murder. He

was sentenced to seven years two months' imprisonment with a non-parole period of four years three months. The sentence had been discounted by 25% because Mr Werner had undertaken to give evidence as a Crown witness at the appellant's trial.

[33] During Mr Werner's cross-examination, defence counsel focused on the differences between Mr Werner's account of his dealings with Mr Neels and Mr Neels' account of those dealings in his witness statement.

[34] Mr Werner agreed in cross-examination that when he was initially interviewed by the police he had denied having been involved in any plan to procure Mr Stewart's murder. Mr Werner admitted in cross-examination that his denial was a lie.

[35] Mr Werner was also cross-examined regarding a statement of facts that was tendered during his sentencing hearing in the District Court of New South Wales. Mr Werner asserted that some of those facts, which were more consistent with Mr Neels' account of their dealings, were not true.

[36] Defence counsel put to Mr Werner that he did not have any conversations with the appellant regarding the procuring of Mr Stewart's murder and that the appellant had never given him any money. Mr Werner rejected both of those propositions.

[37] Mr Werner's cross-examination concluded with the following exchange:

> "So far as your state of mind is concerned, obviously you were never intending that Neels would do anything to Matthew Stewart?---To Malcolm Stewart, yes.
>
> To Malcolm Stewart?---Yes.
>
> In fact, you well knew that he wouldn't and that he would just take the money?---Yes.
>
> I'm suggesting you well knew that because he was an old friend of yours?---Yes" (ts 2-83).

[38] The prosecutor re-examined Mr Werner by putting to him a number of extracts from the transcript of an interview on 29 September 2014 between Mr Werner and police. The apparent purpose of this re-examination was to endeavour to elicit admissions from Mr Werner which supported the Crown's case that Mr Werner intended that Mr Neels should kill Mr Stewart or arrange for him to be killed. Eventually, defence counsel objected to the course being adopted by the prosecutor, and the trial judge upheld the objection.

[39] Mr Werner accepted in re-examination that he had pleaded guilty to the charge in New South Wales partly on a factual basis which included Mr Werner having given Mr Neels, at a barbecue in New South Wales, a manila folder containing a picture of Mr Stewart, and Mr Werner having explained to Mr Neels that if Mr Neels killed Mr Stewart he would be paid $20,000 cash. The prosecutor asked Mr Werner why he had pleaded guilty on the basis of facts which he asserted in cross-examination were not true. Mr Werner explained, in essence, that he took a pragmatic approach. He said that, based on legal advice he had received, he believed that if he did not continue to dispute the basis on which he was to be sentenced he would receive a sentencing discount and he would not continue to be held in a maximum security prison. Mr Werner asserted he had been advised by his solicitor that he was guilty

of the offence he was charged with and it did not matter whether "it happened in Queensland or New South Wales" (ts 2-91).

Mr Neels: overview of his evidence

[40] Mr Neels was a Crown witness at the trial. He gave evidence, relevantly, as follows.

[41] Mr Neels said he recalled receiving a telephone call from Mr Werner. During the call Mr Werner asked to see him. Mr Neels thought the telephone call occurred in November 2009.

[42] After the telephone call Mr Neels had a meeting with Mr Werner in New South Wales. At the meeting Mr Werner gave Mr Neels a file containing a picture of a man and details of some motor vehicles and addresses. Mr Werner asked Mr Neels whether Mr Neels could kill the man in the photograph. There was some discussion regarding payment. Mr Neels told Mr Werner the cost would be "20 up front and 20 later" (ts 3-14). Mr Werner responded that he would "let her know and get back to you" (ts 3-14).

[43] During this initial meeting Mr Werner explained to Mr Neels that the man to be killed had "ripped a lot of people off and … was a paedophile" (ts 3-16). Mr Werner said there was a block of land behind the man's property and Mr Neels could park his car somewhere and "shoot [the man] when he was out the back having a barbecue" (ts 3 16). Mr Werner suggested that a stoke rifle could be used to shoot him. Mr Neels told Mr Werner that the rifle would probably cost about $2,800.

[44] Subsequently, Mr Werner telephoned Mr Neels. Mr Werner said he had the money for the rifle and he was at the front of Mr Neels' house. Mr Neels met Mr Werner at the front of his house. Mr Werner handed him $2,800 cash. Mr Neels used the money to purchase an air conditioning unit for his daughter's bedroom.

[45] Later, Mr Neels received another telephone call from Mr Werner who told him that he had $20,000 cash. They arranged to meet at the Burleigh Heads Hotel. Mr Neels thought the meeting occurred in February 2010. At the meeting Mr Werner told him how the additional $20,000 cash could be collected after the killing. Mr Neels informed Mr Werner that he had arranged for someone else to kill Mr Stewart. That was a lie.

[46] Mr Neels gave evidence that, some time after the meeting at the Burleigh Heads Hotel, he telephoned Mr Werner and gave him a "story" that they had been photographed together and that the "deal was off" (ts 3-18).

Neita Patricia Chapman: overview of her evidence

[47] Ms Chapman was a Crown witness at the trial. She gave evidence, relevantly, as follows.

[48] Ms Chapman said Mr Werner was her son and she had been a friend of the appellant.

[49] Ms Chapman gave evidence that in 2010 she had a conversation with the appellant. The appellant told her that she had "lost $20,000 down the coast". When

Ms Chapman asked the appellant what she meant, the appellant replied "I gave Neelsey $20,000 to kill Malcolm" (ts 3-5).

[50] Defence counsel put to Ms Chapman in cross-examination that the appellant had not said she had given "Neelsey $20,000 to kill Malcolm" (ts 3-6). Ms Chapman rejected that proposition.

Relevant documents tendered at the trial

[51] At the trial, records relating to bank accounts in the name of Mr Werner were tendered. The records revealed that Mr Werner had no apparent means of providing $20,000 cash to Mr Neels.

[52] Records relating to bank accounts in the name of the appellant were also tendered at the trial. The records showed that in November 2009 five separate withdrawals for $9,000 each had been made.

[53] The documents given by Mr Werner to Mr Neels were also tendered.

The appellant's submission of no case to answer

[54] At the close of the Crown's case, defence counsel submitted that there was no case for the appellant to answer. Defence counsel argued that there was no evidence to establish one of the elements that the Crown was required to prove in order to establish that Mr Werner, as the principal offender, had committed an offence under s 539 of the Code. The element was Mr Werner's intention to commit the offence of attempting to procure Mr Stewart's murder. Further, defence counsel argued that, as a matter of law, it was not open to the Crown to contend that, even if the jury was not satisfied that Mr Werner had the requisite intention, s 7(4) of the Code applied and the appellant could be found guilty pursuant to that provision on the basis that she had procured the offence.

[55] The trial judge rejected defence counsel's first argument. Her Honour held that, notwithstanding the inconsistencies in the evidence and notwithstanding Mr Werner's evidence as to his intent, the Crown's case taken at its highest was capable of supporting a finding that Mr Werner held the requisite intent.

[56] As to defence counsel's second argument, her Honour accepted that s 7(4) of the Code "may well extend criminal responsibility to a case where the person procuring an act holds the relevant intent and the person carrying [out] the act does not" (ts 4-5). However, her Honour considered that s 7(4) did not apply in the present case for two reasons. First, on the Crown's case, Mr Werner was the principal offender and, on the Crown's case, "an active, knowing participant even if the relevant intention is not made out" (ts 4-5). Secondly, on the Crown's case, if Mr Werner did not hold the requisite intention, no principal offence would have been committed, for the purposes of s 7, under s 539 of the Code. Her Honour added:

> "Given the breadth of section 539 … if Mr Werner was an innocent agent [the appellant] would have been the relevant party attempting to procure the act of murder as a principal. [However] the Crown's case has not been formulated on that basis.
>
> I therefore find that in the present case section 7(4) does not apply and as a matter of law cannot be relied upon by the Crown … I

otherwise find that there is a case for [the appellant] to answer" (ts 4-5).

The appellant did not give or adduce evidence

[57] At the trial, the appellant elected not to give evidence. Defence counsel did not call any witnesses.

The grounds of appeal

[58] The appellant relies upon three grounds of appeal.

[59] Ground 1 alleges that the verdict of guilty is unreasonable or cannot be supported having regard to the evidence.

[60] Ground 2 alleges that a miscarriage of justice occurred because the prosecution failed to disclose documents about the primary prosecution witness, Mr Werner, until after the jury had retired to consider their verdict.

[61] Ground 3, as substituted at the hearing of the appeal, alleges that a miscarriage of justice occurred because the jury was instructed that regard could be had to Mr Werner's plea of guilty in the District Court of New South Wales, to the offence of soliciting Mr Stewart's murder, in proof of the prosecution's case against the appellant.

[62] It is convenient, first, to consider ground 3, then ground 1 and, finally, ground 2.

Ground 3: the prosecutor's closing address

[63] The prosecutor submitted to the jury in his closing address that "[Mr Werner] has pleaded guilty to the offence of soliciting the murder of Mr Stewart in New South Wales, and as a matter of law, by pleading guilty he acknowledged he intended that Mr Stewart be murdered, and that he sought to solicit another to commit that murder". The prosecutor added that, by pleading guilty, Mr Werner had made "an admission … as to his intent" (ts 3).

[64] The prosecutor also submitted to the jury that "[all] of Mr Werner's conduct in the hiring of Mr Neels, providing him with the money and pleading guilty to the charge in New South Wales well and truly establish[ed] he had [the requisite] intent" (ts 3).

