SUPREME COURT OF QUEENSLAND

CITATION:	*R v Trebeck* [2018] QCA 183
PARTIES:	**R** **v** **TREBECK, Robert Ian** (appellant)
FILE NO/S:	CA No 331 of 2016 SC No 8 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Toowoomba – Date of Conviction: 9 November 2016 (Martin J)
DELIVERED ON:	7 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 February 2018
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDER:	**The conviction to be set aside and a retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of murder after a 13 day trial – where the case against the appellant was circumstantial, with no evidence of motive, and relied upon post-offence conduct of the appellant – where manslaughter was properly left for the jury as an alternative verdict despite not being a feature of the defence case – where the Crown retained the onus of proving intention and the jury retained the obligation to exclude any inference consistent only with manslaughter – where it was submitted by counsel for the appellant that the directions given by the learned primary judge allowed the jury to rely on the post-offence conduct as evidence of consciousness of guilt of murder, without considering whether that conduct could only point to consciousness of guilty of manslaughter – where the Crown submitted that the *Edwards* direction given by the learned primary judge had been effective, in the context of the summing up as a whole, and that *R v Mitchell* could be distinguished – whether the appellant was denied a proper consideration of conviction for manslaughter, rather than murder CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISCARRIAGE

OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE OF JUSTICE – MISDIRECTION OR NON-DIRECTION – where the Crown case against the appellant relied upon alleged lies relating to the extent of his contact with the deceased, his whereabouts at the time of the killing, what boots he was wearing at the time and how he sustained particular injuries to his wrist – where the appellant gave five different versions of the night in question to different people – where the identification of these lies and other related conduct occurred during the Crown's closing address – where the learned primary judge decided not to refer to those facts during his summing up as it would be "repetitive and over emphasising" – whether the failure to specifically identify the lies and other post-offence conduct was in error and likely to confuse the jury

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
R v Mitchell [2008] 2 Qd R 142; [2007] QCA 267, followed
R v Murray [2016] QCA 342, followed
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: S C Holt QC, with K Gover, for the appellant (pro bono)
C W Heaton QC for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** The appellant was convicted of murder after a 13 day trial. The case against the appellant was circumstantial, with no evidence of motive.

[2] The appellant and deceased were at a hotel in Goondiwindi on 15 March 2014. They knew of each other in the sense that they had previously been in contact via phone and Facebook. After the hotel closed a number of witnesses saw the two of them in a nearby park. Police witnesses gave evidence that they saw them twice: the first at 2.40 am; the deceased was in "good spirits" when they asked her if everything was okay; and the second at about 3.30 am, which was when the deceased was last seen.

[3] The deceased was found on the riverbank at Goondiwindi in the morning. Unchallenged forensic evidence established the cause of death namely, smothering, likely in a struggle. She had sustained a moderate blow to the head causing a left orbital fracture.

[4] The deceased's jeans were found pushed into a hedge about 150 metres away from the body. They were stained with her blood, and one trouser leg was scrunched up. It was the Crown's submission that the location and position of the jeans suggested that they had been used to smother the deceased.

[5] DNA testing was carried out on the deceased's body and inside her jeans. Both of them indicated the presence of the appellant's DNA. When he was examined on

17 March 2014, he had an abrasion to his left wrist, which the Crown argued might have occurred by pushing the jeans into the hedge, or if he fell in a struggle.

[6] The appellant did not give evidence at the trial. His defence case was that another man, Rowsell, must have killed the deceased. That is what he had told his parents in intercepted telephone conversations. On the final version of that case, he and the deceased were engaged in sexual activities by the river when Rowsell attacked them. Rowsell threatened the appellant and aimed to kick at him, but it missed and hit the deceased. At that point the appellant ran away, not looking back.

[7] That version came after the appellant had given differing versions of events to differing people.

[8] Rowsell's DNA was not found on the swabs from the deceased's body or the jeans.

[9] The appellant appeals against his convictions on three grounds related to the directions given to the jury about the use of post-offence conduct. The grounds are that a miscarriage of justice occurred because of:

1. the failure to distinguish between murder and manslaughter during the directions in relation to the use of post-offence conduct, specifically lies, as consciousness of guilt (the *Edwards*[1] direction);

2. the failure to precisely identify the post-offence conduct relied upon as consciousness of guilt; and

3. when directing the jury on the use of post-offence conduct as proof of the appellant's intention.

Differing versions given by the appellant

[10] The appellant gave various versions of events when speaking to different people. The variations were relied upon by the Crown as lies going to the consciousness of guilt.

