

SUPREME COURT OF QUEENSLAND

CITATION: *R v Lang* [2022] QCA 29

PARTIES: **R**
v
LANG, Thomas Chris
(appellant)

FILE NO: CA No 288 of 2020
SC No 273 of 2017

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction:
30 November 2020 (Lyons SJA)

DELIVERED ON: 8 March 2022

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2021

JUDGES: McMurdo and Mullins JJA and Brown J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was found guilty of murder – where the victim was stabbed – where there were no witnesses – where the only two possibilities as to who caused the victim’s death were either the appellant stabbed the victim or the victim stabbed herself – where the central issue at trial was whether the prosecution could exclude beyond reasonable doubt the possibility that the victim committed suicide – where the prosecution’s case relied on a lie told by the appellant in consciousness of guilt – whether the verdict was unreasonable and cannot be supported having regard to the whole of the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was found guilty of murder – where the victim was stabbed – where there were no witnesses – where the only two possibilities as to who caused the victim’s death were either the appellant stabbed the victim or the victim stabbed herself – where the central issue at trial was whether the prosecution could exclude beyond reasonable doubt the possibility that the victim committed suicide – where the

forensic pathologist who examined the body where it was found and conducted the post mortem gave evidence that it was his opinion that it was more likely the victim's death was caused by a second person – where the appellant's pre-trial application to have the forensic pathologist's opinion that the victim's death was more likely to have been caused by a second person excluded was refused – where the appellant conceded that the expert could speak of the factors that favour a view of self-infliction and those that favour a view of homicide – whether the forensic pathologist's training and experience in conducting post mortems and familiarity with the literature on stabbing deaths justified his giving the opinion on the likelihood of the cause of the victim's death – whether there was a miscarriage of justice by the forensic pathologist giving evidence that it was in his opinion more likely that the victim's wound had been caused by another person than the wound being self-inflicted

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited

R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited

R v Boscaino [2020] QCA 275, cited

R v Lang [2020] QSCPR 26, related

R v Mahony [2019] QCA 131, cited

R v Miller [2021] QCA 126, cited

SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

Velevski v The Queen (2002) 76 ALJR 402; [2002] HCA 4, cited

COUNSEL: R M O’Gorman and D M Caruana for the appellant
M A Green for the respondent

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

- [1] **McMURDO JA:** The evidence at the trial is well set out in the judgment of Mullins JA, with which I agree.
- [2] An important part of the prosecution case was the evidence about Mrs Boyce’s phone. The appellant told police, more than once and with apparent certainty, that Mrs Boyce had thrown her phone from a balcony, and that this had happened at about 9.30 or 9.45 pm on the evening when he last saw her alive. The phone was recovered by the police and the prosecution was able to prove that later that night, at about midnight, the phone had been unlocked for a few minutes and used to read text messages between Mrs Boyce and Mr McAlpine which were there recorded. It was also used, perhaps unintentionally, to make an unanswered call to the recorded number of another man.
- [3] Indisputably, the appellant’s statements to police, that the phone had been thrown away at about 9.30 or 9.45 pm, were untrue. Further, it was open to the jury to conclude that they were deliberate lies because the appellant must have known that the phone was not thrown from the apartment at or about the time that he stated to police. He was talking to police very soon after what he said were the relevant

events, and his account of what happened to the phone had a particular place in the sequence of events which he was relating. On that version, his argument with Mrs Boyce which culminated in the phone being thrown from the balcony, could not have occurred as late as midnight.

- [4] In *Edwards v The Queen*,¹ Deane, Dawson and Gaudron JJ said:

“A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (i.e. it relates to a material issue) and if it was told by the accused in circumstances in which the explanation for the lie is that he knew that the truth would implicate him in the offence.”

In the same judgment, their Honours said:²

“In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell.”

- [5] The appellant told police that earlier in the day of 21 October 2015, Mrs Boyce said to him that she was “going to hook back up again with that Kenneth guy”. The fragility of his relationship with Mrs Boyce provided a sound basis for an inference that, concerned by her relationship with Mr McAlpine, the appellant saw fit to look at her phone, when she was asleep at around midnight, for recorded conversations with Mr McAlpine. Had he done so, the messages would have confirmed his suspicions of a developing relationship between Mrs Boyce and Mr McAlpine. As the prosecution argued to the jury, the appellant’s resultant jealousy provided the explanation for his killing her.
- [6] It was open to the jury to infer that he lied to police about the phone, because he was wanting them to believe that the phone was thrown away well prior to the phone being searched and the killing of Mrs Boyce. His wanting police to believe that the throwing away of the phone had no connection to that killing provided an explanation for his lies. There was no other explanation for them: the jury were entitled to think that this was a lie which an innocent person would not tell.
- [7] Taken together with the circumstantial case which Mullins JA has detailed, it was open to the jury to conclude, beyond reasonable doubt, that the appellant had killed Mrs Boyce, and that he had done so with the requisite intent to commit the offence of murder. I agree with what Mullins JA has written on the other ground of appeal.
- [8] **MULLINS JA:** The appellant who was a retired general medical practitioner was convicted by a jury of having murdered Mrs Boyce on or about Thursday 22 October 2015. The cause of Mrs Boyce’s death was blood loss from a stab wound to the abdomen. The appellant and Mrs Boyce were the only persons in her Kangaroo Point apartment at the time of her death. Mrs Boyce was 68 years old when she died. The appellant was then 62 years old. There were only two possibilities as to who caused Mrs Boyce’s death: either the appellant stabbed Mrs Boyce or she stabbed herself. It was a circumstantial case against the appellant. The central issue in the trial was whether the prosecution could exclude beyond reasonable doubt the possibility that Mrs Boyce committed suicide.

¹ (1993) 178 CLR 193 at 210; [1993] HCA 63 at [14].

² (1993) 178 CLR 193 at 209; [1993] HCA 63 at [10].

- [9] The grounds of appeal are:
- (1) the verdict was unreasonable and cannot be supported having regard to the whole of the evidence; and
 - (2) there was a miscarriage of justice by the forensic pathologist Dr Ong being permitted to give his opinion that it was more likely that Mrs Boyce's wound had been caused by another person than the wound being self-inflicted.

Summary of the relevant evidence

- [10] Exhibit 64 in the trial was a table of selected stored SMS and email messages to and from Mrs Boyce by identified parties between 7 July 2013 and 22 October 2015 and telephone calls made and received by Mrs Boyce on 21 and 22 October 2015 from the mobile phones used by her, Dr Graham Boyce and their children that was the subject of admissions by the parties.
- [11] Mrs Boyce and Dr Boyce were in a relationship from 1974 and married in 1976. Dr Boyce's evidence included the following. In 1979 Mrs Boyce commenced a relationship with the appellant in the United States. Mrs Boyce returned to Australia in 1980 and resumed living with Dr Boyce. Zachary was born in 1981 and Angelique was born in 1985.
- [12] From about 2002, Dr Boyce worked in Cairns as a general medical practitioner. The family had been living at Hawthorne and Mrs Boyce bought an apartment at Kangaroo Point in her name, but subject to a mortgage for which Dr Boyce took responsibility. Dr Boyce would return to Brisbane regularly and stay with Mrs Boyce for various periods of time. Mrs Boyce and the children would travel to Cairns and stay with Dr Boyce in the school and university holidays. Dr Boyce paid the living expenses for Mrs Boyce. From about 2013 into 2014 for about 18 months Mrs Boyce lived in Cairns with Dr Boyce, as Zachary who is also a doctor was working at the Cairns Hospital. Dr Boyce began treatment for medical issues, undergoing surgery in November 2014, and from the latter part of 2014 through to the early part of 2015 was living with Mrs Boyce either at the Gold Coast or in Brisbane. Mrs Boyce was having major problems with depression at that time contributed to by Dr Boyce's illness and returned to Cairns with him. Their daughter married in May 2015. The Kangaroo Point apartment was put on the market to sell in about June 2015 with the intention of buying a smaller apartment for Dr Boyce and Mrs Boyce.
- [13] Mrs Boyce's depression started when her mother died 25 years ago. When she was depressed, she would not want to go out, she would not take care of her appearance and would not want to see people. She was medicated from about 1995.
- [14] Mrs Boyce had been very depressed in 2015 up until late July when she accompanied Dr Boyce to a dinner in Cairns for which she had gone out to the hairdressers and a nail salon and found some new clothes. Mrs Boyce returned to Brisbane at the end of August 2015 when she said she was feeling better. Dr Boyce was unaware that Mrs Boyce intended travelling to New Zealand in September 2015. He became aware only when he was unable to contact her, and asked Zachary to check on her. Zachary reported that Mrs Boyce was on her way to New Zealand to see the appellant and referred to a post on her Facebook page. Dr Boyce did not know that Mrs Boyce was continuing to have contact with the appellant, was

upset about that, and posted a vile message on her Facebook page. Their regular daily contact ceased. It resumed about a week after she returned from New Zealand, when they had discussions about the sale of the Kangaroo Point apartment.

