This decision has been amended. Please see the end of the decision for a list of the amendments.

Court of Criminal Appeal
New South Wales

Case Title:	Lane v R
Medium Neutral Citation:	[2013] NSWCCA 317
Hearing Date(s):	23 July 2013
Decision Date:	13 December 2013
Before:	Bathurst CJ; Simpson J; Adamson J
Decision:	Appeal against conviction dismissed
Catchwords:	CRIMINAL LAW - appeal - murder - whether error in failure to leave alternative count of manslaughter to jury - whether trial miscarried by reason of prejudice occasioned by Crown prosecutor - whether reversal of onus of proof - whether separate trial application should have been made in respect of perjury/false swearing charges - whether trial miscarried by failure of trial judge to discharge jury after Crown prosecutor made prejudicial remarks in opening address - whether error in leave granted pursuant to s 38 Evidence Act 1995 - whether verdict unreasonable and not supported by evidence - failure of trial counsel to request direction regarding delay in prosecution - all grounds rejected - appeal dismissed
Legislation Cited:	Crimes Act 1900 Criminal Appeal Act 1912 Criminal Appeal Rules Criminal Code (Qld) Evidence Act 1995 Jury Act 1977
Cases Cited:	Alford v Magee [1952] HCA 3; 85 CLR 437 Barca v The Queen [1975] HCA 42; 133 CLR 82

Beavan v The Queen [1954] HCA 41; 92 CLR 660
Burns v The Queen [2012] HCA 35; 246 CLR 334
Carney v R; Cambey v R [2011] NSWCCA 223; 217 A Crim R 201
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152
Demirok v The Queen [1977] HCA 21; 137 CLR 20
Director of Public Prosecutions v Newbury [1976] UKHL 3; [1976] 2 WLR 918
Edwards v The Queen [1993] HCA 63; 178 CLR 193
Gammage v The Queen [1969] HCA 68; 122 CLR 444
Gilbert v The Queen [2000] HCA 15; 201 CLR 414
Gillard v The Queen [2003] HCA 64; 219 CLR 1
Huynh v The Queen [2013] HCA 6; 87 ALJR 434
Hyam v Director of Public Prosecutions [1974] UKHL 2; [1975] AC 55
Jones v Great Western Railway Co (1930) 144 LT 194
Justins v R [2010] NSWCCA 242; 79 NSWLR 544
Libke v The Queen [2007] HCA 30; 230 CLR 559
Longman v The Queen [1989] HCA 60; 168 CLR 79
M v The Queen [1994] HCA 63; 181 CLR 487
Markby v The Queen [1978] HCA 29; 140 CLR 108
MFA v The Queen [2002] HCA 53; 213 CLR 606
Mraz v The Queen [1955] HCA 59; 93 CLR 493
Nudd v The Queen [2006] HCA 9; 162 A Crim R 301
Nydam v R [1977] VR 430
Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 at 431
Pemble v The Queen [1971] HCA 20; 124 CLR 107
R v Barlow [1997] HCA 19; 188 CLR 1
R v Birks (1990) 19 NSWLR 677
R v Collie [1991] SASC 2996; (1992) 56 SASR 302
R v Donald [1997] QCA 454]
R v Downs (1985) 3 NSWLR 312 at 327
R v Gilbert [1998] QCA 13
R v Gillard and Preston (No 3) [2000] SASC 454; 78 SASR 279
R v Holzer [1968] VR 481
R v Kanaan [2005] NSWCCA 385; 64 NSWLR 527
R v Lane [2011] NSWCCA 157; 221 A Crim R 309
R v Lavender [2005] HCA 37; 222 CLR 67
R v Rugari [2001] NSWCCA 64; 122 A Crim R 1
Richardson v The Queen [1974] HCA 19; 131 CLR 116
Ross v The King [1922] HCA 4; 30 CLR 246
Seltsam Pty Ltd v McGuiness; James Hardie & Coy Pty Ltd v McGuiness [2000] NSWCA 29; 49 NSWLR 262

	SKA v The Queen [2011] HCA 13; 243 CLR 400 Stevens v The Queen [2005] HCA 65; 227 CLR 319 The Queen v Crabbe [1985] HCA 22; 156 CLR 464 TKWJ v The Queen [2002] HCA 46; 212 CLR 124 Whitehorn v The Queen [1983] HCA 42; 152 CLR 657 Williams v Smith [1960] HCA 22; 103 CLR 539 Wilson v The Queen [1992] HCA 31; 174 CLR 313 Wood v R [2012] NSWCCA 21
Texts Cited:	Stephen's Digest of the Criminal Law, 1st edition (1877) The Duty of Care in Gross Negligence Manslaughter, Jonathan Herring and Elaine Palser [2007] Crim Law Rev 24
Category:	Principal judgment
Parties:	Keli Lane (Appellant) Regina (Respondent)
Representation	
- Counsel:	Counsel: W Terracini SC/J Trevallion (Appellant) J A Girdham SC/H Baker (Respondent)
- Solicitors:	Solicitors: Archbold Legal (Appellant) S Kavanagh - Solicitor for Public Prosecutions (Respondent)
File Number(s):	2009/256171
Decision Under Appeal	
- Before:	Whealy J
- Date of Decision:	15 April 2011
- Citation:	R v Keli LANE [2011] NSWSC 289
- Court File Number(s):	2009/256171
Publication Restriction:	Non publication of any information or material that may lead to the identification of certain children (s 15A Children (Criminal Proceedings) Act 1987)

JUDGMENT

1 **THE COURT**: On 9 August 2010 the appellant was arraigned in the Supreme Court on an indictment that charged one count of murder (*Crimes Act* 1900, s 18), and three of perjury (*Crimes Act*, s 327). A jury was empanelled and a trial commenced. On 2 December 2010, the trial judge, Whealy J, directed the jury to return verdicts of not guilty on each of the perjury charges, but left, as alternatives, charges of false swearing, a statutory alternative to perjury.

2 The jury trial proceeded over four months. On 13 December 2010 the jury returned unanimous verdicts of guilty on each of the false swearing charges. Later on the same day, after having been given directions in accordance with s 55F of the *Jury Act* 1977 (which permits, in specified circumstances, a majority verdict to be returned), the jury found the appellant guilty of the charge of murder. On 15 April 2011 Whealy J sentenced the appellant. In respect of the conviction for murder, he imposed a sentence of imprisonment for 18 years, with a non-parole period of 13 years and 5 months, commencing on 13 December 2010. In respect of two of the false swearing convictions, he imposed fixed term sentences of imprisonment for 9 months, also to commence on 13 December 2010, and therefore wholly subsumed in the sentence for murder. In respect of the third offence of false swearing, he imposed a fixed term sentence of imprisonment for 12 months, commencing on 13 February 2011, and therefore accumulated by two months, but nevertheless still wholly subsumed within the murder sentence.

3 The appellant appeals against her conviction on the murder charge. She does not appeal against the verdicts in respect of the false swearing charges. She has not sought leave to appeal against the sentences imposed.

The Crown case

4 The Crown alleged that, on or about 14 September 1996, the appellant murdered her daughter, Tegan Lane, then 2 days old. The Crown case was entirely circumstantial. Although s 18 of the *Crimes Act* specifies that the requisite state of mind to establish murder may be an intention to kill, an intention to cause grievous bodily harm, or reckless indifference to human life, it was always unequivocally the Crown case that the appellant's intention was to kill Tegan. Intention to cause grievous bodily harm and reckless indifference to human life can therefore be put to one side.

5 What follows is an outline of the Crown case. A more detailed account will be given in our consideration of ground 7 of the appeal, in which it is contended that the verdict was unreasonable and cannot be supported having regard to the evidence. In factual terms, the Crown case was largely uncontroversial. It is the inferences to be drawn from the factual background that are in dispute.

6 The appellant gave birth to Tegan at Auburn Hospital on 12 September 1996. Because the appellant had no partner, friend or relative present at the hospital, she was referred to a social worker, Ms Alicia Baltra-Vasquez. To Ms Baltra-Vasquez the appellant gave a comprehensively false account of her circumstances, saying by way of example, that her parents lived in Perth, and that she and her boyfriend had no close friends in Sydney. In fact, the appellant's parents lived at Fairlight, the appellant had grown up in Sydney, and she had a circle of friends. On 14 September 1996, between 11am and 12 noon, the appellant discharged herself from the hospital, taking Tegan with her. At about 3pm she arrived at the home of her parents at Fairlight. Tegan was not with her. Her parents did not know of Tegan's birth. They had not known that the appellant was pregnant. On arrival at her parents' home, the appellant met her then boyfriend, Duncan Gillies. Duncan Gillies was also unaware of the appellant's pregnancy, and unaware of the birth of Tegan. None of the appellant's friends or

acquaintances was aware of the pregnancy. The appellant's mother drove the couple to a wedding at Manly, where they remained until 11.30pm. Video footage of the wedding was in evidence, although it throws little, if any, light on the issues. Nobody appears to have noticed anything untoward about the appellant's appearance or behaviour. Nevertheless, the Crown case was that, in the hours intervening between the appellant discharging herself from the hospital and her arrival at her parents' home, she killed the child, and in some way disposed of her body. No body has ever been found.

7 Since the evidence indicates that the appellant's pregnancy had been entirely unknown to anybody but herself, and, presumably, her medical practitioner, no questions were raised about Tegan's whereabouts until October 1999, three years later. The inquiries that were then made arose because, on 31 May of that year, the appellant gave birth to another child, AJ. Again, neither her parents nor any of her friends were aware that the appellant was pregnant, or that she had given birth. She immediately (on 1 June) made contact with the Anglicare Adoption Agency, with a view to surrendering AJ for adoption. She dealt with a social worker called Virginia Fung. She told Ms Fung that AJ was her first child. This was not true. By that time, the appellant had in fact had two children, Tegan and a daughter to whom we will refer as TR, born in March 1995. As was the case with the 1996 pregnancy that resulted in the birth of Tegan, neither the appellant's parents nor any of her friends were aware of this pregnancy or the birth of TR. Similarly, in 1999, none of the appellant's family or friends was aware of the pregnancy, or the birth of AJ.

8 The appellant surrendered TR for adoption. For the purposes of adoption proceedings in the Supreme Court, the appellant swore two affidavits, the first on 3 April 1995, and the second on 28 April of the same year. In the first of these affidavits, the appellant deposed that she had been living in a de facto relationship with Duncan Gillies, and that TR was a child of that

relationship. She further deposed that Mr Gillies was then working in the United Kingdom, but had plans to return within 14 days.

9 In the second affidavit, she maintained that Mr Gillies was the father of TR, but said that she was separated from him, and that he wished to have no further involvement with the child, or to parent her, and he did not wish to sign an adoption consent form.

10 It was not in dispute that each of these affidavits contained false statements. They gave rise to two of the three perjury (later false swearing) charges.

11 In addition to the pregnancies that resulted in the births of TR, Tegan and AJ, the appellant has had two other pregnancies, each of which she had terminated.

12 The arrangements for the adoption of AJ did not proceed smoothly because Ms Fung was not able to satisfy herself (on the information provided by the appellant) that the father of AJ consented to the adoption. The appellant again gave an account of her circumstances that was false in many respects - for example, she said that she had had antenatal care at a hospital in Brisbane, before coming to Sydney, and prior to that, had lived in London with Duncan Gillies. None of this was true. She provided Ms Fung with contact details that were false. By 18 October the appellant was dealing with another social worker, of the Department of Community Services, John Borovnik, at Katoomba. In the course of his inquiries, Mr Borovnik discovered that, contrary to what she had told Ms Fung, the appellant had given birth to another child, Tegan. Mr Borovnik contacted the appellant at a private school where she was engaged as a teacher. In a telephone conversation she denied having had a baby girl on 12 September 1996. Mr Borovnik reported Tegan as a missing person to Katoomba Police.

13 On 13 September 1999, in relation to the proposed adoption of AJ, the appellant again swore an affidavit. She identified the father of AJ as "AW" and deposed that they had both been living in London when they met, and had had a brief sexual relationship, and had never lived together. She said that she had no contact with him after his discovery that she was pregnant, and said that she had no means of contacting him. Again, it was not in dispute that this affidavit contained false statements. It gave rise to the final perjury charge. It was the Crown's assertion that no such person as "AW" existed.

14 An adoption order for AJ was made by the Supreme Court on 30 June 2000.

15 Initially, a Detective Kehoe was in charge of the investigation into Tegan's disappearance. He interviewed the appellant on 14 February 2001. In October 2002 the investigation was transferred to Detective Gaut. Detective Gaut spoke to the appellant on 16 October 2002, and interviewed her on 9 May 2003. That interview was electronically recorded.

16 A very careful, thorough and detailed police investigation ensued. The investigation was initially directed to ascertaining whether Tegan was or was not alive. In the course of the investigations, in which she was interviewed on three occasions, the appellant gave a number of different versions of what had happened to Tegan after she left Auburn Hospital with her on 14 September 1996. On 25 October 1999 the appellant sent Ms Fung a facsimile in which she asserted that Tegan was living with a family in Perth, with whom she had not had contact for some time.

17 On 14 February 2001 the appellant told Detective Kehoe that she had given Tegan to her biological father, whom she identified as Andrew Morris. In October 2002, she identified the father as Andrew Norris.

18 These various statements concerning the disposal and whereabouts of Tegan were, in the Crown case, categorised as lies evidencing a consciousness of guilt: see *Edwards v The Queen* [1993] HCA 63; 178 CLR 193; *R v Lane* [2011] NSWCCA 157; 221 A Crim R 309.

19 A very extensive Australia wide search by police failed to locate any child who could possibly have been Tegan. A similarly extensive search failed to locate anybody who could have been the Andrew Morris or Andrew Norris of whom the appellant had spoken.

20 On this evidence (and a great deal more that will be detailed below), the Crown case was that Tegan was dead, and that her death had been caused by the appellant. Since no body had ever been found, the Crown was not in a position to propose a cause of death. Nor did it have any direct evidence of the state of mind of the appellant. The intention to kill on which the Crown relied had to be proved, if it were to be proved, by inference. In this respect, the Crown relied on the evidence of the appellant's history of taking steps to ensure that she did not have the responsibility of caring for a child or children - the evidence of two pregnancy terminations, and two children whom she had given up for adoption (one of the latter post-dating the birth of Tegan). The trial judge permitted this evidence to be relied on by the Crown as tendency evidence pursuant to s 97 of the *Evidence Act* 1995. There is in the appeal no challenge to that determination.

The trial

21 The senior Crown prosecutor opened the case to the jury in considerable detail, over three days. On the second day, he said:

> "We don't know how or where the accused killed Tegan, or how she disposed of the body. However, the Auburn Hospital was just a couple of kilometres away from the Australian College of Physical Education at what was then the Homebush Olympics site which at that time in 1996 was surrounded by vast swathes of

> vacant land, a few building sites and deserted roads, particularly at the weekend. So there was an opportunity nearby for the accused to find somewhere that was entirely private, which would have given her an opportunity to kill Tegan and dispose of the body."

22 This prompted a complaint by senior counsel for the appellant. The complaint was that the observations by the Crown prosecutor were not reflected in any evidence or proposed evidence that had been served on the appellant's legal representatives. After discussion his Honour indicated that the remark ought to be withdrawn, and the transcript records that the Crown prosecutor began proceedings on the third day by saying:

> "Yesterday I said to you that we don't know how or where the accused killed Tegan, or how she disposed of the body. There is no evidence at all as to what happened to Tegan or the accused, for that matter, during those three hours plus between when she left the hospital before midday, to use her own words, and when she arrived at her parents' house at Fairlight at 3pm.
>
> I think it is fair to say, ladies and gentlemen, that it would not be appropriate for you to speculate about what might have happened during that time. I ought not to have speculated about the Olympic site because there is no evidence of the Olympic site having been searched. I would like to correct what I said yesterday in that regard."

Notwithstanding that withdrawal, the remarks in the Crown opening are the subject of ground 5 of the appeal.

23 At the conclusion of the Crown opening, senior counsel for the appellant opened the defence case. He encapsulated the defence case in the following terms:

> "So, members of the jury, the first and perhaps fundamental difference, dispute or difference, between the defence and the prosecution is that our submission to you will be the Crown can't prove her death, the Crown can't prove the manner of her death, the Crown can't prove that any act was done by the accused in relation to Tegan Lane that either was done when she intended to cause Tegan's death or to do her serious bodily harm."

The trial then proceeded.

24 On 22 September the trial judge gave leave, pursuant to s 38 of the *Evidence Act*, to the Crown to cross-examine a Crown witness, Peter Clark. He did not give detailed reasons for this decision, but said:

> "Well, my view is that it is an appropriate case to allow it. The section, I think for the reasons I advocated [during argument] is triggered because of what appears to me to be an inconsistency in the statements [of Mr Clark]. It's not necessary for me to determine the other grounds in section 38. I take the view that there is nothing in section 192 that would preclude me from giving leave because it's a narrow issue. It's important to both parties and both parties will have the opportunity to cross-examine the witness. I think it's better to have the Crown's cross-examination out of the way first."

This ruling gives rise to ground 6 of the appeal.

25 The appellant did not give or call evidence in the trial. She had at all times in various interviews with police denied that she had killed Tegan, and maintained that she had given the child either to "the Perth couple" or Andrew Morris or Andrew Norris.

26 The evidence in the trial concluded on 16 November 2010. There was then a good deal of discussion between counsel and the trial judge concerning various issues. The Crown prosecutor commenced his final address on 22 November. At the conclusion of the address he said:

> "I have said to you that I don't know exactly what [defence counsel] is going to say in his address, but what I would ask you to do is to bear in mind certain questions whilst you are listening to [defence counsel's] address and to see what he says about these particular issues which we would submit to you are particularly pertinent issues to the resolution of this case."

27 He then posed a series of ten questions, in the following terms:

> "Firstly, why did the accused give eight different versions of what happened to Tegan?
>
> Secondly, why did the accused add Tegan to her Medicare membership at the Auburn Hospital if she was about to hand over Tegan to anyone else?

> Thirdly, why did it take the accused four hours to get home from the Auburn Hospital to Fairlight, either directly or via Venus Street?
>
> Fourthly, why did the accused tell Detective Kehoe and initially Detective Gaut that she would not be able to find Andrew Norris/Morris's unit in Balmain when she so easily found it in May 2003?
>
> Fifthly, why did the accused wait until May 2003 to look for Andrew Norris/Morris's unit in Balmain?
>
> Sixthly, why did Keli Lane lie to Detective Gaut about Lisa Andreatta of Brisbane knowing Andrew Morris and about the Tegan birth?
>
> Seventhly, why did the accused lie to Detective Gaut about looking for Andrew Norris/Morris's mobile phone number of Venus Street?
>
> Eight, why did the accused lie to Detective Gaut that her circle of friends had changed since the time that she had known Andrew Norris/Morris?
>
> Number nine is, is it just a coincidence that there are so many similarities between Andrew Norris/Morris and [AW]?
>
> Finally, tenthly, why would a natural father of a child not lodge the child's birth registration forms?"

The form in which the questions were posed gives rise to ground 2 of the appeal.