Ground 3: the trial judge's directions to the jury in her summing up

[65] The trial judge directed the jury in her summing up, relevantly, as follows.

[66] Her Honour told the jury that intention was a "critical feature" in the case in relation to both Mr Werner and the appellant (ts 3). The jury had to be satisfied that Mr Werner "attempted to procure Matthew Neels … to murder Mr Stewart, in order to prove that the primary offence to which [the appellant] is said to be the accessory was committed" (ts 3). In that regard, the jury had to be satisfied that Mr Werner "intended to procure Matthew Neels to murder Mr Stewart". If the jury was "satisfied of the principal offence", the jury then had to be satisfied that the Crown had proven beyond reasonable doubt "[the appellant's] intention, relevant to each of the three pathways relied upon by the Crown" (ts 3).

[67] The trial judge said that the jury "must be satisfied of … Mr Werner's intention in determining whether he committed the principal offence" and that required the Crown "to prove, beyond reasonable doubt, that [Mr Werner] intended to procure Matthew Neels to do an act - namely, to unlawfully kill Malcolm Stewart - with the intent to do so" (ts 3 4).

[68] Her Honour elaborated:

> "Intention may be inferred from the conduct of Mr Werner before, at the time or after he did the specific acts which are said by the Crown to constitute attempting to procure Mr Neels to do the act in question. And, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time. In the present case there is evidence by Mr Werner as to what his intention was.
>
> The Crown's case relies on the evidence as to what Mr Werner said he did when speaking to Mr Neels and in delivering money and identifying documents which included exhibits four and five, which we recall are the photo and some identifying information, to Mr Neels and follow-up phone calls after he had gone to Tasmania, as well as Mr Werner's plea of guilty to the offence in New South Wales. Mr Werner gave evidence that he pleaded guilty in New South Wales to soliciting the murder of Malcolm Stewart - that was under section 26 of the New South Wales *Crimes Act* … An element of that offence required that Mr Werner intended that Malcolm Stewart be murdered. By pleading guilty to that offence, Mr Werner admitted that … it was his intention that Malcolm Stewart be murdered. His plea of guilty is evidence of his intention. The Crown also relies on evidence of Mr Neels in relation to the words of Mr Werner to him and the conduct that occurred when Mr Werner approached him in relation to Mr Stewart. However, the Crown asks you to reject Mr Werner's own evidence as to what his intention was. In that regard … Mr Werner gave evidence that he was never intending that Mr Neels would ever do anything to Malcolm Stewart, that he well knew that Mr Neels wouldn't, and that he would just take the money.
>
> The Crown, therefore, asks you to infer that Mr Werner had the relevant intention from the matters which I've outlined … rather than relying on Mr Werner's own evidence as to his intention. You will need to examine all the evidence and ask yourselves whether it is proved by the Crown, beyond reasonable doubt, that Mr Werner did have the intention to procure Matthew Neels to murder Mr Stewart. It will involve you drawing inferences from the evidence that you accept as proved. You are entitled to infer such intent as is put to you by the Crown if, after considering all of the evidence - which includes Mr Werner's own evidence - you are satisfied - in terms of his intention you are satisfied, beyond reasonable doubt, that it is the only reasonable inference open on that evidence. That inference must be the only rational inference that could be drawn from the circumstances. There is nothing wrong with you drawing inferences so long as you [heed] the warnings I have given you that inferences

> must be drawn from facts that are established by the evidence, and you must be logical and rational in drawing those inferences.
>
> Importantly, in relation to Mr Werner's intent: if there is an inference which is reasonably open - if there is an inference reasonably open which is adverse to [the appellant], that is, one pointing to Mr Werner holding the relevant intention to procure Mr Neels to murder Malcolm Stewart, and an inference that's in [the appellant's] favour that is one consistent with Mr Werner not holding that intention to procure Mr Neels to murder Mr Stewart. You may only draw the inference as to Mr Werner's intention if it overcomes any other possible inference as to leave no reasonable doubt in your minds that it is the only rational inference that could be drawn in the circumstances (ts 4 5)."

[69] The trial judge then directed the jury in relation to the appellant's intention.

[70] Her Honour reminded the jury that the Crown did not contend that Mr Werner was truthful and reliable in all respects. In particular, the Crown contended that the jury should reject Mr Werner's evidence as to his intention "and have regard to the evidence of his conduct and words, which has been given by [Mr Werner] and Mr Neels, and the plea of guilty to the offence in New South Wales, by which [Mr Werner] admitted he held the relevant intention" (ts 13).

[71] The trial judge also told the jury:

> "… the Prosecution does not need to prove that the person who actually committed the offence has also been convicted of it. In this case, the Crown's case is that Mr Werner did commit the offence. He has been convicted of a related offence in New South Wales and the Crown rely on that conviction in New South Wales as evidence of his intention to procure the murder of Mr Stewart. They otherwise rely on the matters that I have outlined above, in terms of the evidence of the approaches to Mr Neels and the provision of money to prove that the principal offence was committed (ts 19)."

[72] Her Honour directed the jury as to the elements of the offence and the three alternative pathways to guilt relied upon by the Crown in accordance with a document her Honour gave to the jury. The document provided, relevantly:

> "**THE PRINCIPAL OFFENCE**
>
> The principal offence relied on by the Crown for the purpose of s 7(1)(a) is that Mr Werner committed an offence under s 539 of the Criminal Code, of attempting to procure another to murder Mr Stewart.
>
> **To prove this offence, the Crown must prove, beyond reasonable doubt, that Mr Werner committed an offence by:**
>
> 1. **Attempting to procure another, namely a Mr Neels, to do an act in Queensland between 12 January 2010 and 14 February 2010 at Burleigh Heads or elsewhere in the state of Queensland;**

2. Which, had the act been done by Mr Werner or Mr Neels, would have been an offence under Queensland, namely murder.

(1) To establish that Mr Werner attempted to "**procure**" another to do an act, the Crown must show that:

(i) Mr Werner intended to procure Mr Neels to do an act, namely to unlawfully kill Malcolm Stewart intending to cause the death of Malcolm Stewart or grievous bodily harm;

(ii) Mr Werner began to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

(iii) Mr Werner did some act which manifests his intention; that is, Mr Werner performed an act which is capable of being observed by another and which in itself makes clear his intention is to procure Mr Neels to do an act, namely unlawfully kill Malcom Stewart.

…

(2) To establish that the act, had it been done, would have constituted murder under Queensland law, the offence of murder requires a person to be unlawfully killed with the intent to cause the death of Malcom [sic] Stewart or grievous bodily harm to him.

SECTION 7(1)(b) AND S 7(1)(d)

[The appellant] is said to be liable for the offence of attempting to procure another to do an act in Queensland which, had it been done, would have constituted murder, due to the operation of provisions which extend criminal responsibility for an offence to any person who is a party to the offence, namely s 7(1)(b) and s 7(1)(d) of the Code.

ELEMENTS OF THE OFFENCE

The Crown's case is that [the appellant] is also guilty of that offence because she:

(a) Did an act for the purpose of <u>enabling or assisting</u> Mr Werner to commit the offence of attempting to procure another to commit the murder of Malcolm Stewart (s 7(1)(b)); and/or

(b) <u>Counselled</u> Mr Werner to commit that offence of attempting to procure another to commit the murder of Malcolm Stewart; and/or

(c) <u>Procured</u> Mr Werner to commit the offence of attempting to procure another to commit the murder of Malcolm Stewart.

For the Crown to prove beyond reasonable doubt any of the above, it must prove beyond reasonable doubt that the principal offence was

committed by Mr Werner and that [the appellant] had actual knowledge of the essential facts of the principal offence, including Mr Werner's state of mind.

(a) Enabling or Assisting: S 7(1)(b)

1. **The prosecution must prove to your satisfaction beyond reasonable doubt each of the following things:**

    1. **That Mr Werner committed the offence of attempting to procure another to murder Malcolm Stewart; and**

    2. **That [the appellant] did acts for the purpose of enabling or aiding Mr Werner to commit the offence of attempting to procure another to murder Malcolm Stewart, even if those acts did not in fact assist; and**

    3. **That [the appellant] did so with the intention of aiding Mr Werner to commit the offence; and**

    4. **That [the appellant] had actual knowledge or expectation of the essential facts of that offence, that is, the offence of attempting to procure another to commit another to murder Malcolm Stewart. The essential facts of that offence are all the essential matters which make the acts done by Mr Werner a crime, including that Mr Werner had the intention to commit the offence.**

(b) Counselling S 7(1)(d)

2. **For the prosecution to establish that [the appellant] is guilty, because she counselled Mr Werner to commit the offence of attempting to procure another to do an act which would constitute murder if it had been done, the prosecution must prove beyond reasonable doubt:**

    1. **That Mr Werner committed the offence of attempting to procure another to do an act which would constitute murder if it had been done; and**

    2. **That [the appellant] counselled, in the sense of urging or advising Mr Werner to commit the offence of attempting to procure another to do an act which would constitute murder if it had been done; and**

    3. **That Mr Werner committed that offence after being urged or advised by [the appellant] to commit that offence; and**

    4. **That Mr Werner committed the offence when carrying out that counsel.**

(c) Procuring s 7(1)(d)

3. **The prosecution must prove beyond reasonable doubt:**

   (1) That Mr Werner committed the offence of attempting to procure another to do an act which would constitute murder if it had been done; and

   (2) That [the appellant] procured Mr Werner to commit that offence by successfully persuading Mr Werner to do it and thereby bringing about the commission of the offence; and

   (3) [The appellant] knew that Mr Werner intended to commit the offence." (original emphasis)

[73] After the closing addresses of the prosecutor and defence counsel and before the trial judge commenced her summing up, the jury gave her Honour a note containing three questions (ts 4-34). Her Honour dealt with the questions in her summing up.