- [15] After she had returned from New Zealand, Mrs Boyce had looked at another apartment in the block next door to the building where she was living and signed a cash contract to purchase the apartment, when there was no cash available for the purchase. This occurred in late September 2015. Dr Boyce managed to re-negotiate the contract, so that it was subject to finance, but the finance was not obtained and the contract did not proceed. Mrs Boyce was not happy with Dr Boyce pulling out of the unconditional contract that she had signed and told Dr Boyce at that time that she wanted a divorce. The desire for a divorce was expressed in text messages sent by Mrs Boyce to Dr Boyce on 28 September 2015.
- [16] At 5.28 am on 19 October 2015, Mrs Boyce sent a text to Dr Boyce, saying “I feel all depressed again. Up at 3am today.”.
- [17] Dr Boyce’s last conversation with Mrs Boyce was in the evening on 21 October 2015. She had called him earlier that evening to say that the people who had viewed the apartment were not going to buy it and she was wanting to give the property to another agent to sell. In the last conversation they had that evening (which telephone records show was around 8 pm), Mrs Boyce asked Dr Boyce to provide her with the valuation that he had from his bank which had been done a few months earlier, so she could show it to the prospective purchasers. She said words to the effect “just make sure you get it”, referring to the valuation. By then, the animosity that had been between them had mellowed.
- [18] Many times Mrs Boyce said to Dr Boyce “I feel so bad, I wish I was dead.”. She often mentioned jumping off the balcony of her apartment and when she was up in Cairns in 2015, she got the idea of slipping off the back of the ferry to Green Island and disappearing that way.
- [19] Travel dates of Mrs Boyce and the appellant between Brisbane and New Zealand from July 2014 (being the earliest time from which the police obtained records) were the subject of admissions at the trial.
- [20] Mrs Boyce returned to Brisbane from New Zealand on 29 July 2014. The appellant travelled to New Zealand from Brisbane on 6 September 2014. Mrs Boyce travelled to New Zealand from Brisbane on 16 February 2015 and returned on 20 March 2015. Mrs Boyce travelled to New Zealand from Brisbane on 11 September 2015 and returned on 25 September 2015.
- [21] The appellant had travelled to Brisbane from New Zealand on 6 October 2015 and was staying at Mrs Boyce’s apartment. It is apparent from the text messages sent by Mrs Boyce to the appellant in early October 2015 that she encouraged him to make the trip to visit her in Brisbane.
- [22] At approximately 5.30 am on Thursday, 22 October 2015, the appellant made a 000 call from the landline in Mrs Boyce’s bedroom asking for emergency services to attend Mrs Boyce’s apartment. He told the operator he had just woken up and found his fiancée was dead. Mrs Boyce’s apartment was on level 20 of the building. The other apartment on that level was unoccupied on 21 October 2015. Mrs Boyce and the appellant returned to the apartment at 7.23 pm on 21 October

2015 after having gone to dinner at a restaurant. The electronic record and CCTV footage for the building established that no one accessed level 20 between 7.23 pm on 21 October 2015 until the arrival of the paramedics and police at the apartment at 6.06 am on 22 October 2015.

- [23] When the police and paramedics arrived, Mrs Boyce's body was positioned on the left side of the bed on her back (looking at the bed from the foot of the bed), but partially on the right side, with a knife protruding from her abdomen. Advanced care paramedic, Mr Weijers, observed a pillow on top of Mrs Boyce from the torso up near her face (but not covering her face) which Mr Weijers picked up and moved, so he could assess her. He put that pillow towards the foot of the bed. He touched her throat to take the pulse, but was unable to detect a pulse. Her body was cold and she had lividity with hypostasis. Mrs Boyce was partially covered by a flat sheet and she had been stabbed into her abdomen through the flat sheet. The knife was one of the kitchen knives from the apartment. Mrs Boyce's head was rotated to the right with the right side of her face resting against the pillow and her right hand was level with her head in a position that was beneath the same pillow. There was no bloodstaining on Mrs Boyce's right arm, right hand or on the pillow that her hand was under. Mrs Boyce was right-handed.
- [24] Mrs Boyce occupied the main bedroom of the apartment. The appellant kept his belongings in a bedroom other than the main bedroom and on the evening of 21 October 2015 was sleeping in the bedroom where his belongings were. The appellant told the first police officer who arrived at the scene (and who recorded the conversation on his body worn video recorder) the following. Mrs Boyce had been "very distraught" the previous night, drank a lot of alcohol and took some pills. He referred to her psychiatric history and that the previous evening she got into his phone, saw a call from his aunt, and thought there was something going on and was very upset. At about 9.00 pm, Mrs Boyce took her cell phone and "just winged it off the balcony somewhere, said she was going to bed and wanted me, for the first time this has ever happened, asked me to sleep at the other end of the house". He normally slept in Mrs Boyce's bed and they had been lovers for two years, since they had reunited. She said she wanted to be by herself and that was about 9.30 pm. She went to bed at 9.00 pm and he went in, gave her a kiss, tucked her in, and that was the last he saw her. He went to bed about 11.00 pm. Three or four days ago, when Mrs Boyce woke up, she said she felt like she wanted to die, and by the end of the day she was fine. She then saw her psychiatrist who said she was in "pretty good shape" and did not change her medicines. Mrs Boyce was frustrated about the apartment which had been for sale for two months. They had gone out to dinner on the evening of 21 October 2015 so that the real estate agent could show prospective buyers through at 6.30 pm. The appellant drove Mrs Boyce to the restaurant, as she had been drinking. She had a glass of wine at the restaurant and a couple of glasses when they returned to the apartment. Two days ago, he and Mrs Boyce got a ticket for him to go back to New Zealand the next week. He found Mrs Boyce that morning, when he went into the bedroom to give her a kiss. He checked her pulse and there was no response and the only thing he touched was her neck. It was unusual that she had thrown her phone away, as it was her lifeline. Something had come up the previous day that there might have been somebody else and Mrs Boyce got an idea that he had a clue about that. Mrs Boyce had locked him out of his phone. He and Mrs Boyce were engaged to be married before Christmas.

- [25] From about 7.10 am the appellant was spoken to at the apartment by Detectives Webster and Bakker and the interview was recorded on a digital voice recorder. The appellant repeated much of what he had told the first police officer. He also mentioned that on the way back from dinner, they stopped to buy Limoncello which Mrs Boyce had been drinking during the day. When asked which balcony Mrs Boyce had thrown her phone off, he said it was one of two balconies, but he could not remember.
- [26] Mrs Boyce's iPhone was found by a police officer at 7.21 am on the footpath near the gate that led from the apartment building to the marina. It was not in a working state and had a broken screen. Mr Robertson who is an investigative computer analyst employed by the Queensland Police Service took the memory board out of Mrs Boyce's iPhone and put it into another iPhone that he had and was able to access the memory. Mr Robertson obtained the passcode that was required to unlock the handset which was 0852. (The passcode was the middle vertical row of numbers on the keypad going from the bottom to the top of the keypad.) Mr Robertson was able to recover the activity on the iPhone on 21 and 22 October 2015. Mr Robertson explained that the phone takes screenshots at various intervals when certain activities were occurring and they get saved and stored in the handset memory and are able to be retrieved. A screenshot is a photograph of what was on the screen at the time. Mr Robertson could say that at 11.56 pm on 21 October 2015, the handset was unlocked and at 11.58 pm the SMS application was opened on the handset. A snapshot was taken which showed the phone contact that was opened was for Kenneth with a phone number. Mr Robertson was also able to say that at 12:00:03 am, the SMS application was still open and at 12:03:37 am, the SMS application remained open and a snapshot was taken at 12:03:38 of the SMS message dated 18 May 2015 that was on the screen. That message from Kenneth to Mrs Boyce stated:
- “I truly think we would do each other a world of good to calci up and spend casual time together, realising we are both okay. If we want to be ourselves. I miss you heaps x O x.”
- [27] After that message was viewed, the handset was returned to the home screen by pressing the home button at 12:03:54 am. (The inference to be drawn was that the person who had opened the messages with Kenneth scrolled through them for about five minutes arriving at the message dated 18 May 2015.) There was an outgoing call at 12:04:03 am to the mobile number of Mr East who was in Mrs Boyce's contacts. The call lasted 12 seconds. At 12:06:02 am, the handset was in a locked state.
- [28] There were 2,677 messages between Mrs Boyce and the appellant between 28 June 2013 and 7 October 2015.
- [29] In cross-examination, Mr Robertson confirmed that whoever had accessed the handset at 11.58 pm on 21 October 2015 had unlocked the phone using the PIN.
- [30] A latent fingerprint developed on Mrs Boyce's iPhone was matched to that of the right middle finger of the appellant.
- [31] The appellant accompanied the detectives to the police station where a record of interview commenced at 8.30 am which included the following.