28 Defence counsel summed up his response in the following terms:

> "Point number one is that we do not even know that the victim is dead. Point number two is if she's dead, we don't know how she died. There's no scientific evidence at all. There's nothing. Nobody can tell us anything, not one word in this case.
>
> 'We don't know' number three is this, members of the jury: I haven't even got to the investigation and the evidence in the case yet directly. Number three is if she's dead, that is, Tegan Lane, we don't know who caused the death if anyone did because we don't know. It could have been an accident and people do terrible things to cover things up.
>
> And you will find out, members of the jury, when his Honour gives you directions in relation to this, that these next matters are absolutely as critical as the first point which we suggest is 'we don't know'. We do not even know that Tegan Lane is dead.

> Point number four: If Tegan Lane is dead we don't know that it was the deliberate act of Keli Lane that caused her death.
>
> Number five: We don't know that if Tegan is dead and the ability [sic - ? act] of Keli Lane caused her death, we don't know that it was done with the intention to kill her."

29 The trial judge then summed up in a manner that has not, except in one respect, attracted criticism. The exception is set out in ground 1 of the appeal.

30 The jury retired to consider its verdicts at 11.10am on 6 December 2010 (a Monday). Deliberations continued over the whole of that week. On the following Monday, 13 December, one member of the jury sent a note to the judge advising that the jury had reached unanimous verdicts on some, but not all, counts on the indictment, and that a unanimous verdict was unlikely in relation to one count. After discussion with counsel, the judge recalled the jury and ultimately was assured by the foreperson that the jury had reached unanimous verdicts in relation to the three counts of false swearing, and that it was unlikely that they would reach a unanimous verdict on the murder count. The judge then took those verdicts, each of which was guilty. The trial judge gave a direction in accordance with s 55F of the *Jury Act*. Within a very short time the jury returned with a verdict of guilty on the murder charge.

The appeal

31 Initially, eight grounds of appeal were pleaded, in the following terms:

> "1. The Trial Judge erred in failing to leave the alternative count of manslaughter to the jury.
>
> 2. The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor. In particular that he reversed the onus of proof in his closing address by positing a series of questions that he stated the defence had to answer.
>
> 3. A separate trial application should have been made by Trial Counsel in respect to the perjury/false swearing charges.

4. The Trial Judge should have directed the Jury that the charge of Infanticide was an alternative.

5. The trial miscarried by the failure of the Trial Judge to discharge the Jury after the Crown Prosecutor made prejudicial remarks in his opening address.

6. The Trial Judge erred in granting an application pursuant to Section 38 of the *Evidence Act 1995* made by the Crown Prosecutor to have Mr Peter Jerry Clark cross examined due to him making an allegedly inconsistent statement.

7. The verdict is unreasonable and cannot be supported by the evidence.

8. Failure of the Trial Counsel to ask for a direction that The Applicant had suffered prejudice as a result of the delay in prosecution."

During the course of the hearing of the appeal, ground 4 was abandoned.

Ground 1: should the trial judge have left an alternative count of manslaughter to the jury?

32 During the entire course of the trial there was never any suggestion that an alternative verdict of manslaughter ought to have been left to the jury. Whether an accused person seeks such a direction sometimes hinges upon tactical considerations. It should not be assumed that it is always to the advantage, or perceived to be to the advantage, of a person accused of murder to have the jury given the option of returning an alternative verdict of guilty of manslaughter. That may be seen to be offering the jury a middle path between conviction of murder and acquittal. Such a case was *Mraz v The Queen* [1955] HCA 59; 93 CLR 493 (see below). A person accused of murder may perceive an advantage in casting upon the jury the responsibility of determining whether he or she is guilty of murder, or is to be acquitted, with no middle course available. Although the tactical considerations had added force in the days when the penalty following a conviction for murder was or could be death, the consideration, while diminished somewhat, still remains valid. In *Mraz*, in a joint judgment, Williams, Webb and Taylor JJ said:

> "As those who are familiar with murder trials well know, if the only alternatives before a jury are acquittal and sentence of death, there is a strong tendency to shrink from pronouncing a verdict which leads to death ... Whilst, perhaps, the like comment may not now be made with quite the same force it is clear that the appellant was entitled to have the issues decided upon the graver charge and, to us, it seems quite wrong to attempt to justify the verdict of manslaughter, returned in the circumstances of this case, by the observation that the jury, upon an issue of manslaughter which they were invited to consider, must have reached conclusions on issues of fact which would have required them, if properly instructed, to have returned a verdict of murder. It is, of course, quite possible to say that the same conclusions on these issues of fact must have led the jury to find the appellant guilty of murder if they had been properly instructed. *But it would be ignoring the realities of the matter to assume that if they had been required to consider whether they should convict the appellant of murder or acquit him they would have reached the same conclusions*." (italics added)

33 Fullagar J said:

> "In many murder trials the question whether the possibility of a verdict of manslaughter should be raised presents a serious problem to counsel for the accused. Probably in most cases it is regarded as disadvantageous to the accused to suggest the possibility of a verdict of manslaughter. A jury which would hesitate to convict of murder may be only too glad to take a middle course which is offered to them. The position is well illustrated by *Ross v The King* [[1922] HCA 4; 30 CLR 246] ... In the same case in the High Court Higgins J. said:- 'I thoroughly concur with the view put by the Supreme Court that "the absence of any express direction as to manslaughter was an omission, as far as it went, entirely in the prisoner's favour". As those who are familiar with murder trials well know, if the only alternatives before a jury are acquittal and sentence of death, there is a strong tendency to shrink from pronouncing a verdict which leads to death' ... In the present case the jury may well have hesitated long before convicting the appellant of murder, and it is very far indeed from clear that the misdirection did not operate to his grave disadvantage. In such circumstances it is impossible to say that no substantial miscarriage of justice has occurred. These 'too favourable' directions can only too often be veritable gifts from the Greeks."

Mraz was a rare case in which it was held to have been erroneous to leave to the jury an alternative verdict of manslaughter. At trial, Mraz was acquitted of murder but convicted of manslaughter. That verdict was set aside and a verdict of acquittal entered.

34 The italicised passage from the joint judgment was quoted by Gleeson CJ and Gummow J in *Gilbert v The Queen* [2000] HCA 15; 201 CLR 414 at [14], with the comment:

> "17 When, in *Mraz*, the majority referred to 'ignoring the realities of the matter', one of the contemporary realities to which they were referring was the death penalty. That was why, tactically, defence counsel might prefer to conduct a homicide case on a 'murder-or-nothing' basis. The death penalty has gone, but there are other, perhaps equally influential, realities. This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J, a jury may hesitate to acquit, and may be glad to take a middle course which is offered to them."

35 That it may not be to the advantage of an accused person to have an alternative verdict of manslaughter left was also specifically recognised by Kirby J in *Gillard v The Queen* [2003] HCA 64; 219 CLR 1. His Honour set out a series of propositions of which the eighth and last was:

> "83 Eighthly, great care on the part of a trial judge is needed to ensure that, by posing the possibility of a verdict of manslaughter, the judge does not effectively deprive an accused of a verdict of acquittal ..."

The duty of a trial judge

36 The duty of a judge in a jury trial is:

- to explain to the jury the relevant law (without excursions into interesting but inapplicable legal principles);
- to place that explanation in the context of the facts of the case;
- to explain how the law applies to the facts of the particular case;
- to give these explanations in the context of the issues in the particular case;

- to identify the issues in the case as they have been fought between the parties; and

- to direct the jury on what those issues are.

The above propositions are drawn from the decision of the High Court in *Alford v Magee* [1952] HCA 3; 85 CLR 437 at 466. They have been adopted on many occasions since, relevantly for present purposes in *Stevens v The Queen* [2005] HCA 65; 227 CLR 319 by Gleeson CJ and Heydon J. See also *Huynh v The Queen* [2013] HCA 6; 87 ALJR 434 at [31]. In *Stevens*, Gleeson CJ and Heydon J were in dissent as to the outcome of the case, but the application of *Alford v Magee* principles is not controversial. Their Honours went on to say, at [18]:

> "A summing-up in a murder trial is not meant to take the form of an essay on the law of homicide, with points given for comprehensiveness. Juries decide issues of fact, not law. The task of the trial judge is to formulate for the decision of the jury the issues of fact which they need to resolve in order to return a verdict. In formulating those issues, the judge may think it appropriate to refer to legal principles by way of explanation, but the task of the jury is to decide facts ..."

37 It is clear from the principles stated in *Alford v Magee* and the passage extracted from *Stevens* that "the issues" are those which emerge from the way the trial has been conducted; that is, definition of the issues depends upon the conduct of the trial by the parties. That the jury had been adequately directed on the issues in the trial, as so defined, was central to the ultimate outcome in *Huynh*.

38 As at 1954, that was equally the case with respect to charges of murder. In *Beavan v The Queen* [1954] HCA 41; 92 CLR 660, the Court (Dixon CJ, McTiernan, Webb, Fullagher and Taylor JJ) said:

> "Upon an indictment for murder where the proofs suffice to justify a verdict of murder, but on no view of the evidence which might

> reasonably be adopted, would the crime amount to manslaughter and not murder, and counsel for the prisoner has not suggested to the jury the possibility of their returning a verdict of manslaughter, the judge is under no duty to inform the jury that it is within their power to find a verdict of manslaughter, unless the jury ask a question upon the subject. In that case it will usually be incumbent upon the judge to inform them that upon an indictment for murder it is within the province of a jury to find a verdict of manslaughter; but it is proper for him to add an expression of his opinion that in no view of the evidence which the jury might reasonably take are findings of fact open that fall short of murder but amount to manslaughter."

39 Since 1971, with respect to charges of murder, however, there is an important qualification to the *Alford v Magee* principles. Notwithstanding *Mraz*, it is now well established that, where a person is on trial for murder, *and where the evidence in the trial is capable of supporting a verdict of guilty of the lesser offence of manslaughter*, it is the duty of the trial judge to direct the jury of its entitlement to acquit the accused of murder and return a verdict of guilty of manslaughter. That is so even if the accused person does not seek such a direction, and even where the accused person actively opposes the direction.

40 That has been the position since the decision of the High Court in *Pemble v The Queen* [1971] HCA 20; 124 CLR 107. In that case, Barwick CJ, for example, said, at 117:

> "... There is no doubt that the course taken by counsel for the appellant at the trial contributed substantially to the form of the summing up. If the trial had been of a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial ... Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could *in the circumstances of the case upon the material before them* find or base a verdict in whole or in part.
>
> Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge

> of the duty to put to the jury with adequate assistance any matters on which the jury, *upon the evidence*, could find for the accused ..." (italics added)

In the same case, Menzies J said:

> "An appeal court is not, of course, concerned to investigate the actual basis upon which a jury has returned its verdict, but the events which I have outlined emphasize that the conduct of a case by counsel does not impose any limit upon the course which the jury may take and cannot make superfluous a full and accurate direction covering all that must be proved before a verdict of guilty can be returned ...
>
> ... Furthermore it is always in the power of a jury to acquit and that power cannot be denied ... Moreover, counsel for the defence cannot effectively disclaim a defence open to the accused *upon the evidence*. The judge must submit that defence to the jury. Even less can counsel concede a matter of law to the disadvantage of the accused. The law is always for the judge as counsel for the defence rightly told the jury ..." (italics added)

Windeyer J said:

> "... Of course this appeal cannot depend upon the form which advocacy took or upon the issue counsel presented to the jury ..."

Finally, Owen J said:

> "... On several occasions during his address to the jury the solicitor appearing for the appellant disclaimed any suggestion that his client should be acquitted of both murder and manslaughter. He asked the jury to acquit his client on the charge of murder and to return a verdict of guilty on the charge of manslaughter. The case was thus fought on the basis that the only question was whether the appellant was guilty of murder or not guilty of murder but guilty of manslaughter and it was in this way that the learned trial judge charged the jury ..."

41 In that case, the verdict of guilty of murder was set aside and, by majority, a verdict of guilty of manslaughter was substituted. The Court divided as to the outcome, and as to the reasoning processes. The commonality is in the passages extracted above - the duty of the trial judge, notwithstanding tactical or other decisions taken by an accused or counsel, to give the jury directions as to verdicts available *on the evidence*. It will be noted that, in

the passages extracted, and in the foregoing statement at [39], words to the effect of "on the evidence" have been italicised. They are a critical element of the principle.

42 This Court has concisely stated the current position, in four propositions, as follows:

> "(1) Manslaughter cannot be left for the determination of the jury as an alternative verdict in a murder trial unless there is evidence to support such a verdict (or unless the case on manslaughter is 'viable').
>
> (2) However, if in a murder trial the jury nevertheless returns a verdict of manslaughter where there is no evidence to support it, the judge may request them to reconsider the matter but, if they persist in that verdict, the judge must accept it.
>
> (3) *If there is evidence to support an alternative verdict of manslaughter*, the judge must leave that issue to the jury - notwithstanding that it has not been raised by any party, and even if a party objects (or all parties object) to the issue being left to the jury.
>
> (4)(a) *If there is evidence to support an alternative verdict of manslaughter*, and if the judge has not left that issue (for whatever reason), there has been an error of law.
>
> (b) Subject to the provisions of the *Criminal Appeal Rules* 1952 (NSW), r 4 (see [99]-[100]), the appellant is entitled to a new trial unless the Crown establishes that no substantial miscarriage of justice has actually occurred.
>
> (c) In determining whether there has been such a substantial miscarriage, it is not permissible to reason that the jury's verdict of guilty of murder at the first trial excludes any consideration of the alternative verdict of manslaughter at the new trial." (italics added)

R v Kanaan [2005] NSWCCA 385; 64 NSWLR 527 per Hunt AJA, Buddin and Hoeben JJ.

43 The outcome of this ground of appeal hinges on whether there was, in the evidence, material capable of supporting a verdict of guilty of manslaughter. It does not depend upon whether there was evidence capable of supporting a verdict of guilty of murder. That question arises in relation to ground 7. The mere fact that the jury has found all of the

elements of murder proved does not, of itself, obviate the need to consider whether manslaughter was a viable alternative. If it were, and manslaughter was not left, the appeal must be allowed. Determination of whether there was, on the facts of this case, evidence capable of supporting a verdict of manslaughter, or that a verdict of manslaughter was "viable", calls, first, for an examination of the law relating to murder and manslaughter.

Homicide

44 It is necessary to understand how murder and manslaughter fit together. The generic offence is homicide: *R v Downs* (1985) 3 NSWLR 312 at 327, per Smart J. Murder and manslaughter are species of the generic offence. Murder is defined in s 18 of the *Crimes Act* as follows:

> **"18 Murder and manslaughter defined**
> (1)
> (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
> (b) *Every other punishable homicide shall be taken to be manslaughter*.
>
> (2)
> (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
> (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only." (italics added)

45 Section 18(1)(b) makes clear that murder and manslaughter are mutually exclusive. If a killing is murder it is not manslaughter. It is murder if it is accompanied by the requisite state of mind. The same conduct cannot

constitute both offences. That is not to say that the evidence in any given case may not be so interpreted as to give rise to a verdict of either. But that is because of the inferences to be drawn from the evidence. If the requisite state of mind for murder is not proved, it is appropriate to consider whether, notwithstanding that murder has not been proved, the evidence may nevertheless establish the lesser offence of manslaughter.

46 It will be seen that while a detailed definition is given in s 18 of the circumstances in which a killing will be categorised as murder, there is no such definition of what constitutes manslaughter. For that, it is necessary to go to the common law, to which we will shortly come.

47 Speaking of the provisions of the *Criminal Code* of Queensland ("the Queensland Code") with respect to homicide, in *R v Barlow* [1997] HCA 19; 188 CLR 1, Brennan CJ, Dawson and Toohey JJ said:

> "The scheme of the Code's provisions relating to culpable homicide is to define unlawful killing, to divide the categories of unlawful killing into murder and manslaughter, to define the offence of murder by reference to the specific intent with which the fatal act must be committed or the fatal omission must be made or by reference to the circumstances which must accompany the commission of that act or the making of that omission, and then to define the offence of manslaughter as consisting of the residual cases of unlawful killing." (footnotes omitted)

Although the form of the Queensland Code provisions is very different, the substance of that passage applies equally to s 18 of the *Crimes Act*.

48 Section 18 defines the crime of murder by reference to the specific intent with which the act or omission causing death was committed, and by reference to other circumstances that render a killing murder. (The other circumstances are the commission of a relevant crime. This gives rise to the offence known as "constructive murder" or "felony murder". That has no application to the present case and it can be put to one side.) The definition of murder derives from the common law, as stated in Stephen's Digest of the Criminal Law, 1st edition (1877) as follows:

> "Art 223: ... Murder is unlawful homicide with malice aforethought. Malice aforethought means ... (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused ..."

See also *The Queen v Crabbe* [1985] HCA 22; 156 CLR 464 at 467-468.

49 In *Crabbe*, the High Court adopted a definition of murder as "unlawful homicide with malice aforethought", and of "malice aforethought" as either an intention to cause death or grievous bodily harm, or knowledge that the act that causes death will probably cause death or grievous bodily harm. The High Court emphasised that knowledge of death or grievous bodily harm as the probable consequence of the act (or omission) is sufficient to constitute the mental element for murder. That is because a person who kills while in possession of that knowledge is equally blameworthy as the person who does an act causing death with the express intention of doing so. The Court noted, but did not adopt (or reject), a view that to do an act that causes death knowing that death or grievous bodily harm is the probable consequence of the act is sufficient to give rise to an inference that the person intended those consequences (at p 469).

50 As mentioned above, there is no statutory definition of the offence of manslaughter. There are two categories of manslaughter - voluntary manslaughter and involuntary manslaughter: see *Wilson v The Queen* [1992] HCA 31; 174 CLR 313 (at p 333 [49]); *R v Lavender* [2005] HCA 37; 222 CLR 67 at [2]. Voluntary manslaughter is a creature of statute; it is committed where a killing which would otherwise amount to murder is reduced by reason of some circumstance provided by statute - provocation (*Crimes Act*, s 23), substantial impairment by abnormality of mind (*Crimes Act*, s 23A) or excessive self defence (*Crimes Act*, s 421). For voluntary manslaughter to be proved, it is necessary that the Crown first prove all of

the elements of murder; it is then necessary, in the case of s 23A, that the accused prove something additional: that, at the time of the acts or omissions causing death, his or her capacity to understand events, or to judge whether his or her actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind resulting from an underlying condition, and that the impairment was so substantial as to warrant liability for murder being reduced to manslaughter. With respect to s 23, if there is evidence that the act causing death was done or omitted to be done under provocation (as defined) the onus is on the prosecution to prove something additional - that the act was not done under provocation. Similarly, with respect to s 421, if the defence of self defence is raised, the onus is on the prosecution to prove that the act causing death was not done in self defence. The essential thing is that, before voluntary manslaughter can even be considered, all of the elements of murder must be proved.

51 That is not so in the case of involuntary manslaughter. Involuntary manslaughter is the product of the common law. There are two categories so recognised - manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence. The same conduct may give rise to liability under either category: *Burns v The Queen* [2012] HCA 35; 246 CLR 334 at [6].

52 It is involuntary manslaughter that, it is contended on behalf of the appellant, ought to have been left to the jury in this case. The contention is that both categories of involuntary manslaughter were available and ought to have been left. It will be necessary to examination that contention in some detail.

53 Before doing so, it is necessary to identify the specific features of each of the two categories of involuntary manslaughter.