[74] One of the questions was:

> "What is the relevance of the dates on the charge, and if procurement dates are outside this range what are we to do?"

[75] Her Honour answered that question as follows:

> "The dates of the charge and the range [that is] given between January and February 2010 are particularly relevant to the Crown's case in relation to [the appellant's] actions of counselling and procuring. If [you are] not satisfied on the evidence that [the appellant] counselled or procured Mr Werner during that period to commit the offence, then the Crown [has not] proven beyond reasonable doubt a necessary element of the pathways for counselling or procuring. So it [will not] have satisfied the [burden of] proof beyond reasonable doubt of each element of the offence in relation to counselling or procuring" (ts 27).

[76] Another question asked by the jury concerned what Mr Werner had been disputing before he was sentenced (ts 29). The trial judge informed the jury in her summing up that when an offender pleads guilty and the facts concerning the offence are disputed then the court has a hearing to determine the facts. Her Honour read to the jury passages from Mr Werner's cross-examination and re-examination in relation to the facts on the basis of which he was sentenced, including his evidence in cross-examination that some of those facts were untrue (ts 29-30). Her Honour did not, however, direct the jury as to how they could and could not use the evidence of the facts on the basis of which Mr Werner was sentenced, or how they could and could not use Mr Werner's evidence that some of those facts were untrue, in considering Mr Werner's intention in the context of the Crown's case against the appellant.

Ground 3: the appellant's submissions

[77] Senior counsel for the appellant noted that in evidence in chief Mr Werner said that on 28 August 2015 he had pleaded guilty in the District Court of New South Wales to the offence of soliciting Mr Stewart's murder. Defence counsel did not object to the evidence. Senior counsel submitted that the failure to object was probably

explicable on the basis that the defence wanted to take advantage of the circumstance that Mr Werner had an incentive to give evidence which implicated the appellant and that circumstance was connected with his plea of guilty. However, senior counsel argued that evidence of Mr Werner's plea of guilty was inadmissible if it was to be relied upon against the appellant.

[78] Senior counsel submitted that Mr Werner gave evidence to the effect that, notwithstanding what he had said to Mr Neels and notwithstanding what he had provided to Mr Neels, Mr Werner did not intend that Mr Neels should kill Mr Stewart.

[79] At the trial, the prosecutor advanced a number of arguments as to why the jury should find that Mr Werner did intend that Mr Neels should kill Mr Stewart. One of those arguments was that Mr Werner's plea of guilty was an admission that he had the requisite intention (ts 1-2, 1-4).

[80] Senior counsel accepted that the trial judge had correctly directed the jury that it was necessary for the prosecution to prove that Mr Werner intended to procure Mr Neels to murder Mr Stewart (ts 3).

[81] However, after reminding the jury of some of the evidence relied upon by the prosecution to prove Mr Werner's intention, her Honour directed the jury as follows:

> "Mr Werner gave evidence that he pleaded guilty in New South Wales to soliciting the murder of Malcolm Stewart … An element of that offence required that Mr Werner intended that Malcolm Stewart be murdered. By pleading guilty to that offence, Mr Werner admitted … that it was his intention that Malcolm Stewart be murdered. His plea of guilty is evidence of his intention (ts 4)."

[82] Senior counsel submitted that a miscarriage of justice was occasioned by that direction because her Honour directed the jury that the jury could have regard to Mr Werner's plea of guilty in determining whether the prosecution had proved that Mr Werner intended to procure Mr Neels to murder Mr Stewart.

[83] Senior counsel acknowledged that the trial judge had foreshadowed to the prosecutor and defence counsel that she would give the direction in question. Defence counsel did not object to the proposed direction. Accordingly, on appeal the appellant must establish, first, that the direction was wrong and, secondly, that the direction occasioned a miscarriage of justice.

[84] As to the first matter, senior counsel argued that Mr Werner's plea of guilty was no more than a prior statement that was either consistent or inconsistent when compared with different parts of Mr Werner's evidence at the trial. Senior counsel referred to *R v Kirkby*[1] and *Humphries v The Queen*.[2]

[85] As to the second matter, senior counsel argued that the impugned direction might have affected the verdict of guilty because the import of the direction was to commend for the jury's consideration the plea of guilty as evidence which

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1 *R v Kirkby* [2000] 2 Qd R 57 [45].
2 *Humphries v The Queen* [2015] NSWCCA 319 [112].

supported the prosecution's case that Mr Werner intended to procure Mr Neels to murder Mr Stewart. In order to prove that the appellant was a party to the offence charged against her, it was necessary for the prosecution to prove, through evidence admissible against her, that an offence had been committed by the principal. However, her Honour left to the jury evidence which was inadmissible for that purpose. No conceivable forensic advantage flowed to the defence from the impugned direction and, accordingly, the absence of any objection to the direction was not able to be accounted for on that basis.

Ground 3: the Crown's submissions

[86] Counsel for the Crown submitted that *Kirkby* was authority for the proposition that the conviction of a third party is ordinarily inadmissible in a subsequent criminal proceeding against a different person as evidence of the facts on which the conviction was based.

[87] Counsel sought to distinguish *Kirkby* on the basis that the appellant in *Kirkby* was charged with unlawfully doing grievous bodily harm; the Crown's case was that the appellant had procured a third party to attack the complainant; and although evidence of the third party's conviction was adduced at the appellant's trial, the third party was not called as a witness.

[88] Counsel submitted that, unlike *Kirkby* and cases which have followed or applied *Kirkby*, the third party in the present case, namely Mr Werner, was called to give evidence at the appellant's trial. Further, the facts and circumstances of Mr Werner's conviction were not relied upon by the Crown to prove the appellant's guilt. Mr Werner's conviction was solely relied upon by the Crown as one part of the evidence that could be used by the jury in determining Mr Werner's intent at the time he did the acts he swore in evidence that he did.

[89] Counsel argued that the impugned direction in the present case did not contain any error when that direction is considered in the context of her Honour's directions as a whole. Further, even if the impugned direction contained an error, no miscarriage of justice occurred having regard to the totality of the directions given with respect to Mr Werner's evidence. Counsel emphasised that her Honour identified the relevant facts and circumstances that were capable of supporting an inference as to Mr Werner's intent, including the delivery of the money and the identifying documents, Mr Neels' evidence as to Mr Werner's words and conduct, and Mr Werner's plea of guilty.

[90] Counsel submitted that, when regard is had to the whole of the evidence, the only reasonable inference open was that Mr Werner intended, when he did the relevant acts of procurement, that Mr Neels should kill Mr Stewart.

Ground 3: its merits

[91] I begin by noting a number of legal principles which apply as between the Crown and an offender where the offender pleads guilty to a charged offence.

[92] An accused person may enter a plea of guilt whether or not he or she believes himself or herself to have committed the charged offence. As Dawson J observed in *Meissner v The Queen*:[3]

> "It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred (157)."

[93] A plea of guilty to a charged offence necessarily involves an admission by the offender of each of the elements of the offence, including all of the essential facts necessary to constitute the offence. See *R v Hill*.[4] The plea also negatives all defences. See *Schugman v Menz*.[5] The plea does not, however, constitute an admission of all of the facts stated in the Crown's depositions or witness statements. See *Hill* (312). It is necessary for the sentencing judge to evaluate the facts, consistently with the plea, to determine the offender's culpability and to decide upon an appropriate sentence.

[94] I emphasise that the legal principles which I have noted apply only where an offender has pleaded guilty to a charged offence and only in criminal proceedings to which the offender is a party.

[95] In Heydon JD, *Cross on Evidence*, (11th Aust ed, 2017), [5200] - [5210], the author discusses, in a chapter titled *Estoppels*, the admissibility of a person's previous criminal conviction in subsequent civil or criminal cases in which he or she is a party. It is stated that "[a]lthough there is very little authority on the point, it seems that the principle [applicable in civil cases] applies to criminal cases" [5210]. The author then states:

> "As between the Crown and the accused, the previous conviction estops the accused from denying guilt of the offence, but the conviction of a third party is generally inadmissible as evidence of the facts on which it was based (*Bennett v Western Australia* (2012) 223 A Crim R 419 at [111])."

[96] It is well established that an offender's formal admission of guilt by a plea of guilty upon arraignment is ordinarily not admissible at the trial of a co-accused as evidence of the facts on which it was based. That principle is an incident of the wider principle that in Australia there is no exception to the hearsay rule which makes admissible, either against or in favour of an accused, hearsay evidence of a confession by a co-accused or by a third party. See *Bannon v The Queen*.[6]

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3 *Meissner v The Queen* [1995] HCA 41; (1195) 184 CLR 132.
4 *R v Hill* [1979] VR 311, 312 (Young CJ, Menhenitt & Crockett JJ).
5 *Schugman v Menz* [1970] SASR 381, 381-382 (Bray CJ).
6 *Bannon v The Queen* [1995] HCA 27; (1995) 185 CLR 1, 22 (dawson, Toohey & Gummow JJ).