- [32] Mrs Boyce had mentioned the other day how sharp the knives were when they were making salad. She had also been suicidal in the past and she had told him that once her son had got her off the balcony. When she got depressed the last time, she went up to Cairns where her husband was, so she would have some security. In the last couple of weeks since he had been visiting, Mrs Boyce was “pretty good” until one morning when she woke up and said she felt like she wanted to die again. That was a few days ago. A visit to her psychiatrist was arranged on Tuesday, but Mrs Boyce told the appellant that she did not tell the psychiatrist that 24 hours earlier she wanted to die. Mrs Boyce was coming to New Zealand to live permanently with the appellant. Last night, when he kissed her good night, she was asleep.
- [33] In response to a question whether he suffered from any illnesses, the appellant said he had been treated for depression, recently he had not taken medication for anything, and that was why he was able to help Mrs Boyce so much. Mrs Boyce told the appellant that she was out of money and that she would come to New Zealand in a couple of weeks, but that he had to buy her ticket.
- [34] When they were out at dinner on the evening of 21 October 2015, Mrs Boyce got a call from the real estate agent and was shocked that the prospective buyers said the apartment was too big and she took it as a personal insult. After they returned to the apartment and the appellant was in the bathroom, Mrs Boyce looked at his phone and was suspicious about the message from his aunt. Earlier in the day, Mrs Boyce had been suspicious about internet searches the appellant was doing. The appellant said that he thought Mrs Boyce had contact with somebody else yesterday. The transcript for this interview records the appellant saying “she mentioned [INDISTINCT] some guy named [INDISTINCT] that I think she had an affair with before” and “there might have been some guilt involved or something but it was really strange the way she reacted about the cell phone”. (In his address to the jury, the prosecutor suggested that if they listened carefully to the recording, the name of the man referred to was Kenneth, and that is confirmed by the recording itself and is consistent with other statements made by the appellant in this interview referring to Kenneth.) While he was in the bathroom, Mrs Boyce put a pin number in to lock his phone.
- [35] The appellant recalled that earlier in the day, when Mrs Boyce had suspicions about his being on the computer, she had said “I’m going to hook back up again with that Kenneth guy”. The appellant described that statement as a “curve ball”. The appellant also said to Mrs Boyce, “why did you bring this thing up with Kenneth you know?” During the afternoon of 21 October 2015, the appellant and Mrs Boyce went out and saw a movie. They stopped at Dan Murphy’s on the way back to the apartment and Mrs Boyce bought a bottle of Limoncello. After they got back from dinner at the restaurant, Mrs Boyce wanted the appellant to record “The Bachelorette”, but she had to turn the sound off, as she kept telephoning people to tell them how upset she was. When the appellant came out of the bathroom, Mrs Boyce questioned him about his aunt and a bunch of other names. When the appellant asked her whether she would want him to look through her phone, she took her phone and threw it off the balcony. When she did that, the appellant was in the lounge room. It was either one of two balconies, as both doors were open. The appellant thought Mrs Boyce had contact that day with some guy that she had previously had an affair with, so there might have been some guilt involved, but it was “really strange the way she reacted about the cell phone”. After that, she got “real lovey dovey”, but she wanted to go to sleep and be left alone. When they had

returned to the apartment after dinner, Mrs Boyce spent a lengthy period on the telephone to her friend, Sarina, and also to the real estate agent and Graham Boyce. The appellant normally slept next to Mrs Boyce, but when he kissed her goodnight, she said, "sleep in the back room tonight". The appellant went to bed about 11 pm and did not wake up until the morning. When he woke up on 22 October 2015, he used the toilet in the en suite adjoining Mrs Boyce's bedroom and, when he returned to the bedroom, he noticed Mrs Boyce's leg hanging out awkwardly and it looked pale and then he saw the blood on her. The appellant bumped into the handle of the knife with the back of his hand after he checked Mrs Boyce's pulse. When asked to explain further about Kenneth, the appellant described him as a handyman with whom Mrs Boyce had affairs off and on and when she had been suspicious yesterday about the appellant's email, she said that she was going to call Kenneth and have him fix the place up. The appellant stated he did not stab Mrs Boyce. The first time that Mrs Boyce brought up the appellant's connections with other women was on Wednesday 21 October 2015. The appellant then stated:

"Even though you know, this Kenneth guy I remember she must have been still seeing him because I can remember she was in my house and texting him sitting next to me and I said what's this Kenneth thing? And then she that's when she first told me about, this was about a year or so back, and then she said that [INDISTINCT] but they parted ways and she told him I, I was engaged with, that, that we were engaged but whether or not all that's true or not I don't know."

[36] When asked by one of the detectives whether he and Mrs Boyce argued much, the appellant responded that they did not argue until yesterday and "yesterday was lots of stupid arguments".

[37] A second formal record of interview was conducted by Detectives Webster and Bakker with the appellant commencing about 2.30 pm on 22 October 2015. The detectives showed the appellant a floor plan of Mrs Boyce's apartment to which he referred when answering questions.

[38] Further questioning on what happened when the appellant and Mrs Boyce returned from dinner on 21 October 2015 elicited the following. When the appellant came out of the bathroom and saw Mrs Boyce looking at his phone, she started walking out of the lounge room. The appellant followed her and was reading to her, explaining that this contact was his aunt and another contact was a friend of his mother. As Mrs Boyce was walking away with her phone in her hand, the appellant said, "well would you want me to go through your phone?" and that was when Mrs Boyce said, "yeah go ahead" and tossed the phone out. Mrs Boyce went into the bathroom and then came out, she had perfume on, tried to be "lovey dovey" for 10 minutes or so on the couch, and then decided she wanted to go to sleep. One of the detectives then asked the appellant to explain how he was able to get into his phone and show Mrs Boyce the names and at what point did that not become available. The appellant responded:

"Oh that's right. That's when it, good point. That's when I realised that it, it had been PIN'd, the lock had, the PIN lock."

[39] When one of the detectives pointed out that was not what he said earlier, he recanted and said he was not showing her the names, but was going through the

names of the people in the phone as Mrs Boyce rattled off the names, and the appellant did not actually read them, but was explaining to Mrs Boyce who each person was. The appellant said that he did not think that he opened his phone at that stage and it was after Mrs Boyce threw her phone off the balcony, that he then opened his phone and saw that it was locked. The appellant identified on the floor plan the balcony door (which was open) through which Mrs Boyce threw her phone. She was about a foot from the balcony door on the inside, when she threw her phone. When asked why earlier in the day he could not remember which balcony, he said that it was all “pretty fast”. The appellant was now certain as to which balcony it was. Mrs Boyce was in bed about 9.30ish. “The Bachelorette” show had ended, she went back to the bathroom and then when the appellant came in and kissed her goodnight, it was 10 or 15 minutes later. She had almost been asleep, because she was “kind of startled” when the appellant came into the bedroom. It was about 9.30 pm or 9.45 pm, somewhere between those times.

[40] The detectives then asked the appellant to go through the timeline again. The appellant explained that Mrs Boyce was on the couch, the appellant was texting his son and she kept interrupting to suggest he should call rather than text him. He stopped his text and put it in drafts and left his phone, when he went to the bathroom. It was when he came back that Mrs Boyce said, “Who are all these people?”. That would have been after the call that Mrs Boyce had with Dr Boyce. It was when the appellant came out of the bathroom that Mrs Boyce was yelling at Dr Boyce to get the bank’s appraisal that showed the value of the apartment. After she ended the call with Dr Boyce, she started asking the appellant about the names. After she tossed her phone off the balcony, the appellant returned to his phone to finish the text to his son and that was when he found that his phone was locked. That was when Mrs Boyce went into the bathroom and came back out with perfume on and sat down for another 15 or 20 minutes or so before she decided to go to bed. “The Bachelorette” show was just ending. When she brought up “the Kenneth thing” earlier in the day “it was a real stab in the back in a way ...terrible thing to say”. Mrs Boyce knew the appellant knew about Kenneth and had told him they had not had contact in months and then she said that she had got hold of Kenneth and he was going to come fix everything.

[41] The detectives told the appellant they had been speaking to Zachary and that Mrs Boyce had told Zachary that she and Graham were back together and she was selling the apartment in order for Graham and her to buy a new place and move in together and that the appellant was the one suffering from depression. The appellant confirmed that he had been suffering from depression, but Mrs Boyce’s plans which they described was news to him. He then commented:

“She had a lot of secret stuff going on cause I know there was something going on with this other guy too.”

[42] The appellant was asked more questions about when Mrs Boyce came out of the bathroom. The appellant stated as follows. She gave me a big kiss, sat down and we touched a little bit. She then started nodding off and she went to bed. Then he went in to give her a kiss. She had already dozed off and she said “Oh you woke me up”. She could not have been in there for more than 10 minutes.

[43] Forensic scientist, Sergeant Esaias, arrived at the scene while Mrs Boyce’s body was *in situ* and directed a number of photographs to be taken. Sergeant Esaias’

evidence included the following. Nothing had been moved or touched at that stage apart from a pillow at the bottom of the bed that was moved to there by the paramedics. There was another pillow wedged up against Mrs Boyce, the corner of which had a saturation stain on it from being up against the bloodstain on the sheet where the knife went through. Other than two drops of Mrs Boyce's blood on the carpet next to the bed in the direction of the en suite, the blood in the room was on Mrs Boyce's body and bedding. There were two types of bloodstaining on the pillow at the bottom of the bed. There was a saturation stain in the corner which meant that the pillow would have had to have been in contact with a liquid blood source to form that stain and there were 15 small circular stains on that pillow. The tips of Mrs Boyce's fingers on her left hand were just touching the knife handle. There were bloodstains around the site of the stab wound on the abdomen and on the left hand.

