SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 889 of 2007

THE QUEEN

v

ROBERT DONALD WILLIAM FARQUHARSON

JUDGES	WARREN CJ, NETTLE and REDLICH JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	1 and 2 June 2009
DATE OF JUDGMENT	17 December 2009
MEDIUM NEUTRAL CITATION	[2009] VSCA 307
JUDGMENT APPEALED FROM	[2007] VSC 469 (Cummins J)

CRIMINAL LAW – Conviction – Murder – Applicant alleged to have murdered three children, by drowning, by driving car into dam – Evidence – Expert evidence – Medical opinion – Whether opinion of specialist thoracic physician admissible to prove applicant not likely to have suffered cough syncope before driving car off road into dam – Engineering opinion – Whether opinion of expert accident reconstruction engineer admissible to prove car 'under control' and subject to 'three steering movements' before entry into dam – Whether accident re-enactment evidence and computer simulations admissible to establish likely path of vehicle from road into dam – Whether judge erred in refusing to exclude evidence in exercise of discretion – Directions to jury – Whether permissible to summarise expert evidence by reference to counsel's arguments – *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, *Festa v The Queen* (2001) 208 CLR 593, applied; *R v Andrakakos* [2003] VSCA 170, *R v VN* (2006) 15 VR 113, referred to.

Consciousness of guilt – Post offence conduct – Conversations between applicant and friend after drowning of children – Whether requests that friend not mention parts of pre-incident conversations admissible as evidence of consciousness of guilt - Directions to jury – Failure to direct jury of need to be satisfied of contents of pre-incident conversations – Failure to direct jury of need to be satisfied of those parts of pre-incident conversations applicant sought to conceal – Need to direct jury that, unless prepared to convict in absence of evidence of consciousness of guilt, jury must be satisfied of that evidence beyond reasonable doubt – Need to give jury *Edwards* direction in respect of denials – *R v Ciantar* (2006) 16 VR 26, *R v Cuenco* (2007) 16 VR 118, applied; *R v Laz* [1998] 1 VR 453, *R v Franklin*

(2001) 3 VR 9, followed; *Edwards v The Queen* (1992) 173 CLR 653, considered.

Procedure – Crown's duty of full disclosure and fairness – Failure of Crown to inform applicant that witness for Crown faced pending indictable offences – Whether productive of miscarriage of justice – *R v Spiteri* (2004) 61 NSWLR 369, applied; *Cannon v Tahche* (2002) 5 VR 317, *Mallard v The Queen* (2005) 224 CLR 125, referred to.

Trial – Final address of Crown prosecutor – Impermissibility of posing question as to why witness for Crown would lie – *Palmer v The Queen* (1998) 193 CLR 1, applied.

Verdict – Whether unsafe and unsatisfactory – Conflicting expert opinions – Whether sufficient evidence to sustain conviction – *M v The Queen* (1994) 181 CLR 487, applied.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr J Rapke QC with Mr D Trapnell SC	Mr C Hyland, Solicitor for Public Prosecutions
For the Applicant	Mr P J Morrissey SC with Mr C Mylonas	Victoria Legal Aid, Geelong

WARREN CJ
NETTLE JA
REDLICH JA:

1 The applicant, Robert Donald William Farquharson, was convicted in the Supreme Court, at Melbourne of the murder of his three children Jai, Tyler and Bailey Farquharson. He was sentenced to life imprisonment with no minimum term. He now seeks leave to appeal against both his conviction and sentence.

The Facts

2 On Fathers' Day 2005 the applicant had the care of his three children, Jai aged 10, Tyler aged 7 and Bailey aged 2. These were children from a relationship with his former partner and wife, Cindy Gambino.

3 Having spent the day with the children, the applicant drove to the house of friends in Mt Moriac. He arrived at approximately 7.00 pm and visited for about 10 to 15 minutes. He left that property with the children in his car, a 'Commodore' sedan, and began to drive along the Princes Highway in the direction of Winchelsea where he was to return the children to the care of Ms Gambino.

4 In his record of interview, the applicant gave the following account of what occurred next. He said that there was a bit of traffic on the highway, which he put down to it being Fathers' Day. The children talked amongst themselves. Despite it being a 100kph zone, he drove under 100kph and said he intended to do so as he had his children in the car.

5 The Princes Highway was a two lane, two way undivided road with sealed shoulders and rumble strips outlining the shoulders. The road was straight and horizontal, and then travelled over an overpass bridge before coming down and sweeping through to the right. In the direction in which the applicant was travelling there was a dam on the right-hand side of the road a short distance beyond the overpass. The car there left the Princes Highway and ran into the dam.

6 The applicant said that he did not recall running into the dam. He recalled

driving over an overpass and that, when he had just come over it, he started coughing. He then 'really really' started coughing and recalls nothing further.

7 He said that he found himself under water. He told the kids not to panic, but as Jai (the eldest child) opened the front passenger door, the car began to fill with water and it nose dived slightly. He reached over and shut Jai's door. He managed to get out of the vehicle after which it sank further. He claimed that he then attempted to go around to the other side but could not get there due to the water pressure.