[97] In *Kirkby*, the appellant was convicted after trial of unlawfully doing grievous bodily harm. The Crown's case was that the appellant was a principal offender under s 7(1)(d) of the Code, in that he procured Vogler to organise the attack on the complainant. Vogler in turn arranged for Bonner to carry out the attack. The prosecutor did not call Bonner, but tendered a certificate of conviction of Bonner for the offence, following Bonner's plea of guilty. Defence counsel objected to the tender, but the trial judge overruled the objection. The Crown also led evidence of Vogler's plea of guilty. The prosecutor called Vogler. It was conceded in *Kirkby* that Vogler's plea was admissible.

[98] McMurdo P (Jones J agreeing) referred to the general rule that the conviction of a third party for an offence is not admissible against an accused person at his or her trial. Her Honour also referred to the exception to the general rule that, on a trial of an accessory after the fact, proof of the conviction of the actual offender is admissible to prove an element of the offence. Her Honour noted that once evidence of the conviction is admissible, s 53 of the *Evidence Act* 1977 (Qld) permits a certificate of conviction to be tendered [40]-[44].

[99] McMurdo P considered the decisions of this court in *R v Hutton*[7] and *R v Carterand Savage, ex parte Attorney-General*.[8] Her Honour observed:

> "In *Hutton*, the issue, whether a distinction should be made between the admission of the conviction of the actual offender on the trial of an accessory after the fact and the trial of an offender charged under s. 7(1)(a), (b), (c) or (d) of the *Criminal Code*, does not seem to have been considered. The court in *Hutton* mistakenly accepted *Carter and Savage* as justifying the admissibility of evidence of the conviction of the actual offender on the trial of alleged co-offenders, other than accessories after the fact. *Carter and Savage* is authority allowing evidence to be given of the conviction of the actual offender by way of certificate of conviction tendered under s. 53 of the Act only on a trial of an accessory after the fact. It should also be noted that the tendering of the conviction in *Hutton* did not assume the same importance as in this case, as the convicted witness there gave evidence and was able to be cross-examined, something denied the appellant here [42]."

[100] Thomas JA (Jones J agreeing) held that there was "no principle in the law of evidence which makes evidence of the conviction of a third party admissible against an accused in criminal proceedings to prove that the third party did the acts that amount to the offence" [82].

[101] Both McMurdo P and Thomas JA said that, where evidence is adduced of a conviction of a co-offender, the trial judge should generally instruct the jury that the co-offender's conviction is not evidence against the accused [45] (McMurdo P), [71] (Thomas JA).

[102] In *Kirkby*, this court held unanimously that Hutton was wrongly decided insofar as *Hutton* purported to apply the principles set out in *Carter and Savage* to those who are allegedly co-accused by way of s 7(1)(a), (b), (c) or (d) of the Code. *Hutton* was

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7 *R v Hutton* (1991) 56 A Crim R 211.

8 *R v Carter and Savage, ex parte Attorney-General* [1990] 2 Qd R 371.

overruled. In *Kirkby*, this court also held unanimously that the majority in Carter and Savage apparently did not appreciate that in Queensland the rule in *Hollington v Hewthorn* has been abolished by statute in respect of civil offences only, and that the rule continues to apply to criminal proceedings. Consequently, *Carter and Savage* may have been wrongly decided. However, this was not expressly determined in *Kirkby*.

[103] The appeal in *Kirkby* was allowed, the verdict of guilty was set aside and a new trial ordered on the ground that the trial judge had erred in permitting the Crown to tender, without the consent of the accused, a certificate of conviction as evidence of the principal offender's commission of the offence.

[104] I will now consider a number of other cases in which two or more co-accused were charged with an offence; one or more of the co-accused pleaded guilty and the remaining co accused pleaded not guilty to the offence; at least one co-accused who pleaded guilty gave evidence as a Crown witness at the subsequent trial of the co-accused who pleaded not guilty; and evidence was admitted at the trial of the plea of guilty entered by the co accused who gave evidence at the trial as a Crown witness.

[105] In *R v Windsor*,[9] Windsor and Boock were jointly charged in the Magistrates Court with conspiracy to defeat the course of justice. Depositions were taken. Boock pleaded guilty and was committed for sentence. Windsor pleaded not guilty and was committed for trial.

[106] Windsor was tried on an indictment which alleged that he conspired with Boock to defeat the course of justice. Windsor was convicted. He appealed. His grounds of appeal included the contention that evidence given by Boock at Windsor's trial to the effect that Boock had pleaded guilty to the charge of conspiring with Windsor was wrongly admitted and that, having regard to the admission of this evidence and notwithstanding the corroboration warning given by the trial judge to the jury, the verdict should be set aside because it was unsatisfactory and it would be dangerous to let it stand.

[107] Finlay J, who delivered the judgment of the Court of Appeal of New Zealand, said:

> "Whether, therefore, the plea of 'guilty' be regarded as an act or a declaration, evidence of it was not admissible against the appellant on his trial. If it be regarded as a confession, then it was still inadmissible, for a prisoner can be affected only by confessions of himself, and not by those of accomplices: *R v Turner* ((1832) 1 Mood CC 347; 168 ER 1298), *Reg v Gardner and Humbler* ((1862) 9 Cox CC 332), and *R v Dibble* ((1908) 72 JP 498); unless, of course, made in his presence otherwise than in a judicial proceeding, or assented to by him. None of those conditions was satisfied here, for the plea of 'guilty' was made in a judicial proceeding, and the appellant never assented to it. If the evidence of a plea of 'guilty' was neither a declaration admissible against the prisoner nor an admission or confession of which evidence could be given against him, then it is difficult to imagine on what ground it could be received. Its real purpose was, we should imagine, to reinforce the evidence of Boock by informing the jury that she herself had acted to her detriment upon the truth of the matters alleged in her testimony.

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9 *R v Windsor* [1953] NZLR 83.

> But evidence of that could scarcely be admissible against the appellant, for what Boock said or did when a common purpose had ceased to exist was not admissible against the appellant (90)."

[108] In *R v Gallagher*,[10] the appellant was charged with 43 counts of receiving secret commissions. He pleaded not guilty. After a trial, the jury returned verdicts of guilty on 20 counts. The appellant appealed against his conviction.

[109] During his opening address, the prosecutor told the jury that most of the 'givers of corrupt gifts' (who were described on appeal as 'the developers'), in relation to the transactions forming the basis of the charges against the appellant, had 'pleaded guilty and been dealt with'. The prosecutor also told the jury, in the course of opening, that such evidence was not capable of being used against the appellant. Defence counsel did not object when the prosecutor intimated his intention to call evidence that the developers had pleaded guilty and been dealt with.

[110] On appeal, junior counsel for the appellant (who had been defence counsel) admitted that he did not object because he judged it was in the appellant's interest that the evidence of the guilty pleas be led (232). Defence counsel believed that cross-examination of the developers in relation to the circumstances in which they pleaded guilty was likely to yield material favourable to the appellant (232). Defence counsel anticipated extracting from some or all of the developers that a 'deal' had been made in which each developer had been assured that if he pleaded guilty he would be dealt with in a way in which no conviction was recorded (232-233).

[111] The prosecutor was permitted to adduce evidence at the appellant's trial of the developers being charged, brought before the court, pleading guilty and being dealt with.

[112] On appeal, one of the grounds of appeal alleged that the trial judge had erred in failing to discharge the jury, in circumstances where inadmissible evidence was opened, notwithstanding defence counsel's failure to object.

[113] In the Full Court of the Supreme Court of Victoria, Young CJ, Kaye and Gray JJ held that the evidence in question was irrelevant to any issue in the trial and, accordingly, none of the evidence should have been opened or given (235-236). The fact of a plea of guilty might have become relevant to the issue of a particular witness' credit, depending upon how the issue was raised, but until that happened the evidence of the developers' pleas of guilty, and the manner in which a particular developer was brought before a court and dealt with, was inadmissible (235). The prosecutor's statement to the jury, in his opening address, that the evidence of the pleas of guilty could not be used against the appellant was a correct statement of the law, and demonstrated that the evidence should not have been opened or given (236). However, no miscarriage of justice was occasioned by the trial judge's failure to discharge the jury on that account because defence counsel deliberately refrained from objecting to the evidence for legitimate tactical or forensic reasons (236-237).

[114] In *Romeo v The Queen*,[11] the three appellants, together with Ian Murray, were presented in the District Court of Western Australia upon an indictment which charged that between specified dates at Mount Magnet they conspired with each

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10 *R v Gallagher* [1986] VR 219.

11 *Romeo v The Queen* [1988] WAR 304.

other to cultivate cannabis with intent to sell or supply it to another. Murray pleaded guilty to the charge and was convicted upon his plea. Each of the appellants pleaded not guilty but were convicted after trial. The appellants appealed against their convictions. The appeals were allowed, their convictions quashed and a new trial was ordered.

[115] At the material time Murray held a pastoral lease of land at Mount Magnet. The property was known as Iona Station. The Crown case was that the appellants had occupied accommodation on Iona Station, and the appellants together with Murray had established a cannabis plantation and had harvested the crop and taken it away.

[116] Murray made a full confessional statement to the police in an interview. He gave evidence at the trial of the appellants as a Crown witness. Although Murray admitted that he had been convicted of the offence, he claimed that he had changed his plea from not guilty to guilty upon wrong advice. Murray denied the truth of the confessional statement. The trial judge permitted Murray to be treated as a hostile witness. The confessional statement was put to him. He claimed that it was a concoction and denied that he had grown cannabis.