Manslaughter by unlawful and dangerous act

54 In *Wilson*, Mason CJ, Toohey, Guadron and McHugh JJ described this category of manslaughter as "an uncertain area of the law, reflecting a divergence between Australian and English authorities as to the degree of danger which must exist". *Wilson* settled the law of manslaughter by unlawful and dangerous act for Australia.

55 An unlawful act is one which is contrary to the criminal law: *Wilson*, per Brennan, Deane and Dawson JJ (at p 335). A dangerous act is one carrying with it an appreciable risk of serious injury: *Wilson*, per Mason CJ, Toohey, Gaudron and McHugh JJ (at p 333), adopting (with one qualification - the deletion of the description "really" before "serious injury") the test specified in *R v Holzer* [1968] VR 481. It is no part of this offence that the accused intended to cause death or grievous bodily harm; if that were the case, the offence would be murder. It is necessary, however, that the Crown prove that the accused intended to commit the act that caused death. It is also necessary that the Crown prove that a reasonable person in the position of the accused, performing the act which the accused performed, would have realised that he or she was exposing another or others to that appreciable risk. In that respect, the test of dangerousness is objective.

56 In *Lavender* at [40], Gleeson CJ, McHugh, Gummow and Hayne JJ said, in a joint judgment:

> "40 ... The decision in *Wilson v The Queen* establishes that this is a form of manslaughter [that is, manslaughter by unlawful and dangerous act] which exists because of the importance which the law attaches to human life. It turns upon an objective test. The only relevant intent of the accused is an intent to do the act that was unlawful and dangerous and that inadvertently caused death. A description of an act as dangerous requires consideration of whether a reasonable person would have realised that he or she was exposing another to an appreciable risk of really serious injury ..."

See also *Burns* at [75].

57 In order to sustain a conviction of this category of manslaughter, it is necessary that the Crown prove:

(i) that the act causing death was a breach of the criminal law;

(ii) that the act causing death was one that carried with it an appreciable risk of serious injury to another or others;

(iii) that the act causing death was one that a reasonable person in the position of the accused would have realized carried such a risk; and

(iv) that the accused person intended to commit the act that caused death.

Manslaughter by criminal negligence

58 As in the case of the tort of negligence, the offence of manslaughter by criminal negligence takes as a starting point the existence of a duty of care owed by the accused to the victim: see *The Duty of Care in Gross Negligence Manslaughter*, Jonathan Herring and Elaine Palser [2007] Crim Law Rev 24; see *Justins v R* [2010] NSWCCA 242; 79 NSWLR 544, per Simpson J at [93].

59 What constitutes manslaughter by criminal negligence was stated by the Full Court of the Supreme Court of Victoria in *Nydam v R* [1977] VR 430. The Court said:

> "No doubt manslaughter does involve mens rea. But to use the language of Lord Salmon in Newbury's Case [*Director of Public Prosecutions v Newbury* [1976] UKHL 3; [1976] 2 WLR 918, at p 923], the necessary intent is no more than an intent to do the acts which constitute the crime. The problem is to formulate the requirement in terms which will enable the jury to determine whether the case is one of murder by recklessness or manslaughter by criminal negligence. The requisite mens rea in

> the latter crime does not involve a consciousness on the part of the accused of the likelihood of his act's causing death or serious bodily harm to the victim or persons placed in similar relationship as the victim was to the accused. The requisite mens rea is, rather, an intent to do the act which, in fact, caused the death of the victim, but to do that act in circumstances where the doing of it involves a great falling short of the standard of care required of a reasonable man in the circumstances and a high degree of risk or likelihood of the occurrence of death or serious bodily harm if that standard of care was not observed, that is to say, such a falling short and such a risk as to warrant punishment under the criminal law. This formulation proceeds on the footing that the accused man did not in fact advert (although a reasonable man would have adverted) to the probability that death or grievous bodily harm would ensue. It adopts the view of Menzies, J, in *Pemble v R*, supra, and of Lord Hailsham in *Hyam v Director of Public Prosecutions* [[1974] UKHL 2; [1975] AC 55, at p 79] that if the accused knows that the act is likely to cause death or grievous bodily harm, and consciously accepts that risk, it is murder. The formulation is consistent with the objective test of manslaughter by an unlawful and dangerous act approved by the House of Lords in *DPP v Newbury*, supra."

The Full Court concluded:

> "In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

60 The latter formulation has been expressly approved by the High Court: see *Lavender* at [136]; *Wilson* at p 333 [49]; *Burns* at [19], per French CJ.

61 As was pointed out in *Justins*, it is necessary that there be identity of the act or omission constituting the breach of duty of care, and the act or omission causing death; that is, it is essential that the act or omission that amounts to a breach of duty is the act or omission that causes death (*Justins*, at [97]).

62 Accordingly, to sustain a conviction of this category of manslaughter, it is necessary that the Crown prove:

(i) that the accused owed the victim a duty of care;

(ii) that the accused acted or omitted to act in such a way as to constitute a breach of that duty of care;

(iii) that that act or omission caused the death of the deceased; and

(iv) that the breach of duty was of such magnitude that it merited criminal punishment.

63 The above discussion, with respect to both categories of involuntary manslaughter, assumes two things - the death of the victim, and that the death was caused by an act (or, in the case of manslaughter by criminal negligence, an omission) of the accused. In the present case, both of those elements had to be proved, if they were to be proved, by inference. The verdict of guilty of murder establishes that the jury accepted that both were proved beyond reasonable doubt.

The elements of the offences of murder, manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence

Murder	Manslaughter by unlawful and dangerous act	Manslaughter by criminal negligence
1. Death of the victim	1. Death of the victim	1. Death of the victim
2. Death caused by the act or omission of the accused	2. Death caused by the act of the accused	2. Death caused by the act or omission of the accused
3. The accused acted or omitted to act with the relevant state of mind - that is:	3. (i) The act was unlawful (that is, criminal); (ii) The act was dangerous	3. (i) The accused owed a duty of care to the victim; (ii) breach of that duty

● intention to kill; ● intention to do grievous bodily harm; ● reckless indifference to human life		(by act or omission); (iii) identity between the act or omission constituting breach of duty, and act or omission causing death
	4. The accused intended to do the act that caused death	4. The breach of duty was so grave as to merit criminal punishment
	5. A reasonable person in the position of the accused would have appreciated that the act was one that, in the circumstances, exposed another or others to risk of serious injury	

64 One feature that distinguishes murder and manslaughter by criminal negligence on the one hand from manslaughter by unlawful and dangerous act on the other is that, in the case of former, conviction may result from proof that death was caused either by act or omission; as is apparent from the terminology, manslaughter by unlawful and dangerous act may only be established by proof of a specific act. And the act must be identified with precision. That is because, for conviction, the act must be shown to have the requisite characteristics - that it is unlawful (that is a breach of the criminal law), and dangerous, in the sense explained above. If the act causing death is not identified with precision, it is not possible to ascribe to it those characteristics.

65 There is a limit on the extent to which an omission may be relied upon to establish either murder or manslaughter. In *Burns*, the plurality said:

> "97 Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life. Such an obligation may be imposed by statute or contract or because of the relationship between

> individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind ..." (internal citations omitted)

66 The question which arises under this ground of appeal is whether, in the circumstances of this case, either category of manslaughter ought to have been left to the jury. The answer to that question depends upon whether there was, on the evidence, in either case, a "viable" alternative verdict. Manslaughter ought not to be left if there is no evidence to support such a verdict: *Ross v The King* [1922] HCA 4; 30 CLR 246; *Kanaan* at [50]. Indeed to leave an alternative verdict of manslaughter to the jury may be to do a disservice to the person accused, as illustrated by Kirby J in *Gillard* (at [83]).

67 Before turning to that specific question, it is useful to have regard to the practical application of the *Pemble* principles - the various occasions on which consideration has been given to when an alternative verdict of manslaughter ought to have been, but was not, left to the jury, and the rationale for the decisions. (We have already adverted to *Mraz*, where the converse was held - manslaughter was, but ought not to have been, left.) In every case, the factual basis is far removed from the present case.

Pemble v The Queen [1971] HCA 20; 124 CLR 107

68 We start with a reference to *Pemble*. *Pemble* is well known and widely cited for the propositions extracted at some length above. However, it is useful to examine the facts of that case, and the background to the statement of those propositions.

69 Pemble's trial took place in the Supreme Court of the Northern Territory in 1970. Pemble was charged with the murder of a woman with whom he had been living in a de facto relationship. The victim terminated the relationship. The victim died as a result of the discharge, admittedly by Pemble of a rifle. After a one day trial in the Supreme Court, the jury

convicted of murder. The High Court, by majority, set aside the conviction of murder, and substituted a verdict of manslaughter. The factual basis for that determination was drawn from statements made by Pemble to investigating police after the death, and a statement made by him in court. Those statements were to the following effect.

70 After the victim terminated the relationship, her father was, to Pemble, highly critical of her conduct, and could be said to have incited Pemble at least to anger, and violence against her. Pemble took a rifle to a local hotel, where he unexpectedly encountered the victim. In statements made to police and in court, he claimed not to have known that the rifle was loaded. He called to the victim, then stumbled. The rifle discharged, killing the victim.

71 Two important assertions are contained in this outline - that Pemble did not know that the rifle was loaded, and that, when he called the name of the victim, he stumbled. He said that he had no intention of discharging the rifle. Implicit in this was an assertion that the discharge of the firearm was accidental.

72 From the start of the trial, on his behalf it was accepted that he bore criminal responsibility for the death. His counsel opened and closed to the jury that the case was one of murder or manslaughter. He repeatedly invited the jury to reject the count of murder and convict of manslaughter. Pursuant to an express request by counsel, the trial judge directed the jury (in terms that would not suffice under present requirements and were held by Barwick CJ to have been inadequate) that they could bring in a verdict of guilty of manslaughter. What was not put, by either counsel or by the trial judge, in express terms, was the defence of accidental death was implicit in Pemble's account of events.

73 *Pemble* was therefore not a case in which it was said that the alternative verdict of manslaughter ought to have been, but was not, left. Nevertheless, the judgments bear heavily upon related questions.

74 Barwick CJ, McTiernan J and Windeyer J held that it would not have been reasonably open to the jury, on the evidence, to acquit Pemble by reason of accident. Barwick CJ held, however, that the direction as to manslaughter was inadequate. There were other defects in the summing up. Accordingly, his Honour reached the conclusion that the conviction for murder ought to be set aside, and a verdict of guilty of manslaughter substituted. McTiernan J and Windeyer J essentially agreed. The Court did not specify which category of involuntary manslaughter ought to have been left. Given the circumstances outlined above, it is feasible that either manslaughter by unlawful and dangerous act, or manslaughter by criminal negligence, was open.

75 Menzies J and Owen J considered that the accounts given by Pemble left open the possibility of accident, and the consequent possibility of acquittal. They therefore would have set aside the verdict of guilty of murder and ordered a new trial.

Gilbert v The Queen [2000] HCA 15; 201 CLR 414

76 In *Gilbert*, the issue arose in an indirect fashion. Gilbert, his brother and another man were jointly tried in the Supreme Court of Queensland on a charge of murder. The applicable law was the Queensland Code. Gilbert's brother was alleged to have been the principal perpetrator of the offence; Gilbert was said to be liable by reason of s 7(c) of the Queensland Code, which provided for accessorial liability. Gilbert's state of knowledge as to what his brother intended to do to the victim was critical. If he knew that his brother intended to inflict at least grievous bodily harm on the victim, then, by reason of s 7(c) of the Queensland Code, Gilbert was, as was his brother, guilty of murder. His case, however, was that all he knew was that

his brother intended to assault the victim. If the jury accepted that as a reasonable possibility, Gilbert was guilty of manslaughter. (This, presumably, was because he would have been an accessory to an unlawful and dangerous act.) Acting on the perceived understanding of the Queensland Code at the time, the trial judge did not leave manslaughter to the jury. The case went to the jury on the basis that he was guilty of murder, or should be acquitted.

77 After the Gilbert trial, the High Court delivered judgment in *Barlow*. This decision established that, contrary to the previous understanding, an alternative verdict of manslaughter ought to have been left to the jury. So much was accepted when Gilbert appealed to the Queensland Court of Appeal (*R v Gilbert* [1998] QCA 13). The question which then arose was whether, by reason of s 668E(1) of the Queensland Code, the appeal ought nevertheless be dismissed. Section 668E is the Queensland equivalent of the proviso to s 6 of the *Criminal Appeal Act* 1912, pursuant to which, notwithstanding established error, an appeal might be dismissed if the court considers that no substantial miscarriage of justice has occurred. By majority, the Court of Appeal applied the proviso and dismissed Gilbert's appeal. Gilbert appealed by special leave to the High Court, where the same issue was debated.

78 The proviso proceeds on the assumption that error has been established. The question posed by the proviso is whether, notwithstanding the error, the appellate court considers that no substantial miscarriage of justice has occurred. In the circumstances of *Gilbert*, that question was to be answered by reference to another question - whether the jury, properly instructed, would necessarily have returned a verdict of guilty of murder (at [19]-[20]). It was in the course of the consideration of that question that the members of the High Court made observations relevant to the issue now before this Court.

79 Three members of the Court (Gleeson CJ, Gummow J and Callinan J) concluded that, on the evidence, a jury properly instructed could have "failed to reach the state of satisfaction necessary for a conviction of murder". They therefore answered in the negative the question whether a verdict of guilty of murder was inevitable. McHugh J and Hayne J would have dismissed the appeal, McHugh J saying:

> "26 Where a trial judge correctly directs the jury as to the essential elements of the crime charged, a verdict of guilty necessarily amounts to a finding of every essential element of the crime, and the verdict cannot be set aside on the ground that the trial judge should have directed the jury that on the evidence they could convict the accused of a lesser offence ...
>
> 27 ... in the present case, the jury could not as a matter of law, fact or conscience find the appellant guilty of manslaughter. The jury's verdict negatives the essential facts that the appellant had to rely on to obtain a verdict of manslaughter ..."

80 The basis on which the various members of the Court reached their conclusions is interesting. The division turns upon the extent to which a jury is taken to apply intellectual rigour in applying itself to its task, and acting on the directions it has been given, and its reasoning process. For example, McHugh J said:

> 28 Consequently, the error of the learned trial judge ... had no causal effect on the jury's verdict. Even if the trial judge had directed the jury that they could find manslaughter, they could not have found him guilty of manslaughter given the findings that are *necessarily* implicit in their verdict of murder. The legal error of the learned trial judge, therefore, did not constitute a miscarriage of justice. The appellant would have been convicted of murder even if the jury had been directed that they could find him guilty of manslaughter and not murder.
>
> 29 The argument for the appellant would have it that this is too legalistic a way to look at the case. If manslaughter had been left as an issue, so the argument runs, the jury might have convicted him of manslaughter notwithstanding that their verdict necessarily shows that they were satisfied beyond reasonable doubt that the 'facts' upon which the 'defence' of manslaughter depended were not true. In my opinion, this argument should be rejected as a matter of legal policy as well as legal principle and established authority.

> 30 The argument for the appellant is a claim that this Court should proceed on one of two bases, each of which necessarily involves an assumption that, if manslaughter had been left as an issue, the jury might have disregarded their sworn duty to give a verdict in accordance with the evidence. The first assumption is that, if manslaughter had been left, the jury might have convicted of manslaughter even though they knew, because of the trial judge's directions, that the appellant was guilty of murder. The second assumption is that the jurors were not convinced beyond reasonable doubt that the appellant knew that his brother intended to kill or to inflict grievous bodily harm on [the victim], that they knew therefore that he was not guilty of murder, but that they nevertheless convicted him of murder rather than acquit him and see him go free. In my respectful opinion, as a matter of legal policy, no court of justice can entertain either assumption." (italics in original)

81 Hayne J, who concurred with McHugh J's view that the appeal should be dismissed, expressed similar views. His Honour said:

> "46 The issue that lies behind the question the parties identified is, however, fundamental: whether an appellate court can conclude that there may have been a miscarriage of justice because the jury *might* have disobeyed the instructions they were given in reaching the verdict they did. In the language of the cases dealing with the proviso in criminal appeal statutes, can it be said that, because the jury *might* have disobeyed what the judge told them, the accused lost a chance of acquittal that was fairly open to him?
>
> 47 The essence of the appellant's contention in this Court was that the jury should have been told to consider whether the appellant may not have known that his co-accused intended to kill or do grievous bodily harm to the victim (but, mistakenly, thought some lesser assault was intended). It was suggested that, had the jury been given such a direction, they might have felt able to choose a middle course between convicting the appellant of murder and acquitting him of any responsibility for what was done to the victim ...
>
> 48 ... it is of the first importance to understand that, consistent with the trial judge's directions, the jury could not have returned the verdict they did without being satisfied to the requisite standard that 'at some time before arrival at the scene [the appellant] realised that there was an intention to kill or do grievous bodily harm, and knowing that that was the intention, adhered to the plan by continuing to drive [his co-accused to their destination] ... so that that intention might be carried out'. If not satisfied of that beyond reasonable doubt, the judge directed the jury to return a verdict of not guilty of murder. By their verdict, then, the jury necessarily rejected the possibility that the appellant held the mistaken belief that underpinned the appellant's argument in this Court. Had they concluded that there was a reasonable possibility

that the appellant held that belief, the judge's directions obliged them to acquit the appellant of murder.

49 It follows that the contention that the appellant lost a chance of acquittal of murder that was fairly open to him because the jury were *not* told that they should consider whether he had some different and less precise knowledge of the intentions of his co-accused must be rejected. It is a contention that assumes that the jury disregarded the judge's direction that the appellant could be convicted of murder *only* if the jury were satisfied to the requisite standard that the appellant knew of the murderous intent of one or both of his co-accused." (internal citations omitted, italics in original)

82 Gleeson CJ and Gummow J recounted the arguments put on behalf of Gilbert, and said:

"13 The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.

[Their Honours referred to the reasoning in *Mraz* that is set out above.]

16 These statements are inconsistent with the notion that an appellate court must assume, on the part of a jury, a mechanistic approach to the task of fact-finding, divorced from a consideration of the consequences. Indeed, juries are ordinarily asked to return a general verdict. They make their findings of fact in the context of instructions as to the consequences of such findings, and for the purpose of returning a verdict which expresses those consequences.

17 When, in *Mraz*, the majority referred to 'ignoring the realities of the matter', one of the contemporary realities to which they were referring was the death penalty. That was why, tactically, defence counsel might prefer to conduct a homicide case on a 'murder-or-nothing' basis. The death penalty has gone, but there are other, perhaps equally influential, realities. This is an age of concern for the victims of violent crime, and their relatives. To adapt the words of Fullagar J, a jury may hesitate to acquit, and may be glad to take a middle course which is offered to them."

83 Callinan J referred to another decision of the High Court (*Gammage v The Queen* [1969] HCA 68; 122 CLR 444), in which Barwick CJ said (at p 451):

> "... They have no right, in my opinion, to return a verdict of manslaughter where they are satisfied of murder. But, as I have said, persistence by them in returning another verdict must ultimately result in the acceptance of that verdict. In that sense, but in no other sense, it is both within their power and, if you will, their privilege to return a wrong verdict."

Of this, Callinan J said:

> "96 This is to recognise the reality that a jury room might not be a place of undeviating intellectual and logical rigour. It is not to say that a jury should not perform their sworn duty to determine a case before them according to the evidence.
>
> ..."