- [44] At the scene, Sergeant Esaias measured the length of the knife that was protruding from the wound. He did the same measurement at the commencement of the autopsy and there was no overall difference in the measurements. The general orientation of the knife in the wound at the commencement of the autopsy appeared to be consistent with how it appeared at the scene. In order to transport the body, the section of the sheet through which the knife protruded was cut from the rest of the sheet. At the commencement of the autopsy, the hole in the fabric from the knife appeared to be larger than it was at the scene which Sergeant Esaias attributed to the transporting of the body.
- [45] Sergeant Esaias tested samples recovered by Sergeant Norton from the S-bend from the en suite bathroom and from the tap and plug in the en suite bathroom for the presence of blood. The tests were negative which did not necessarily mean blood was never there. It meant that, if blood were there, it was below a certain dilution or sensitivity threshold which was not picked up by the test.
- [46] In cross-examination, Sergeant Esaias was asked about the saturation stain that could be seen on the fitted bottom sheet on the bed after the body was moved. Sergeant Esaias was of the view that the stain was not consistent with the bleeding out occurring at the same time as a struggle, but was the result of their having been a slow release of blood from the wound during which there was minimal movement from Mrs Boyce. Sergeant Esaias confirmed that he made observations of the rest of the apartment and saw no evidence of any disturbance.
- [47] Mrs Boyce's DNA was found on the knife handle and the appellant's DNA was not. There were no fingerprints located on the handle of the knife.
- [48] Dr Ong observed Mrs Boyce's body *in situ* before it had been moved. His observations included the following. When he commenced examining the body at about 9.45 am, rigor mortis was well established and, although there was no certainty in predicting from the state of the rigor mortis as to when death occurred, he estimated it was about 6 to 8 hours prior to his assessment. (That was an estimate that death occurred at between 1.45 am and 3.45 am on 22 October 2015.) The defect in the flat sheet made by the knife was large in dimension (7.5 centimetres) when compared to the size of the blade of the knife. The entire blade of the knife, extending to part of the handle, had been inserted into the abdomen. The size of the wound on the skin was larger than the size of the blade which was indicative of the knife entering at an angle into the body. Dr Ong explained that where

the blade joins into the handle, there is a short portion where the sharp edge of the knife becomes blunt that is known as the ricasso. The dimension of 19.5 centimetres was from the tip to the point of the blade where the sharp edge became blunt. The length of the handle protruding from the skin was 8.5 centimetres. The blade of the knife up to the sharp edge was 19.5 centimetres and the length of the handle was 13 centimetres. The blade at its widest near the ricasso was 4.5 centimetres. The stab wound was located on the upper left abdomen and 8.5 centimetres to the left of the midline. The tip of the knife protruded from the back of Mrs Boyce's body and the length from the tip to the skin was 0.5 centimetres.

[49] In order to describe the positioning of the knife in the body, Dr Ong used the clock face, so that, looking at the body, 12 o'clock would be the top of the head and 6 o'clock would be towards the feet. The sharp edge of the blade in the wound was pointing toward the direction of 6 o'clock and was downwards. After the knife was removed from the wound, Dr Ong let the skin relax and returned to the normal position and observed that the knife had been in the position of "roughly 30 degrees from the horizontal plane" which meant it was between the 3 to 9 o'clock position to the 4 to 10 o'clock position and with the blade upwards.

[50] Dr Ong's observations of the wound track in the abdominal cavity were as follows:

"When I examined the abdominal cavity, I noticed that there were two different tracks within the abdomen – two major different tracks. The first one was more or less in the direction of the blade, which we mentioned, that points towards the 10 o'clock ... direction. So it goes to the right of the body in a slightly upward direction towards the back.

...

The second track is where the knife was. It's in the direction where the knife was found at the time of the post-mortem examination. That is, the – the knife is directed to the back. Also – but this – in this instance, only to the right, and in a slight – in – in towards – in a downwards direction."

[51] Dr Ong described the first major track as track A and the second major track as track B. The diagrams marked up by Dr Ong to show the paths and entry and exit points for tracks A and B were tendered as exhibit 52. Track A travelled from the left to the right of the body and from the front towards the back. Track A involved the liver and the knife had gone behind the liver with the sharp edge pointing upwards and cut into the bottom of the posterior left lobe of the liver and then the cut into the right lobe of the liver was slightly bigger and went deeper and penetrated completely into the liver, so the knife travelled through the liver. There were two exit wounds from the liver which meant there had been a slight withdrawal and re-insertion into the liver, so that track A left two track marks through the liver. Track A also involved a cut to the structures of the bile duct and the inferior vena cava which is a major vessel where all the blood from the bottom half of the body passes through to return to the heart. The incision to the inferior vena cava measured 1.5 centimetres (where the circumference of the vessel is 3.5 centimetres). There was also an incision 1.5 centimetres long to the renal vein.

- [52] Dr Ong explained that the vena cava is attached to the liver and the knife cut through the inferior vena cava and the left renal vessel that brings blood from the kidney. Dr Ong initially had a bit of a problem because that vessel seemed to be a slight distance away from the main injury, but postulated that “during the stabbing the body could have been slightly bent, like a crouching position, and the structures were somewhat approximate each other at the time of the stabbing”.
- [53] The cut to the inferior vena cava would have caused profuse haemorrhage, causing shock within the first five minutes, which in turn would increase her blood pressure and cause greater bleeding leading to blood loss and death. As track A left two track marks through the liver, there were two exit wounds, one slightly to the front and 2.6 centimetres long which was the anterior wound and one slightly to the back which was the posterior wound. Track A perforated into the chest cavity by cutting through the diaphragm and probably ended up within the chest cavity but, as it is a space, there was no other injury around that area. There was no exit wound out of the body for the first track of track A.
- [54] Dr Ong was able to identify the second track of track A, because of the second entry through the liver. The second track was more towards the posterior aspect of the liver and there was an incision of 4.8 centimetres on the liver surface where the second track exited. It then entered the chest cavity by incising through the diaphragm, but missed the lungs, then continued to the posterior chest wall at the ninth intercostal space and partially fractured the superior margin of the 10th rib. There was an incision between 2.1 x 0.8 centimetres on the chest wall at the back before exiting from the body through a 0.7 centimetres long incision. That incision was 120 centimetres above the heel and 14 centimetres to the right of the midline.
- [55] Dr Ong was of the opinion that only mild force would have been required to inflict the injury represented by the first track of track A, but it was possible that a more severe force was used. Dr Ong considered that a slightly stronger or between mild to moderate force would have been required to inflict the injury represented by the second track of track A, as it caused a partial fracture of a rib. Dr Ong measured the depth of the wound from the skin on the front of the abdomen to the exit wound which was the skin on the right back of the torso and the length was about 24 centimetres. The depth of wound was explicable as longer than the blade of the knife, because the tissues are compressible making them slightly narrower or shorter and when relaxed they span back to their normal size. That makes the track longer than the length of the blade. If the body had been in a crouching or a bending position, that would also explain the track being longer than the length of the blade.
- [56] Track B was the track in which the knife was found in Mrs Boyce’s body. It travelled in a downwards direction across the body from the left and only slightly to the right. It initially penetrated through the upper border of the stomach (which is called the lesser curvature of the stomach), continued through the right hemidiaphragm, and entered the back of the chest. The incision in the lesser curvature of the stomach was 13 centimetres long and the incision in the hemidiaphragm was 5.5 centimetres long. Within the chest cavity Dr Ong detected three tracks. The first of these tracks hit the 11th rib which resulted in an incision on the chest wall adjacent to the rib that was two centimetres long and a superficial fracture of the 11th rib. Dr Ong estimated the force required to cause that fracture was between mild to moderate.