First version to the police

[11] On 17 March 2014 the appellant spoke to police at his home. He initially said, "I … don't even know her name or anything".[2] He then gave an account that after the hotel closed he and the deceased walked down a street together and Rowsell had offered the deceased a lift home, which she refused. He said that he and the deceased had parted ways just before reaching a park in the town, and he walked back to the house he was staying in. Because he was locked out he "camped" near his ute, being let into the house at around 5.30 am. He was asked in that interview, "Do you have reef boots?", and he replied "No".[3]

Second version to the police

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1 *Edwards v The Queen* (1993) 178 CLR 193.

2 Appeal Book (**AB**) 523 ll 42-43.

3 AB 526 ll 28-29; the significance of the reef boots was that another witness (the appellant's then partner) said that was what he was wearing on the night but the police did not locate any such boots. At trial, the missing reef boots were linked to a mark found on the deceased's leg, which the prosecution described as a possible shoe impression.

[12] Later on 17 March 2014 the appellant gave a record of interview with the police. In this account he revealed that he and the deceased had "fooled around" in the park before they were interrupted by the police.[4] They then stayed in the park for about half an hour, parting ways and walking off in different directions, at which time he said the deceased was alive and happy.[5] He denied that he had worn reef boots, asserting that he had worn black, leather shoes that night. However, he admitted owning a pair of reef boots, but said he did not know where they were.[6]

[13] In a second part of that record of interview, the same day, the appellant denied having ever been to an area by the river where the deceased's body was found.[7]

Third version – the Crime Stoppers call

[14] On 9 June 2014 the appellant made an anonymous call to Crime Stoppers from his mobile phone. He was unaware that his phone had been tapped. He told Crime Stoppers that:

(a) in respect of the crime being investigated, the "person of interest … hasn't had any involvement in anything wrong";[8]

(b) that the person of interest had "been set up" in respect of the "whole lot … with his shoes";[9] he said "they've taken 'em off his car" and "the person of interest can't give 'em to the police to clear his name";[10]

(c) that the person who had taken his shoes off his car were "the person of interest's sister and brother-in-law" because "his sister hates him";[11] and

(d) he believed "they might have had something to do with the whole lot", referring to the murder as well as subsequent events.[12]

Fourth version - to the parents

[15] On 2 January 2015 the appellant's parents visited him in custody. The conversation was recorded. The appellant told them:

(a) he admitted to having sex with the deceased "in the park and down the river";[13]

(b) he was "too scared to tell them down the river because of what happened … because they'll think I've done it";[14]

(c) "I was down the river with her … and out of the blue he's come fucking running in", referring to Rowsell;[15]

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4 AB 907.
5 AB 908.
6 AB 950-951.
7 AB 942.
8 AB 958.
9 AB 957-958.
10 AB 959.
11 AB 961.
12 AB 962.
13 AB 970.
14 AB 970.
15 AB 970-971.

(d) that Rowsell went to kick him in the head, but as the deceased looked up Rowsell kicked her; "I don't know what happened from there. … I got up and run";[16]

(e) that he had not told the police because he was scared of being "an accessory";[17] and

(f) he explained that "you can't be a dog in [prison]. … you're a dog in here, you get fucking bashed".[18]

Fifth version - to the parents

[16] On 4 January 2015 the appellant's parents visited him in custody again. The conversation was recorded. In that conversation he made the following statements:

(a) referring to Rowsell, he said "… next minute, he come running over and said, 'Trebeck, you're gone'";[19] and

(b) "I had no reason to hurt her".[20]

[17] The appellant also gave varying explanations as to how he came to have abrasions on his wrist, which were noticed by various witnesses on the morning of 16 March 2014. The varying explanations included:

(a) he had been shearing burry sheep;[21]

(b) it happened in the course of his work out on the farm;[22]

(c) that they were the result of fencing and cutting and lifting logs;[23] and

(d) when he was examined by a doctor the appellant told him that a fresher, wide abrasion was "sustained it when he was lifting logs … that morning".[24]

[18] Three witnesses said they had not noticed the abrasions before 16 March 2014 and another gave evidence that they were definitely not there the previous day.

Formal admission at the trial

[19] After the Crown had closed its case the appellant made a formal admission under s 644 of the *Criminal Code* 1899 (Qld). The admission was in these terms: "On the morning of 16 March 2014, [the deceased] was unlawfully killed".