His Honour went on to say:

> "101 The appellant was entitled to a trial at which directions according to law were given. It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.
>
> 102 I would agree with the statement that was made by Pincus JA in *R v Donald* [[1997] QCA 454] in these terms:
>
> > 'Circumstances can well be imagined in which failure to direct the jury of the possibility of a verdict of guilty of a lesser offence than that of which an offender has been convicted may cause injustice. That will surely be so, in general, if the lesser verdict is open on the evidence and has been raised as a possibility by the defence ...'."

Thus, three members of the Court allowed for a certain amount of loose thinking in the jury's reasoning process. Two members of the Court stood firmly on the assumption that juries comply rigorously with directions and steadfastly discharge their duties.

Stevens v The Queen [2005] HCA 65; 227 CLR 319

84 This was another case that concerned the Queensland Code. The short facts were that the victim was shot in the head. The only other person

present at the time of the shooting was Stevens. At trial Stevens gave an account of events preceding the shooting. His account was that he and the victim were business colleagues and friends who had arranged to meet for a discussion of their business arrangements, which were in a state of flux. When Stevens arrived for the meeting he found the victim holding a rifle that was pointed upwards. Stevens stepped forward to grab the gun, which discharged, killing the victim. Stevens was charged with murder.

85 Although asked to do so by counsel who appeared for Stevens at trial, the trial judge refused to leave to the jury the question of accident (for which express provision is made by statute). Instead, he directed the jury that intention to cause death or grievous bodily harm was an essential element of the offence of murder. If one or other of those intentions was not proven, the necessary consequence was acquittal. Manslaughter was not contended for either by the Crown or by the defence.

86 Nor was it argued in the High Court that manslaughter ought to have been left. The issue was the adequacy of the directions with respect to the nature of the factual issues in dispute.

87 Notwithstanding that, McHugh J considered that manslaughter ought to have been left (at [30]). At [29] he said:

> "A jury is entitled to refuse to accept the cases of the parties and 'work out for themselves a view of the case which did not exactly represent what either party said'."

88 In support of this proposition he referred to *Williams v Smith* [1960] HCA 22; 103 CLR 539 at 545. *Williams v Smith* was a civil case, tried before a jury, involving a claim for damages for personal injury resulting from a motor vehicle accident. There was conflicting evidence about the circumstances of the accident from the plaintiff and the defendant. The jury found in favour of the plaintiff motor cycle rider, but the Full Court of the Supreme Court of NSW set aside their verdict, finding that, on the

plaintiff's own evidence, contributory negligence was established (in the days when contributory negligence was a complete defence). The High Court reversed that decision, saying:

> "It was indeed a case in which the very divergent views of the parties might be compared by the jury and they might work out for themselves a view of the case which did not exactly represent what either party said. That is a possibility in such cases as this which every court of appeal must contemplate, and although there is no reason to suppose that is what they did in this case, it should not be excluded from the general view of the court."

89 Of significance, *Williams v Smith* was a case in which two competing, and divergent, accounts had been given. It was in that context that the Court said that the jury could, in effect, work out that the truth lay somewhere between the two versions. Moreover, while the Court accepted that a jury could develop its own hypothesis, there is nothing in the judgment that suggests that a judge should invite the jury to do so.

90 Two other members of the Court in *Stevens*, Kirby J and Callinan J, joined McHugh J in allowing the appeal and ordering a new trial, but on the ground that the sought direction concerning accident should have been given. Kirby J expressly rejected the proposition that manslaughter ought to have been left, saying:

> "87 ... To introduce that consideration as a possibility would have involved pure speculation applied to [the evidence of an expert witness]. There was no other evidentiary basis upon which manslaughter arose for judicial directions.
>
> 88 ... Although the agreement of the parties cannot control the judicial duty to instruct the jury on applicable principles of law, the trial judge did not err in failing to direct the jury in the present trial on manslaughter."

Callinan J (at [61]) agreed that the case did not call for a direction on manslaughter.

91 Gleeson CJ and Heydon J dissented in the result. Their joint judgment is important for a passage to which we will return, but which may conveniently be extracted at this point:

> "5 Both the prosecution and the defence conducted the trial on the basis that either it was a case of murder or the appellant must be acquitted. Manslaughter was not left to the jury. Neither side wanted that, and it has not been argued that manslaughter should have been left. *No doubt it is possible to surmise that something might have occurred between the two men that was different from what the prosecution alleged, and different from what the appellant said. What that could have been, however, is entirely a matter of speculation. The jury were not invited, by either counsel, or by the trial judge, to engage in such speculation. They were instructed that, unless they accepted the prosecution case, as summarised above, they must acquit the appellant*." (italics added)

Gillard v The Queen [2003] HCA 64; 219 CLR 1

92 In *Gillard*, in a trial in the Supreme Court of South Australia, it was the prosecution who sought to have manslaughter left to the jury. The defence successfully resisted the prosecution's application, and the trial judge declined to leave manslaughter; that ruling was upheld on appeal to the Supreme Court of South Australia: *R v Gillard and Preston (No 3)* [2000] SASC 454; 78 SASR 279. In the High Court, the Crown conceded that manslaughter ought to have been left. The High Court unanimously accepted that that concession was correctly made. It is apparent from the judgments that the category of manslaughter that the Court had in mind was manslaughter by unlawful and dangerous act: see [15], [16] (the extract from *Markby v The Queen* [1978] HCA 29; 140 CLR 108 at 112-113), [18] (the quote from *R v Collie* [1991] SASC 2996; (1992) 56 SASR 302), [25], [125]. The discussion in that case, however, as in *Gilbert*, focused on the principles relevant to joint criminal enterprises resulting in death. It throws little if any light on the issues that arise in the present case. Although considerable attention was paid to explaining the reasons that the Crown concession was correct, the real issue in the appeal was, again as in *Gilbert*, whether, notwithstanding the error, the proviso ought to

be applied on the basis that conviction of murder was inevitable. All members of the Court agreed that it ought not, and ordered a new trial.

93 None of the above cases factually bears any resemblance to the present case. The Court was referred to no case remotely like the present. For a practical application of the *Pemble* doctrine, reliance was placed on the decision of this Court in *Carney v R; Cambey v R* [2011] NSWCCA 223; 217 A Crim R 201.

94 *Carney* and *Cambey* was a case that may fairly be said to have taken the *Pemble*/*Kanaan* principles to their outer limits. The Crown case was that Carney and Cambey, with two other men (one of whom was tried separately) drove to the home of the victim for the purpose of obtaining cannabis, either on credit or as a result of a threat of violence. They assaulted the victim by hitting him around the head with a 30 cm metal bar and kicked and stomped on him. He died of head injuries, the result of a skull fracture. The evidence showed at least four separate blows to the head with the metal bar. The case was put to the jury on the basis that Carney and Cambey each inflicted injuries, or, alternatively, aided or abetted others to do so.

95 Neither Carney nor Cambey gave evidence in the trial. The defence made on their behalf was to put the Crown to proof, by suggesting that neither was present in the victim's home when the injuries were inflicted. A specific concession was made on behalf of Cambey that whoever inflicted the blows intended at least to cause grievous bodily harm.

96 In these circumstances, not surprisingly, the jury were not directed of an alternative verdict of manslaughter; no suggestion was made to the judge that such a direction should be given.

97 Notwithstanding that, on appeal, it was contended, and accepted, that such a direction ought to have been given. The Court noted the test in

Pemble and *Kanaan* - whether a verdict of manslaughter by unlawful and dangerous act was "open on the evidence", or was "viable".

98 The Court accepted arguments that Carney and/or Cambey may have used the metal bar "only intending to render the deceased unconscious or otherwise to incapacitate him", providing the basis for "a reasonable possibility that there was no intention to cause him really serious harm". It was put, and accepted, that there was a reasonable possibility on the medical evidence consistent with Carney and/or Cambey striking the victim once, intending to render him unconsciousness or otherwise to incapacitate him, and then having to strike him again with greater levels of force because the initial blows were ineffective.

99 Reliance upon this decision in the present case is misplaced. Certainly, it is a precedent likely to encourage appeal grounds of the kind now under consideration. However, there is no new statement of principle in the judgment; the statements of the applicable law are orthodox and uncontroversial. While some may consider the application of the principles to be surprising, even questionable, the judgment is of no precedent value.

Application of relevant principles to the present case

100 *Kanaan* Proposition 4(c) is to the effect that it would be wrong for this Court to take the view that, because the jury accepted that the Crown had proved all of the elements necessary to establish murder, an alternative verdict of manslaughter was necessarily excluded. The basis for this proposition lies in *Gilbert* and *Gillard*.

101 It is not uncommon in trials of criminal offences for alternatives to be identified in descending order of seriousness. Once a jury has found one of the alternatives established, it does not proceed further down the list. *Kanaan* Proposition 4(c) appears to create an exception to that practice, in

the case of murder trials. As a matter of logic, that can only emerge from reliance on the potential of a jury to take a sympathetic, or merciful - but not intellectually rigorous - view of the evidence. As a matter of logic, if a jury is satisfied beyond reasonable doubt of the elements of murder, there remains no room for a verdict of involuntary manslaughter. That is in accordance with s 18 of the *Crimes Act*.

102 Underlying *Kanaan* Proposition 4(c) is an assumption that, provided with alternatives, the jury may draw inferences, available on the evidence, more favourable to the accused person. We accept that that is the approach presently mandated. However, it remains subject to the existence of an evidentiary foundation for the inferences.

103 The key to the determination of this ground of appeal lies in the examination of what must be established in order to prove the appellant guilty of either of the categories of manslaughter. That examination has to take place in the context of the evidence. What is somewhat unusual is that, as Tegan's body has not been found, no cause of death can be determined. Whether the ground succeeds depends upon what inferences were (or would have been) properly available to the jury, on the evidence in the trial.

104 The circumstance that no cause of death can be determined concludes the issue of manslaughter by unlawful and dangerous act. Guilt of this offence depends upon the absence of intention to cause death or grievous bodily harm. As we have acknowledged above, the same evidence may be capable to giving rise to inferences that justify, or call for, a finding of murder, or that justify, or call for, a finding of manslaughter. As pointed out above, for a verdict of guilty of that category of manslaughter, it is necessary that the act causing death be identified with precision, in order that it can properly be characterised as both unlawful (a breach of the criminal law), and dangerous. What, it may be asked, is the criminal act that caused the death? How can it be said that it was dangerous in the

sense that a reasonable person in the position of the appellant, performing that act, would have realised that he or she was exposing another or others to an appreciable risk of serious injury? The evidence was not such as to permit or justify the inferences necessary to found a conviction of manslaughter by unlawful and dangerous act. It was therefore not an error not to leave that verdict to the jury.

105 The same reasoning applies to manslaughter by criminal negligence. In order to establish guilt of that category of manslaughter, it is necessary that the Crown prove an act or omission in breach of the appellant's undoubted duty of care to Tegan, the causal connection between that act or omission and the death, and, importantly, that the breach of duty was so grave as to merit criminal punishment. Guilt of this offence also depends upon the absence of intention to cause death or grievous bodily harm.

106 To come to a conclusion that the appellant was guilty of either category of manslaughter, in the absence of evidence as to the nature of the act or omission causing death, would be to engage in pure speculation. To leave either category of manslaughter to the jury would be to invite the jury to engage in pure speculation. It will be recalled that, in *Stevens*, Gleeson CJ and Heydon J (while in dissent in the result) dismissed the possibility of inviting surmise or speculation, as did Kirby J.

107 The majority judgments in *Gilbert* are instructive in that they recognise that juries may not always apply intellectual rigour to the reasoning process. They do not, however, authorise an approach to jury directions that involves an invitation to speculation or conjecture. It remains the case that there must be an evidentiary foundation for a finding of guilty of either category of manslaughter.

108 This was a case in which the jury had a particularly difficult task. They were faced with a young woman, of prior good character, accused of murdering her two day old baby. No body had been found, and therefore

no cause of death could be established. Every element of the offence had to be proved by the Crown by inference. It may reasonably be asked, and the question has to be confronted, why it is permissible for the jury to draw the inference that, by some means that cannot be specified, the appellant murdered the child, but that it would not have been permissible for the jury to find that she killed the child, but in a manner that amounted to manslaughter rather than murder.

109 The answer to that question lies in the distinction, which is a very real one, between inference and speculation. In *Seltsam Pty Ltd v McGuiness; James Hardie & Coy Pty Ltd v McGuiness* [2000] NSWCA 29; 49 NSWLR 262, Spigelman CJ considered this very question. He acknowledged that it is often difficult to distinguish between permissible inference and conjecture. Quoting from *Jones v Great Western Railway Co* (1930) 144 LT 194, his Honour adopted a definition of inference as "a deduction from the evidence" which, if reasonable, may have the validity of legal proof.

110 He referred also to *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, quoting as follows:

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

Spigelman CJ stated the test as:

> "... whether, on the basis of the primary facts, it is reasonable to draw the inference."

To similar effect were observations of Gibbs, Stephen and Mason JJ in *Barca v The Queen* [1975] HCA 42; 133 CLR 82 at 104-105.

111 The critical issue in this case is the inferences available to be drawn concerning the appellant's state of mind. As we have mentioned, it may be taken that the jury was satisfied beyond reasonable doubt that Tegan was dead, and that her death had been caused by an act or omission of the appellant. Those conclusions are not in issue for the purpose of this ground. The circumstance that would distinguish the appellant's guilt of murder from guilt of manslaughter by criminal negligence is her state of mind. There was before the jury a great deal of evidence that the appellant was determined not to accept responsibility for the care of a child. True it is, competing arguments could be, and were, advanced in relation to the inferences to be drawn from the manner in which she had (lawfully) previously disposed of children, and the manner in which she subsequently disposed (again lawfully) of another. The jury were also entitled to take into account evidence of the accounts she gave concerning her disposal of Tegan to, as she asserted, the child's natural father. The jury were entitled to accept the Crown contention that these were lies evidencing consciousness of guilt. These alone were sufficient to provide the evidentiary foundation for an inference that, in causing the death of the child, she acted with the intention of killing. They provide no factual foundation for an inference that the manner in which she killed Tegan was a breach of duty of the requisite gravity. There was no other evidentiary foundation for such a conclusion. It was therefore not an error not to leave that possible verdict to the jury.

112 Accordingly, we reject this ground of appeal.

Ground 2: alleged miscarriage of justice due to conduct of the Crown by failing to have the jury consider manslaughter as an alternative verdict and due to the content of the Crown's address

113 The first aspect of this ground must be dismissed for the same reasons as given with respect to the first ground of appeal since the obligation of the trial judge to leave manslaughter to the jury is greater than the obligation of

the prosecutor to address on it in circumstances where the accused does not contend that it is available.

114 The second aspect of this ground arises from the Crown's closing address to the jury. The appellant challenges the following aspects of the address: the expression of personal opinion by the prosecutor; the prosecutor insinuating in his address that the appellant was a person of bad character in that she would mistreat or malign innocent people; and his posing of ten questions in the Crown's closing address, which the appellant contended had the effect of reversing the onus of proof.

115 In support of her contention that the prosecutor had impermissibly expressed a personal opinion, the appellant instanced the Crown saying, "Come on" when the prosecutor was addressing the significance of the appellant's having filled in a Medicare form that registered Tegan as her child:

> "What's the significance of the Medicare membership form? Well, ladies and gentlemen, if the accused was intending to hand over baby Tegan to anyone - Andrew Norris/Morris - anybody at all, why on earth would she fill out a Medicare membership form to place Tegan's membership on her own membership? The filling out of the Medicare membership form shows that the accused never intended handing Tegan over to anyone. It's inconsistent with her giving the baby to anybody. She filled out the form because the hospital were urging her to do so, you might think.
>
> What does she say in her ERISP interviews about why she filled out the Medicare membership form? What she said to the police in her first ERISP interview at question 72, you might like to make a note of that so you can read it yourselves, question 72 in the first ERISP interview, she told police that she filled it in in case Tegan was in her care in the future. Come on."
> [Emphasis added]

116 As Heydon J said in *Libke v The Queen* [2007] HCA 30; 230 CLR 559 at 600, legitimate comments, including disparaging ones, concerning the evidence or lack of it can appropriately be made in final address. In our view, the duties of a prosecutor are not inconsistent with the use of rhetoric. In a circumstantial case where the Crown must exclude all

reasonable hypotheses consistent with innocence, a prosecutor may, in the course of final address, be obliged in the course of forceful presentation of the Crown case to disparage versions given by the accused on the grounds that they do not fit with the surrounding facts and circumstances or are, for other reasons, not to be accepted. Less formal language, including vernacular phrases, may appropriately be used to persuade the jury to exclude those hypotheses consistent with innocence. The responsibilities of the prosecutor do not preclude resort to colourful language as a tool of persuasion.

117 We do not consider the prosecutor to have overstepped the bounds of his role when he used the phrase, "Come on", to persuade the jury that the appellant's explanation was manifestly implausible.

118 The appellant further contended that the prosecutor had insinuated in his address that the appellant was a person of bad character in that she would mistreat or malign innocent people. She instanced the following two passages in the Crown closing address:

> "So, ladies and gentlemen, having lied about Duncan Gillies, having had the lies exposed, having waited 35 days to make up another story, she then tells the most abject lies again to this supportive, gentle, caring adoption worker [Virginia Fung].
>
> ...
>
> So here is the accused allowing completely fictitious information about a fictitious person [AJ's birth father and siblings] being provided in a document [prepared by Virginia Fung on the basis of what the appellant told her for eventual access of AJ] that would at some stage potentially be made available to AJ when he reached a suitable age."

119 The Crown case was that the appellant's conduct followed a pattern of keeping secret her several pregnancies and finding permanent solutions for the children she had borne such that she would not have to care for them for any time after her discharge from hospital following their respective births. That part of the prosecutor's address that included these

passages was directed to highlighting the extent to which the appellant kept the truth of AJ's birth secret. This was, in turn, relevant to her conduct and motive surrounding Tegan's birth. The description of Ms Fung as "gentle" and "caring" advanced the Crown case that the appellant was not to be believed since she fabricated falsehoods even to a person who was not only sympathetic but also, inferentially, non-judgmental. That the appellant would tell lies which she knew would be likely eventually to be communicated to one of her children, AJ, also supported the Crown case that she was lacking in credit and, most importantly, that her version that she gave Tegan to her natural father could be excluded beyond reasonable doubt.

120 In this forensic context, the passages relied upon were neither gratuitous, nor inappropriate. This may explain why defence counsel at trial did not object to them.

121 The appellant separately challenged the final portion of the Crown's address in the following terms:

> "I have said to you that I don't know exactly what my friend is going to say in his address, but what I would ask you to do is to bear in mind certain questions whilst you are listening to Mr Chapple's address and to see what he says about these particular issues which we would submit to you are particularly pertinent issues to the resolution of this case.
>
> Firstly, why did the accused give eight different versions of what happened to Tegan?
>
> Secondly, why did the accused add Tegan to her Medicare membership at the Auburn Hospital if she was about to hand over Tegan to anyone else?
>
> Thirdly, why did it take the accused four hours to get home from the Auburn Hospital to Fairlight, either directly or via Venus Street?
>
> Fourthly, why did the accused tell Detective Kehoe and initially Detective Gaut that she would not be able to find Andrew Norris/Morris's unit in Balmain when she so easily found it in May 2003?