8 Having made it to the shore of the dam, he then approached the Princes Highway with the intention of waving down passing traffic. A car carrying Mr Atkinson and Mr McClelland pulled over, the applicant having been spotted at the side of the road. Mr Atkinson yelled to him 'what the fuck are you doing mate, are you trying to kill yourself'. The applicant did not answer but repeatedly said, 'Oh no, fuck what have I done, what's happened'. He then said 'I've killed the kids. They've drowned'. Within a few minutes he then asked 'can I grab a smoke off you mate'.

9 Both Mr Atkinson and Mr McClelland had difficulty getting any sense out of the applicant. Later, Mr Atkinson recalled the applicant saying he had put his car into a dam and had either a coughing fit or 'done' a wheel bearing. Mr McClelland also said the applicant told them he must have 'done a wheel bearing' and then shortly after that he said he 'must have had a coughing fit and blacked out and just woke up in the water … and [he] couldn't get the kids out'. He repeatedly told them that he had 'killed' his kids and that he had to go home to tell 'Cindy' that he had 'killed them'.

10 The request to be taken to 'Cindy' was a reference to Cindy Gambino, the applicant's former partner and mother of the children. The applicant and Ms Gambino had known each other since 1990, commenced a romantic relationship in 1993 and were married in August 2000. The relationship came to an end in the

late part of 2004 when Ms Gambino asked the applicant to leave the family home. She had told him that she did not want the marriage any longer. Later the applicant was told that Ms Gambino had commenced a new relationship with another man by the name of Stephen Moules.

11 The applicant was driven by Mr Atkinson and Mr McClelland to Ms Gambino's property. The applicant there informed her of the incident. Distraught, Ms Gambino immediately rang Mr Moules. She then drove down to the dam with Mr Moules' son and the applicant in the back seat. Mr Moules drove separately to the dam.

12 Upon arrival, the applicant's vehicle was not visible. It was fully submerged in the dam. A number of attempts were made to rescue the children, searching for them in what was described as 'freezing' cold water. This included attempts by Mr Moules, Mr McClelland and another person, a Mr Cromer. The applicant did not participate meaningfully in any of those efforts. Within a short time a large number of emergency personnel attended the site including the SES and the Urban Fire Brigade.

13 After some time, the applicant was taken to the back of an ambulance and assessed. He was then taken to the Geelong Hospital where he arrived at 9.00pm. He was there treated by Dr Bruce Bartley in the emergency department. A physical examination revealed nothing untoward. But as a result of the history given to him by the applicant, Dr Bartley made a provisional diagnosis of cough syncope; meaning that the applicant had lost consciousness as a result of coughing.

14 The applicant's vehicle was eventually located and recovered from the dam. The applicant's three children were found deceased inside. The cause of death in each case was later confirmed as drowning.

Overview of the Crown Case

15 The Crown case was that the incident was not an accident. Rather, it was the

result of a conscious, voluntary and deliberate act by the applicant who wanted to punish his former partner, Ms Gambino, for their marital break-up. He deliberately drove his children into the dam with murderous intent. His intention was to drown his children and then to escape and inform his wife of their deaths. He was determined to punish her by making her suffer a loss she would always remember with the date of Fathers' Day chosen for this purpose.

16 The Crown case was predominantly circumstantial, comprised of three strands. These were: (a) medical evidence as to the general rarity and specific unlikelihood of the condition that was consistent with the applicant's account of cough syncope; (b) engineering and reconstruction evidence relating to the movement of the applicant's vehicle; and (c) statements made by the applicant to the witness Greg King.

Medical Evidence

17 There was a deal of evidence about the applicant's health before the incident. Ms Gambino said the applicant suffered coughs most winters. On 17 August 2005 he suffered a severe coughing fit when speaking to his employer. The next day he saw his doctor and was prescribed medication. A few days later he saw the doctor again citing worsening symptoms of a cough. After almost two weeks absence the applicant returned to work on 28 August 2005. On 1 September 2005 the applicant was found walking along a road, complaining of a coughing fit when driving that he said rendered him unconscious. On 2 September 2005 he suffered another coughing episode when with his employer. Around the same time others noticed his cough.

18 The defence was that the applicant blacked out at the wheel of the car while it was in motion after he had a coughing fit. The Crown relied upon its medical evidence to exclude that as a reasonable hypothesis. It called three expert medical witnesses. The first was Dr Bruce Bartley, a specialist emergency physician who treated the applicant at Geelong Hospital following the incident and who, based upon the history which the applicant gave at that time, made a provisional working

diagnosis of cough syncope. The defence relied on that diagnosis. The second was Dr John King, a consultant neurologist with the Royal Melbourne Hospital and an associate professor of medicine at the University of Melbourne, who gave expert opinion evidence generally as to the ætiology and incidence of cough syncope. That was less favourable to the defence because it suggested that cough syncope was unlikely to occur in patients other than middle-aged men suffering from obstructive airway disease or similar disorders. There were, however, some aspects of Dr King's evidence which were of advantage to the defence. The third was Dr Thomas Naughton, a specialist thoracic physician and associate professor of medicine in the Department of Medicine at Monash University who, over objection, expressed a conclusory opinion that it was most unlikely that the applicant had suffered from cough syncope.

19 The defence called another neurologist, Dr Christopher Steinfort, a consultant physician in thoracic and general medicine, and head of thoracic medicine at the Geelong Hospital whose testimony was similar in effect to Dr King's opinion.