[117] The Crown case against the appellants was circumstantial. The critical question in relation to each appellant was whether, upon the evidence admissible against him, it could be found beyond reasonable doubt that he was a member of the group which cultivated and harvested the crop.

[118] Each appellant gave evidence in his own defence denying involvement in the alleged conspiracy and denying that he had been associated with the growing of the cannabis crop on Iona Station.

[119] One of each appellant's grounds of appeal was that the trial judge's directions were inadequate in that, relevantly, he failed to direct the jury adequately on the effect of Murray's plea of guilty.

[120] In the Court of Criminal Appeal of Western Australia, Burt CJ held that it was necessary for the trial judge in his direction to the jury:

> "To make it clear that the fact that Murray had pleaded guilty and that he had been convicted upon that plea was not admissible against any of the appellants in proof of the fact that he (the appellant) had been party to the alleged agreement: *R v Moore* (1956) 40 Cr App R 50 and *R v May* [1984] 13 CCC (3d) 257 (307)."

[121] His Honour concluded that the directions given by the trial judge did not adequately cover that matter.[12]

[122] Brinsden J said in relation to the trial judge's directions concerning Murray's plea of guilty:

> "What his Honour said, however, in relation to Murray's evidence on oath that he had pleaded guilty, though on wrong advice, is at best ambiguous but at worst could have left the jury with the impression that they were entitled to assume that as he had said on oath he had

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12 See also *Dunn v The Queen* [2015] WASCA 126; (2015) 252 A Crim R 147 [107] - [199], [242] - [257] (Buss JA; Newnes & Mazza JJA agreeing).

> been convicted of the offence that was evidence the three appellants had conspired with him to commit on their part the offences (310)."

[123] The appeal in *Romeo* was allowed, the convictions quashed and a new trial ordered because of a number of inadequacies in the trial judge's directions. That is, the inadequacies were not limited to the trial judge's directions on the effect of Murray's plea of guilty.

[124] In *R v Fountain*,[13] the appellants, who were mother and son, were presented for trial in the County Court of Victoria on a presentment charging each of them with one count of recklessly causing serious injury (count 1), false imprisonment (count 2) and attempting to pervert the course of justice (count 3). Two co-offenders, Luckman and Ryan, had previously pleaded guilty, in Ryan's case to the same three counts, and in Luckman's case to charges of recklessly causing serious injury and attempting to pervert the course of justice.

[125] Ryan and Luckman gave evidence at the appellants' trial as prosecution witnesses [20]. Both Ryan and Luckman gave answers in cross-examination which supported the view that the appellants had acted in self-defence in the relevant interaction with the complainant [27]. Accordingly, the prosecutor led evidence in re-examination to the effect that both Ryan and Luckman had pleaded guilty to the same offences upon which the appellants were being tried [27]. Counsel for the appellants accepted in the appeal that in light of the evidence given by Ryan and Luckman under cross-examination, the evidence led in re-examination concerning their pleas of guilty was admissible [27]. In any event, defence counsel did not object to the evidence [27].

[126] The prosecutor, in his closing address to the jury, attacked the credibility of Luckman and Ryan and then said:

> "But the bottom line is, is that all those men gave evidence on oath about and two of them have pleaded guilty in relation to these offences. What, pleaded guilty to nothing, if it was justified? The fact that they pleaded guilty can't be used against these respective accused people because everybody is entitled to an individual trial. You have to assess the evidence against each particular person. But nevertheless the significance is that these two men admitted their guilt in unlawful behaviour and gave evidence of it. So really the scenario is that even in cross-examination, particularly in relation to Luckman who you might well think was almost ashamed to be in the witness box and admit what had happened on that particular night. That he was quite prepared almost to say, well, yes, the actions were justified but that was totally inconsistent with his behaviour leading up to this trial and his admissions and pleas of guilty in relation to these matters [27]."

[127] Charles JA (Buchanan & Chernov JJA agreeing) noted that both the prosecutor and defence counsel told the jury that the fact that Luckman and Ryan had pleaded guilty could not be used against the appellants because everybody was entitled to an individual trial [27]. However, the trial judge did not mention these matters in his summing up, and no point about the absence of any warning was taken by counsel [27].

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13 *R v Fountain* [2001] VSCA 200; (2001) 124 A Crim R 100.

[128] Charles JA said:

> "There was, I think, plainly a possibility that the jury would make improper use of the evidence that Luckman and Ryan had pleaded guilty to the same offences. The prosecutor's submission to the jury certainly did not make it clear that the pleas of guilty by Luckman and Ryan could only be used to rebut any contention by the defence that pressure had been placed by the investigating police officers upon these witnesses to make a statement in support of the prosecution case or to undermine the concessions made by the witnesses under cross examination in favour of the case of self-defence made by the [appellants]. On the contrary it seems to me that the prosecutor's words invited the jury to treat the pleas of guilty as evidence tending to establish the guilt of the [appellants]. On this basis the evidence clearly had the potential to be prejudicial to the [appellants] who were being alleged to be co-offenders of the persons who had pleaded guilty. In these circumstances the judge should have warned the jury appropriately, as stated in *Cowell* and *Burnett* [30]."

[129] The Court of Appeal of Victoria allowed the appeal, quashed the convictions and ordered a new trial. The basis for making those orders was the trial judge's failure to give an accomplice warning and the judge's failure to warn the jury concerning the guilty pleas entered by Ryan and Luckman.

[130] In *R v Simpson*,[14] the appellant was convicted after trial of one count of entering premises and stealing. Prior to the commencement of the appellant's trial, her son, Stephen Simpson, pleaded guilty to carrying out the theft with the assistance of Paul Millsom, who kept watch outside the premises. Simpson gave evidence, as a Crown witness, at the appellant's trial to the effect that the appellant had procured him to commit the offence. Simpson also gave evidence that the appellant had facilitated the offence by giving him keys to enter the building and information about the safe located in the premises. Simpson further gave evidence that the appellant had paid him $10,000 and that Millsom had received $5,000 for his part in the enterprise. Prior to the appellant's trial, Millsom pleaded guilty to receiving. This court (White AJA; de Jersey CJ and Keane JA agreeing) held that the trial judge had erred by directing the jury that Millsom's plea of guilty could be used, by inference, to bolster Simpson's credibility in circumstances where Simpson's credibility was the central issue at the trial.

[131] White AJA said:

> "It is a fundamental principle that the conviction of a third party is ordinarily inadmissible as evidence of the facts on which it was based (*R v Kirkby* [2000] 2 Qd R 57). This is not to be confused with the rule that upon the trial of an accessory proof of the conviction of the alleged principal offender is admissible and constitutes prima facie evidence that the crime was effected by him (*R v Kirkby* at 62 referring to *R v Carter & Savage ex parte Attorney-General* [1990] 2 Qd R 371 at 372-3).

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14 *R v Simpson* [2008] QCA 413.

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> As is well recognised, a person may enter a plea of guilty for many reasons and, without more, the most that it stands for is an acceptance that all the elements of the offence charged have been established (*Meissner v R* (1994-1995) 184 CLR 132 per Dawson J at 157). Thus, even if there was any relevance in mentioning Millsom's plea, which is doubted, it was necessary to tell the jury that it had no further forensic value than that. Instead, the trial Judge did the very opposite and instructed the jury that Millsom's plea could be used, by inference, to bolster Simpson's credibility - the central issue in the trial [40], [42]."

[132] In *Simpson*, this court allowed the appeal, set aside the judgment of conviction and ordered a retrial.[15]

[133] In *Andelman v The Queen*,[16] the appellant was arraigned in the County Court of Victoria upon an indictment containing 85 charges of theft. He pleaded not guilty and represented himself at the trial. The appellant was convicted on each charge. He appealed against his conviction.

[134] The appellant was employed to collect money from parking meters. Collectors worked in pairs. Three other collectors gave evidence as prosecution witnesses at the appellant's trial. Many of the appellant's alleged thefts were said to have been committed with one of these other collectors. Two of them, Kalia and Tatnell, had previously pleaded guilty and been sentenced for thefts from parking meters. The prosecutor adduced evidence-in-chief from Kalia and Tatnell that they had pleaded guilty to offences of a like nature to those alleged against the appellant.

[135] Ground 1(a) of the appellant's appeal complained that the prosecutor had impermissibly adduced evidence from the appellant's co-offenders, Kalia and Tatnell, regarding their pleas of guilty and that, in the circumstances of the case, this had led to a miscarriage of justice.

[136] In the Court of Appeal of Victoria, Maxwell P, Weinberg and Priest JJA said it was important to note that the prosecutor did not adduce evidence from Kalia or Tatnell that each had received a discount on his sentence for his cooperation or that he stood to be resentenced on appeal by the Crown to the Court of Appeal if he did not swear up to his statement [35].

[137] Their Honours said that the evidence from Kalia and Tatnell had been led by the prosecution for the primary purpose of bolstering their credit by showing that they now had no motive falsely to incriminate the appellant [39].

[138] Their Honours also noted, in the context of the appellant being unrepresented at his trial:

> "In light of [*R v Ristic*, unreported, Court of Criminal Appeal, Starke, Murphy and Marks JJ, 7 October 1991] and [*R v Gallagher* [1986] VR 219], it was arguable that, in the circumstances of this case, the fact that Kalia and Tatnell had pleaded guilty was inadmissible. The

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15 In *R v Richards* [2017] QCA 299 [16] - [17], this court (Sofronoff P, Fraser JA & Henry J) cited with approval the conclusions and observations (to which I have referred) in *Kirkby* and *Simpson*.