[20] I will return to the significance of this admission in relation to the grounds of appeal, but wish to observe two matters. First, consistently with the defence case a major issue for the jury to deal with was whether the appellant was the person who had killed the deceased. The defence case was that it was Rowsell. Secondly, if the jury concluded that it was the appellant who killed the deceased, the effect of the admission was that a verdict of at least manslaughter had to follow. Of course, if

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16 AB 971.
17 AB 971.
18 AB 971.
19 AB 994.
20 AB 988.
21 As told to Mr Styles, AB 70 ll 40-41.
22 As told to Mrs Styles, AB 88 ll 25-26.
23 As told to the police on 17 March 2014, AB 953.
24 AB 557 ll 19-21.

the jury were persuaded to the requisite standard that the killing was accompanied by the intention to kill or do grievous bodily harm, then the verdict of murder would follow.

Post-event conduct

[21] During the course of his address to the jury, Mr Heaton QC, appearing for the Crown, relied upon a variety of post-event conduct. The bulk of the conduct referred to in the address, and subsequently in the summing up, concerned the following lies:

(a) about the extent of his contact with the deceased; his whereabouts at the time of the killing were otherwise unaccounted for by independent means;

(b) about his whereabouts at the time within which the killing took place;

(c) about knowing the deceased; even initially denying knowing who she was;

(d) about the boots that he was wearing that night;

(e) about ever even owning reef boots; and

(f) about how he came by the injuries to his wrist.

[22] The other post-event conduct that the Crown relied upon consisted of three things, namely:

(a) the fact that he disposed of the boots he was wearing that night;

(b) the call to Crime Stoppers, which did not refer to any involvement by Rowsell; and

(c) the late disclosure of Rowsell's involvement generally.

The summing up

[23] In the course of the summing up the learned trial judge identified the fact that there were two major questions for the jury to consider. The way it was put is as follows:

> "The major questions for you are these: it is not in dispute that [the deceased] was unlawfully killed on the 16th of March. There are many individual questions that you will want to consider. But the major questions are these: one, has the Prosecution proved beyond a reasonable doubt that the defendant killed [the deceased]? And two, if it has, has the Prosecution proved beyond a reasonable doubt that he did so intending to cause her death, or at least, to cause grievous bodily harm?"[25]

[24] The learned trial judge turned to out of court statements which he identified in a general way, reminding the jury that the prosecution contended that there were lies within those statements. His Honour then said:

> "When you're considering the issue of whether he told lies or not, do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something means that that is evidence of guilt. The mere fact that a defendant tells a lie is not, in itself, evidence of guilt. A defendant may lie for many reasons.

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25 AB 680 ll 35-40.

> For example, to bolster a true defence or to protect someone else, or to conceal disgraceful conduct, or conduct that is short of the commission of the offence with which he's charged, or out of panic or confusion. If you think that there is or may be some innocent explanation for any lies then you should take no notice of them."[26]

[25] As his Honour said, that required four things: first, that the deceased was dead, which was not in issue; secondly, that the appellant had caused her death, which was denied; thirdly, that in doing so he intended to cause her death, or at least cause grievous bodily harm, and that was denied; and fourthly, that the killing was unlawful, which was admitted.[27]

[26] Having done that his Honour again identified the two real issues, which were whether the appellant had caused the death, and did he have the relevant intention for murder. His Honour went on:

> "If you answer yes to both those questions – that is, he killed her and he killed her intending to kill her or cause her grievous bodily harm, then the verdict is one of guilty of murder. If you find that he did kill [the deceased], but you're not satisfied he intended to kill her or cause her grievous bodily harm, then you would return a verdict of guilty of manslaughter."[28]

[27] His Honour then identified what was required for someone to hold an intention to kill or cause grievous bodily harm. He continued:

> "Now, I'll remind you about manslaughter because that has not been spoken of in great depth. Essentially it's the two questions I referred you to. If you're satisfied beyond a reasonable doubt that the defendant killed [the deceased], but the prosecution has not proved beyond a reasonable doubt that he did so intending to kill her, or to cause GBH, then the defendant is guilty of manslaughter only."[29]

[28] I pause to note that by framing the questions that way for manslaughter his Honour identified the relevant elements. The fact that the victim was dead and that the killing was unlawful were both admitted. That left the question of who killed the deceased, and if the jury were not satisfied that he had the intention necessary for murder, then manslaughter was the only alternative.

[29] In the course of dealing with directions on circumstantial evidence and how that should be approached, the learned trial judge directed the jury that if there was any reasonable inference or conclusion open on the facts that was inconsistent with the prosecution case then the circumstantial case failed. His Honour went on:

> "In this case, the defendant admits and has argued before you that there is another conclusion that you can draw which is consistent with the defendant's innocence and that is that … Rowsell is responsible for [the deceased's] death.

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26 AB 685 ll 32-40.
27 AB 686 ll 1-6.
28 AB 686 ll 14-19.
29 AB 686 ll 26-31.