> Fifthly, why did the accused wait until May 2003 to look for Andrew Norris/Morris's unit in Balmain?
>
> Sixthly, why did Keli Lane lie to Detective Gaut about Lisa Andreatta of Brisbane knowing Andrew Morris and about the Tegan birth?
>
> Seventhly, why did the accused lie to Detective Gaut about looking for Andrew Norris/Morris's mobile phone number of Venus Street?
>
> Eight, why did the accused lie to Detective Gaut that her circle of friends had changed since the time that she had known Andrew Norris/Morris?
>
> Number nine is, is it just a coincidence that there are so many similarities between Andrew Norris/Morris and [AW]?
>
> Finally, tenthly, why would a natural father of a child not lodge the child's birth registration forms?"

122 The appellant submitted that the effect of the Crown posing questions in such a form was to reverse the onus of proof. She relied on *Wood v R* [2012] NSWCCA 21 (**Wood**) at [604]-[605] per McClellan CJ at CL, with whom Latham and Rothman JJ agreed and also referred to *R v Rugari* [2001] NSWCCA 64; 122 A Crim R 1 (**Rugari**) at [57]. She submitted that she had not had a fair trial according to law and that the conviction ought be quashed.

123 It is inappropriate and unsatisfactory for a prosecutor to ask questions of a jury in the course of closing address which are designed to undermine or disparage the defence case because of the risk that it will give the jury the impression that the accused, contrary to the fundamental principle that the accused is presumed to be innocent, bears an onus of answering such questions. In *Wood*, this Court held that the course taken by the prosecutor had the effect for which the appellant contended in this appeal: it reversed the onus of proof. This Court said in *Wood* at [605]:

> "Asking questions, even in a rhetorical manner, and inviting the jury when considering its verdict to consider whether the applicant had provided satisfactory answers to the questions was an impermissible course for the prosecutor to follow."

124 It does not, however, follow from the general undesirability of a prosecutor posing questions in that way that in every case where such questions are asked, the verdict must be quashed because of a miscarriage of justice. The question is whether the departure from the standards expected of a prosecutor has affected the accused's fundamental right to a fair trial. If it has, then this Court must intervene. If it has not then, while such a departure is always regrettable, a departure that is inconsequential in the context of the whole trial, including the summing up, will not require the conviction to be quashed: see *Whitehorn v The Queen* [1983] HCA 42; 152 CLR 657 at 663-664 per Deane J.

125 In *Wood*, there were significant extra factors which led to the quashing of the conviction, not the least of which were the content and number of the questions, of which there were fifty, and the conduct of the prosecutor throughout the trial. In *Rugari*, it was not merely the asking of questions, but also the belittling of the appellant's counsel's cross-examination of Crown witnesses and a misstatement of the effect of there not being cross-examination on particular matters.

126 What consequences flow from questions being asked substantially depends on the content of the questions, whether any objection was made at trial by counsel for the accused and whether the trial judge sought to correct any misapprehension that the posing of questions may have created by directing the jury as to the onus of proof.

127 In the instant case, although it was undesirable that the matters put to the jury at the conclusion of final address were put in the form of questions, each concerned an issue which was relevant to the jury's consideration whether the Crown had excluded the hypothesis that the appellant had given Tegan to her natural father, Andrew Norris, at or near Auburn Hospital before she went to Fairlight to meet Duncan Gillies at 3pm and change her clothes for the wedding. Had these matters been identified as

relevant issues rather than questions, no exception could reasonably have been taken to any of them.

128 Four of the questions posed, the first, sixth, seventh and eighth, concerned the appellant's credibility directly which was, itself, a relevant issue which would assist the jury to determine whether the hypothesis consistent with innocence for which the appellant contended had been excluded by the Crown. The second question was relevant in that it served to highlight a potential inconsistency between the appellant's version and her conduct. The third question highlighted the period of time which, on the Crown case, gave the appellant the opportunity to kill Tegan. The fourth question highlighted an inconsistency between the appellant's conduct and what she said, which served not only to undermine her credibility but also to persuade the jury that Andrew Norris was a fictitious person, whose existence was fabricated by the appellant to avoid responsibility for the murder. The fifth question was also relevant to the Crown case that Andrew Norris/Morris was a fabrication. The ninth and tenth questions raise further matters on which the Crown relied to persuade the jury that the appellant had made up Andrew Norris/Morris.

129 It can be inferred, in the absence of any suggestion of incompetence, that defence counsel at trial considered that no such direction was required, or that the direction given by the trial judge was ample to counter any prejudice that might flow from the prosecutor's questions in final address. The appellant is, in these circumstances, bound by the conduct of her counsel at trial and there is no basis for this Court's intervention unless we consider there to have been a miscarriage of justice: *R v Birks* (1990) 19 NSWLR 677 (**Birks**), at 684-685 per Gleeson CJ, McInerney J agreeing; see also *TKWJ v The Queen* [2002] HCA 46; 212 CLR 124 at [8] per Gleeson CJ (**TKWJ**), which in this context means that the appellant must show that she lost a real chance of acquittal.

130 In his summing up, at [333]-[334] the trial judge gave the following direction:

> "The Crown then concluded its submissions by asking you to bear in mind a number of questions when you were considering the defence arguments. I will not go through them all, but quickly, they were to this effect: Why did the accused give eight versions? Why add Tegan's name to the Medicare card? Why take a number of hours to get home? Why tell Kehoe that she could not locate the unit when later it was found relatively easily? Why were lies told about Lisa Andreatta, the search for Andrew's mobile, the circle of friends changing.
>
> I will not go through them all but, as I say, in a sense, those questions do touch upon the central issues I have identified for you. They, of course, are not the central issues, but in turn they may be matters that you are perfectly entitled to consider. *I think you should be careful to remember that they do not impose some type of onus on the defence to answer them all. The defence does not have an onus of proof. They are more matters for your consideration in the light of all the evidence*. Of course, as I will point out to you when we come to the defence submissions, a number of them were the subject of answer or response or submission, and it will be a matter for you what you make of them. *The point I am making is that the Crown does not, by asking the question, alter or change the onus of proof which remains always on the Crown*." (italics added)

131 We are bound to accept, there being no contrary indication, that the jury applied the directions of the trial judge: *Demirok v The Queen* [1977] HCA 21; 137 CLR 20 at 22 per Barwick CJ. We do not consider that, once directed by the trial judge in the terms set out above, there was any reasonable possibility that the jury would have been acting under a misapprehension as to the onus of proof or that it was for the appellant to provide an answer to the questions posed by the prosecutor, even if the posing of such questions had had such an effect in the first place.

132 We consider it to be appropriate to grant leave under Rule 4 of the *Criminal Appeal Rules* because of the importance of the onus of proof and the jeopardy to it that the posing of questions by prosecutors poses. However, for the reasons given we do not consider that any deleterious effect of the questions was more than transitory. Accordingly this ground fails.

Ground 3: a separate trial application should have been made by trial counsel in respect of the perjury/false swearing charges

133 The appellant submitted that the nature of the perjury charges was highly prejudicial to her at trial and made the Crown case in respect of the murder charge "immeasurably stronger". The appellant also relied on the directed verdicts of acquittal in respect of the perjury charges in support of her contention that a separate trial application ought to have been made.

134 No allegation is made that the trial judge failed in any way to direct the jury appropriately as to how it might use evidence in respect of each count or the need to consider each count separately.

135 In order to determine this ground it is not necessary for this Court to consider the hypothetical prospects of success of an application for a separate trial, had one been made. The appellant's trial counsel expressly confirmed, at a pre-trial hearing on 6 August 2010, that he was instructed not to make such an application. It can be assumed that those instructions were given on advice. No allegation was made that trial counsel was incompetent. For the same reasons as we have earlier given with respect to the second ground, the appellant is, in these circumstances, bound by the conduct of her counsel at trial: *Birks* at 684-685 per Gleeson CJ, McInerney J agreeing. No basis for this Court's intervention has been established.

136 Accordingly, this ground fails.

Ground 5: the trial miscarried by the failure of the trial judge to discharge the jury after the prosecutor made prejudicial remarks in his opening address

137 This ground is based on the following passage from the Crown's opening on 10 August 2010, the second day of trial:

> "We don't know how or where the accused killed Tegan, or how she disposed of the body. However, the Auburn Hospital was just a couple of kilometres away from the Australian College of Physical Education at what was then the Homebush Olympics site which at that time in 1996 was surrounded by vast swathes of vacant land, a few building sites and deserted roads, particularly at the weekend. So there was an opportunity nearby for the accused to find somewhere that was entirely private, which would have given her an opportunity to kill Tegan and dispose of the body."

138 On the following day, 11 August 2010, defence counsel submitted that, in the absence of any evidence having been served of any search for Tegan's body having been undertaken at the Olympic site, the matter ought not to have been raised in opening. In the absence of the jury, the prosecutor confirmed that there was no evidence either of the method of killing or the disposal of the body or any search of the Olympic site having been undertaken. The trial judge invited the Crown to correct his opening, which he did as soon as the jury returned, in the following terms:

> "Good morning, ladies and gentlemen. I would like to begin by just referring to several of the things that I said yesterday. The first thing I would like to do is I suppose by way of a type of correction. Yesterday I said to you that we don't know how or where the accused killed Tegan, or how she disposed of the body. There is no evidence at all as to what happened to Tegan or the accused, for that matter, during those three hours plus between when she left the hospital before midday, to use your own words, and when she arrived at her parents' house at Fairlight at 3pm.
>
> I think it is fair to say, ladies and gentlemen, that it would not be appropriate for you to speculate about what might have happened during that time. I ought not to have speculated about the Olympic site because there is no evidence of the Olympic site having been searched. I would like to correct what I said yesterday in that regard."

139 Later that day, in the course of opening the case for the defence, trial counsel reminded the jury of the "error":

> "And she didn't scuttle out of the place. She didn't dodge out of the fire escape. These are suggestions made to you, theories, speculation, we would say to you, and you have seen how dangerous speculation is in this case, theorising, not looking at the evidence. *My learned friend made that error yesterday in relation to the Olympic site*. If you've killed a baby, you've got to get rid of the body you might feel. You can't take it to a wedding.
>
> For some reason it's suggested because there's a big site where the Olympics are going to take place, that in broad daylight somebody would go and do that anyway, you might have thought as you heard that. *But a theory. No evidence that the police went out there and whatever. None*. Do not even know which way she went. I don't know if there's any real evidence of how she went from Auburn to Fairlight to the wedding. So we urge you, members of the jury, [be] careful [of] speculation." (italics added)

140 The appellant submitted that the passage in the Crown opening was highly prejudicial, speculative and deliberate, that it was not cured by the "correction" and that it could only be cured by a discharge of the jury. She submitted accordingly that defence counsel ought to have applied for the jury to be discharged and that such an application would have been granted because the trial was only in its second day.

141 The appellant purported to concede that Rule 4 of the *Criminal Appeal Rules* applies. However, in our view, Rule 4 does not, in terms apply to the present ground since Rule 4 is confined to directions, omissions to direct, or decisions as to the admission or rejection of evidence given by the trial judge.

142 The fundamental obstacle that faces the appellant in pressing this ground is that her counsel at trial did not apply for a discharge of the jury: *Birks*. Rather, it appears that he made a decision to exploit the Crown's error and use it for his client's forensic advantage to warn the jury against speculation and, at least by implication, against placing too much reliance on what the Crown said, as distinct from the evidence. It is not for this Court to enquire as to the actual reasons for trial counsel preferring this course to an application for discharge. In our view, trial counsel's decision is rationally capable of explanation on the basis of a perceived forensic advantage: *TKWJ* at [27] per Gaudron J. Accordingly we are entitled to

conclude that no unfairness attended the process: *Nudd v The Queen* [2006] HCA 9; 162 A Crim R 301 at [9].

143 This is sufficient to dispose of this ground. It is rejected.

Ground 6: the trial judge erred in granting the prosecutor's application pursuant to s 38 of the *Evidence Act* to have Peter Clark cross-examined due to his making an allegedly inconsistent statement

144 This ground must be addressed in the context in which the application for leave under s 38 of the *Evidence Act* was made.

145 The Crown case was that neither Andrew Norris nor Morris existed and that the information provided to police by the appellant as to his identity, his residential address (variously Units 10 or 11, 24 Wisbeach Street, Balmain) and the name of his partner, Mel, was false.

146 At the relevant time Unit 10 was occupied by Sean Greaves who did not know anyone by the name of Andrew Norris or Morris and had never used that name himself. He did not recall receiving mail for such a person. He denied having a woman called Mel stay in his unit, having anyone mind his unit while he was away or knowing the appellant. The appellant did not suggest that she knew him. There was accordingly evidence which, if accepted by the jury, could exclude Unit 10 as a location where Andrew Norris/ Morris lived.

147 Peter Clark lived with his brother Steven but with no one else in Unit 11 between December 1995 and December 1996. Having regard to Tegan's birth date, and the estimates that she was about full-term, she must have been conceived in about December 1995.

148 In his first statement to police dated 3 December 2003 Mr Clark said he knew an Andrew Morris who was of Asian appearance but he had not

seen him since 1990 and had not been to their unit. The appellant said that Tegan's father was not Asian.

149 When Mr Clark gave evidence on 23 June 2005 at the inquest into Tegan's death he did not give evidence of seeing any mail addressed to Andrew Morris or Andrew Norris.

150 On 13 August 2008 Mr Clark provided the police with a second statement in which he said that some time after his first statement he recalled having seen the name Andrew Morris on an envelope in the letter box for Unit 10 in about 1995 or 1996, which he remembered because he knew a man by the name of Andrew Morris. He said that he was 90 per cent sure that the letter was typed. He explained that he had not mentioned it at the inquest because he thought he might have been mistaken once he heard the real estate agent give evidence that there was no one by that name living in the block and that he wished neither to place undue pressure on the Lane family or deceive the coroner.

151 On 6 April 2010 Mr Clark provided a third statement to police in which he said he had seen mail addressed to both Andrew Morris and Andrew Norris at different times.

152 On the *voir dire* on 22 September 2010 Mr Clark's evidence was:

> "Q. Whereabouts did you see it?
> A. I believe it to be number 10.
>
> Q. Do you know who was the occupant of number 10?
> A. Only by sight. I later found out it was Sean Greaves.
>
> Q. Whereabouts was the mail when you saw it?
> A. In number 10. I'm not exactly sure. It could have even been outside the main blocks. As you may understand, often mail is left out.
>
> Q. Do you recall how often you saw this?
> A. I saw some mail for Andrew Morris I'd say on more than one occasion. Andrew Norris was just the once. I think for one of those occasions for Andrew Morris, it may even have been in the foyer of

> the building, but I'd be prepared to say that Andrew Norris once, Andrew Morris more than once."

153 The Crown sought leave to cross-examine Mr Clark pursuant to s 38(1) of the *Evidence Act* 1995 (NSW) on two bases: first, that he was an unfavourable witness; and secondly, that he had made a prior inconsistent statement.

154 The appellant's trial counsel objected to the grant of leave on the basis that there was no inconsistency. The trial judge, who was satisfied that there was an inconsistency, and that s 192 of the *Evidence Act* did not preclude the grant of leave, permitted the Crown to cross-examine Mr Clark on condition that the cross-examination was confined to the issue of the mail.

155 The appellant submitted, in support of this ground, that the reasons did not disclose a clear inconsistency within the meaning of s 38 of the *Evidence Act* and, further, that the trial judge ought to have exercised his discretion under s 192 of the *Evidence Act* to refuse the grant of leave.

156 Section 38(1) of the *Evidence Act* relevantly provides:

> "A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
> (a) evidence given by the witness that is unfavourable to the party, or
> ...
> (c) whether the witness has, at any time, made a prior inconsistent statement."

157 Section 192 of the *Evidence Act* provides:

> "**Leave, permission or direction may be given on terms**
> (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
> (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
> (b) the extent to which to do so would be unfair to a party or to a witness, and
> (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
> (d) the nature of the proceeding, and
> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence."

158 The reasons for the grant of leave appear sufficiently from the transcript of argument. First, the trial judge was satisfied Mr Clark had made a prior inconsistent statement. His Honour put to the appellant's trial counsel in the course of argument that in his first statement Mr Clark was effectively saying:

> "'there's only one person I've known and he never lived there' and, by inference, 'I don't know any other Andrew Morris and no other Andrew Morris lived at our block of units'."

159 His Honour then put to the appellant's trial counsel that this was inconsistent with what the witness said in his later statements: namely that he had seen mail addressed to Andrew Norris/Morris. We respectfully agree with the conclusion of the trial judge that the condition for the grant of leave under s 38(1)(c) had been fulfilled because Mr Clark had given the following three inconsistent versions:

(1) no mention of mail (first statement: 3 December 2003 and inquest: 23 June 2005);

(2) saw an envelope addressed to Andrew Morris (second statement: 13 August 2008);

(3) saw mail addressed to both Andrew Morris and Andrew Norris at different times (third statement: 6 April 2010); and saw mail addressed to Andrew Morris more than once and to Andrew Norris once (*voir dire*: 22 September 2010).

160 Further, the trial judge accepted that Mr Clark's evidence was unfavourable to the Crown since its case was that the Andrew Morris/Norris described to the police in the interview as living in one of

those units was a fictitious person and the delivery of mail to such a person tended to establish the contrary. Accordingly, there was a separate basis, s 38(1)(a) on which to support a grant of leave.

161 The appellant's trial counsel accepted that Mr Clark's evidence was unfavourable. However, he submitted that the application ought be refused under s 192 of the *Evidence Act* because to grant leave to the Crown to cross-examine Mr Clark would be unfair to the appellant (s 192(2)(b)) in that it would undermine the general principle that the Crown is obliged to call all relevant witnesses in this case unless the prosecutor concludes that the witness is not credible or truthful.

162 The trial judge considered that the imposition of conditions on the grant of leave that the cross-examination be limited to the issue of the mail, that it not extend to matters solely relevant to Mr Clark's credibility and that it take place before defence counsel was required to cross-examine Mr Clark would be sufficient to avoid unfairness.

163 The appellant submitted in this Court that the trial judge inappropriately permitted cross-examination that impugned the credibility of Mr Clark and that this course was inconsistent with the Crown's duty of fairness to her. The appellant appeared also to rely on the argument put by defence counsel at trial that a grant of leave to permit a prosecutor to cross-examine a Crown witness was inconsistent with the requirement of prosecutorial fairness and that the leave ought to have been refused by reason of s 192(2)(b).

164 As a matter of general principle it is for the prosecutor alone to decide what witnesses will be called for the prosecution. However, it is appropriate that the prosecutor exercise that discretion so as to call all relevant witnesses, unless the prosecutor concludes that such witnesses are not credible or truthful, so that the defence counsel has the opportunity

to cross-examine them: *Richardson v The Queen* [1974] HCA 19; 131 CLR 116 at 120-121.

165 In our view, s 38 does not create an inconsistency with the general principle referred to above or in any way interfere with the duties of prosecutors. It provides a mechanism whereby the party calling a witness is, with leave, permitted to cross-examine its own witness, in circumstances that include where the witness is unfavourable or has made a prior inconsistent statement. A grant of leave does not remove the right of the other party, in this case the appellant, to cross-examine the witness.

166 Section 192 provides added protection to the opposing party in that, by s 192(2), it obliges the trial judge to take certain matters into account in deciding whether leave ought be granted. Such matters include the extent to which to do so would be unfair to a party or to a witness: s 192(2)(b).