20 Dr King gave evidence that blackouts were common within his area of practice. He said that cough syncope is an uncommon cause of syncope, characterised by a sudden loss of consciousness after a bout of coughing. In terms of its rarity, Dr King estimated that, in Melbourne, less than two per cent of cases of syncope were due to coughing. Dr King said he had never seen a patient collapse before him, though he had diagnosed a number of patients with cough syncope based on their histories. He said that diagnosis was based solely on a patient's history, and its accuracy was entirely dependent on the patient or witness. He estimated that in 30 years of medical practice, he would have diagnosed only a very small number of patients with cough syncope and could not recall one who did not have lung disease. He acknowledged that cough syncope had been seen in patients without chronic airways disease. He said that patients usually only suffer from a momentary loss of consciousness, in the order of seconds, but that an episode may last 20 seconds from start to finish.

21 Professor Naughton gave evidence that cough syncope was a recognised syndrome and a condition with which he was familiar. He described it as involving a very brief loss of consciousness following episodes of intensive coughing. The loss of consciousness was transient, lasting just a couple of seconds. He said it was usually described in middle-aged men who were heavy smokers, usually with underlying heart or lung disease and often with elevated body weight. Dr Naughton testified that it is an 'extremely uncommon' condition and that in 25 years of practice, he had never seen it personally. He said that there was an absence of good quality scientific rationale supporting the validity of the condition in the medical literature. Having regard to the history given to him, it was his opinion that it was 'medically, extremely unlikely' that the applicant had suffered an episode of cough syncope. The defence challenged the admissibility of Dr Naughton's opinion.

22 Dr Steinfort's evidence was that cough syncope resulted in sudden loss of consciousness following an episode of coughing. He said that it was diagnosed principally on a patient's history. He estimated that an actual loss of consciousness associated with cough syncope lasted approximately ten seconds. He said that he had previously diagnosed cough syncope in 15 patients. He referred to a database he had kept since 1995 of patients seen in his consulting rooms (which represented half his practice) that included an approximate total of 6,500 patients. Of this total he had diagnosed 32 patients with syncope, and coughing was attributed as the cause in 15 of those patients. Although chronic obstructive airways disease was common in people who had suffered from cough syncope, he said it was not a necessary pre-existing condition. He concluded that cough syncope was 'an appropriate diagnosis' of the applicant's condition. Dr Steinfort stated that he was surprised Dr Naughton had not seen or diagnosed cough syncope, attributing this to the filtering process that he would expect to take place before patients were referred to his specialised practice. He disagreed that it was medically highly unlikely that the applicant had suffered from cough syncope. Dr Steinfort's opinion was attacked by the Crown on the basis that it was based on a history that included an established lie by the applicant, namely, that he had previously coughed to the point of losing

consciousness and that it had been witnessed.

23 The defence also led medical evidence of the applicant's condition prior to Fathers' Day 2005, that was said to have increased the likelihood that the applicant had suffered from cough syncope. This evidence showed that the applicant had been suffering from an upper respiratory tract infection which, on occasions, had caused him to cough severely. The evidence was given by Dr Ian McDonald, who was the applicant's treating physician. He testified that on 18 August 2005, the applicant consulted him regarding an upper respiratory infection, which was worsening into pharyngitis and sinusitis. On 23 August 2005, the applicant returned with worsened symptoms of a chesty cough. He also complained of sore and aching ribs that Dr McDonald expected were a result of his coughing. The applicant did not state that he had had difficulty with breathing, passing out or feeling dizzy as a result of his coughing. On examination, the applicant's chest was clear. Dr McDonald prescribed a different set of antibiotics.

Engineering and Reconstruction Evidence

24 The engineering and reconstruction evidence was led by the Crown for the purpose of showing that the path taken by the vehicle was consistent with the driver exercising control of that vehicle. Evidence was led of three steering inputs after the time at which the applicant claimed to have lost consciousness.

25 The key Crown engineering witness was Acting Sergeant Glen Urquhart, an accident reconstruction expert with Victoria Police. He attended the dam site on the morning after the incident and made a number of observations. In his later reconstruction of the incident, he relied upon these observations, photographs taken by other police members and plans of the area. His observations also formed the basis for a drive-through experiment and a computer simulation.

26 Of particular importance were the tyre marks that were used to determine the location and angle of the car when it left the road and the rolling prints in the grass that were used to demonstrate the path of the vehicle.

27 Acting Sergeant Urquhart testified that the course of the vehicle altered three times after the point at which the applicant claims to have lost consciousness. This was said to reflect three steering inputs. He said the car did not veer to the left according to what would be the natural path of a car if it were being correctly driven but went across the highway to its incorrect side of the road and off the road. This involved a steering input of some 220 degrees. Then it straightened up a little with a small steering input to the left. That was the second input. Finally, as the car approached the dam, the car made a slight deviation to the right to avoid running into the trunk of a tree. That, he said, was the third steering input.

28 As part of his evidence, Urquhart presented the results of a 'drive through' experiment to the jury. In this experiment he drove a car without any steering input down the Princes Highway in the direction of the dam. As the exact speed travelled by the applicant's car could not be determined from evidence at the scene, this test was conducted at three different speeds. He said that, when driving at 64kph, the car veered so far to the left that he had to steer right to prevent the car running off the road. At both 82kph and 100kph the car maintained a virtual straight line. This provided a basis for his opinion that the movement towards the dam required a steering input to the right by the driver.