> Part of the defendant's case, as argued yesterday, is that a reasonable conclusion can be drawn from the evidence that [the deceased] was killed by … Rowsell. If you find that to be so then the Prosecution's case fails and you must return a verdict of not guilty."[30]

[30] The learned trial judge then gave a direction specific to the question of lies. It was in these terms:

> "I turn now to what are said by the Prosecution to be lies told by the defendant. The Prosecution relies on them as part of the circumstantial case showing that he is guilty of the offence. Before you can use this evidence against the defendant you must be satisfied of a number of matters and unless you're satisfied of all these matters then you cannot use the evidence against the defendant.
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> First, you must be satisfied that the defendant has told a deliberate untruth. There's a difference between the mere rejection of a person's account of events and a finding that the person has lied. In many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The defendant may have been confused or there may be other reasons which would prevent you from finding that he has deliberately told an untruth.
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> Secondly, you must be satisfied that the lie is concerned with some circumstance or event connected with the offence. You can only use a lie against the defendant if you're satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it.
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> Thirdly, you must be satisfied that the lie was told because the defendant knew that the truth of the matter would implicate him in the commission of the offence and not some lesser offence. The defendant must be lying because he is conscious that the truth would convict him. There may be reasons for the lie apart from a realisation of guilt. People sometimes have an innocent explanation for lying. If you accept that a reason of this kind is the explanation for the lie then you cannot use it against the defendant. You can only use it if you're satisfied that he lied out of a realisation that the truth would implicate him in the offence."[31]

[31] The learned trial judge reviewed the evidence during the course of his summing up. That included specific reference to the evidence which was characterised as lies by the Crown.[32] Finally, in the course of summarising the address by the Crown, the learned trial judge referred to the categories of post-event conduct including lies with some specificity.[33]

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30 AB 688 ll 19-27.

31 AB 688 l 44 to AB 698 l 20.

32 What was said about the reef boots: AB 691 l 27, 32; AB 691 ll 35-40; AB 695 l 38; AB 697 ll 5-9; AB 702 l 25. What was said about the scratches on his arms: AB 691 l 27; AB 692 l 18, 30; AB 702 l 43. Lies to the police about where he was and his involvement: AB 696-697 l 3; AB 702 l 16. The Crime Stoppers call: AB 697. The different versions given to his parents: AB 697-701.

33 AB 706-707.

Ground 1 – failure to distinguish murder and manslaughter during the directions

Submissions

[32] Mr Holt QC and Ms Gover, appearing pro bono on behalf of the appellant, submitted that manslaughter was properly left for the jury as an alternative verdict, even though it was not a feature of the defence case. The Crown retained the onus of proving intention and the jury retained the obligation to exclude any inference consistent only with manslaughter, before using post-offence conduct to support a finding of guilt of murder. The directions given permitted the jury to bypass a crucial step in the reasoning process, namely to rely on post-offence conduct as evidence of consciousness of guilt of murder, without considering whether that conduct would only point to consciousness of guilt of manslaughter.[34]

[33] It was submitted that a jury following the directions actually given would not have considered whether there were any inferences consistent with unintentional killing before relying on that conduct in respect of the murder charge. It was submitted that the result was that the appellant was denied a proper consideration of conviction for manslaughter, rather than murder.

[34] Mr Heaton QC, appearing for the Crown, submitted that it was generally a matter for the jury to decide whether the post-offence conduct of an accused was related to the crime before them, rather than to some other culpable act.[35] That issue would turn upon the nature of the evidence in question and its relevance to the real issue in dispute.[36] There were no rigid prescriptive rules as to when and in what precise terms an *Edwards* direction should be given.[37]

[35] The jury were directed to consider whether the appellant had been lying for reasons other than that he was guilty of murder, such as to conceal conduct falling short of the commission of murder. That was signified by the learned trial judge's direction that they had to be satisfied that the lie was told because the truth would implicate the appellant "in the offence, and not some lesser offence". In context the words "the offence" would have been understood to refer to the murder charge, and the "not some lesser offence" phrase to manslaughter.

[36] Having regard to the directions given, in the context of the summing up as a whole, and in light of the issues at the trial, there was no risk of the jury having bypassed a crucial step in the reasoning process. Further, the appellant's experienced criminal defence counsel at the trial did not urge for any redirection.

[37] Further, it was submitted that *R v Mitchell* was distinguishable on its facts.