- [57] The second and third tracks of track B were closely associated with each other. Both of them hit the end of the 12th rib causing a glancing fracture of the 12th rib and there were two exit wounds on the back next to one another. Dr Ong's estimate of force to cause the second and third tracks of track B was mild to moderate. The inner exit wound towards the middle of the body was 0.8 centimetres long, 115 centimetres above the heel and 9.5 centimetres to the right of the midline. The second exit wound was towards the outer aspect or the right and was 0.5 centimetres long, 115 centimetres above the heel and 10 centimetres to the right of the midline. The knife was protruding from the inner wound. Dr Ong measured the depth of the tracks for track B as 23.5 centimetres.
- [58] Dr Ong was of the opinion that for the two tracks that comprised track A to occur, the tip of the knife had to be withdrawn completely from the liver and re-inserted. He estimated that a withdrawal of one to two centimetres would suffice to cause the second track of track A. Dr Ong was of the opinion that most of the blade of the knife would have exited from track A before it was reinserted into track B, as the direction of track B was completely different and there was rotation of the blade. There had to be a significant pulling back of the knife and a changing of direction of the knife before the three tracks that comprised track B occurred. As the track on the skin and muscles did not show any change of direction, probably about three to four centimetres of the blade remained in the body, before it changed direction from the 10 to 4 o'clock position to the 6 o'clock position. As the first track of track B cut the hemidiaphragm which aids in the breathing process, that injury might have impeded slightly Mrs Boyce's breathing process. As the second and third tracks of track B perforated the chest cavity, they would also have contributed to difficulty in the process of breathing.
- [59] On the internal examination, Dr Ong measured 200 millilitres of blood in the right side of the thoracic cavity. That would have impeded the breathing process of the right lung. There were 500 millilitres of blood in the abdominal cavity which is a moderate loss of blood, but combined with the 200 millilitres of blood in the thoracic cavity and the blood on the bed sheets made the total blood loss significant. Dr Ong's opinion as to the cause of death was a stab wound to the abdomen and the resultant blood loss.
- [60] Dr Ong determined during the autopsy that Mrs Boyce was alive at the time the knife wound was inflicted. Dr Ong described "during the stabbing the body could have been slightly bent, like a crouching position and the structures were somewhat approximate each other at the time of the stabbing". By "structures", Dr Ong was referring to the parts of the body that were cut. Dr Ong's explanation for some of the structures being cut, despite the distance between them, was that Mrs Boyce was crouching or bending when the knife was first inserted.
- [61] The blood alcohol concentration of 0.049 was just below the legal limit for driving. There were a number of drugs detected in Mrs Boyce's blood being the sedative drug diazepam, nordiazepam (which is a metabolite of diazepam), antihypertensive amlodipine and drugs to lessen anxiety, olanzapine and venlafaxine, and Dr Ong was of the opinion they did not play any role in Mrs Boyce's death. Dr Ong was also of the opinion that the level of alcohol and drugs in her system would not have prevented Mrs Boyce from fighting an attacker. He was also of the opinion that Mrs Boyce was not smothered or asphyxiated at the time of, or prior to, death. She did not have any defensive injuries that suggested there was a struggle.

[62] Dr Ong was asked whether there were any factors that he took into account in determining whether the stab wound to Mrs Boyce was a self-inflicted injury or not. He noted that there were no other injuries that may indicate self-harm such as incision to the wrist and that the knife pierced the sheet, although they were not strong factors to decide one way or another. The strongest factor that Dr Ong took into account was the multiplicity of the stab wounds with the two main directions that the knife travelled, including rotation of the blade. He then referred to taking into account that in the first instance wider structures had been involved in track A and stated:

“That is the main one I take into account is the inferior vena cava which will cause bleeding. A profuse amount of bleeding, and also even the liver substance itself. The liver itself, which is a very vascular organ, and also I take into account that – I mentioned the rotation of the blade and – and that it appears that some of the wounds, judging by the blood on her hand, that it’s only – if – if it’s self-inflicted, it – it may be only the – the left hand was involved, especially at the later stages. The – the initial stages, it’s possible both hands can be involved because there’s no bleeding yet. But after the bleeding has occurred, it was only the left hand that was – has bloodstains.”

[63] Dr Ong concluded that after taking into account all of this, he thought it more likely that the wound was caused by a second party, but he could not exclude that it was a self-inflicted injury.

[64] Dr Ong’s evidence in cross-examination included the following. On the basis that the second and third tracks of track B were very close together, there was a possibility that the third track may not have reflected an injury inflicted as the time of death, but during transportation of the body after death from the apartment to the morgue. As Mrs Boyce was postmenopausal and suffering from osteoporosis, the force required to inflict the second track of track A might have been more towards the mild end than towards the moderate end. In relation to track A, it would be unusual for one track to sever both the liver and the renal vein at the same time, but that would be explained by the body being in a crouched up position. The body could be crouched forward, but the body could also be sideways on the mattress and crouching forward along the side. On the basis that track A involved two movements of the knife and then partial withdrawal for at least the first and second tracks of track B, the injuries may have taken up to five seconds to inflict and there would have been a number of minutes before Mrs Boyce was weakened to the point of not being able to move. There would have been serious consequences after about 15 minutes or it may have happened more quickly after about five minutes. None of the injuries was capable of immediately disabling her or preventing her movement.

[65] Dr Ong was informed that Mrs Boyce suffered from arthritis in her hands, but it is difficult to attribute the functional deficit based on appearance. On the basis that Mrs Boyce was able to drive a car, carry bags and conduct other daily activities of living, Dr Ong was satisfied that whatever arthritis she suffered from would not have prevented her from being able to inflict the wounds.

[66] The position of the hands of Mrs Boyce when Dr Ong viewed the body did not necessarily indicate, if the injuries were self-inflicted, which hand or hands had been used to hold the knife. There would be no blood when track A was inflicted,

but after track B, the knife handle would be stained with blood. If track B was inflicted with the left hand on the handle of the knife closest to the body and the right hand was also on the knife handle, but further up, it was a reasonable possibility that the right hand would not get any blood on it.

- [67] It is very subjective how a person is affected by the level of alcohol in the person's system. The level of alcohol and drugs in Mrs Boyce's system would not have prevented her from fighting back or attempting to move away from an attacker. A stab to the abdomen by a large kitchen knife would induce the physiological fight or flight response and there was nothing about the deceased's position lying in the bed that was observed by Dr Ong that suggested Mrs Boyce had engaged in a fight. Mrs Boyce who weighed 74 kilograms would have been capable of attempting to ward off an attacker, if she were stabbed by a man of the appellant's size of 100 kilograms, at least to a certain extent.
- [68] Dr Ong was taken through each of the factors that he considered in reaching the conclusion that it was more likely the wound was caused by a second party. The first was features of self-harm in the nature of previous attempts of self-harm like cutting of the wrists and cuttings made at the same time as the fatal wounds. A previous attempt by Mrs Boyce to take her own life would have been a factor that weighed more towards the stabbing being self-inflicted. Dr Ong did not know anything about Mrs Boyce's mental health history and had not had any conferences or discussions with Mrs Boyce's psychiatrist. He was not aware that Mrs Boyce had been diagnosed with bipolar disorder or had spoken in the past of committing suicide. He was not aware of an incident of Mrs Boyce's son being called to intervene, when she was stepping onto a chair on the edge of her balcony. Dr Ong was looking at the whole picture rather than relying on one factor alone. The piercing of the sheet before the knife entered the skin and the body was a neutral factor. The number of stab wounds was a factor, as even though there was only one external stab wound, there was at least four or possibly five internal tracks. Dr Ong considered that one stab wound was equivocal. The rotation of the knife was significant, because for the blade to rotate, it had to be withdrawn before being plunged again in a different direction which involved a slight delay. It was significant that, if the stabbing was self-inflicted, the person "would take the trouble" to rotate a blade, rather than just plunge it in different directions. Dr Ong had performed an autopsy on a person who died by suicide and had inflicted more than 10 and possibly 20 stab wounds. The rotation of the knife was "fairly unusual", but that did not mean that it could not be a self-inflicted injury. The number of stab wounds was not a neutral factor, as multiple stab wounds points towards a possible second party involvement.
- [69] The features which made the case more consistent with self-infliction rather than infliction by another person were the lack of defensive injuries on Mrs Boyce's body and no evidence of any attempt by Mrs Boyce to grab the knife or to ward off an attacker using her arms.
- [70] Ms Cusack is a chemist employed by the Forensic Chemist Laboratory at Queensland Health Forensic and Scientific Services. She examined the bloodstained fitted sheet from Mrs Boyce's bed. She identified four cuts or severances in the sheet. Each of them was fresh in the sense the sheet had not been laundered or extensively worn since the damage occurred. Severance No 1 was on the right side of the sleeping surface of the sheet from the sleeper's perspective.

Severances Nos 2, 3 and 4 were on the left side from the sleeper's perspective. In relation to severance No 4, there were two severances roughly parallel to each other and, given their proximity, Ms Cusack could not rule out that one was a secondary cut from the other, where the material is bunched and the one cut goes through two layers.