167 The effect of the prosecutor's decision to call Mr Clark in the Crown case was to provide an opportunity for the defence to cross-examine him. Had the discretion been exercised not to call Mr Clark, the appellant would have had no choice but to call Mr Clark if she wished to have the benefit of his evidence. The prosecutor sought leave under s 38 to cross-examine Mr Clark. For the reasons given, the conditions for a grant of leave were met in two respects: his evidence was unfavourable and he had made at least one if not two prior inconsistent statements.

168 The conditions on the grant of leave confined the Crown's cross-examination to the issue of mail, which was the issue in respect of which Mr Clark's evidence was unfavourable and in respect of which he had made prior inconsistent statements. It was inevitable that questions concerning his prior inconsistent statements about the mail would be relevant not only to the issue - whether the Andrew Norris/Morris to whom the appellant referred was a real person - but also to his credibility, in the sense of the reliability of his recollection: see *Onassis and Calogeropoulos*

v Vergottis [1968] 2 Lloyd's Rep 403 at 431 per Lord Pearce. We cannot discern any unfairness in the grant of leave having regard to the conditions imposed. The appellant's concession that leave under Rule 4 of the *Criminal Appeal Rules* is required amounts to a concession that defence counsel at trial did not object to the conditions of the grant of leave that were proposed by the trial judge.

169 As we are unable to discern any merit in this ground we are not disposed to grant leave.

Ground 8: failure of the trial counsel to ask for a direction that the appellant had suffered prejudice as a result of the delay in prosecution

170 The appellant submitted that she had suffered a forensic disadvantage by reason of the passage of time between the commission of the offence and the trial which was exacerbated by what she termed a substandard police investigation. She contended that a *Longman* direction was required as to the effect of the delay on her ability to test the Crown case and that the failure of her trial counsel to seek it had caused her prejudice. The appellant did not identify any particular inquiry said to have been foreclosed to her because of the delay or what the results of any such inquiry could or might have been.

171 This ground falls into the same category as several that have already been considered. The appellant is bound by her counsel's conduct in not seeking a *Longman* direction as long as no unfairness attended the process. Where the omission to seek such a direction was an objectively rational, tactical decision, we are entitled to conclude that no unfairness attended the process: *Nudd* at [9]. Furthermore as Rule 4 of the *Criminal Appeal Rules* applies, leave is required to argue this ground.

172 In *Longman v The Queen* [1989] HCA 60; 168 CLR 79 (**Longman**), a conviction for indecent assault was quashed and a new trial ordered because a warning had not been given to the jury to the effect that it is

unsafe to convict an accused on the uncorroborated evidence of the victim after a long delay. In *Longman*, the alleged offence had occurred decades before a complaint had been made to police and the resultant trial. The relevant factor that was held to require a warning in *Longman* was that the delay in the complaint had the result that the applicant lost the means of testing the complainant's allegations since it was no longer possible for him to explore the alleged circumstances surrounding the alleged offences and adduce evidence that either cast doubt on the complainant's version or supported his denial.

173 A significant distinction between *Longman* and the instant case is that the appellant at trial used the length of the period between the date of the alleged offence and the trial to assert that the police investigation could not establish that Tegan was dead. The absence of a *Longman* direction, and presumably one of the reasons it was not sought by defence trial counsel, meant that the trial judge did not need to canvass the reasons for the delay as his Honour would have been obliged, as a matter of fairness, to do had such a direction been given. Any examination of the reasons for the delay would have highlighted the Crown case on the issue: that the appellant had given a false exculpatory account which had the result of sending the police on a wild goose chase to find a non-existent man. It was an objectively reasonable decision for defence counsel not to seek a *Longman* direction on the basis that it was not in the appellant's forensic interests for the jury to be further reminded of that.

174 There being an objective tactical reason for defence trial counsel's not seeking a *Longman* direction we are entitled to conclude that no unfairness attended the process. The appellant has not raised any argument in support of this ground that would incline us to give leave under Rule 4. Leave is refused.

Ground 7: unreasonable verdict

175 For the purposes of considering ground 7 it is necessary to expand substantially upon the relatively brief outline of the Crown case that appears at the commencement of these reasons. It is convenient to approach this task generally chronologically. It is emphasised that the following account is drawn from evidence given in the Crown case. It is not intended to represent any findings of disputed fact.

176 The appellant was born in March 1975, in Sydney. During the 1990s she lived with her parents in Fairlight, a suburb of Sydney near Manly. She was an enthusiastic and ambitious participant in the sport of water polo. Her ambitions extended to representing Australia in international competition, including the Olympic Games.

177 In 1991, at about the age of 16 or 17, the appellant became romantically and sexually involved with a young man to whom we will refer as AT. Towards the end of 1992 the appellant became pregnant. She and AT made a joint decision to have the pregnancy terminated and this was done. Although the appellant was then living with her parents at Fairlight, they were unaware of the pregnancy, as were her friends.

178 In November 1993, while the relationship with AT was continuing, the appellant again became pregnant. On this occasion, she did not inform AT of her pregnancy, and, again, did not inform her parents or friends. In March 1994 the pregnancy was terminated. Sometime in early 1994 the relationship with AT came to an end.

179 In about May 1994 the appellant began a relationship with another man to whom we will refer as PR. The relationship was short lived, about six to eight weeks, but during that time the appellant again became pregnant. In late April 1994 the appellant began a relationship with Duncan Gillies. At that time Mr Gillies lived at Harbord or Freshwater. The appellant did not disclose her pregnancy to Mr Gillies, nor, again, to her parents or friends. Throughout this pregnancy the appellant maintained her usual and normal

social and sporting activities. At about 10pm on 18 March 1995, after playing a competitive game of water polo, followed by socialising at a Balmain hotel, the appellant travelled alone to Balmain hospital. She was in labour. She told staff at Balmain Hospital that she was from Perth, where she had been planning to have the baby, and that she had been in Sydney for three weeks. She gave the name of a doctor who she said was a Perth obstetrician who had been caring for her. None of this was true.

180 The appellant was transferred to King George V Hospital where, early the next morning, she gave birth to the daughter, to whom we have referred as TR. She told staff that she had had antenatal care in Perth, that her parents were in Perth, and that she had no social support in Sydney. None of this true. She gave an address at Harbord where she said she had been living. This was not true: she was living with her parents at Fairlight.

181 While an inpatient at King George V Hospital the appellant made inquiries about surrendering TR for adoption. She was referred to the Centacare Adoption Agency where she saw a social worker, Ms Sheila Townsend. The appellant again gave a deal of false information, some of it replicating that which she had earlier given to King George V Hospital. She said that she had moved to Perth at the age of 13; she gave a Perth address at which she said her parents lived, and the names of a school and a university which she said she had attended; she repeated the (false) address at which she said she was living in Sydney, and gave a (false) contact telephone number; she said her parents were aware of her pregnancy and, although disappointed, were supportive of adoption. She said that the father of the child was Duncan Gillies, who she said was a footballer, and that he had indicated a willingness to sign adoption papers, but that he was currently working in the United Kingdom with plans to return in two weeks. She gave a (false) address at which she said Duncan Gillies lived, and said that she and he had moved to Sydney from Perth three weeks prior to the birth of the baby, and that Duncan Gillies had

visited in hospital, and kissed and hugged the baby. Except that Duncan Gillies was a footballer, none of this was true.

182 Duncan Gillies was, in fact, not the father of the baby. He knew nothing of the pregnancy, and had not visited the appellant in hospital and, of course, the couple had not recently moved to Sydney from Perth.

183 The appellant was discharged on 23 March. TR was left in the care of the hospital. Over the ensuing days, the appellant had regular contact with Ms Townsend, who advised her of the need for Mr Gillies to be involved in the adoption decision. The appellant resisted this. She told Ms Townsend that she was under a lot of pressure from Mr Gillies because she had promised not to involve him. However, she also said that Mr Gillies had agreed to visit the adoption agency. When she next attended, however, she was alone, and said that Mr Gillies had been sent to Scotland to play rugby. She signed a general consent for adoption. On 3 April 1995 she swore an affidavit that again contained a number of false statements: she gave the same (false) address as she had previously given, she said that she had been living in a domestic relationship with Mr Gillies since November 1993, and that TR was a child of that relationship, and that Duncan Gillies had indicated his willingness to sign a consent for adoption, but was out of the country working in the United Kingdom. The false statements in the affidavit were the foundation for the first charge of perjury on the indictment.

184 Ms Townsend attempted to contact the appellant and Mr Gillies by telephone at the number the appellant had given, and by writing to the address she had given. The appellant informed Ms Townsend that she and Mr Gillies had temporarily separated. She then attended Centacare, and told Ms Townsend that Mr Gillies was claiming that she had tricked him by telling him that he did not need to be involved. She said that she was staying with Mr Gillies' mother at an address she gave. On 29 April she swore a second affidavit giving a different (false) address, stating that she

had separated from Mr Gillies who she again identified as the "birth father", and said that Mr Gillies had informed her that he did not wish to have any involvement with the child, or in the adoption. The false statements in this affidavit were the foundation for the second charge of perjury on the indictment.

185 In April 1995 the appellant was one of 13 selected to compete in international water polo championships.

186 Ms Townsend continued her efforts to locate and speak to Mr Gillies. She telephoned the number given to her by the appellant, and was told that Mr Gillies did not live at that address, and that the telephone number was not associated with the address that the appellant had given. The appellant attempted to explain this to Ms Townsend by saying that Mr Gillies was avoiding contact, and having his flatmate lie for him.

187 In December 1995, while still in the relationship with Mr Gillies, the appellant again became pregnant. This was the pregnancy that resulted in the birth of Tegan. Once again, the appellant did not disclose the pregnancy to Mr Gillies, her parents, or her friends.

188 In December 1995 Mr Gillies purchased a house at 10 Venus Street, Gladesville. The appellant continued to live with her parents at Fairlight, but spent several nights each week with Mr Gillies at the Venus Street house. They had regular sexual relations and they continued to socialise together. The appellant continued to play water polo at an elite level.

189 Four times in September 1996 the appellant attended the Ryde Hospital in relation to the pregnancy. She told staff at that hospital that she had made arrangements for a home birth with a private midwife, that she lived in Perth and was "in transit", that her partner was in the United Kingdom, and she gave 70 Venus Avenue, Gladesville as her temporary address in Sydney. On the third visit she gave the name of her home birth midwife as

Julie Melville for whom she nominated an incorrect contact telephone number. The appellant named "Kati Holt" as a contact person, again giving an incorrect telephone number.

190 Julie Melville was Duncan Gillies' mother. She was a registered nurse. She was in fact a midwife, although not registered as such. She was not involved in the appellant's care and did not know that the appellant was pregnant. She did not know that the appellant had given birth.

191 At about 4pm on 11 September 1996 the appellant attended Auburn Hospital where she gave similar information to that she had given to the Ryde Hospital. She gave the name of Duncan Gillies as a contact person. She said that she had been referred by her "home birth midwife", who she again named as Julie Melville.

192 The appellant was admitted to the Auburn Hospital the following day, 12 September, and gave birth to Tegan on that day. On the following day, 13 September, nursing staff referred the appellant to a trainee social worker, Alicia Baltra-Vasquez. Ms Baltra-Vasquez took detailed notes of her consultations with the appellant. The appellant was referred to Ms Baltra-Vasquez because she was unaccompanied at the hospital, and had no apparent support. The appellant told her that she had planned to have the baby at home with the help of an independent midwife. She again said that she had been born in Perth, where her parents still lived. She said that the pregnancy was planned, and that she and her boyfriend had moved to Sydney a few months previously and had no family or close friends in this city. She said that it was intended that the boyfriend would be present at the birth, which was due on 30 August, but that, as the baby was late, her boyfriend was overseas playing football and was not able to be present. She told Ms Baltra-Vasquez that she planned to be discharged the following day, 14 September, and that "a lady" would stay with her until her parents arrived from Perth the following Tuesday, and that her boyfriend would arrive home from overseas on the Wednesday. Their plans were

then to leave Sydney to live in London (where the boyfriend had rugby league commitments) "for a couple of years".

193 Ms Baltra-Vasquez observed the appellant with Tegan present. She thought that "it looked like the normal mother and things", and made a note that the appellant:

> "... is happy with her baby girl, breastfeeding her."

194 It was not suggested that Ms Baltra-Vasquez's evidence was in any way inaccurate. The information provided to her by the appellant was, in many respects, untrue. The appellant had not been born in Perth. Her parents did not live in Perth but did, in fact, live in Fairlight in Sydney. Her boyfriend, Duncan Gillies, had had no part in the planning of the pregnancy and was unaware of it. He was also unaware of the birth of Tegan. He was not overseas playing rugby league at the time of the birth: two days later, on 14 September, he accompanied the appellant to a wedding in Manly.

195 On 14 September 1996, at some time between 11am and 12 noon the appellant discharged herself from the hospital, taking Tegan with her. She did not submit Tegan for identification checks, as she had been requested to do. An Auburn Hospital nurse arranged for the appellant to be followed up by the Ryde Domiciliary Midwife Program.

196 The appellant arrived at her parents' home at about 3pm on 14 September. She did not have Tegan with her. Mr Gillies arrived shortly after, and the appellant's mother drove the couple to a wedding at Manly. Mr Gillies noticed nothing untoward about the appellant's behaviour.

197 On 16 September the appellant telephoned the Ryde Domiciliary Midwife Program to inform them that she would not be needing their services. She said that her "home birth midwife" would take over her care. No midwife made contact with Auburn Hospital, as would have been expected.

198 On 19 September Tegan was enrolled on the appellant's Medicare card. No claim for medical or pharmaceutical expenses for her has ever been made.

199 The appellant and Duncan Gillies continued in their relationship until about March 1998, when they separated. In the second half of 1998, the appellant began a relationship with another man, to whom we will refer as AH. The appellant was still living with her parents at Fairlight. In August of that year the appellant was again pregnant. She did not tell AH of her pregnancy, nor did she tell her parents or her friends. In February 1999 she sought advice, in Brisbane, with respect to the termination of the pregnancy, but was told that the pregnancy was too far advanced. The appellant gave her parents' address, and her correct date of birth. She said that she was separated, occupied in home duties, and a mother. Much of this was untrue.

200 On 21 May 1999 the appellant was admitted to Ryde Hospital, telling staff she was 39 weeks pregnant. She gave the name of Lisa Andreatta as an emergency contact person. She told staff at Ryde Hospital that she had been booked into the Royal Women's Hospital in Brisbane for the birth, and had received antenatal care at that hospital; she was currently in Sydney with an older child and was not accompanied by any other family member; that she had breast fed her baby girl born at Auburn for six months; that she was living with friends at 10 Venus Street, Gladesville; that her parents were living in London; and that her partner was in London. None of this was true.

201 In the early hours of 31 May 1999 the appellant was re-admitted to Ryde Hospital and gave birth to AJ later that morning. Later DNA tests established that AH was the father of AJ. The appellant repeated that in 1996 she had given birth to a baby girl, whom she said she had breast fed for six months; she said that the child was well.

202 On 1 June 1999 the appellant contacted Anglicare Adoption Services for the purpose of surrendering AJ for adoption. She told Ms Elliott, a principal officer of Anglicare, that she had travelled from London to have the baby in Sydney and surrender him for adoption, and that she had received counselling while in England. This was not true.

203 Ms Fung assumed responsibility for supervising and completing the adoption process. The process did not go smoothly. This was largely because the appellant gave a great deal of false information, some parts of it inconsistent with other parts. The appellant was difficult for Ms Fung to contact.

204 The dealings with Ms Fung were extensive and continued over many weeks. The appellant told Ms Fung that she was due to start work in London in mid June and might stay (in Australia) for another two weeks. She said that her "ex partner" was in London and that he had left her when she was five months pregnant, that he was aware of the birth of AJ, and that she had discussed with him the prospect of adoption. Ms Fung queried whether the appellant's parents were aware of the pregnancy. On 3 June 1999 the appellant signed a foster care agreement for a one month period, and AJ was given into the care of a foster couple.

205 The appellant told Ms Fung that the father of AJ was Duncan Gillies, from whom she was separated. She gave a London address for him. She gave her address as 10 Venus Street, Gladesville and also gave a London address for herself. She said that she had not lived with her parents since she was 17 years old. On a later occasion, she gave Ms Fung the name of AJ's father as "AW".

206 On 13 September 1999 the appellant swore an affidavit in which she said (falsely) that the father of AJ was AW, that she had met AW in London, where they both resided, and that she was unable to contact AW. The

false statements in this affidavit were the foundation for the third charge of perjury on the indictment.

207 The appellant engaged with Ms Fung over a period from early June 1999 until the beginning of September of that year. In June, she told Ms Fung that Mr Gillies had frozen their joint bank account in London, leaving her without access to funds. She said that she had been in contact with her employer in London, who had agreed that she could remain in Australia until mid July. She said that she hoped that her mother would be able to come to Australia in order to accompany her on her return to London.

208 Ms Fung found it increasingly difficult to contact the appellant. Various telephone numbers the appellant supplied were incorrect: by way of example, she gave one telephone number as that of Lisa Andreatta's grandmother. When Ms Fung rang the number, the telephone was answered by a mortgage company. The appellant's mobile phone that she used was almost invariably switched off or unanswered. The appellant gave many explanations for not being available for consultations with Ms Fung. These centred around what she claimed was her need to make arrangements for re-entry to Britain, including travel to Canberra.

209 Ms Fung later ascertained that the address of 70 Venus Street, Gladesville, given by the appellant to the Ryde Hospital as her temporary address, did not exist.

210 Eventually, in July, Ms Fung contacted the Department of Community Services in Katoomba. She was concerned about the legal status of AJ. The foster care agreement signed by the appellant was about to expire, and Ms Fung could not contact the appellant to extend it. Mr John Borovnik was assigned as AJ's caseworker, for the purpose of obtaining a care order.

211 In the course of his investigations, Mr Borovnik obtained the appellant's medical records from the Ryde Hospital, which disclosed the appellant's 1996 pregnancy. This led to the discovery of Tegan's birth at the Auburn Hospital. On 18 October 1999 Mr Borovnik contacted the appellant and asked her if she had given birth to a child at Auburn Hospital in 1996. The appellant said that she had not. Mr Borovnik asked if she had given birth to a child in 1995, and she confirmed that she had. Mr Borovnik asked the appellant if she were sure that she had not given birth in 1996, and she assured him that she was. She also denied having attended Ryde Hospital at about that time in a pregnant condition. She said that she was not pregnant at that time. Mr Borovnik told the appellant that he would have to pass the information to the police. The appellant also told Ms Fung that she had had no children other than TR and AJ.