Discussion

[38] In *R v Murray*[38] the appellant was found guilty of murder and appealed in part in relation to errors in the directions about post-event conduct. At the trial it was admitted that he had killed the victim. The prosecution argued that his conduct in disposing of the body, cleaning up at the scene and disposing of some items which

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34 Relying upon *R v Murray* [2016] QCA 342 at [35] and *R v Mitchell* [2008] Qd R 142; [2007] QCA 267.
35 Referring to *R v Bayden-Clay* [2016] 258 CLR 308 at [73].
36 *Bayden-Clay* at [74].
37 Referring to *Zoneff v The Queen* [2000] 200 CLR 234 at [15].
38 [2016] QCA 342.

were there, was indicative of his guilt of murder. The learned trial judge in that case directed that the conduct of cleaning up the scene and disposing of the items at the scene could not be regarded as demonstrating a consciousness of guilt of murder, although it could be regarded as indicating that he was guilty of manslaughter.[39] The learned trial judge distinguished that conduct from disposing of the body, which his Honour said might indicate murder. The contention on appeal was that a direction should have been added, to the effect that the conduct in disposing of the body could not be used as an indication of guilt of murder, except if the jury was first satisfied that the conduct was not indicative of guilt of the lesser offence of manslaughter.[40]

[39] McMurdo JA[41] held that it was far from clear that, based on those directions, the jury would have understood that they should first consider whether the conduct of the disposal of the body could be explained by a consciousness of guilt of manslaughter, before considering (if at all) whether the conduct could be explained by the appellant's guilt of murder.[42] His Honour considered it important that in explaining his view to the jury, the trial judge did not say why, in his view, the conduct was not consistent with a consciousness of guilt for an unintentional killing of the deceased.[43]

[40] Several passages in *R v Mitchell*[44] were expressly adopted:

> "[29] In *R v Mitchell*, this court held that a conviction of murder should be set aside because an *Edwards* direction about lies told by the appellant was ineffective, in that the jury was not instructed that the lies might show a consciousness of guilt with respect to the unlawful killing of the deceased but not necessarily murder. Speaking more generally, Keane JA (as he then was) there said:
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> > '[48] In my respectful opinion, it is necessary for a trial judge to ensure that the jury clearly understand that they may use evidence of a lie by an accused as an indication of a consciousness of guilt of murder only if they are satisfied that the lie was not told out of a consciousness of guilt of some lesser offence, such as manslaughter …'
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> Keane JA then set out this passage from the judgment of Thomas JA (with whom McMurdo P and Davies JA agreed) in *R v Ali*:
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> > 'The term 'consciousness' of guilt or 'realisation of guilt and a fear of the truth' (*Edwards v The Queen* above at 211) remains an accepted rationale for a direction on this topic, although some of the problems associated with it have been recognised (*Zoneff v The Queen* (2000) 200 CLR 234, 244 at para 15). The problem that has been raised arises when several offences have been committed and the lie is equally explicable by consciousness of guilt of the lesser offence. Usually in such a

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39 *Murray* at [23].
40 *Murray* at [24].
41 With whom Gotterson JA and Douglas J concurred.
42 *Murray* at [26].
43 *Murray* at [28].
44 [2008] 2 Qd R 142; [2007] QCA 267.

> case it is necessary that this possibility be pointed out to the jury and in each of *R v May*, *R v M* and *R v R* it was held that the failure to do so amounted to an error. However, I do not think that it is always necessary to direct that a lie may be used only to support guilt upon the least of the options available. Obviously, each case must depend upon its own facts and circumstances. In the present case I think it was proper to leave the interpretation of these lies open to the jury as capable of supporting guilt on the appellant's part on all or any of these offences.'

Keane JA added:

> '[50] The effect of these decisions of this Court may, I think, be summarised in the following way: while it is for the jury to determine whether the circumstances are such that a lie can be said to be understood as revealing a consciousness of guilt of the greater offence, where the false statement is capable of amounting to an acknowledgement of guilt of one or more of several offences with which the accused stands charged, it is necessary for the trial judge to point out to the jury the possibility that the consciousness of guilt revealed by the lie relates to the lesser offence …'"[45]

[41] McMurdo JA continued, turning to the efficacy of the directions given in that particular case:

> "[30] As the respondent's argument appears to accept, the conduct of the disposing of the body was capable of amounting to an acknowledgement of guilt of manslaughter. In other words, it was open to the jury to find that the explanation for this conduct was that the appellant wanted to destroy evidence that he had unintentionally killed the deceased. The question is whether the directions which were given sufficiently indicated that factual possibility and instructed the jury that unless they rejected it, the conduct could not be indicative of the appellant's guilt of murder.
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> [31] There was no specific direction that the jury should reason in this way. That would not be critical if the directions, considered as a whole, did sufficiently instruct the jury such that they would know that they had to reason in the required way. There are examples of directions which were sufficient in that way in *R v Box & Martin* and *R v Ali*.[46]

[42] *Mitchell* involved charges of murder and two counts of assault occasioning bodily harm whilst armed with an offensive instrument. The appellant was convicted on all three counts. The evidence at the trial was that he had savagely attacked three persons. The appellant maintained he was not responsible for the attack on any of them, pleading severe intoxication. There were inconsistencies between what the

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45 *Murray* at [29].