- [71] The appellant's DNA was not located on swabs taken from Mrs Boyce's hands or scrapings taken from underneath her fingernails. The appellant's DNA was detected from swabs taken from Mrs Boyce's left breast and her right breast. A forensic medical examination was conducted on the appellant at 9.30 pm on 22 October 2015 which revealed no injury to the appellant or any forensic evidence relevant to Mrs Boyce's death. The appellant's clothing was seized by police on 22 October 2015 and no forensic evidence was recovered relevant to Mrs Boyce's death.
- [72] Zachary's evidence included the following. After Zachary returned to Brisbane from Cairns in August 2014, he lived in his own apartment on the 6th level of the same building as Mrs Boyce's apartment. When Mrs Boyce was depressed, she would sleep all day and not get out of bed until late in the afternoon. She did not want to go out and see her friends. She would cancel appointments. She would not take pride in her appearance. She would not get dressed and would not put on makeup. She would not want to see Zachary. She had spoken to Zachary about suicide in the past, but only during times when she was severely depressed and she only ever spoke about jumping off the balcony.
- [73] The last time he had a conversation with his mother about suicide was when he was living with his mother in the Kangaroo Point apartment in 2009. Dr Boyce phoned him to check on Mrs Boyce after he had been speaking to her on the phone. Zachary saw Mrs Boyce standing on the balcony off the lounge room peering over. She had pulled one of the chairs up against the railing and when she saw Zachary coming towards her, she went to lift her leg, as though to get up on the chair. Zachary yelled out to her to get down which she immediately did and came back inside. She told him that she would never go ahead with it, but she did not like the way she was feeling. She would not want to leave his sister and him.
- [74] Zachary went out with his mother to dinner and a musical on the Friday before she died. Mrs Boyce was in high spirits and they had a great night together. He spoke to her on the telephone about 9.30 pm on Wednesday 21 October 2015. (Mr Robertson was able to ascertain that Mrs Boyce telephoned Zachary at 9:25:50 pm and the call lasted for four minutes and 15 seconds.) His mother sounded in high spirits and said that she and the appellant had been out for a lovely meal. She sounded "a little tipsy" at the time and he asked her whether she was all right. She said that she had a couple of glasses of wine with dinner and that was around the time that she took her medication which made her very drowsy. She said that when they had been out, the real estate agent had shown a buyer through the apartment.
- [75] Mrs Boyce had arthritis in both her hands.
- [76] Zachary's evidence in cross-examination included the following. Mrs Boyce told Zachary in July 2013 that she was contemplating leaving Dr Boyce for the appellant. Zachary was aware that the appellant had come to Brisbane in October 2015, but he

did not see the appellant. Mrs Boyce had told Zachary that she was in a sexual relationship with the appellant.

- [77] In re-examination, Zachary stated that his mother's technical ability with respect to the iPhone was limited and she would often get Zachary to do things for her on the iPhone.
- [78] Angelique's evidence included the following. The last time she saw her mother was in June 2015 when her mother was very excited that she was going to be a grandmother. When Angelique became aware in September 2015 that her mother had travelled to New Zealand, she was upset about what her mother was doing and sent her a text message, because she wanted to show her mother that she did not accept her mother's relationship with the appellant. In one of the messages, she told her mother she wanted nothing to do with her and that her mother would never meet her grandson. Her mother continued to message her and moved on to different topics. (The schedule of texts in exhibit 64 showed that Angelique did not respond to her mother's texts.)
- [79] Ms Sarina Russo gave evidence. She met Dr Boyce and Mrs Boyce in 1979 when they lived in the same building. They lost connection after a few years, but reconnected when Ms Russo's nephew started going out with Angelique. Mrs Boyce was looking forward to attending Ms Russo's mother's birthday party on 29 October 2015. Ms Russo had introduced Mrs Boyce to real estate agent Mr Walsh to sell the apartment. Ms Russo spoke to Mrs Boyce on the evening of 21 October 2015 when Mrs Boyce told Ms Russo she was feeling stressed as the prospective buyers had changed their mind about the apartment. During the telephone call Mrs Boyce said that she would see Ms Russo on 29 October for Ms Russo's mother's birthday.
- [80] The real estate agent Mr Walsh gave evidence that after he dropped off the prospective buyers on the evening of 21 October 2015, he telephoned Mrs Boyce to let her know that the buyers said that the apartment might be a little big for them, but they were still considering it. Mrs Boyce did not enjoy that news, as she was very keen to see these buyers place an offer. The telephone records showed another call between Mrs Boyce and Mr Walsh on that evening at 7:53:41 pm. That call included a discussion about generating an offer from the buyers by providing a valuation that Mrs Boyce said she had.
- [81] Mr East was an acquaintance of Zachary Boyce. On 22 October 2015, he had a voice message on his mobile telephone that was very short, and no words were spoken. He had been a Facebook friend of Mrs Boyce.
- [82] Kenneth McAlpine's evidence included the following. He met Mrs Boyce in 1999 or 2000. He did landscaping work at her house at Morningside. After about eight or 10 months, they commenced a sexual relationship that ended when Mr McAlpine moved away in 2002 or 2003. Mr McAlpine returned to live in Brisbane in 2009. Mrs Boyce invited him around on his birthday in 2013. Their further contact was then by telephone or messages. At one stage, he received a text message from Mrs Boyce saying she was engaged. Shortly after, Mrs Boyce told him that the engagement had broken off. The last time he saw Mrs Boyce was when he watched the Riverfire event from her apartment on 26 September 2015. Mrs Boyce left a message on his message bank (which the telephone records showed was a call

made at 10:54:43 am on 21 October 2015). The message said she had some people visiting from New Zealand, but there was one fellow who she could not get rid of and in a light-hearted way she said “Perhaps you can help me get rid of him”.

- [83] It was an admitted fact at the trial that Mrs Boyce telephoned Ms Neilson on 20 October 2015 at 10.21 am and the call lasted seven minutes and 39 seconds. Ms Neilson’s evidence included the following. She met Mrs Boyce about 15 years ago as Mrs Boyce was a friend of a friend of Ms Neilson. Over the 10 year period until Mrs Boyce’s death, she saw her on about six occasions when Mrs Boyce was at the same social events as Ms Neilson and her friend. Ms Neilson had not spoken to her for years, when Mrs Boyce called her in the afternoon of the Tuesday before she died. Mrs Boyce sounded very depressed. She told Ms Neilson that she had been living in Cairns with Dr Boyce who was coming back to Brisbane to practise as a doctor, because he had found out he had stomach cancer (which was not, in fact, the cancer for which Dr Boyce was treated). He was coming back to practise because he had financial problems and they may have to sell the unit. Mrs Boyce said she was “very, very depressed” and that she had tried to commit suicide. Mrs Boyce then said something that Ms Neilson could not make out that ended the conversation. The conversation had gone on for probably about a minute. In cross-examination, when Ms Neilson was asked to recall the exact words that Mrs Boyce used to describe how she was feeling, Ms Neilson said “she said she was feeling very depressed, and then she said suicidal, depressed/suicidal, and she had tried to commit suicide”, but Mrs Boyce did not say exactly when or how.
- [84] Psychiatrist Dr Spelman had treated Mrs Boyce for depression since 2001. His evidence-in-chief included the following. Within two or three years after commencing to treat Mrs Boyce, Dr Spelman diagnosed her as having some form of bipolar disorder. When Mrs Boyce was depressed, she was pervasively sad and unhappy, her self-care was reduced, she would have difficulty with sleeping, she would have trouble getting out of bed in the morning and her symptoms were significantly worse in the morning.
- [85] Her treatment included undertaking the cognitive therapy course at the hospital on a number of occasions as a day patient and an inpatient. She tried different anti-depressant medications and different mood stabilising medications. She was also prescribed a small amount of benzodiazepines to assist with sleeping. On three occasions she was admitted to hospital for electroconvulsive therapy (ECT). The last admission for ECT was between 30 April and 14 May 2015 when she received four ECT treatments. The stressors that were operative at the time of the last occasion of ECT treatment were her husband’s diagnosis of cancer and the pending wedding of her daughter.
- [86] When Mrs Boyce’s mood was elevated, she tended to avoid giving Dr Spelman the opportunity to treat her. Dr Spelman also diagnosed that Mrs Boyce appeared to have a borderline personality disorder.
- [87] There was suicidal ideation attached to the depressive disorder. When Mrs Boyce was depressed and struggling to function on a daily basis, she would talk about thinking about suicide. She expressed suicidal ideation on every occasion when she had been significantly depressed for any period of time. In discussions with Dr Spelman, her suicidal ideation had never progressed to suicidal intent that involved planning and putting thought into action.

- [88] Dr Spelman saw Mrs Boyce at 1.30 pm on 20 October 2015. The appellant was in the corridor outside his room, but Dr Spelman did not speak to him on this occasion. Mrs Boyce informed him that her daughter was pregnant and the baby was due the following February, the relationship with her husband was strained, she had switched out of depression slowly while in Cairns, her mood had been elevated and she had been waking up very early. Mrs Boyce also told Dr Spelman that she was in a relationship again with the appellant, had been to New Zealand to visit him and he was in Australia visiting her. After the consultation, they were going across the road to the shopping centre and she was organising for the appellant to get a ticket to return to New Zealand. She wanted him to return to New Zealand and had not discussed that with him at that point in time. The appellant was not aware that he was going to New Zealand on his own. At that consultation, Mrs Boyce was reasonably well dressed, upbeat and was not expressing any depressive symptoms at all. Dr Spelman made an appointment to see Mrs Boyce in six days. Dr Spelman considered the fact that her daughter was pregnant was a significant protective factor in reducing Mrs Boyce's suicidality. Other protective factors were her significant concerns about her husband's wellbeing and health and they had been attempting to sell their unit in order to reduce their financial burden to get Dr Boyce down to Brisbane, so he did not have to work as much.
- [89] Dr Spelman's evidence in cross-examination included the following. A person with bipolar disorder tends to suffer from prolonged periods of depression and periods of mood elevation which tend not to be as prolonged. The depression can go on for months, but the hypomania may go on for days or a week. People who suffer from bipolar disorder have an increased risk of suicide. The manifestations of borderline personality disorder may fluctuate in intensity, but there is some evidence of them at all times. Mrs Boyce's borderline personality disorder led her to be more impulsive and unstable than a person who suffered only from bipolar disorder. His observations of Mrs Boyce over the years was she had a tendency towards impulsivity in areas that were potentially self-damaging such as intimate relationships.
- [90] When assessing a person's risk for suicidality, one cannot predict whether a person is going to commit suicide at any given point in time. In general, where a person suffers from both bipolar disorder and borderline personality disorder, it is difficult to predict accurately about when, or if, such a person might commit suicide. At the appointment on 20 October 2015, Mrs Boyce did not raise with Dr Spelman that her daughter was not talking to her at that point in time. The fact that her daughter had told her that she would not meet her unborn grandchild weakened that particular protective factor. The effect of Dr Boyce's message to her when she was flying to New Zealand on 11 September 2015 was diminished when looking back from 20 October 2015 as a lot had transpired in that month and Dr Boyce was actively back involved in Mrs Boyce's care and life. The fact that on 21 October 2015 the purchasers who Mrs Boyce had hoped would buy the unit did not do so would weaken that as a protective factor, but it would not necessarily have made her more suicidal. It was not advisable for people who suffer from bipolar disorder and borderline personality disorder to mix their medications with alcohol. Dr Spelman was aware that Mrs Boyce drank alcohol on a regular basis, but did not believe she had a problem with alcohol.
- [91] In re-examination, in relation to Dr Spelman's agreement to the proposition that borderline personality disorder led to both impulsivity and instability, Dr Spelman