212 On 20 October 1999 the appellant wrote to Mr Borovnik, in the following terms:

> "John,
>
> I received all of the information. I will be speaking to Virginia Fung on either Friday or Monday and will discuss those facts. Many people have been involved by name, who actually, have no knowledge of what has occurred and therefore are useless in your inquiries. Please do not contact them before giving me prior notice as they will be completely unaware of what you are talking about. There is no use concerning them with issues that they have no knowledge of, in particular Julie Melville & Duncan Gillies. I suggest you contact Virginia Fung after Monday 25/10/99 to confirm facts." (Ex LLL)

213 On 25 October 1999 the appellant sent by facsimile a letter to Ms Fung. It is too lengthy a letter to be fully reproduced here. However, it is necessary to reproduce substantial extracts:

> "Dear Virginia,
>
> Firstly, thankyou for all of your time, your patience and your understanding even though I have not been entirely honest with you. I'm glad now that I can stop telling half truths and lies and perhaps move on in my life. You are the first person in a long time

> who has reached out to help me without me feeling like I was being judged. It must be very hard for you to understand what has been going on and why I have done the things I've done and I'm not sure I can give you all the answers. Over all of these weeks my main concern was [AJ] and making sure that he was safe and happy and that you would find him a loving and secure home.
>
> So where do I start? I'm not sure? My life for the last 6 years has been a nightmare ... Many people, including my family, have disowned me and looking at the situation I guess it's not hard to figure out why. There were 3 children obviously I can't lie anymore as the paperwork is there. *The middle child lives with a family in Perth although I have not had contact with them for along time*. They befriended me just before I had her and supported us. I am not able to give you many details as I am not sure of them myself. If my story isn't unusual enough as it already is! I know you probably can't believe it but I know somehow that you know I am now being honest with you ..." (italics added) (Ex YY)

Even in this letter, the appellant was not being truthful with Ms Fung. For example, her family had not disowned her. (Whether there was any reasonable possibility that it was true that "the middle child" (Tegan) in 1999 lived "with a family in Perth" was a question the jury had to consider.) In the letter the appellant maintained the fiction that her parents lived in London. She said:

> "Perhaps in the future we could become closer again and reform the ties I broke with them so long ago. I'm not sure? I would like to see them when I go over in December but I'm not sure if they'll see me or not."

She claimed that:

> "People dropped off me when they realised that I was going to relinquish the babies."

(There was no evidence of anybody, other than hospital staff, who was aware of the birth of the children or the adoptions of TR and AJ. The evidence was to the contrary: that the appellant had successfully concealed all of her pregnancies from her family and friends.)

214 On 4 November 1999 Mr Borovnik reported the matter to Katoomba Police. The precise terms of his report are not in evidence. On 8

November 1999 the appellant again wrote by facsimile to Mr Borovnik (Ex LLL) giving him her "adjusted contact numbers", and adding:

> "Your discretion is essential & appreciated."

215 The police investigation was transferred from Katoomba Police Station to the Manly Police Station where it came under the supervision of Detective Mathew Kehoe. Detective Kehoe made various inquiries and the appellant was interviewed on 14 February 2001. The interview was electronically recorded. *Inter alia*, the following questions were asked and answers given:

> "Q23 As I've explained to you, we're investigating a, a report forwarded to us by the Katoomba Children's Court in relation to the birth and subsequent adoption of, of that child. Can you, in your words, can you just explain to us the circumstances of when the child was born and what happened subsequent to that?
> A After a brief affair with the father of the child I gave birth. We made an arrangement that he would come and take custody of Tegan as I was unable to take care of her myself, and he dropped me home and then took Tegan with him into his care.
>
> Q24 O.K. And you told me that the person that you, that is the natural father of the child is an Andrew Morris. Is that correct?
> A That's correct.
>
> Q25 Now you don't know where he is at the present time?
> A No, I don't.
>
> Q26 You believe he previously lived in Balmain?
> A That's right.
>
> Q27 And you believe that his date of birth is sometime in August, 1966?
> A Perhaps a little earlier ... maybe July, August.
>
> ...
>
> Q32 Now you also explained to me that he, during that time in 1996 that he had a partner that lived with him.
> A That's right, Mel.
>
> Q33 And are you aware of her full name?
> A No, I'm not.

... [The appellant then agreed that she had attended Ryde Hospital prior to the birth of Tegan, and that the baby was born on 12 September 1996.]

Q40 And you were referred to the hospital by a home birth midwife. Is that correct?
A No, it's not correct.

Q41 All right. Can you tell me who Julie Melville is?
A Yep, she was the mother of the, um, guy I was seeing at the time, who was a midwife.

... [The appellant said that she left the Auburn Hospital at sometime before midday on 14 September, a Saturday.]

Q47 And when you were at the hospital did anybody visit you out there?
...
A Oh, sorry, sorry. Yes, I was visited on 2 days by Andrew and Mel and Andrew's mother. Sorry.

...

Q50 And what was the purpose of their visit?
A To make arrangements for Andrew to take custody of Tegan.

Q51 O.K. And, and what arrangements were made for him to take custody of her?
A He was to arrange to have a car seat organised so he could take Tegan home, he was to take me home, and then he would go home with Tegan.

Q52 Right, O.K. To your knowledge is there any reason why Andrew wanted to adopt or care for Tegan?
A Well, he's the natural father and I was unable to, to take custody of her myself, and that was very clear from March in '96 when I found out I was pregnant, and I had made that clear to him and that was part of the, the, you know, agreement between us, for me to carry the baby to full term.

Q53 O.K. When did you first meet Andrew?
A I met him in December, '95.

Q54 Are you aware if his partner has any kind of medical problem or she can't have children, or is that perhaps the reason, or ---
A No, it was just by choice because I was not able to have a child at the time, mentally or financially, I wasn't capable and wasn't prepared to keep Tegan and, and Andrew was, and he earned good money and he had a partner. That to me seemed, they seemed to have a pretty, they had a future together. Well, they indicated to me that they were gunna be together and I thought that would be more suitable than me on my own at Uni and ---

...

Q57 And as you've explained to me beforehand, on the day you were discharged from hospital Andrew came to the hospital. Is that right?
A That's correct.

Q58 And they dropped you to, they dropped you home to Gladesville.
A That's right.

Q59 And what address did they drop you to in Gladesville?
A 10 Venus Street, Gladesville.

Q60 And, and Andrew took Tegan home with him.
A That's right.

Q61 And I think you've explained to me beforehand that you saw Tegan on a number of occasions after that.
A That's right.

Q62 And when was the last time that you saw her?
A Oh, approximately, it would have been about 3 or 4 months later.

Q63 And when was the last occasion that you spoke with either Andrew or Melanie?
A Either January or February of '97.

Q64 O.K. Now I think you've explained that you don't have an address for, for Andrew. Is that right?
A No, I don't know where he is.

...

Q68 Do you have any other friends that may know where he is at the moment?
A No, the people that are in my life now weren't necessarily around then. They wouldn't have known him.

Q69 O.K. Are there any other people who knew of Andrew that you might be able to get in contact with that might know of his whereabouts now?
A Yeah, quite possibly.

...

Q71 ... Now you showed us beforehand that you had, you have Tegan's details on your Medicare card.
A That's correct, yeah.

Q72 And can you just explain the reason why her details are on your card?
A That would be because when I filled out the registration forms in the hospital I went through them with a nurse and she had the

> official sticker or whatever it was, it may be, all the paperwork together, and I filled out the registration forms and signed them, and also signed a form for Medicare to, in future in case Tegan was with me and I needed to take her to the doctor's or something ..." (Ex NNN)

216 In October 2002 Detective Richard Gaut took over the investigation. On 16 October Detective Gaut had a conversation with the appellant. This conversation was not recorded. However, Detective Gaut made notes of the conversation. He introduced himself to the appellant, and asked "the circumstances of who you gave the child to and how it was given over". The appellant replied:

> "I gave it to the father Andrew Norris."

217 The appellant then told Detective Gaut that Andrew Norris, his mother and his girlfriend Melanie had come to Auburn Hospital when she was discharged and picked the child up from there. She said that she had caught a taxi home to Gladesville by herself. Detective Gaut noted that this was different, in two respects, from what the appellant had told Detective Kehoe. These were the name given to the father of the child - Norris, not Morris, and the circumstances in which she said that she had returned to her home. He challenged the appellant about this. She denied having used the name "Morris" to Detective Kehoe and insisted that she had spoken of Andrew Norris. Detective Gaut also asked her about the different accounts she had given about how she travelled home to Gladesville - she had told Detective Kehoe that Andrew Morris, with his partner and mother, had driven her to Gladesville; but she told Detective Gaut that she had travelled by taxi. The appellant explained:

> "... I told him that because that's what I wanted to happen. He hated me. I felt like a slut. I wanted to make it sound better, the fact that they didn't - they didn't care about me."

218 The appellant gave Detective Gaut a description of Andrew Norris. She said that he would (in 2002) have been about 36 years of age (that is, born in about 1966) had bleached blonde hair, was well built, with a tanned

complexion, worked in the finance industry or in banking. She thought he had attended Sydney University.

219 Detective Gaut asked the appellant about the existence of anybody who could verify the existence of Andrew Norris, and knew about the birth and the fact that she had handed Tegan to that person. The appellant replied:

> "There was a lot of people I used to hang around back then who aren't in my life now."

220 She identified a Lisa Andreatta from Brisbane as a friend of Andrew's who knew about the birth, and who also knew Andrew's partner Mel. Ms Lisa Andreatta met the appellant in 1996 as a fellow student at the Australian College of Physical Education in Homebush. During that year they became friends. Ms Andreatta met Duncan Gillies, who she understood to be the appellant's boyfriend. The appellant never told Ms Andreatta that she was having a relationship either with Andrew Morris or Andrew Norris, nor anybody whose first name was Andrew. The appellant never introduced Ms Andreatta to a man named Andrew Morris or Andrew Norris. Ms Andreatta had never lived in Brisbane.

221 The following day, 17 October, the appellant telephoned Detective Gaut and told him that she was intending to go to the Gladesville address (10 Venus Street) to attempt to locate old diaries containing phone numbers of friends who could verify her account of Andrew Norris. Detective Gaut did not hear from the appellant over the next three weeks, and, on 7 November, he telephoned her to ask how her inquiries were proceeding. She told him that at that point she had been unable to find any contact numbers but was intending to go to the Gladesville address (10 Venus Street) on Saturday, 9 November to look through old boxes containing diaries with phone numbers of mutual friends. Detective Gaut asked her to call him by Monday, 11 November. She did not do so. Detective Gaut made a number of attempts to contact the appellant and eventually did so.

On one occasion (22 November) she told him that she was not in a position to speak, but would call back in 20 minutes. She did not do so.

222 On 13 December 2002 Detective Gaut received from the appellant a hand written letter. The appellant advised him of her intention to travel to the United Kingdom with her then partner and daughter. Later, she provided Detective Gaut with details of her travel arrangements.

223 On 2 December 2002, with another detective, Detective Gaut went to 10 Venus Street, Gladesville where he spoke to two of the three women then living at that address. They told him that nobody had come to the house to search through old boxes of papers.

224 On 3 January 2003, Detective Gaut and a dog handler went to that address with a cadaver dog for the purpose of investigating whether any human remains were on the property. The search yielded no result.

225 On 9 May 2003 the appellant was again interviewed, this time by Detective Gaut, at the Manly Police Station. The interview was electronically recorded.

226 Detective Gaut asked the appellant to confirm that, on 16 October 2002, she had given the name of Tegan's father as Andrew Norris. She did not agree with that. When further questions were asked, the appellant said [A67]:

> "I made a mistake, yes, I, I told Detective Kehoe one name and I told you a different name."

227 The interview was a lengthy one. The following questions and answers are significant:

> "Q96 ... Is it true that when you were at the hospital, that his [Andrew Morris/Norris] mother came to the hospital?
> A That's true.

> Q97 That's true? And is it true that his, his girlfriend or his wife at the time, Melanie, or Mel ---
> A Mel.
>
> Q97 --- she also came to the hospital?
> A Yes.
>
> Q98 How many times did they come to the hospital?
> A They only came to, to pick Tegan up, but Andrew had been once before.
>
> ..."

228 In response to a specific question by Detective Gaut, the appellant said that she had gone through boxes at her old address, 10 Venus Street, Gladesville. That, she said, occurred in November 2002. Immediately after that, she said that she had been unable to go through the boxes, because the tenants refused her access.

229 Detective Gaut then asked a number of questions about the notes taken by Ms Baltra-Vasquez at Auburn Hospital. The appellant agreed that, although she had told Ms Baltra-Vasquez that she had been born in Perth and her parents still lived there, that was not true. She agreed that she had "probably" told Ms Baltra-Vasquez that her boyfriend was a good caring man and the pregnancy had been planned, and that this was not true. With respect to her statement to Ms Baltra-Vasquez that, on her discharge from hospital, "a lady" would come to stay with her, she said:

> "A222 But by that stage, I knew that Andrew was taking Tegan, so I was going to be on my own."

230 Detective Gaut asked the appellant about her statements to Ms Fung that AJ was her first child. She said this was because she thought Ms Fung would not help her, would judge her and would not help AJ. He asked her about the letter to Ms Fung in which the appellant had claimed that "the middle child" (Tegan) lived with a family in Perth. When asked if that was true, the appellant said:

"A292 I'm not sure where they are."

Detective Gaut asked why she said they were in Perth, and asked if she had believed that the family were in Perth. The appellant answered:

"A294 I wasn't sure what Andrew was going to do."

231 The appellant told Detective Gaut that the reference to "the Perth family" was a reference to Mel and Andrew. The following questions and answers are pertinent:

"Q297 Do you agree that it says 'they befriended me'?
A Yes.

Q298 O.K, 'just before I had her and supported us'.
A Yes. I -

Q299 Well, do you agree that if, if you had an affair with Andrew, who, who you knew well before you had the child ---
A But I didn't know Mel at all.

Q300 Why did you say they lived in Perth?
A (NO AUDIBLE REPLY)

Q301 Well, do you agree that you've never told the police that you believe that they live in Perth?
A Sorry?

Q302 Do you agree that you've never told the police, while we're trying to find out where, where Norris is living, you've never mentioned him living in Perth?
A No. I, I never have.

Q303 Can you tell us why?
A No.

Q304 Do you believe he lives in Perth?
A I'm not sure. I'm not sure what his plans were. He wasn't going to tell me.

Q305 Can you tell me why you told Virgina Fung that, that the child lives in Perth with a family?
A Some of the conversations I had with Andrew indicated perhaps he wasn't going to stay in Sydney because of the embarrassment that I'd caused him and, or could cause him, I guess.

Q306 Did he, did he ever say he was going to Perth?
A Not direct, not directly, amongst other, he just said, I can't, I don't know, somewhere, something along the lines of I don't know

> how I could stay in Sydney, what will everyone think, it's such an embarrassment. For him. It's an embarrassment for him." (Ex PPP)

Detective Gaut asked the appellant directly if she had killed Tegan, which the appellant denied.

232 Detective Gaut asked the appellant about the inclusion of Tegan on her Medicare card, and the absence of any claims made with respect to her. She said that she filled out "the paperwork" and gave it to Andrew Morris/Norris. He asked about her claim that Lisa Andreatta was aware of the relationship and the birth of Tegan. The following questions were asked and answers given:

> "Q352 You didn't think it might be important that she was the one person who could verify the fact that ---
> A But I know she doesn't know where he is.
>
> Q353 Yeah, but you, you agree that you said that she knew about the child and she knew about the, who the father was and all that and that she could verify that? ... Do you agree with that?
> A Yes.
>
> ...
>
> Q355 All right. So, you didn't think, it, this could put it all to rest, if you were to allow police to speak with her?
> A I don't, I don't want to have her involved, I don't, she's overseas and I don't want her to, I just thought you would speak with him and it would be fine and she wouldn't have to be involved and -
>
> Q356 Mm. Well, I, I've spoken with Lisa and she states that she doesn't know any Andrew Norris and she also doesn't know anything about you having a child in 1996. Keli, it's obviously from what you've telling myself and other people, all right, that you're not telling us the truth. Now, this matter is not a matter that's going to go away.
> A I know it's not going to go away, but I don't want to hurt everybody around me." (Ex PPP)

233 The appellant maintained that Tegan was with Andrew Norris. She said:

> "A361 I thought, I know she didn't know, about the baby, but she, I, I am sure she knew who Andrew was, because we used to, she used to be there when he was there." (Ex PPP)

234 Detective Gaut then asked the appellant again to nominate anybody who knew about her relationship with Andrew Norris or who knew that she had had a child with him. The appellant did not reply.

235 Following this interview, the appellant agreed to accompany detectives to Balmain in an attempt to locate the apartment block in which she had said that Andrew Norris lived. She gave a general description of the area where she claimed to have visited Andrew Norris. This excursion took place on 19 May 2003. After driving around the area for a time, the appellant identified an apartment block in Wisbeach Street, Balmain as having features similar to that where she said she had conducted her liaison with Andrew Norris. They entered the block and, from the outside, the appellant identified the apartment she said she believed to have been occupied by Norris.

236 The appellant said that Andrew Norris lived in the apartment with his girlfriend Melanie, who, the appellant understood, worked in retail, but who was never present when the appellant visited. She said that Melanie's possessions were in the apartment.

237 Detective Gaut was able to gain access to one of the apartments in the block, which the appellant said was directly underneath the apartment occupied by Andrew Norris, and was identical in layout. She told Detective Gaut that, on two or three mornings after she had stayed with Norris, she had walked to the nearby Dawn Fraser Swimming Pool for water polo training.

238 As part of his investigation Detective Gaut made contact with some friends of the appellant. A couple called Brandon and Melinda Ward, who had known the appellant since childhood, were among those contacted. Mr and Mrs Ward told the appellant of the inquiries, saying:

> "A detective has been ringing us asking us about a missing baby that you've had. We have no idea what he is talking about. We thought we would make you aware of this."

The appellant replied:

> "It has nothing to do with you, it is something between Duncan, Narelle and Simon."

239 Simon Gillies was Duncan Gillies' brother. He and his wife Narelle had had difficulty conceiving and she had given birth to a still born child in February 1998. The appellant had visited her in hospital. There was no arrangement between Simon and Narelle Gillies and the appellant in relation to a baby born in 1996.

240 On 7 January 2004 Detective Gaut visited the appellant at her home, in company with Detective Edgtton. A conversation ensued that was not recorded. Detective Gaut made it plain that he did not wish, in an unrecorded conversation, to discuss matters the subject of the investigation. The appellant told Detective Gaut that, as she had not heard from him for months, she was wondering why he had not contacted her. The appellant protested that Detective Gaut had contacted a number of her friends and acquaintances. She maintained that she had given Tegan away. Eventually, the appellant agreed to a further recorded interview at the Manly Police Station.

241 That interview took place the following day, 8 January 2004. The appellant told Detective Gaut that she was confident that Duncan Gillies was not the father of the child, because, at about the time of conception, they had abstained from sexual relations. She said that Andrew Norris reacted with hostility when she told him that she was pregnant, and that, thereafter, she had virtually no contact with him, until after Tegan's birth. Shortly after saying that, she said that there had been some face to face contact during that time, and that Andrew Norris had remained hostile, accusing her of "trapping" him.

242 She said that the arrangement for Andrew Norris and his partner "Mel" to take the baby was made on a Friday in September, after Tegan's birth, and while the appellant remained in the hospital.

243 The appellant said that she had a lengthy conversation with Andrew Norris when she first informed him of her pregnancy, and then had no further contact with him until she telephoned him from the hospital after which he, with his mother and partner Melanie, came to the hospital to take Tegan.