46 *Murray* at [30]-[31].

appellant had said to investigating police and the evidence of the two survivors about the events on the night. It was open to the jury to find that his version of events was a lie. Keane JA concurred with the main judgment, in these terms:

> "[41] I also agree with the reasons of Williams JA upholding the second ground of appeal, namely, that, if an *Edwards* direction were properly given, the learned trial judge erred in failing to instruct the jury that lies told by the appellant might show a consciousness of guilt with respect to the unlawful killing of the deceased, but not necessarily murder."[47]

[43] It is in that context that his Honour's comments in paragraphs [48] and [50][48] were made. His Honour went on:

> "[55] I am respectfully in agreement with Williams JA that the direction given by the learned trial judge was not sufficient to alert the jury to consider whether the appellant's lie was told because of a consciousness of guilt for the assaults upon the complainants and the deceased. While the 'interpretation' of the appellant's lie about the circumstances of his return home could properly be left to the jury, the circumstances of the case were such as to require a direction that the jury consider carefully whether the appellant's lie was explicable by a consciousness of guilt in respect of the assaults upon the complainants and the deceased, or the killing of the deceased or the intended killing of the deceased."[49]

[44] In my respectful view the directions in this case suffered in the same way as those in *Murray* and *Mitchell*. First, it is doubtful that the jury would have understood that they may use the evidence of the lies as an indication of a consciousness of guilt of murder, only if they were satisfied that the lie was not told out of a consciousness of guilt of the manslaughter. Unless the jury rejected the factual possibility that the lies were only referrable to the manslaughter, they should not have taken them into account only in respect of the question of intent on the murder.

[45] Secondly, there was no direction to the jury requiring them to consider whether the conduct was consistent only with a consciousness of guilt of manslaughter. Thus, the jury may well have understood that they could consider the lies only in respect of the murder charge, without first considering whether they applied to the manslaughter.

[46] As was said in *Mitchell*, where the accused is charged with murder, but the lesser offence of manslaughter is available, "it is of critical importance to identify what is in issue at the trial and what precise admission is established by the lie".[50] In considering that question the admission that the killing was unlawful assumed some significance. It meant that in respect of the manslaughter alternative the fact that the deceased had been killed unlawfully was admitted. It followed that if the jury reached the conclusion that it was the appellant who killed the deceased, a verdict of

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47 *Mitchell* at [41].
48 Adopted in *R v Murray*.
49 *Mitchell* at [55].
50 *Mitchell* at [26].

manslaughter would necessarily follow. Therefore in respect of that charge the admission to be established by the lies in the post-event conduct was simply that it was the appellant who killed the deceased.

[47] On the murder charge, the position was different. One thing was common, namely that one admission sought to be established by the post-event conduct was that the appellant was the killer. However, as the jury were told on several occasions, the second admission that the post-event conduct was relied upon to establish was that at the time of the killing the appellant held the intent to kill or to do grievous bodily harm.

[48] Even though that is so, that does not, in my respectful view, avoid the difficulty that the jury were not directed to consider whether the post-event conduct, and more specifically the lies, were referrable only to a consciousness of guilt of manslaughter, rather than a consciousness of guilt of murder. As a consequence, the jury were not directed as to how to approach those questions, nor given any assistance as to whether the identified lies and other post-event conduct bespoke a consciousness of guilt of the one offence (manslaughter) as opposed to the other (murder). As was said by Keane JA in *Mitchell*[51] it was necessary to ensure that the jury clearly understood that they might use the evidence of the lies as an indication of consciousness of guilt of murder only if they were satisfied that the lies were not told out of a consciousness of guilt of manslaughter. Having been given no guidance in that respect there is an obvious risk that the jury did not reason properly in dealing with that category of the evidence.

[49] Reference to the identified lies leaves open the suggestion that some or all of them could be said to be referrable only to a consciousness of guilt of manslaughter, rather than indicative of an intent in relation to murder. In summary the lies were as follows:

(a) the extent of the appellant's contact with the deceased;

(b) his whereabouts at the time of the killing;

(c) that he did not know the deceased;

(d) what boots he was wearing at the time and whether he owned reef boots;

(e) how he got his injuries to the wrist.