29 Urquhart also presented a simulation using a software program known as 'PC Crash'. Two simulations were conducted at different speeds, with two variances, one attempting to replicate the path followed by the vehicle as calculated by Urquhart from his observations at the scene and one involving a constant steering input (on the basis that that would be more consistent with an unconscious driver). From this it was calculated that the vehicle required three steering inputs for it to follow the path determined by Urquhart from the scene.

30 The evidence of Urquhart was challenged by the defence in cross-examination; first, on the basis that he did not conduct a survey of the camber of the road. The consequence, it was said, was that the 'drive through' experiment was of no value to the jury. Urquhart strongly disagreed on the basis that knowing the

camber would not change the result of the experiment. The proposed evidence of a Mr Jacobs, a mechanic that the defence would call, that the car driven by the applicant may have had a steering bias to the right was put to Urquhart. He considered that at the lower speed, if the steering pulled to the right, with a left veering camber in the road, the car should maintain equilibrium and travel in a straight line. However, at the higher speeds, Urquhart drew a distinction between a drift to the right and movement at a sharp angle off the road to the right. Such movement was relied upon by the defence as inconsistent with the Crown case that there had been a sharp steering input to the right. Urquhart was also questioned as to what was said to be inconsistent evidence as to which of the crime scene markings was used to calculate the movement of the car. Finally, Urquhart conceded that three steering inputs were not the only movements consistent with the path of the vehicle as determined from the evidence at the scene, and that it may have been consistent with a series of smaller movements.

31 The key defence reconstruction witness was David Axup, a traffic analyst. In his opinion the applicant's vehicle followed a smooth arc to the dam with at least three steering inputs. In contrast to Urquhart, he testified that there were a number of hypotheses (apart from conscious driving) that might explain such inputs.

32 Commenting upon the evidence given by Urquhart, Axup opined that a steering input of 220 degrees in a vehicle travelling at 60kph, being the change in angle of the car as calculated by Urquhart, would cause a car to spin out and leave yaw marks on the road surface, in turn resulting in sideways skid marks. Given the absence of such evidence, Axup said he doubted the correctness of Urquhart's opinion. He calculated instead that the vehicle had taken a curved path, and calculated the angle of departure from the road surface as approximately 12 degrees, which would require a constant input at the steering wheel of 23.5 degrees.

33 Sergeant Geoffrey Exton was stationed at the Major Collision Investigation Unit at Glen Waverley. Exton's observations at the scene were of rolling tyre prints leaving the right-hand side of the road when heading towards Winchelsea at an

approximate angle of 30 degrees. The tyre prints left the road's sealed surface and travelled down a slight slope, where the surface then began to level out slightly. The front of the vehicle then would have dropped into a spoon drain. Beyond the spoon drain the grass was longer and had been flattened by the bottom of the car. The tracks continued on into a farm fence. The vehicle had struck two fairly solid upright wooden posts and, as the car went through the fence, it cause the wire to tension and break. The rolling tyre prints continued to a tree on the embankment of the dam, which it appeared had been struck by the vehicle which continued on and then entered the dam.

34 Sergeant Exton said he expected the vehicle could not follow the path that he had determined, particularly over the rough terrain, without some pressure at the steering wheel. His evidence was said to support the Crown case that the path of the vehicle was consistent with the applicant having conscious control.

Statements of intention made to Greg King and subsequent false denials

35 Some days after Fathers' Day 2005, a long time friend of the applicant, Greg King, reported to police that he had had a conversation with the applicant some two to three months before Fathers' Day, outside the fish and chip shop in Winchelsea ('the fish and chip shop conversation'), in which the applicant said that he intended to get even 'big time' with his former wife, Cindy, and also said 'I'll pay her back, I'll teach her.' King said he went home and told his wife about the conversation. His wife said she had no recollection of the details of the conversation.

36 At the trial, it was common ground that there had been a fish and chip shop conversation, in which the applicant said words to the effect that he would pay Cindy back 'big time', and also that, as he spoke, he nodded his head towards the fish and chip shop window where Cindy and the children were. But there was a dispute as to what if anything else was said during the conversation.

37 Part of the difficulty was that King made three different statements to police about the fish and chip conversation. Those statements were not tendered at the trial

and we have not been provided with copies. But one is able to glean an understanding of their content from the cross-examination of King. Each of the second and third statements contained a version of the fish and chip shop conversation which was considerably more detailed and more serious than the preceding version. According to King's evidence at trial, that was due to the fact that the conversation came back to him in stages over time after the death of the applicant's children. King's evidence at trial was in accordance with the third and most serious version. This account was contested by the defence, who argued that King's memory of the details of the conversation was flawed, due to the emotional turmoil of the children's death.

38 To understand the Crown and defence allegations, it is necessary to state briefly the timeline of statements made by King. King made his first statement to the police on 9 September 2005. That was a date five days after the incident. He did so after he was observed crying at work, at which point the suggestion was made that he should speak to the police.

39 In his statement of 9 September 2005, King said that the applicant had complained to him about getting the 'shit car' and that 'Cindy gets to drive around in the good car'. He also stated that the accused said 'She's going to pay big time for this. She's not going to do that and get away with it'. He said something about the kids but King could not remember what it was, other than that he was going to take away the most important thing to her, and that he mentioned something about having a dream and going into a dam.