16 *Andelman v The Queen* [2013] VSCA 25; (2013) 38 VR 659.

> issues surrounding the admissibility of those pleas were not brought to the appellant's attention. He was not invited to question their admissibility. Nor was the issue brought to his attention after that evidence been put before the jury, and the possibility of requesting a discharge raised [46]."

[139] Ground 1(b)(i) of the appellant's appeal alleged that the trial judge's failure, properly or at all, to direct the jury against impermissibly using Kalia's and Tatnell's pleas of guilty against the appellant occasioned a miscarriage of justice.

[140] Maxwell P, Weinberg and Priest JJA held that, irrespective of whether ground 1(a) was made out, there was "obviously considerable force" in ground 1(b)(i) [47]. Their Honours elaborated:

> "Evidence of the pleas of guilty by Kalia and Tatnell having been adduced by the Crown, it was necessary, in our view, for the trial judge to direct the jury as to what use, if any, they could make of that material. That was so even though the appellant did not seek any such direction [47]."

[141] After referring to and discussing *Fountain*, their Honours said:

> "There is no basis for distinguishing Fountain … in the circumstances of this case. We consider that the jury ought to have been instructed not to use the fact of Kalia and Tatnell's pleas of guilty as tending to establish the guilt of the appellant. As in *Fountain* … the presence of the appellant at the scene with the co-offenders was never in dispute (cf *Bou-Elias v The Queen (No 1)* [2012] VSCA 61 [25] (Mandie JA)). Kalia and Tatnell's guilty pleas, in relation to incidents that occurred in the same circumstances as those allegedly committed by the appellant, may well have been viewed as highly significant by the jury in the absence of appropriate direction [52]."

[142] The appellant in *Andelman* also made out other grounds of appeal. It is unnecessary to mention them. The Court of Appeal allowed the appeal, quashed the convictions and ordered a retrial.

[143] In *Humphries*, a decision of the Court of Criminal Appeal of New South Wales, Bellew J (Gleeson JA and RS Hulme AJ agreeing) reviewed the authorities and commented that the circumstances in which a jury may become aware of a plea of guilty by a co-offender can vary. His Honour then said:

> "The ultimate question is whether or not such circumstances have caused a miscarriage of justice. Central to the question of whether such a miscarriage has been caused will be the nature of any direction given by the trial judge. The trial judge is under an obligation to direct the jury that the plea of guilty entered by one co-accused is not to be taken into account, in any way, in determining whether the Crown has proved its case against any remaining co-accused [112]."

[144] In the present case, defence counsel did not object at trial to the admission of evidence as to Mr Werner's plea of guilty. It is therefore not asserted (and it could

not have been asserted) that the trial judge made a wrong decision on a question of law by admitting the evidence. See *R v Soma*.[17] Ground 3 recognises that it is necessary for the appellant to establish that a miscarriage of justice occurred at trial. The appellant alleges that a miscarriage occurred because her Honour instructed the jury that regard could be had to Mr Werner's plea of guilty in proof of the Crown's case against the appellant.

[145] It is apparent from the discourse between the trial judge, the prosecutor and defence counsel before the commencement of the trial that the prosecutor and defence counsel were aware that, despite his plea of guilty, Mr Werner was likely to give evidence that he did not intend that Mr Neels should kill Mr Stewart and that he thought Mr Neels would never kill Mr Stewart.

[146] The prosecutor adduced evidence from Mr Werner in evidence-in-chief as to Mr Werner's conversations and dealings with the appellant, and Mr Werner's conversations and dealings with Mr Neels, in relation to procuring Mr Neels to kill Mr Stewart. However, the prosecutor did not ask Mr Werner any questions in evidence-in-chief as to Mr Werner's intention in procuring Mr Neels to kill Mr Stewart. The prosecutor put to Mr Werner, towards the end of his evidence-in-chief, that he had pleaded guilty in the District Court of New South Wales to the offence of soliciting Mr Stewart's murder and that his sentence had been discounted by 25% because he undertook to give evidence as a Crown witness at the appellant's trial. Mr Werner agreed with those propositions.

[147] Defence counsel elicited evidence from Mr Werner in cross-examination that he did not intend that Mr Neels should kill Mr Stewart and that he thought Mr Neels would never kill Mr Stewart.

[148] The prosecutor endeavoured, in re-examination, to repair the damage to the Crown's case caused by Mr Werner's evidence in cross-examination that he did not have the requisite intention, by putting to Mr Werner (before defence counsel objected) a number of extracts from the transcript of the interview on 29 September 2014 between Mr Werner and police and by securing Mr Werner's acceptance as to the basis on which he had pleaded guilty to the charge in New South Wales.

[149] I am satisfied, for the following reasons, that a miscarriage of justice did occur at the appellant's trial as alleged in ground 3.

[150] First, at the appellant's trial the Crown had to prove beyond reasonable doubt, as a matter of fact, that Mr Werner intended that Mr Neels should kill Mr Stewart.

[151] Secondly, the admissible evidence at the appellant's trial as to Mr Werner's intention comprised, principally:

(a) Mr Werner's evidence as to his conversations and dealings with the appellant in relation to procuring Mr Neels to kill Mr Stewart;

(b) Mr Werner's evidence as to his conversations and dealings with Mr Neels in relation to procuring Mr Neels to kill Mr Stewart;

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17 *R v Soma* [2003] HCA 13; (2003) 212 CLR 299 [11] (Gleeson CJ, Gummow, Kirby & Hayne JJ), [79] (McHugh J).

(c) Mr Werner's evidence in cross-examination to the effect that he did not intend that Mr Neels should kill Mr Stewart and that he thought Mr Neels would never kill Mr Stewart; and

(d) Mr Neels' evidence as to his conversations and dealings with Mr Werner in relation to Mr Werner procuring him to kill Mr Stewart.

[152] The Crown's case as to Mr Werner's intention was not supported by any direct admissible evidence. There was, however, admissible evidence from which an inference could be drawn that Mr Werner had the requisite intention. That admissible evidence comprised, principally, Mr Werner's evidence as to his conversations and dealings with the appellant and with Mr Neels and, also, Mr Neels' evidence as to his conversations and dealings with Mr Werner.

[153] The defence case as to Mr Werner's intention was supported by direct evidence, namely Mr Werner's assertion in cross-examination that he did not have the requisite intention.

[154] Thirdly, Mr Werner's acceptance in examination-in-chief and re-examination that he had pleaded guilty to the charge in New South Wales was hearsay evidence of Mr Werner's formal admission of guilt by his plea of guilty upon arraignment.

[155] As a matter of law, Mr Werner's formal admission of guilt by his plea of guilty upon arraignment was admissible at the appellant's trial on the basis that the plea and the sentencing discount were relevant to Mr Werner's honesty and reliability as a witness, including the existence of a motive to fabricate evidence implicating the appellant. Ordinarily, subject to any agreement between the prosecutor and defence counsel, a co offender's plea of guilty and any sentencing discount should be elicited by defence counsel in cross-examination of the co-offender. In the present case, it appears that both the prosecutor and defence counsel anticipated that Mr Werner would give evidence as to his intention that was inconsistent with his plea of guilty. The trial record reveals that, against that background, the prosecutor referred to Mr Werner's plea in his opening address and adduced evidence of the plea in Mr Werner's examination-in-chief with, in effect, the consent of defence counsel. Otherwise, subject to the prosecutor having obtained the leave of the trial judge under s 17 of the *Evidence Act*, the prosecutor could have put the plea of guilty to Mr Werner in re-examination as a prior "statement" (as defined in the dictionary of the *Evidence Act*) by Mr Werner that was inconsistent with his assertion in cross-examination that he never intended that Mr Neels should kill Mr Stewart and that he thought Mr Neels would never kill Mr Stewart. The prior statement would have been relevant to Mr Werner's credit. At common law, the prior statement was not evidence that Mr Werner had the requisite intention. Sections 17, 18 and 101 of the *Evidence Act* were not invoked at the appellant's trial.

[156] However, as a matter of law, the plea of guilty was not admissible at the appellant's trial as evidence of the truth of the facts on which the plea was based or of the truth of the facts that were implicit in the plea. In particular, the plea was not admissible at the appellant's trial as evidence that Mr Werner in fact intended that Mr Neels should kill Mr Stewart. Also, as a matter of law, the facts on the basis of which Mr Werner had pleaded guilty were not admissible at the appellant's trial as evidence of the truth of those facts. The fact that Mr Werner had pleaded guilty,

and the facts on the basis of which Mr Werner had pleaded guilty, were not evidence against the appellant at her trial or evidence that the appellant was guilty.

[157] It was necessary for the Crown to prove that Mr Werner had the requisite intention, either by direct evidence from Mr Werner to that effect at the trial or by inference from other proven facts.

[158] The principle that a plea of guilty by a co-offender is not admissible at an accused's trial as evidence of the truth of the facts on which the plea was based or of the truth of the facts that were implicit in the plea, is not confined to cases where the co-offender is not called as a witness at the trial of the accused. Nor is the principle confined to cases where the Crown relies upon the co-offender's plea of guilty in relation to the specific acts or omissions of the accused.