clarified that instability referred to instability in her mood, so she would have more rapid changes in her mood that were more dramatic than other people would. The reference to self-damaging was to behaviours which have a negative consequence or outcome, such as in respect of her relationship history. To Dr Spelman's knowledge, Mrs Boyce had never physically harmed herself. It would be extremely rare for suicidal ideation to occur when the person was in the manic phase, rather than the depressive state. Alcohol and diazepam have fairly similar effects in reducing anxiety and increasing disinhibition and sedation.

[92] The appellant did not give or call evidence.

The pre-trial ruling on Dr Ong's expertise

[93] Prior to the commencement of the trial, the learned trial judge heard an application by the appellant that Dr Ong's evidence that it was his opinion that Mrs Boyce's death was caused by a second person rather than by the deceased herself (the opinion) should be excluded. After hearing evidence from Dr Ong for the purpose of the application, the trial judge refused the application: *R v Lang* [2020] QSCPR 26 (the ruling). The trial judge applied (at [31] of the ruling) the statements of Gummow and Callinan JJ in *Velevski v The Queen* (2002) 76 ALJR 402 at [160] and concluded (at [32]-[34] of the ruling) that Dr Ong had laid a sufficient foundation for the opinion based on Dr Ong's general experience of incised or stab wounds and his general experience with respect to the investigation of deaths involving suicide against a background of his specialist training in forensic pathology. The trial judge accepted (at [35] of the ruling) that it was also relevant that the appellant's counsel had conceded that Dr Ong could speak of the factors that favour a view of self-infliction and those that favour a view of homicide which must be based on an acceptance of Dr Ong's expertise to identify those factors.

[94] The evidence of Dr Ong at the pre-trial hearing included the following. Dr Ong has been a forensic pathologist for 25 years and had probably conducted 5,000 autopsies and published a paper on incised injuries. About 30 per cent of his investigations involved cases of suspected suicide. He estimated that he saw at least two or three cases per year involving stab wounds. He saw only one or two suicides a year involving incised wounds or stabbings. As part of his role as a forensic pathologist he determines whether a person has committed suicide or whether there is some other means or mechanism which has caused the person's death and is familiar with the literature (both textbooks and other reported cases) on that topic in relation to incised wounds. The six pages of diagrams on which Dr Ong had drawn to show the direction of travel of track A and track B (which accorded with exhibit 52 at the trial) were tendered. Dr Ong gave brief evidence about the path of travel of the knife along the two tracks that comprised track A and the three tracks that comprised track B.

[95] The opinion was based on Dr Ong's experience, the literature and the logical sense of what happened. Dr Ong had come across two reports of self-inflicted stab wounds with a single entry in the skin and had been referred to one other case which had been examined at his centre. These three cases did involve a single entry with several tracks internally, but that was "fairly rare". By the logical sense of what happened, Dr Ong was referring to the fact that, if the injuries were self-inflicted, Mrs Boyce would have first inflicted herself with the injuries of track A which involved two movements, the knife would have been partially withdrawn and then rotated and re-stabbed in a different direction at least twice. Dr Ong had personally

examined probably less than 10 cases where death resulted from a single entry stab wound with multiple tracks within the one stab wound.

[96] There were five features which Dr Ong took into account:

1. the multiple tracks;
2. the fact that there had been an impact of the ribs;
3. the rotation of the knife;
4. the piercing through the sheet; and
5. the lack of hesitation injuries associated with self-inflicted injuries.

[97] Of those five features, Dr Ong considered the latter two were equivocal, so that his opinion was primarily based on the other three features. He considered that multiple stabs or incisions indicated the involvement of a second party. He was confident that the transportation of the body to the morgue could not account for the two tracks that comprised track A or for the first two tracks that comprised track B.

[98] As the evidence of Dr Ong at the pre-trial hearing (and at the trial) showed, there were unusual aspects to the path the knife that travelled on the two tracks comprising track A, before being partially withdrawn and rotated and then travelled on at least the first two of the tracks comprising track B.

[99] The appellant's submission on the appeal focused on the statement that Dr Ong made in cross-examination at the trial in response to being questioned about the significance of the delay in the rotation of the knife. His full answer was:

“I just find that it's – that if a person needs to – in an attempt to – to self-inflict injuries, that it – that – that the injurer would take the trouble to rotate a blade, rather than just plunge it in different directions.”

[100] The appellant therefore submitted on the appeal that Dr Ong was expressing a personal opinion as to the likelihood of Mrs Boyce acting in a particular way and not an opinion based on his training, study or experience.

[101] This part of the cross-examination at the trial had commenced with Dr Ong being questioned about whether there was any difference between a single entry wound with a number of internal tracks or a single wound with a number of internal tracks plus a rotation of the knife. Dr Ong's response was there was a difference, because of the slight delay in the blade being rotated, and that played a role in his decision as to how the injury occurred. It was in that context that he was further questioned about the significance of the delay and that he gave the impugned answer. It is apparent that Dr Ong was answering the questions at the trial by reference to his experience and knowledge of the literature and, as he had explained in the pre-trial hearing, his analysis of the logical sense of what happened revealed by the nature of the injuries. It is not a fair reading of Dr Ong's evidence at trial to submit that the impugned answer was the expression of a personal opinion not based on his medical expertise in respect of stab wounds.

[102] Dr Ong's training and experience as a forensic pathologist in conducting post mortems of deaths resulting from stabbings and his familiarity with the relevant literature was sufficient basis for him to give an expert opinion by reference to his examination of Mrs Boyce's body at the scene and in the post mortem on whether the stabbing was more likely to be homicide rather than suicide. The appellant's

concession at the pre-trial hearing that it was within Dr Ong's expertise to give an opinion on the factors that are indicative of suicide, those which are indicative of homicide and those which are neutral or equivocal was properly made and is irreconcilable with the submission on this appeal that Dr Ong could not offer the opinion. As observed by Gummow and Callinan JJ in *Velevski* at [160], forensic pathologists "are well capable therefore of processing (*sic*) specialised knowledge enabling them to offer informed opinions as to the infliction, self or otherwise, of injuries". In similar vein, in *R v Mahony* [2019] QCA 131 where the issue was whether the deceased's injury was inflicted by the defendant or as a result of a fall from a height of six metres from a gum tree, it was held at [52] (by Sofronoff P with whom Morrison and McMurdo JJA agreed) that the three highly qualified forensic pathologists could express the opinion on the basis of their experience of actual observations made personally over many years that it was unlikely that the deceased could have fallen the distance claimed and suffered only the single injury to the rear of her skull.

[103] There was no error in the trial judge's ruling that Dr Ong could give the opinion at the trial. The appellant's focus on the language used by Dr Ong in answering one question at the trial when he was endeavouring to explain the significance of the delay due to the rotation of the knife does not undermine the foundation that was established in the pre-trial hearing for the giving of the opinion by Dr Ong. There is no challenge on this appeal to the directions given by the trial judge about the expert evidence. It is of note that the trial judge pointed out to the jury that the opinion was given by Dr Ong as an expert forensic pathologist based primarily on his observations of Mrs Boyce's body at the scene and during the autopsy and was not an opinion which took into account all the evidence in the trial. The jury were appropriately warned to consider the opinion in the context that it was not an opinion which was reached after a consideration of all the evidence.

[104] The appellant does not succeed on the ground of appeal based on the admission into evidence of the opinion.

Was the verdict unreasonable or unsupported by the evidence?

[105] The appellant's argument on this ground of the appeal was summarised as the evidence of the circumstances of Mrs Boyce's death pointed to it being suicide and the remaining evidence in the trial was not sufficient to overcome the reasonable doubt inherent in the prosecution case created by the circumstances of Mrs Boyce's death. That two-step process reflected in the appellant's argument is not the same as the assessment of the whole of the evidence in order to consider whether the verdict was unreasonable or unsupported by the evidence.