40 Three days later, on 12 September 2005, King spoke to the police and added to the statement that, when the applicant had said he was going to take away from Cindy the thing that was most important to her, he had pointed his head towards the children in the shop and went on to mention something about an accident in which he got out and the kids did not.

41 In response to these statements, investigating police suggested to King that he

should speak to the applicant while wearing a hidden tape recorder, with the purpose of obtaining a confession. Thereafter, King had two covertly taped conversations with the applicant. Each was played to the jury. In the first, recorded on 15 September 2005, King put to the applicant that the applicant had said in the fish and chip shop conversation that 'I'll pay her back big time'. Without addressing the specifics of the conversation, the applicant urged King not to publish the conversation.

42 The second taped conversation occurred on 13 October 2005. In that, King put a version of the fish and chip shop conversation to the applicant which included the suggestion that the applicant had said 'Well funny about dreams the way I have an accident' and '… I have an accident and the kids die'. This was denied by the applicant who urged non-publication. That suggestion, in combination with the statements, comprised what was described between the parties as the 'dream allegation'.

43 The Crown contended that the applicant's denials, and in particular what was said to be the manipulative nature of the applicant's exhortations not to publish the fish and chip shop conversation, as revealed in the two taped conversations of 15 September 2005 and 13 October 2005, were evidence of consciousness of guilt. The defence contended that these statements were not evidence of consciousness of guilt, that the applicant was merely expressing concern that what King was saying might create a false picture and unfair treatment from law enforcement authorities.

44 On 4 December 2005 King made a further statement that was more extensive than the 'dream allegation'. It was provided to the police as a formal statement on 19 December 2005. It was to be the third and final statement provided by King. The contents of this statement were read into evidence:

> I was down at the Winchelsea fish and chip shop one Friday night. My kids went into the shop to wait for our order. Robbie was in there with his kids. He saw my kids come in and looked out the window and saw me. He came out. He stood beside my driver's side window. We were talking away, I don't remember what about, but he seemed down in the dumps. Then Cindy pulled up. She got out of her car and said, 'hello Greg and Robbie'.

> I said, 'hello Cindy', Robbie said nothing. I looked at Robbie and said, 'I have to say hello'. He said, 'No you don't' and got very angry. I said, 'Come on, Robbie, you have to move on'. He said, 'Move on how, I've got nothing'. Then he said, 'Nobody does that to me and gets away with it, its all her fault'. I said, 'What is'? He said, 'Take that Sports Pack car, I paid $30,000 for, she wanted it and they are fucking driving it. Look what I'm driving, the fucking shit one'. Then he started on about the house and said that she wanted the best of everything and 'we couldn't afford it'. 'Now it looks like she wants to marry that fucking dickhead. There is no way I am going to let him and her and the kids fucking live in my house together and I have to pay for it. I also pay fucking maintenance for the kids, no way'. Then he said, 'I'm going to pay her back big time'. I asked him how, he then said, 'I'll take away the most important thing that means to her'. Then I asked him, 'What's that, Robbie?' He then nodded his head towards the fish and chip shop window where the kids were standing with Cindy and my kids. I then said, 'What, the kids?' He said, 'Yes'. I asked him 'What would you do, would you take them away or something?' He then just stared at me in my eyes and said, 'Kill them'. I said, 'Bullshit, that's your own flesh and blood, Robbie'. He said, 'So I hate them'. I said, 'You would go to goal'. He said, 'No, I wont, I will kill myself before it gets to that'. Then I asked him how, he said 'It would be close by'. I said, 'What'? He said, 'Accident involving a dam where I survive and the kids don't'. He then said it would be on a special day. I asked him what day, he said, 'Something like father's day so everybody would remember it when it was father's day and I was the last one to have them for the last time, not her. Then every Father's Day she would suffer for the rest of her life'. Then I said, 'You don't even dream of that, Robbie'. Nothing was said, my kids started to come out of the shop and then I said to him, 'You deserve to get caught'. Then we went home, I told my wife about the conversation. We didn't do anything about it because we thought he was only bullshitting like he did a fair bit.

45 This version of the fish and chip shop conversation was described as the 'extreme allegation', in contradistinction to the 'dream allegation'. As can be seen, it contained allegations that went well beyond the 'dream allegation', including the highly damaging specific assertions that the applicant had stated that he hated his children, intended to kill them and that this would occur in a dam on Fathers' Day so that everybody would remember it. It was this account that King maintained without substantive alteration from the date of the third and final statement until the trial.

46 King also gave evidence of other conversations with the applicant. He said that, on one occasion when visiting in 2004, the applicant referred to driving off a cliff. In January or February 2005 he saw the applicant sitting under a tree in his car on the other side of the road. At their next meeting the applicant told King 'I was

thinking about lining a truck up'. This was said by the Crown to demonstrate that the applicant often made threats that were not acted upon, so as to explain King's failure to take action following the fish and chip shop conversation.

47 The Crown also led evidence that the applicant was angry and suffering from depression in the period prior to the incident. This was said to create a 'violent cocktail' of emotions.

Dam-Side Conduct

48 In addition to the three strands the Crown relied upon evidence of 'dam-side conduct' of the applicant as revealing the applicant's attitude towards his children and former partner. Such conduct was said to include statements that he had killed his kids and that he wanted to go and tell Cindy what had happened, his refusal to assist with the search for the children and constant requests for cigarettes during that search.