[50] The last lie, given that the inference was that he might have sustained those injuries whilst concealing the jeans 150 metres from where the attack occurred, might be said to indicate a consciousness of guilt in respect of murder rather than manslaughter. The others less clearly so. The same might be said of the post-event conduct that was not characterised as lies, namely:

(a) disposal of the boots;

(b) the call to Crime Stoppers which did not refer to Rowsell;

(c) the late disclosure of Rowsell's involvement; and

(d) disposal of the body.

[51] There is no need to focus on those aspects any further, as the point taken on appeal relates only to the lies.

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51 *Mitchell* at [48].

[52] This ground succeeds.

Ground 2 – failure to precisely identify the post-event conduct

[53] As will be evident from the passages from the summing up referred to above the identification of the post-event conduct and lies occurred in the course of summarising the submissions of the Crown in their address. That was a deliberate decision. The learned trial judge had provided a draft summing up, which included a list of the circumstantial evidence relied upon, including post-offence lies and disposal of the reef boots.[52] On the next day counsel were invited to comment upon the draft, and the learned trial judge identified that he had removed those facts from his summing up "because they are effectively contained in the summary of argument. … and it would be repetitive and over emphasising if I were to say it twice".[53] Counsel for the Crown agreed with that course and the transcript shows no contrary position taken by defence counsel.

[54] It was submitted for the appellant that the failure to specifically identify the lies and other post-event conduct was likely to have confused the jury, and there was a real risk that they approached their task in an unfocussed way.

[55] For the Crown it was submitted that the evidence relied upon was clearly identified during the course of the trial and summarised during the course of directions. There could have been no misunderstanding or confusion as to what the relevant evidence was. The removal of the itemised list from the judge's draft summing up was something to which objection was not taken by the appellant's experienced trial counsel.

[56] In my respectful view there is no need to reach a final conclusion in respect of this ground of appeal. Given the conclusion in respect of ground 1, had the directions achieved the level of precision mandated by *Mitchell* and *Murray* there is every likelihood that the directions would have included an identification of the particular lies and how they might apply to each of the charges. Were that to be the case, the concern of the learned trial judge, and also apparently of counsel, that there be an undue emphasis by repetition of the lies and other post-event conduct, was reasonable and, if the directions otherwise had been in conformity of what was required under *Mitchell* and *Murray*, then it may not have been confusing to have the recitation of the lies and other post-event conduct where it occurred in the summary of addresses. That said, if the directions were to have the level of precision required by *Mitchell* and *Murray*, it is more likely that the lies and other post-event conduct would have been identified and dealt with at that point. That would also have avoided any suggestion that directions did not have the imprimatur of the judge, rather than a recitation of counsel's addresses.

Ground 3 – failure to direct as to the use of the post-offence conduct as proof of intention

[57] In light of the conclusions in respect of ground 1 there is no need to deal with this ground of appeal.

Miscarriage of justice – the proviso

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52 AB 1010-1011.

53 Transcript T13-2 ll 12-22.

[58] This aspect can be dealt with shortly. For the appellant it was accepted that it would have been open to the jury to find that the appellant held the requisite intention to sustain a finding for murder. However it was submitted that the case was a circumstantial one and, whilst strong, it was not overwhelming. For the Crown it was submitted that there was no lost chance of acquittal on the murder charge because the case was overwhelmingly strong on the question of intent. Mr Heaton QC went so far as to submit that it was inevitable that the jury would have concluded that the appellant had the relevant intention, even without taking into account the lies.

[59] It is true that the case against the appellant was strong. Ignoring the lies, once the jury determined that it was the appellant who was the killer, they could have had regard to the following evidence, all of which could be argued to point to his holding the relevant intention:

(a) the uncontested evidence of how the deceased died, by being smothered from behind with her jeans; the blow to her head which required moderate force to cause an orbital fracture; it was likely a minute or more of smothering before she died;

(b) the manner in which he disposed of the body; she was dragged on her stomach to the river bank and dropped down;

(c) his DNA was found on her body and on the murder weapon (the jeans); it was inside the jeans, which were found inside out and scrunched up in the hedge;

(d) he hid the jeans 150 metres away; and

(e) he disposed of the footwear he was wearing on the night.

[60] As was conceded by the appellant it was open to the jury to conclude that the appellant held the relevant intention. However, I find it difficult to conclude that the evidence was such that it was inevitable that the jury do so. Given that the appellant and the deceased were engaging in some forms of sexual activity the DNA may be argued to be equivocal. The disposal of the jeans and footwear can be argued to be referrable to an unintentional killing, and the disposal of the body was arguably not so elaborate as to bespeak only of such an intent, as in *R v Baden-Clay*.[54] The manner of the killing certainly points to the intent to kill or do grievous bodily harm but it could be argued that it is also referrable to an attempt to subdue or overcome resistance.