[159] Fourthly, the trial judge was bound to direct the jury as to the manner in which the jury could and could not use the evidence of Mr Werner's plea of guilty, and the evidence concerning the facts on the basis of which Mr Werner had pleaded guilty (including his evidence that some of those facts were untrue), in deciding whether the Crown had proved beyond reasonable doubt that the appellant was guilty of the charged offence. The direction was necessary having regard to the fundamental notion that the guilt of an accused can be proved only by evidence admissible against the accused and the fundamental notion which excludes hearsay evidence unless there is a relevant exception.

[160] Fifthly, her Honour misdirected the jury in that her Honour instructed the jury that Mr Werner's plea of guilty was evidence of his intention that Mr Neels should kill Mr Stewart (ts 4). Also, her Honour told the jury, as was the case, that the Crown relied upon Mr Werner's conviction in New South Wales as evidence of his intention to procure Mr Stewart's murder (ts 19), but did not direct the jury that the Crown could not, as a matter of law, rely upon Mr Werner's conviction for that purpose. Further, her Honour did not direct the jury as to how they could and could not use the evidence of the facts on the basis of which Mr Werner was sentenced (including his evidence that some of those facts were untrue).

[161] Those material errors in her Honour's summing up were not ameliorated by other directions that her Honour gave to the jury.

[162] Finally, it is true that the appellant's experienced defence counsel did not object to the trial judge's foreshadowed direction concerning Mr Werner's plea of guilty and did not request her Honour to redirect the jury. However, no rational forensic advantage flowed to the defence from her Honour's misdirection. Accordingly, the absence of any objection to the foreshadowed direction and of any request for a redirection is not reasonably explicable on that basis.

[163] Ground 3 of the appeal has been made out.

[164] The proviso cannot be engaged in the present case because it is not possible for this court to conclude that, in the circumstances, the jury did not take Mr Werner's plea of guilty into account in deciding that he intended to procure Mr Neels to kill Mr Stewart. It is reasonably possible that the plea of guilty was relied upon by the jury as evidence to prove Mr Werner's intention. The plea of guilty was a significant part of the Crown's case. Also, Mr Werner was not regarded by either

the prosecution or the defence as a wholly satisfactory witness. This court has not had the advantage of seeing and hearing Mr Werner give evidence. When regard is had to the whole of the admissible evidence, I am not persuaded that the only reasonable and rational inference open is that Mr Werner intended, at the material time, that Mr Neels should kill Mr Stewart. In the circumstances, I am not satisfied beyond reasonable doubt that no substantial miscarriage of justice has occurred.

Ground 1: the appellant's submissions

[165] Senior counsel for the appellant submitted that the verdict of guilty was unreasonable in that it was not open to the jury, on the whole of the evidence, to be satisfied that Mr Werner intended that Mr Neels should kill Mr Stewart.

[166] The evidence relevant to what Mr Werner did and said was given by Mr Werner and Mr Neels.

[167] Senior counsel argued that having regard to Mr Werner's evidence about what he intended, what he expected Mr Neels to do, and why he performed the acts he did, it was not open to the jury to be satisfied beyond reasonable doubt that Mr Werner intended to procure Mr Neels to kill Mr Stewart.

[168] It was submitted that the evidence that the appellant "arguably wanted Stewart dead"; that the appellant had a motive to have Mr Stewart killed; that $45,000 cash in total had been withdrawn from the appellant's bank accounts; and that the appellant, on Ms Chapman's evidence, had confessed to giving $20,000 cash to Mr Neels for Mr Stewart to be killed, did not advance the Crown's case on the issue of Mr Werner's intention. As the trial judge said to the jury, Mr Werner's intention was a "central issue" in the case and there had been a "conflict of evidence" about it (ts 16, 17). In the circumstances, the jury should have been left in a state of reasonable doubt about Mr Werner's intention. One of the arguments advanced by defence counsel in his closing address was that the jury could not be satisfied to the criminal standard that Mr Werner intended to procure Mr Neels to kill Mr Stewart (ts 30-31).

Ground 1: the Crown's submissions

[169] Counsel for the Crown submitted that the "substantive evidence" was largely uncontradicted. That evidence included the appellant's motive and her hostility towards Mr Stewart; the appellant's "nagging" of Mr Werner to "get rid of" Mr Stewart; the cash withdrawals from the appellant's bank accounts; the clear inference that the appellant had provided to Mr Werner the money that Mr Werner had paid to Mr Neels; and Ms Chapman's evidence that the appellant told her the money was paid for Mr Stewart to be killed.

[170] Counsel argued that, against that background, Mr Werner did in fact pay $20,000 cash to Mr Neels; Mr Werner clearly indicated to Mr Neels that the purpose of the payment was for Mr Stewart to be killed; and Mr Werner gave Mr Neels identifying information in relation to Mr Stewart (and, on Mr Neels' evidence, advice as to how Mr Stewart could be killed).

[171] Counsel submitted that the evidence was inconsistent with Mr Werner not having the relevant intention when he did the relevant acts. Indeed, nothing more could have been done by Mr Werner to procure Mr Neels to carry out the killing. A jury could have made reasonable allowances for the inconsistencies between Mr

Werner's account and Mr Neels' account of the relevant events, having regard to the time that had elapsed between the occurrence of the relevant events and the time when they gave their evidence.

[172] According to counsel, the only reasonable inference open on the whole of the evidence was that at the material time Mr Werner had the requisite intention.

Ground 1: its merits

[173] It is a question of fact whether, having regard to the evidence, a verdict of guilty on which a conviction is based is unreasonable or cannot be supported. See *M v The Queen*;[18] *Zaburoni v The Queen*;[19] *GAX v The Queen*.[20]

[174] An intermediate court of appeal (the appellate court) must decide that question by making its own independent assessment of the sufficiency and quality of the evidence, and determining whether, notwithstanding that there is evidence upon which a tribunal of fact might convict, nevertheless it would be dangerous in the circumstances to permit the verdict to stand. See *M* (492-493); *SKA v The Queen*.[21]

[175] The appellate court, in making an independent assessment of the whole of the evidence to determine whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, must weigh the whole of the evidence (in particular, the competing evidence). See *SKA* [22], [24].

[176] The appellate court's task is not to consider, as a question of law, merely whether there was sufficient evidence to sustain a conviction. See *Morris v The Queen*.[22]

[177] The appellate court, in assessing whether it was open to the tribunal of fact to be satisfied beyond reasonable doubt as to the guilt of the accused, "must not disregard or discount either the consideration that the [tribunal of fact] is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the [tribunal of fact] has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations": *M* (493); *R v Nguyen*;[23] *SKA* [13].

[178] The ultimate question for the appellate court must always be whether the appellate court thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty: *M* (494-495). See also *R v Hillier*;[24] *Fitzgerald v The Queen*;[25] *R v Baden-Clay*.[26]

[179] The setting aside of a tribunal of fact's verdict of guilty because, having regard to the evidence, it is unreasonable or cannot be supported is a serious step. Trial by

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18 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson & Toohey JJ).

19 *Zaburoni v The Queen* [2016] HCA 12; (2016) 256 CLR 482 [56] (Gageler J).

20 *GAX v The Queen* [2017] HCA 25; (2017) 91 ALJR 698 [25] (Bell, Gageler, Nettle & Gordon JJ).

21 *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 [14] (French CJ, Gummow & Kiefel JJ).

22 *Morris v The Queen* [1987] HCA 50; (1987) 163 CLR 454, 473 (Deane, Toohey & Gaudron JJ). See also *M* (492-493); *SKA* [20].

23 *R v Nguyen* [2010] HCA 38; (2010) 242 CLR 491 [33] (Hayne, Heydon, Crennan, Kiefel & Bell JJ).

24 *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 [20] (Gummow, Hayne & Crennan JJ).

25 *Fitzgerald v The Queen* [2014] HCA 28; (2014) 88 ALJR 779 [5] (Hayne, Crennan, Kiefel, Bell & Gageler JJ).

26 *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 [66] (French CJ, Kiefel, Bell, Keane & Gordon JJ).

the appellate court is not to be substituted for trial by the tribunal of fact. See *Baden-Clay* [65]-[66].

[180] The appellate court's reasons must disclose its assessment of the capacity of the evidence to support the verdict. See *SKA* [22]-[24]; *BCM v The Queen*;[27] *GAX* [25].

[181] The nature and extent of the appellate court's task, in a particular case, will be informed by:

(a) the elements of the offence;

(b) the accused's defence;

(c) the issues in contest at the trial;

(d) the manner in which the trial was conducted;

(e) the way in which the case was ultimately left to the tribunal of fact;

(f) whether the tribunal of fact was a judge (who must state the principles of law that he or she has applied and the findings of fact on which he or she has relied) or a jury (which does not give reasons); and

(g) the particulars of and the submissions made in support of the ground of appeal.

[182] For example, in *Zaburoni* the critical issue concerned what was able to be inferred, beyond reasonable doubt, about the appellant's state of mind. The question for the appellate court was whether, having made its own independent assessment of the evidence, the court considered it to have been open to the jury to be satisfied beyond reasonable doubt that the appellant had the requisite subjective intention [56].

[183] I am satisfied, after evaluating and weighing the evidence given at the appellant's trial (but not taking into account Mr Werner's plea of guilty as evidence that Mr Werner in fact intended that Mr Neels should kill Mr Stewart), that it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt that Mr Werner intended that Mr Neels should kill Mr Stewart.