49 The defence called Gregory Roberts who was a social worker with four years experience specialising in grief and loss counselling. His evidence was adduced to explain the applicant's post-incident conduct as being a normal response to a traumatic event. He testified that an expression like 'I've just killed my kids' is common and evidence of a person in surrender mode where the reality of the statement may not quite 'hit home' to the person at that time. The applicant's request to go to Cindy was said by Roberts to be common in the case of a child's death where one parent is present, irrespective of whether the parent's relationship is intact. He opined that, after the applicant emerged from the dam, this would have been the next focus for a parent in trauma who had become hyper-focused. Mr Roberts said that not assisting with search attempts was consistent with the applicant being exhausted from being in a high adrenalin state. In relation to the requests for cigarettes, he said it is a physiological fact that the body will crave a stimulant when it is experiencing a traumatic or stressful event.

The Grounds of Appeal

50 The notice of appeal specified 30 grounds of appeal. By way of submissions received from the applicant prior to the appeal, and in oral argument, the applicant abandoned grounds 3, 4, 9, 16, 26, 28, 29 and paragraph (c) of ground 30.

51 The applicant therefore relied on 24 grounds, which were grouped primarily by reference to the evidentiary matters concerned, as follows:

> Unsafe and Unsatisfactory Grounds
>
> 1 The verdict was unsafe and unsatisfactory because there was insufficient evidence to sustain a conviction on any count.
>
> 2 Alternatively, the verdict was unsafe and unsatisfactory because the jury ought not to have been satisfied of the guilt of Mr Farquharson on any count.
>
> …
>
> Grounds concerning disclosure of evidence
>
> 5 The trial miscarried because of the many failures of timely disclosure by the prosecution, as to:
>
> (a) the basis of the prosecution case; and
>
> (b) significant items of evidence; and
>
> (c) the evidentiary basis for expert opinions offered.
>
> 6 Fresh evidence ought be admitted in support of this ground.
>
> Grounds concerning the medical opinion evidence
>
> 7 The Learned Trial Judge erred in failing to apply the correct test to the admissibility of the opinion evidence of Dr Matthew Naughton
>
> 8 The Learned Trial Judge erred in admitting the opinion evidence of Dr Matthew Naughton that it was 'extremely unlikely' that Mr Farquharson suffered a bout of cough syncope.
>
> …
>
> 10 The trial miscarried because of the directions given by the Learned Trial Judge concerning:
>
> (a) the effect of the medical evidence, and
>
> (b) the summary of evidence and submissions about it

Grounds concerning the evidence about the path of the vehicle

11 The trial miscarried as a result of serial and significant failures of timely disclosure by the prosecution concerning the path of the vehicle.

12 The Learned Trial Judge erred in failing to apply the correct test to the admissibility of the opinion evidence of Messrs Urquhart and Exton.

13 The Learned Trial Judge erred in admitting the opinion evidence of Mr Urquhart on several topics:

(a) Evidence that Mr Farquharson's vehicle was 'under control';

(b) Evidence concerning three steering movements, including one involving a steering-wheel turn of 220 degrees;

(c) Evidence concerning the 're-enactment' evidence behaviour of a dissimilar vehicle

(d) Evidence of a computer 'simulation'.

14 The Learned Trial Judge erred in admitting the opinion evidence of Sergeant Exton of the inference to be drawn from the course followed by Mr Farquharson's vehicle

15 Alternatively, the Learned Trial Judge failed to discharge the jury following this evidence.

…

17 The Learned Trial Judge failed adequately to summarise the cross-examination of the reconstruction witnesses, or adequately to put the defence case with respect to the reconstruction evidence.

Grounds concerning the evidence of King

18 The Learned Trial Judge erred in directing the jury that King's 'reply' to defence criticism was 'why would I lie?'

19 The Learned Trial Judge erred in failing to put fully to the jury the defence criticism of Mr King's evidence.

20 The trial miscarried because of the prosecution's failure to disclose, prior to verdict, that Mr King had indictable offence charges pending, and that police were prepared to (and ultimately did) provide a letter of support upon his plea and sentence.

21 Fresh evidence should be admitted in support of this ground.

Grounds concerning Consciousness of Guilt

22 The Learned Trial Judge erred in allowing the recorded words of Mr Farquharson to be used by the jury as consciousness of guilt.

23 The Learned Trial Judge erred in his directions to the jury on consciousness of guilt.

Ground concerning admissibility of telephone intercepts

24 The Learned Trial Judge erred in declining to admit evidence relevant to the jury's consideration of the alleged consciousness of guilt of Mr Farquharson.

Ground concerning dam-side conversation

25 Regarding the evidence of the 'dam-side' conduct of Mr Farquharson, the Learned Trial Judge erred by failing to give adequate directions to guard against the danger that the jury might misuse this evidence as admissions by conduct.

Grounds concerning adequacy of Directions

Ground concerning the witness Greg Roberts

27 The Learned Trial Judge erred in his directions concerning the relevance and weight of the evidence of Mr Roberts.

Grounds concerning the charge

30 The trial miscarried because of numerous errors in the form and conduct of His Honour's charge:

(a) the charge distorted the issues;

(b) the charge ignored or underplayed matters of importance in the defence case.