[61] In my respectful view, there is a real risk that the jury's conclusion as to intent was affected by the fact that they did not approach the task of weighing the evidence of lies and other post-event conduct in an appropriate way. They had been urged to use that evidence not only to determine that it was the appellant who killed the deceased, but also that the appellant had the requisite intention for murder as opposed to being guilty of manslaughter. If some of that evidence was only referrable only to an unintentional killing rather than murder, then the risk is manifest.

[62] As was the case in *Mitchell*, the issue of intent to kill should not be confused with questions about motive to kill. No apparent motive to kill was suggested in respect of the appellant. He had been engaging with the deceased in consensual forms of

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54 (2016) 258 CLR 308.

sexual activity earlier in the evening, and she had indicated to the police that she was in good spirits whilst in the appellant's company. The absence of motive could have been regarded as an indication of an unintentional killing. That highlights the risk that the jury's treatment of the lies and post-event conduct may have been decisive on the question of intent.

[63] In my view, this is not an appropriate case in which the proviso should apply.

[64] I have had the opportunity to read the additional reasons given by McMurdo JA and agree with those reasons.

Conclusion and disposition of the appeal

[65] For the reasons given above the conviction should be set aside and a retrial ordered.

[66] **McMURDO JA:** This appeal should be allowed, and a re-trial ordered, substantially for the reasons given by Morrison JA.

[67] In essence, the three grounds of appeal involve a complaint that the trial judge failed to properly direct the jury as to how they might use evidence of lies and other post-offence conduct.

[68] In *Osland v The Queen*,[55] Gaudron and Gummow JJ said that where a jury might treat lies as evidence of guilt, the preferable course is for the trial judge to ascertain precisely what the prosecution contends may be made of the evidence in question, before instructing the jury, as required by *Edwards v The Queen*,[56] if the evidence (in the judge's view) may be left to the jury as evidence of guilt. In cases such as this one, where there is an issue of whether the defendant killed with the requisite intent, the preferable course is for the trial judge to ascertain whether the prosecution contends that any, and if so what, lies or other conduct amounts to evidence of the defendant's guilt of murder, rather than merely manslaughter. Unfortunately, that did not occur in the present case.

[69] In summarising his argument to the jury, the prosecutor said that the appellant had lied about the extent of his contact with the victim, his whereabouts at the time within which the killing took place, the boots that he was wearing and how he suffered the injuries to his wrist, before saying that the appellant knew that if he was to tell the truth about those things, "that would implicate him in the commission of the offence." It was likely that the jury understood the "offence" to be that of murder. Earlier in his address, he had identified further lies told by the appellant, such as in his first conversation with the police when he denied knowing who the victim was. At that earlier point of his address, the prosecutor did not expressly rely upon lies and post-offence conduct as evidence of the appellant's guilt.

[70] After the addresses and before the summing up, the judge requested and was given by counsel summaries of their arguments, so that the jury could be directed about them. The prosecutor's summary contained this statement, which the judge used in summarising his argument:

> "Intent for murder can be inferred from the nature of the murder, as well as Mr Trebeck's post-offence conduct in attempting to dispose

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55 (1998) 197 CLR 316 at 334 [44]; [1998] HCA 75.

56 (1993) 178 CLR 193 at 210 – 211 per Deane, Dawson and Gaudron JJ; [1993] HCA 63.

> of her body, hiding her jeans, destroying the shoes and attempting to distance himself from the crime scene by telling lies."

[71] Consequently, the prosecution argument as it was ultimately conveyed to the jury, was that all of the appellant's lies and that post-offence conduct was evidence of an intention to kill or do grievous bodily harm. Nevertheless, as Morrison JA has explained, the jury was not duly directed as to how they should assess that argument. They were not told that they could use a lie or some other post-offence conduct as evidence of murder, only after they had considered whether it was explicable as showing a consciousness of guilt of an unintentional killing of the deceased, but not necessarily murder.[57]

[72] As to the operation of the proviso, the fact that the jury did return a guilty verdict is of little weight in this case when that verdict might have been affected by the directions which were, and were not, given. Having reviewed the evidence, most importantly that of Dr Storey as to the likely cause of death, I am unpersuaded that no substantial miscarriage of justice has actually occurred. I accept, as is conceded for the appellant, that it was open to the jury to convict him of murder. But without having heard and seen the evidence as it was given, I am unpersuaded that this evidence proved, beyond reasonable doubt, the appellant's guilt.[58]

[73] **BODDICE J:** I agree with Morrison JA. I also agree with the additional reasons of McMurdo JA.

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57 *R v Mitchell* [2008] Qd R 142; [2007] QCA 267 at [41] per Keane JA.

58 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81.