[184] A jury, acting reasonably, was not precluded by the state of the evidence from being satisfied beyond reasonable doubt that Mr Werner had the requisite intention or from convicting the appellant on the charge of attempting to procure murder.

[185] A jury, acting reasonably, was entitled:

(a) to reject Mr Werner's evidence that he did not intend that Mr Neels should kill Mr Stewart and that he did not think that Mr Neels would kill Mr Stewart; and

(b) to infer that the only reasonable and rational inference open on the whole of Mr Werner's evidence as to his conversations and dealings with the appellant and Mr Neels and, also, on the whole of Mr Neels' evidence as to his conversations and dealings with Mr Werner, was that Mr Werner did have the requisite intention.

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27 *BCM v The Queen* [2013] HCA 48; (2013) 88 ALJR 101 [31] (Hayne, Crennan, Kiefel, Bell & Keane JJ).

[186] The trial record (after excluding Mr Werner's plea of guilty as evidence that Mr Werner in fact intended that Mr Neels should kill Mr Stewart) does not require the conclusion that the jury must necessarily have entertained a doubt about Mr Werner's intention or about the appellant's guilt on the charge of attempting to procure murder. The verdict of guilty was not unreasonable on that basis.

[187] After paying full regard to the consideration that a jury is the tribunal of fact entrusted with the primary responsibility of determining guilt or innocence, and after paying full regard to the consideration that this court has not had the benefit of having seen and heard the witnesses, and after disregarding Mr Werner's plea of guilty as evidence that Mr Werner in fact intended that Mr Neels should kill Mr Stewart, I am satisfied that it would be open to a jury, acting reasonably, to find that Mr Werner intended that Mr Neels should kill Mr Stewart.

[188] Apart from the trial judge's misdirection, the subject of ground 3, it would not be dangerous, in the circumstances, to permit the verdict of guilty of attempting to procure murder to stand.

[189] Ground 1 of the appeal is without merit.

Ground 2: the late disclosure of documents about Mr Werner

[190] While the jury was deliberating, the prosecution disclosed the transcript of submissions made in the District Court of New South Wales during Mr Werner's sentencing for the offence of soliciting Mr Stewart's murder. The sentencing transcript revealed that a psychologist had reported that Mr Werner had asserted that he did not want Mr Stewart to be harmed and that he did not believe Mr Neels had the means or the gumption to kill (ts 38).

[191] Defence counsel submitted to the trial judge that the appellant had been disadvantaged by the Crown's failure to disclose earlier the existence of the psychological report. Defence counsel argued that "the psychological report would have been a very relevant piece of information … because it would have contained an earlier assertion by Mr Werner that he had no intention" that Mr Stewart should be killed (ts 38). However, notwithstanding the claimed disadvantage, defence counsel did not apply to discharge the jury. The verdict was taken.

[192] The appellant has filed an application in the appeal for leave to adduce into evidence in the appeal a copy of the psychologist's report.

[193] The report is dated 29 August 2016 and was prepared by Caroline Hare, a forensic psychologist. In the report Ms Hare records that she met with Mr Werner on 22 August 2016. During the meeting Mr Werner gave Ms Hare an account of the charged offence. In particular, Mr Werner told Ms Hare that "he did not really believe [Mr Neels] had the means or the gumption to undertake the deed" and that he only suggested Mr Neels to the appellant "to get her off [his] back" [29].

Ground 2: the appellant's submissions

[194] Senior counsel for the appellant referred to the prosecutor's contention in his closing address that the jury should reject that part of Mr Werner's evidence to the effect that he never intended that Mr Neels should do anything to Mr Stewart (ts 3). A little later, the prosecutor said "[Mr Werner] may now be confusing his own

personal reticence at the time and his own distaste for the task he set out to do with the simple reality of the situation" (ts 4). (emphasis added)

[195] According to senior counsel, the force of the prosecutor's contention would have been "considerably diminished, if not ruined" had the jury known that Mr Werner had said, even prior to sentence, that he did not want Mr Stewart killed. If the psychological report had been disclosed earlier, defence counsel could have established that Mr Werner had adopted that position in August 2016, thereby tending to negate the notion that Mr Werner had adopted it at trial, perhaps out of convenience for the appellant. Senior counsel argued that, had the jury been aware of Mr Werner's statements to Ms Hare, the jury may have been less inclined to draw an inference to the contrary, that inference having been urged upon them by the prosecutor having regard to what Mr Werner did and said during 2009 and 2010.

[196] Senior counsel informed this court at the hearing of the appeal that the appellant was not complaining about being unable to tender Ms Hare's report at the trial. Senior counsel conceded that the report was not admissible at the trial. The complaint on appeal was that the existence of the report was not disclosed earlier and, consequently, defence counsel had not been aware of it (appeal ts 27).

[197] Senior counsel referred to the observations of Keane JA (Cullinane and Jones JJ agreeing) in *R v HAU*[28] that where the Crown fails to disclose documents in accordance with its obligation an appellate court "cannot ignore even a relatively slim possibility that the defence has been forensically disadvantaged by the non-disclosure" and it is enough that the opportunity denied to the defence "could have made a difference to the verdict".

Ground 2: the Crown's submissions

[198] Counsel for the Crown submitted that the evidence of Mr Werner's alleged statement to Ms Hare that "he did not really believe [Mr Neels] had the means or the gumption to undertake the deed" would not have been admissible at trial. Mr Werner gave evidence to the effect that he did not believe Mr Neels would kill Mr Stewart. There was no basis for putting to Mr Werner the possibility that in 2016 he had said something similar to Ms Hare.

[199] At trial defence counsel was able to elicit from Mr Werner in cross-examination the assertion that Mr Werner did not accept the accuracy of the facts on the basis of which he was sentenced. Defence counsel was also able to elicit from Mr Werner evidence that at the material time Mr Werner did not have the requisite intention.

[200] The jury, by its verdict, rejected Mr Werner's evidence as to his intention.

[201] Counsel submitted that, even if evidence of Mr Werner's alleged statement to Ms Hare about his intention was admissible at the trial, that evidence could not have provided even a relatively slim possibility that the appellant was disadvantaged or that there was a miscarriage of justice.

[202] Further, it was argued that experienced defence counsel had the opportunity to apply to the trial judge for the discharge of the jury if he had perceived any material unfairness or disadvantage. Defence counsel chose not to do so.

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28 *R v HAU* [2009] QCA 165 [40].

Ground 2: its merits

[203] A witness may not, in general, be asked in evidence-in-chief or re-examination whether he or she has previously made a statement consistent with the witness' evidence at trial. This rule is known as the rule against narrative or self-corroboration. The rule is, however, subject to some well-established exceptions including, relevantly, that a prior consistent statement by a witness is admissible to rehabilitate his or her credit by rebutting a suggestion that the witness' evidence at the trial was devised or reconstructed after the events in question. This exception has been described as the doctrine of recent fabrication or invention. However, it appears that the adjective "recent" is a misnomer and that the doctrine is concerned with any suggested fabrication or invention after the relevant events occurred but before the trial. See *Nominal Defendant v Clements*;[29] *Transport and General Insurance Co Ltd v Edmondson*.[30]

[204] In the present case, defence counsel elicited from Mr Werner in cross-examination evidence that was favourable to the defence case, namely that Mr Werner did not intend that Mr Neels should kill Mr Stewart and that Mr Werner did not think that Mr Neels would kill Mr Stewart. Defence counsel did not, for obvious reasons, expressly or impliedly suggest to Mr Werner that his evidence to that effect was a recent fabrication or invention. Also, the prosecutor did not request the trial judge to rule that Mr Werner was a hostile witness with a view to the prosecutor being granted leave to impugn the credit of his own witness by putting to Mr Werner in re-examination that his assertion in cross-examination that he did not have the requisite intention was a recent fabrication or invention. In the circumstances, the alleged prior consistent statement made by Mr Werner to Ms Hare was not admissible.

[205] In any event, I am not persuaded that there is a real possibility (even a relatively slim possibility) that the late disclosure by the Crown forensically disadvantaged the appellant. Defence counsel secured the admission he sought from Mr Werner in cross-examination. Mr Werner gave an explanation in re-examination as to why he had entered the plea of guilty. The prosecutor did not submit in his closing address that Mr Werner's assertion in cross-examination that he did not have the requisite intention was made dishonestly or was a recent fabrication or invention. The prosecutor merely argued that in making that assertion Mr Werner may have "confused" his reluctance and distaste at the time in procuring Mr Neels to murder Mr Stewart with "the simple reality of the situation" (ts 4).

[206] Further, after the Crown made the late disclosure, defence counsel had the opportunity to apply to the trial judge for the discharge of the jury. He chose not to do so.

[207] I am satisfied that the late disclosure by the Crown did not occasion a miscarriage of justice.

[208] I would grant the appellant leave to adduce into evidence in the appeal a copy of Ms Hare's report. However, ground 2 of the appeal is without merit.

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29 *Nominal Defendant v Clements* [1960] HCA 39; (1960) 104 CLR 476, 479-480 (Dixon CJ), 494-495 (Windeyer J).

30 *Transport and General Insurance Co Ltd v Edmondson* [1961] HCA 86; (1961) 106 CLR 23, 28-29 (McTiernan, Taylor and Menzies JJ), 32 (Windeyer J).

Conclusion

[209] I would allow the appeal on the basis of ground 3. The judgment of conviction should be set aside. A new trial should be had.