[106] The approach this Court must take in respect of this ground of appeal is to conduct an independent assessment of the whole of the evidence to determine whether it was open to a jury to be satisfied of the appellant's guilt beyond reasonable doubt: *SKA v The Queen* (2011) 243 CLR 400 at [20]-[22]. That assessment must be undertaken with particular regard for the advantage enjoyed by the jury over this Court which has not seen or heard the witnesses called at trial: *R v Baden-Clay* (2016) 258 CLR 308 at [65].

[107] The prosecution's case relied on the lie that it was asserted the appellant told the police that it was Mrs Boyce who threw her phone off the balcony to the formal

lounge room (or off the balcony to the television lounge room) somewhere around 9.00 pm, 9.30 pm or 9.45 pm on 21 October 2015 as a deliberate lie told to the police in consciousness of guilt of the offence of murdering Mrs Boyce. There were two aspects to the lie: the timing of when the phone was thrown over the balcony and the identity of the person who threw it. The interviews by police of the appellant on 22 October 2015 were lengthy and the essence of the timeline offered by the appellant as to what occurred after Mrs Boyce had finished her telephone calls on the evening of 21 October 2015 was that she threw the phone off the balcony around 9.30 pm and went to bed and then he went to bed around 11 pm was repeated numerous times by the appellant. The version given by the appellant that it was Mrs Boyce who threw her telephone off the balcony at or about 9.30 pm after she had started quizzing the appellant about the female contacts in his phone was shown to be a lie as to the timing by the fact that the text messages exchanged between Mrs Boyce and Mr McAlpine were viewed on the phone between 11.58 pm on 21 October 2015 and 12.03 am on 22 October 2015.

- [108] It was a jury question whether they were satisfied beyond reasonable doubt that it was the appellant, and not Mrs Boyce, who threw the phone over the balcony and that he therefore lied about that critical aspect. The jury had the opportunity to evaluate the credibility and reliability of the appellant in the interviews recorded by the police. By their verdict, the jury rejected the appellant's version. That was not unreasonable. There was the implausibility of the appellant's explanation that the catalyst for Mrs Boyce to throw her phone (rather than the appellant's phone) over the balcony was an argument they had about her suspicions in respect of the female contacts in the appellant's phone. There was his inability to remember when first asked which balcony Mrs Boyce had thrown the phone over, but then in the second record of interview, he purported to identify which balcony it was. It was also not insignificant that when he said he responded to Mrs Boyce's querying him about his female contacts, he first said he read them out and identified who they were, but when it was pointed out by the police that he had earlier said that Mrs Boyce had locked his phone with a PIN by this stage, he resiled from saying he read out the names from his phone.
- [109] There was ample evidence to support the inference that it was, in fact, the appellant who threw Mrs Boyce's phone over the balcony and that he also lied about that aspect:
- (a) both Dr Boyce who had remained married to Mrs Boyce since 1979 and was involved in her care and Zachary who was close to his mother were familiar with Mrs Boyce's presentation when she was depressed and she was not exhibiting those behaviours on 21 October 2015;
 - (b) when Dr Spelman saw Mrs Boyce on 20 October 2015, she was reasonably well-dressed, upbeat and not expressing any depressive symptoms;
 - (c) Mrs Boyce had gone to the movies in the afternoon of 21 October 2015, drunk some alcohol, went to dinner at a restaurant, returned home and wanted to watch "The Bachelorette", actively engaged in her telephone calls with Dr Boyce, Mr Walsh and Ms Russo about the next steps to take in the sale of the apartment (although she was annoyed at the failure of the potential purchasers who had viewed the apartment that evening to make an offer to purchase), and sounded in high spirits in her telephone call with Zachary that ended at 9.30 pm on that evening from all of which (in conjunction with the other evidence of Dr Boyce, Zachary and Dr Spelman on how Mrs Boyce

presented otherwise when she was depressed) it could be inferred that she was not in a depressive state in the evening of 21 October 2015;

- (d) the appellant himself described the phone as Mrs Boyce’s “lifeline”, that was confirmed by the analysis of Mrs Boyce’s phone that she kept every email and text and the evidence of the frequency of her use of the phone, and it could be inferred the phone was of such importance to her that it was unlikely, if she were not depressed, that she would throw it off the balcony;
- (e) the analysis of Mrs Boyce’s phone showed that the last messages that had been viewed were the text messages between Mrs Boyce and Mr McAlpine which had been scrolled back to the message dated 18 May 2015;
- (f) Mrs Boyce’s relationship with Mr McAlpine was referred to by the appellant numerous times in his records of interview from which it could be inferred that the appellant was fixated by that relationship consistent with the appellant having recently viewed the texts exchanged over time between Mr McAlpine and Mrs Boyce and the realisation for what the continuation of that relationship meant for the appellant’s relationship with Mrs Boyce; and
- (g) there was no evidence that the appellant knew Mrs Boyce’s PIN, but it was easily observable as the numbers were in a straight line in sequential order.

[110] Although Ms Neilson’s evidence was to the effect that Mrs Boyce sounded depressed and said that she was depressed, when they talked on the telephone on 20 October 2015, her evidence could be reasonably disregarded, because she did not know Mrs Boyce well, she was mistaken in her estimate of the length of the call and there was a lack of precision in the details of the events related in the conversation, such as when Mrs Boyce said she had tried to commit suicide. It was apparent from the content of the call revealed by Ms Neilson that Mrs Boyce was catching Ms Neilson up on a number of events that had occurred over the years since they had previous contact.

[111] The prosecution had relied on this lie as showing consciousness of his guilt of the offence of murder as the throwing of the phone over the balcony by him was an emotional response to his reading the text messages between Mrs Boyce and Mr McAlpine that provided a motive or explanation for the appellant’s action in stabbing Mrs Boyce to death. The reading of the texts by the appellant brought with it the realisation that his plans for Mrs Boyce to relocate to New Zealand to marry and live with him were not going to eventuate. The throwing away of Mrs Boyce’s phone showed the strength of the appellant’s reaction to that realisation. This lie to the police after the death of Mrs Boyce therefore had the requisite connection with a circumstance of the offence and was capable of being relied on by the prosecution as a lie showing his consciousness of his guilt of the offence.

[112] The significance of a lie showing consciousness of guilt in a circumstantial case was described by Sofronoff P (with whom Morrison JA and Brown J agreed) in *R v Boscaino* [2020] QCA 275 at [30]:

“This is because a jury can infer that the accused’s *reason for telling the lie* was to hide something that pointed to the accused’s guilt and wanting to hide something that points to one’s guilt of an offence is the motivation of a guilty person. In that sense, the lie constitutes evidence of “consciousness of guilt” because the lie proves a motivation based on guilt. It can also be regarded as an implied admission of

guilt in the sense that it is voluntary conduct by an accused that evinces guilt.”

[113] The fact that Dr Ong could not exclude the possibility of Mrs Boyce’s death being caused by suicide did not preclude the jury from otherwise accepting his expert evidence of the significance of the multiple stab wounds and that, after the track A injuries (involving two stab wounds), the knife was withdrawn for all but three to four centimetres of the blade, before its direction was changed to cause the injuries comprising track B (whether two or three stab wounds). Although Dr Ong estimated that it may have taken five minutes for Mrs Boyce to be sufficiently weakened from the injuries and loss of blood to the point of not being able to move, he also noted that it was subjective how a person who had alcohol and sedatives in their system would have been affected by that combination. The concessions made by Dr Ong in his evidence showed it was theoretically possible for Mrs Boyce to have used the knife with both hands and not get blood on her dominant right hand if it had been placed above the left hand on the knife, but the fact that when her body was found, her right hand was under the pillow on which her head rested and did not have any blood on it at all suggested that it had not held the knife. The estimate by Dr Ong of the timing of Mrs Boyce’s death placed the stabbing after the texts between Mrs Boyce and Mr McAlpine had been viewed on her phone. The number of stab wounds, the rotation of the knife, the appellant’s motive and the significant lie he told from which his guilt could be inferred supported the verdict of guilty of murder.

[114] Notwithstanding there was some evidence at the trial that arguably pointed to the possibility that Mrs Boyce committed suicide, there was no direct forensic evidence to implicate the appellant in the stabbing and there was no evidence that Mrs Boyce struggled with an attacker, a review of all the evidence does not reveal that there is a significant possibility that an innocent person has been convicted: *R v Miller* [2021] QCA 126 at [16] and [18].

Order

[115] The order that should be made is: Appeal dismissed.

[116] **BROWN J:** I agree that the appeal should be dismissed in this matter. I am in agreement with the reasons provided by Mullins JA that neither ground of appeal is established. Her Honour’s review of the evidence demonstrates that in light of all of the evidence presented at trial, there is not a significant possibility that an innocent person has been convicted. The additional reasons provided by McMurdo JA further demonstrates the significance of the lies told by the appellant to police in relation to the deceased’s mobile phone in the context of the review of the evidence as a whole.