244 What followed thereafter was a painstaking, meticulous and exhaustive investigation initially under the supervision of Detective Gaut. The investigation began by focussing upon determining: (i) whether there was any realistic possibility that Tegan was alive, and (ii) an attempt to identify the Andrew Morris/Norris to whom the appellant claimed to have given the baby. The searches for Andrew Morris/Norris included:

- electoral rolls for a person of those names living in the Balmain/Rozelle area in 1996;
- University of Sydney records for persons of that name enrolled in the last 20 years with birth dates between 1960 and 1970;
- NSW Water Polo Association, and various water polo clubs, records;
- Roads and Traffic Authority (RTA) records;
- Centrelink records;
- Australia Post records;
- Department of Fair Trading records regarding the lodgement of rental bonds;
- police records concerning reports of missing persons by the name Andrew Norris;
- Registry of Births, Deaths and Marriages records for persons called Andrew Norris born between 1960 and 1976.

None of these searches yielded any person who could have been the Andrew Morris or Andrew Norris of whom the appellant had spoken. By examining Australia wide electoral, Australian Taxation Office, police, RTA, NSW Births, Deaths and Marriages, Department of Immigration, telephone records and records of electricity providers in the Balmain/Rozelle area, 41 men by the name of Andrew Norris in Australia with birth dates between 1960 and 1976 were identified. Statements taken from each of those that could be contacted. The results were detailed in Ex AU.

245 It is unnecessary here to detail the meticulous searches undertaken by Detective Gaut with the assistance of other police. It is sufficient to say that those searches produced no Andrew Morris or Andrew Norris who could have been the father of Tegan.

246 On a direction from the NSW Coroner, in July 2005, Detective Gaut had searches undertaken of Births, Deaths and Marriages Registry records throughout Australia for women named "Mel", or variations thereof - Melanie, Melissa, Melinda - registered as the parent of a female child born in September 1996. This search yielded no mother or child who could have been the "Mel" who the appellant said was the partner of Andrew Norris; nor did it yield any child who could have been Tegan. A search was also conducted for any child in Australia who could have been Tegan. This search began with Births, Deaths and Marriages records, covering children born between 31 March 1996 and 30 September 1997. More than 12,000 births were investigated. No child who could have been Tegan was identified. Searches were undertaken of NSW and interstate Births, Deaths and Marriages registries for a female child whose father's name was given as Andrew Norris. Those searches yielded no results. Searches were undertaken of foundlings, and adoptions, again with no results.

247 Requests were issued to heads of all authorities responsible for government, Catholic, independent, and home schooling in each State and

Territory for any female child born on 12 September 1996 with a father named Andrew Norris or Andrew Morris. Nothing was produced.

248 Investigations were undertaken by the Unsolved Homicide Division of the NSW Police Service (who took over the investigation in September 2006), sometimes, perhaps, duplicating those already conducted. These investigations identified more than 1000 children for more detailed investigation, as possibly Tegan Lane under a different name. All were excluded as being Tegan. A review of Detective Gaut's investigation was undertaken in mid 2007, and many of the inquiries he had made were repeated.

249 Detective Gaut followed up a number of statements made by the appellant over the years. These included statements made to Centacare, Ms Fung, Mr Borovnik, and also Detective Kehoe and Detective Gaut in the three interviews in which the appellant participated. One such statement was that, the mornings after she stayed with Andrew Norris at Wisbeach Street, the appellant had walked to the Dawn Fraser Pool for water polo training. What emerged from the investigation was that, in fact, morning training sessions were held at Homebush. It was evening training sessions that were held at the Dawn Fraser Pool.

250 An equally comprehensive investigation was conducted into the 1995-1996 occupants of the apartment block in Wisbeach Street, identified by the appellant as the address where she had visited Andrew Morris/Norris. All apartments in the block were owned by one company, and managed by a single real estate agency. The agency had no record of any lease to, or payment made by, a person called Morris or Norris.

251 The persons who had occupied the two apartments identified by the appellant as possibly that where she had visited Andrew Morris/Norris were contacted. Each provided information that excluded any real

possibility that he was the person with whom the appellant had had "a brief affair".

252 One of the tenants in the block claimed to have seen mail addressed to both Andrew Morris and Andrew Norris in the mailbox for Apartment 10. However, cross-examination established that this evidence was of dubious (if any) reliability.

253 Department of Immigration records were searched for passport applications for female children aged under 12 months between 14 September 1996 and 31 December 1996. The search produced no passport application for a child who could have been Tegan.

254 In 2008, under the supervision of Senior Constable Rachelle Gambino, a more expansive school search was undertaken. No child who could have been Tegan was identified.

255 In all, more than 86,000 births in NSW between 31 March 1996 and 30 September 1997 were cross-checked against hospital records. No child who could have been Tegan was discovered.

256 In 2004 and 2005 the police strategy included the use of media to attract attention to the investigation. The express purpose was to elicit information from the public. All information provided was followed up. No person who could have been the Andrew Morris/Norris of whom the appellant spoke was discovered. No child who could have been Tegan was discovered.

The trial

257 It is of some importance to note the manner in which the trial was conducted on behalf of the appellant.

258 Following the Crown opening, senior counsel for the appellant opened the defence case at some length. He identified areas of evidence in dispute. With respect to the issues he said:

> "What's in dispute in the case is the very essence, if I can deal with the first count, the very essence of the charge of murder. The dispute, the difference between the defence and the prosecution, is that the defence says, 'This woman, the accused, has never killed anybody in her life. Never.' ...
>
> So the defence dispute with the Crown is that, firstly, there never has been, certainly in the way it's described by the prosecutor, or to the knowledge of the accused, any murder of anybody connected with her, in particular baby Tegan Lane.
>
> ...
>
> ... our case is they can't prove how, when, where or even why Keli Lane would murder her newborn child; but further, they can't even prove that that child is dead. And further, they can't prove, if that child is dead, the manner of the death.
>
> ...
>
> So, members of the jury, the first and perhaps fundamental difference, dispute or difference, between the defence and the prosecution is that our submission to you will be the Crown can't prove her death, the Crown can't prove the manner of her death, the Crown can't prove that any act was done by the accused in relation to Tegan Lane that either was done when she intended to cause Tegan's death or to do her serious bodily harm.
>
> ..."

259 In particular, senior counsel disputed the Crown case with respect to the motive attributed to the appellant - that motive was that she was fixated upon an international sporting career and did not wish to be encumbered by the responsibility for a child.

260 Further, senior counsel pointed out that, even to the extent that the appellant's history showed that she was not prepared to accept responsibility for a child, on four occasions (three before and one after the birth of Tegan) the appellant had employed lawful and responsible methods of achieving that end - on two occasions she had had

pregnancies terminated, and on two she had surrendered children for adoption.

261 In respect of Tegan, senior counsel said:

> "... she took the responsible course with baby Tegan, giving it to the natural father."

In taking this course, it was plain that the appellant maintained her position, as she had in the interviews with Detectives Kehoe and Gaut, that she had given Tegan to Andrew Morris/Norris.

262 These were the issues to which the jury was alerted at the commencement of the trial. There was no variation to that during the course of the trial.

263 One thing that emerges from the above account of the Crown case is the repeated provision of false information by the appellant over many years, and in circumstances not related to the birth, disposal, or death of Tegan. It is relevant to note that only three of the false statements were presented to the jury as lies evidencing consciousness of guilt (*Edwards v The Queen* [1993] HCA 63; 178 CLR 193). These were:

- the statement in the letter to Ms Fung that Tegan was living with a couple in Perth;
- the statement to Detective Kehoe that the appellant had given Tegan to Andrew Morris;
- the statement to Detective Gaut that the appellant had given Tegan to Andrew Norris.

264 These were the subject of the decision of this Court in *R v Lane* [2011] NSWCCA 157; 221 A Crim R 309. His Honour gave appropriate directions to the jury, and no issue arises on this appeal concerning the admission of the evidence or the directions given to the jury.

265 The other false statements attributed to the appellant were relevant to the assessment of her credibility. This had a particular poignancy because, the appellant not having given evidence in the trial, reliance had to be placed upon what she had previously said. It would be difficult to assign any probative value at all to anything said by the appellant concerning the investigation.

266 During the course of the trial the jury were given written directions with respect to murder, perjury (and false swearing), and the use of lies as consciousness of guilt. Those concerning murder were in the following terms:

> "1. The crime of murder has been committed by the accused if the Crown has established beyond reasonable doubt each of the following:
>
> a) the death of Tegan Lane;
>
> b) that it was the deliberate act of the accused that caused the death of Tegan Lane; and
>
> c) that the act causing death was done by the accused with an intention to kill Tegan Lane.
>
> NOTE: If the Crown has satisfied you beyond reasonable doubt as to each of these ingredients, you will find the accused guilty of murder.
>
> 2. If the Crown has not satisfied you beyond reasonable doubt of the death of Tegan Lane, you must find the accused not guilty and acquit her of murder.
>
> 3. If the Crown has not satisfied you beyond reasonable doubt that it was the deliberate act of the accused that caused the death of Tegan Lane, you must find the accused not guilty and acquit her of murder.
>
> 4. If you are not satisfied beyond reasonable doubt that the act causing death was done by the accused with intent on her part to kill Tegan Lane, you must find the accused not guilty and acquit her of murder."

267 The Crown case on motive was put to the jury in final address by the Crown prosecutor in the following words:

> "Firstly, we have evidence of motive. Mainly, evidence of long-term motive. Her sporting life, her social life, educational career, her job, her Olympic ambitions, her overwhelming fear of rejection by her family and friends that would bring shame on her."

The Crown prosecutor went on to speak in some detail of the evidence supporting the assertion that the appellant was driven by "Olympic ambitions", and other evidence supporting the contention that she was motivated by an "overwhelming fear of rejection".

268 The Crown also placed some emphasis on the evidence submitted as tendency evidence, concerning the appellant's disposal of prior and subsequent pregnancies, whether by termination, or by adoption. Senior counsel for the appellant countered this by again reminding the jury that the tendency disclosed was, not to murder or engage in other criminal conduct, but to adopt lawful means of ensuring that the appellant was not responsible for children.

269 Senior counsel who represented the appellant at trial addressed the jury comprehensively and in considerable detail on the evidence. A central theme that recurred through the address was a challenge to the inference, essential to the Crown case, that Tegan was dead.

270 About midway through his address he put a series of numbered propositions to the jury. These included the following:

> "Point number one is that we do not even know that the victim is dead. Point number two is if she's dead, we don't know how she died. There's no scientific evidence at all. There's nothing. Nobody can tell us anything, not one word in this case.
>
> 'We don't know' number three is this, members of the jury: I haven't even got to the investigation and the evidence in the case yet directly. Number three is if she's dead, that is, Tegan Lane, we don't know who caused the death if anyone did because we don't know. It could have been an accident and people do terrible things to cover things up.

> ... that these next matters are absolutely as critical as the first point which we suggest is 'we don't know'. We do not even know that Tegan Lane is dead.
>
> Point number four: If Tegan Lane is dead we don't know that it was the deliberate act of Keli Lane that caused her death.
>
> Number five: We don't know that if Tegan is dead and the ability (sic - act) of Keli Lane caused her death, we don't know that it was done with the intention to kill her."

271 The remaining points were largely argumentative. Senior counsel questioned the motive hypothesised by the Crown for murder, and suggested that the motive proposed was equally a motive for the appellant to have Tegan adopted, or to give her to the natural father. He made a significant attack on the quality of the police investigation, describing it as "so poor", lacking urgency, being "shoved onto the back burner" and "passed from policeman to policeman".

The appeal

272 The submissions advanced on behalf of the appellant began by reiterating the written directions given to the jury, concerning what was essential to be proved in the Crown case:

(a) the death of Tegan Lane;

(b) that it was the deliberate act of the appellant who caused the death of Tegan Lane; and

(c) that the act causing death was done by the appellant with an intention to kill Tegan Lane.

273 The task of an appellate court in considering a ground that a conviction is unreasonable and cannot be supported by the evidence remains as stated in *M v The Queen* [1994] HCA 63; 181 CLR 487, *MFA v The Queen* [2002]

HCA 53; 213 CLR 606 and *SKA v The Queen* [2011] HCA 13; 243 CLR 400. The question the court must ask itself is:

> "... whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.":

M at 493. In answering that question:

> "... the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

274 The adequacy of the Crown case to support the charge of murder was attacked on three fronts:

- the evidence said to establish motive, which, it was contended, was "weak", or even "extremely weak";

- the evidence said to establish the *mens rea* necessary for the offence of murder (in this case, as pointed out above, the Crown relied only on intention to kill and discarded the other states of mind which may, in another case, be sufficient for a conviction for murder);

- the tendency evidence, being, essentially, the appellant's history, both pre- and post- the birth of Tegan, to avoid accepting responsibility for the care of a child.

275 In written submissions directed to this ground it was proposed that the Crown was not able to exclude either manslaughter, or other reasonable hypotheses consistent with the innocence of the appellant. Those "innocent hypotheses" were identified as accidental death, infanticide, that the child was given away to a known person (Andrew Morris/Norris) and

that the child was given away to a person unknown. On the hearing of the appeal the first and second of these (accidental death and infanticide) were expressly disavowed.

276 We do not accept the proposition that the evidence said to establish motive was weak. There was strong evidence that the appellant did not wish to accept responsibility for a child. In any event, it is not essential that the Crown establish a motive; evidence tending to establish motive was, in this case, one of many elements making up a circumstantial case. It was not necessary that it be proved beyond reasonable doubt. Even if it were correct to characterise that evidence as weak, that does not diminish the strength of the numerous other items of evidence in the Crown case that were not explained.

277 We turn to the specific questions posed to the jury.

(i) Did the Crown prove that Tegan was dead?

278 Given the way the trial was conducted, there were really only two alternatives available for the jury to consider. Either, as the Crown contended, Tegan was dead, or, as was contended on behalf of the appellant, she had been handed by the appellant to her natural father, whether named Andrew Morris or Andrew Norris. In this context, the appellant's denial to Mr Borovnik, repeated to Ms Fung, that she had given birth to a child in 1996, was significant. It is also to be recalled that the appellant told the Ryde Domiciliary Midwife Program that she would not require their services. She said this was because she had made "home birth midwife" arrangements to take over Tegan's care. She did not suggest that the child had been taken by her father. Significant also was her subsequent explanation to Ms Fung that the child had been taken by "a Perth couple". Also instructive is a series of answers given by the appellant to Detective Gaut in the interview of May 2003. The questions and answers are set out at [226]-[233] above. The appellant attempted to

assimilate the "Perth couple" to whom she claimed to Ms Fung to have given the child, with Andrew Morris/Norris, and his partner "Mel". All members of this Court viewed the video recording of the interview. The attempt to assimilate the "Perth couple" to Andrew Morris/Norris and "Mel" failed. It is apparent that, in giving these answers, the appellant was desperately attempting to reconcile the various false accounts she had given. That part of the interview is a compelling demonstration that the appellant was not telling the truth about the disposal of Tegan.

279 That leaves the obvious question: if Tegan was not given to a "Perth couple" and was not given to Andrew Morris/Norris and "Mel", what happened to her?

280 Of course, the mere fact that the appellant told untruths about the disposal of the child does not, of itself, establish that the appellant killed the child. It is, however, one powerful item of evidence in a circumstantial case.

281 The evidence, in our view, convincingly excluded any reasonable possibility of the second alternative, that the child had been given to her father. The police investigation virtually excluded any possibility that there existed a man named Andrew Morris/Andrew Norris with whom the appellant had had "a brief affair". Not one person with whom the appellant had been in contact at the relevant time came forward to say that he or she had known the appellant and Andrew Morris/Norris. The evidence strongly established that no such person had lived in the Wisbeach Street apartments that the appellant said that he had lived in. The police investigation pursued every line of inquiry left open by the appellant - his date of birth, his occupation (in finance), his participation in water polo. Leads given by the appellant proved false - for example, she told Detective Gaut that Lisa Andreatta could confirm the existence of Andrew Morris/Norris, and the birth of Tegan. Not only did Ms Andreatta not confirm either of those facts, she gave evidence to the contrary.

282 Extensive searches by police failed to produce any person who might be Andrew Morris/Norris. Equally extensive searches failed to produce any child who might be Tegan.

283 Once the reasonable possibility that the appellant might have given the child to Andrew Morris/Norris is excluded, only one inference remains reasonably open. That is that Tegan is dead.

(ii) Did the Crown prove that the death of Tegan was caused by an act of the appellant?

284 The evidence was that the appellant left Auburn Hospital at between 11am and 12 noon on 14 September, taking Tegan with her. She arrived at her parents' home at Fairlight at 3pm without Tegan. She mentioned nothing to anybody about the birth of Tegan. There was no evidence (other than her claim to have given Tegan to the natural father, a claim we have already held to be untenable in (i) above) that could found any reasonable inference that, in the interim, the appellant disposed of the child in any lawful manner. Once it is concluded that the child is dead, it is a short step, and an inevitable one, to the further conclusion that it was the act of the appellant that caused the death. We are satisfied that the evidence established beyond reasonable doubt that it was an act of the appellant that caused Tegan's death.

(iii) Was the act that caused Tegan's death done by the appellant with the intention of killing the child?

285 This has been largely dealt with in consideration of ground 1 of the appeal.

286 It is to be noted that in oral argument in support of this ground, it was accepted that it is inextricably linked with ground 1 concerning the availability of an alternative count of manslaughter.

287 For the reasons given in relation to ground 1, the evidence was capable of establishing that the appellant intended to kill Tegan, and was not such as to establish any other, or lesser, intention.

288 The final strategy on behalf of the appellant was to characterise the police investigation as "substandard", as a result of which, it was contended, prejudice was occasioned to the appellant, including, but not limited to, delay in bringing the matter to trial.

289 In support of that criticism of the investigation, it was put that the Crown had in fact, in opening to the jury, conceded the inadequacy of the police investigation. That is not so. What the Crown conceded, correctly, was that the investigation got off to a slow start. After Mr Borovnik referred the matter to police, Detective Kehoe interviewed the appellant, but it was not until Detective Gaut assumed control that it gained pace. Thereafter, numerous lines of inquiry were followed in meticulous detail. While courts are not always in a position to make judgments about the quality of police investigations, in this instance, so far as it is possible to gauge, the Crown description of the subsequent investigation as "exemplary" is apt.

290 In any event, it is difficult to see what prejudice was caused to the appellant by the nature of the investigation. Every lead the appellant gave to Detective Gaut was followed up. Potential witnesses in her favour, such as Lisa Andreatta, were located and questioned. As it happens, the evidence Ms Andreatta gave did not assist the appellant at all. But it can hardly be said that a substandard investigation caused prejudice to the appellant. It was evidence that the investigation yielded that caused prejudice, but it was not in any way unfair prejudice.

291 In all of the circumstances, we are satisfied that the verdict of guilty was amply open to the jury, and we are satisfied that the evidence established beyond reasonable doubt the appellant's guilt of the offence.

292 This ground of appeal fails.

Order

293 The appeal against conviction is dismissed.

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AMENDMENT HISTORY:

17/12/2013 - Name anonymised: paragraphs 13, 27, 121, 205, 206

17/12/2013 - substitute "conclusion" with "conviction": paragraph 57

07/02/2014 - para [290] repositioned; now para [272]: paragraph 290

Amendments

17 Dec 2013	Name anonymised	Paragraphs: 13, 27, 121, 205, 206
17 Dec 2013	substitute "conclusion" with "conviction"	Paragraphs: 57
07 Feb 2014	para [290] repositioned; now para [272]	Paragraphs: 290