Kotzmann ground

31 The trial miscarried because of an aggregate of errors.

Grounds 7 and 8: Admissibility of Dr Naughton's Opinion

52 Under Grounds 7 and 8 it was contended by the applicant that the trial judge erred in recognising Dr Naughton as an expert in cough syncope and that he erred in admitting Dr Naughton's conclusory opinion that it was unlikely that the applicant had suffered from cough syncope.

53 In order to put the objection and the judge's ruling in context, it is necessary

to refer further to the evidence given by each of the four expert medical witnesses.

Dr Bartley's Evidence

54 Dr Bartley had specialist qualifications in both surgery and emergency medicine and examined the applicant after he was brought to the emergency department of the Geelong Hospital, following the accident, on the night of 4 September 2005. He said that the applicant told him that he was driving over an overpass near Winchelsea with his three children in the car when he suffered a violent coughing fit and that the next thing he was aware of was sitting in the car with water all around it. When questioned further about his coughing, the applicant stated that he had taken a week off work two weeks previously for a throat infection, and that he had had a dry cough ever since, but that he had never before passed out from a violent coughing fit.

55 Dr Bartley said that, based on that history and the incident, he made a working or provisional diagnosis that the applicant had suffered cough syncope, which is to say that the applicant had coughed to the point of passing out. He explained that a working or provisional diagnosis is one based on the information given by the patient which is either later confirmed or refuted over a period of observation as information comes to light.

56 Asked specifically about cough syncope, Dr Bartley said that he had never before made a provisional diagnosis of cough syncope or seen another patient who reported having that condition and that, after forming his provisional diagnosis of the applicant, he had never seen the applicant again. The applicant's condition was not acute and so he was moved out of the emergency department and into observation over night, where other medical staff were responsible for his care.

57 When cross-examined by defence counsel, Dr Bartley said that his provisional diagnosis was necessarily uncertain and based solely on the patient's history and, in re-examination, he said that cough syncope was rare and something of which he knew only because he had read about it.

Dr King's Evidence

58 Dr King gave expert evidence that syncope is a loss of consciousness due to a failure of circulation of blood to the brain; that there are many different causes of syncope; and that cough syncope is an uncommon species of syncope, characterised by a sudden loss of consciousness after a bout of coughing which may consist of multiple coughs or a single cough after which the patient suddenly loses consciousness.

59 Dr King said that there was a paper from the Mayo Clinic in the United States which stated that cough syncope makes up about two per cent of cases of syncope that were investigated there, but that the Mayo Clinic was not really representative of normal general practice incidents because patients with rare and unusual diseases are referred there from all over the world (and thus the Mayo Clinic tends to see more uncommon diseases than are seen in general medical practice). As was earlier noted, Dr King considered that there may be less than two per cent of cases of syncope in Melbourne that are due to cough syncope and he said that he had never seen a case of cough syncope in front of him, even among individuals with chronic obstructive airway disease. The only case of cough syncope which Dr King had ever seen was on a teaching video.

60 Asked about the diagnostic features of cough syncope, Dr King said that the critical factor is the onset with coughing and evidence of that may be provided by a witness, such as a spouse, or it may be elaborated by the individual who suffers the cough syncope; for example, the patient may recall that before losing consciousness he had a number of coughs and then blacked out. The diagnosis is, therefore, almost inevitably based on history occurring in an individual, often with chronic lung disease, and chronic lung disease tends to occur in males who are smokers who are overweight. As we have said, Dr King could recall only six patients over the last 30 years who were clear cases of coughing followed by blackouts and he could not recall one of them who did not also have lung disease.

61 Dr King said that the loss of consciousness is usually a matter of seconds,

perhaps five, ten, 20 seconds, and that, in contradistinction to patients who suffer from epilepsy, patients who suffer from cough syncope usually recover very quickly and are rapidly oriented as to where they are and they can recall what had happened immediately beforehand. Dr King added that, although the condition was rare, it was a well defined entity: a situation in which the patient suffers one, two, three, four, five coughs, often violent coughs, and then drops into unconsciousness was very characteristic of the condition.

62 In cross-examination, Dr King agreed that a patient might suffer a pre-syncopal episode, in which a paroxysm of coughing leads to the patient feeling very unwell, light headed, dizzy, and will cause the patient to sit down and then try to control the cough. Such a pre-syncopal episode can involve narrowing of the person's vision and a feeling of dizziness. Blackout can occur suddenly without warning and, after an episode of cough syncope, there would also be a loss of consciousness which may be a matter of a few seconds. Dr King also agreed that it was quite reasonable to make a provisional diagnosis of cough syncope, as Dr Bartley had done, based on a history of a paroxysm of coughing followed by a transient loss of consciousness.

63 Dr King accepted that, although cough syncope tends to be confined to middle-aged men who are smokers and overweight, it could occur in a male who is a moderate smoker and thick set who is suffering from an acute respiratory tract illness associated with some quite severe coughing paroxysms.

64 Dr King further agreed that he had given evidence at the committal hearing that, after a loss of consciousness, if there are convulsive movements, they could involve grabbing the steering wheel but not in a purposeful manner; meaning that it would not have been a purposeful grabbing of the steering wheel, but rather possibly falling on the steering wheel and making some twitching movements; it was not beyond the bounds of possibility that a person who suffered cough syncope while driving a car could have maintained his grip on the steering wheel or moved the steering wheel and that the car could have gone anywhere.

Dr Naughton's Evidence

65 Dr Naughton was head of the General Respiratory and Sleep Medicine Service in the Department of Allergy and Respiratory Medicine at the Alfred Hospital. He held a doctoral degree in medicine from the University of Melbourne and in the past had held positions as a Clinical Research Fellow in the Department of Respiratory Medicine in the Faculty of Medicine at the University of Toronto and Acting Director of the Intensive Care Unit at Repatriation General Hospital, Heidelberg. He had published more than 50 manuscripts in the field of his specialisation and reviewed and otherwise been involved in a great many others. He said that he had been provided with a copy of the police summary of the case and several witness statements and that, in order to prepare himself to give opinion evidence, he had consulted with colleagues about the matters on which he was to give evidence and had regard to his own expertise and training in the field of respiratory illnesses and diseases.

66 Dr Naughton opined that there were two schools of thought in the literature as to the causative mechanism of cough syncope. One was pressure in the chest associated with coughing, which was thought to impair blood returning to the heart and thereby deprive the heart of blood, resulting in a transient reduction in forward cardiac output. The other was impairment of venous drainage from the brain to the thorax with resultant back pressure which interferes with the circulation of blood through the brain.

67 Dr Naughton added, however, that he had trouble 'getting [his] head around this condition [of cough syncope] because it's so nebulous'. He said that he had spent a fair amount of his time reading scientific articles and literature trying to verify the truth and the substance behind various conditions and that he had found there was an absence of good quality scientific rationale to back up the validity of cough syncope. He said it was 'extremely uncommon', that he had never seen it personally and that it was 'an extremely rare condition'. Nor had he ever seen a case of cough syncope in the modern medical literature in which the person suffering had

normal heart, lung and neurological condition.

68 Dr Naughton then had put to him, as a hypothetical problem, a male driver aged 37 who was moderately overweight and smoked a packet of cigarettes every three days. He was asked to assume that the subject was generally of robust health but had been suffering for about three weeks with a respiratory tract infection which commenced as an upper tract infection and then developed lower down into a lower infection which was being treated with antibiotics. An ECG examination detected no abnormality in heart function. The subject had taken fluids within a period of about two hours prior to the incident and the incident occurred while he was seated driving. After the incident, the subject was generally coherent and had managed to extract himself from cold water in which he had been immersed. Asked how likely it was that the subject would have suffered an episode of cough syncope while driving the car, Dr Naughton replied that in his opinion it was 'extremely unlikely'. When asked what it was that led him to form that opinion, he answered:

> From the description provided it appears that this particular gentleman had a reasonably good cardiac and pulmonary health. He was – didn't appear to be disabled by breathlessness. He hadn't sought, apart from the respiratory tract infection, I don't believe he was on other medications for heart or lungs, nor had he had any testing for heart or lungs previously. The fact that it occurred, the fact that there had been some liquid consumed within two hours meant that he's – and his blood pressure was, I think you mentioned - - - 140? --- 140. Indicates that his volume status was satisfactory. In other words he was not dehydrated, which a dehydrated person would be more likely to be susceptible to changes in their intrathoracic pressure if they were to cough…The fact that there was no coughing after the event when he was exposed to cold air outside with cold wet clothing as opposed to in a car when the temperature possibly would have been warmed [sic] than it would be outside in the open with wet clothing, the concept of being cold can often trigger coughing, so a warmer environment would steer someone away from coughing. The fact that he was seated is – often cough syncope is more likely to occur if someone is fully upright because of the – a lot of our blood volume is in our abdomen and in our lower limbs and if someone is seated that is less likely to be a contributing factor. So, I suppose my judgment is that the individual did not have any established significant cardiac or pulmonary disease. Yes he did have a – what the medical profession and myself would describe as a garden variety respiratory tract infection, which are commonplace, happening every day in society, but these people aren't having cough syncope on a day to day basis. We just don't see it … I think the single episode of cough syncope in an environment where it's relatively warm and was not replicated thereafter I think is highly unusual, and I mean I just think the whole circumstance is an unusual environment for cough syncope

to occur.

69 Asked whether it would affect his opinion if told that the subject had been observed two days before the incident suffering from a severe coughing fit while standing, which was of such intensity that it caused the subject to become red in the face and prompt another person present to urge the subject to sit down, Dr Naughton answered:

> it would affect my opinion because the witnessed episode of severe coughing did not elicit syncope….
>
> It favours my opinion as I think it is extremely unlikely that cough syncope occurred.

70 Asked whether a person who suffers cough syncope gets any warning that it is going to occur, he answered:

> The literature does describe, and certainly I've had patients who have what's called a pre-syncopal episode. That is where people do feel a bit light headed. Patients sometimes describe seeing stars in front of their eyes. It's usually a transient phenomenon and subsides once the coughing stops. But usually there is no loss of consciousness.

71 Asked what the literature said about the period of time that a person would remain unconscious following a cough syncope, Dr Naughton answered:

> The literature suggests seconds, and I appreciate that's a very loose term. But as far as I'm aware there's no objective number of seconds. We know from – slightly digressing – but we now know that if the heart were to stop[,] loss of consciousness would normally occur somewhere between six and 12 or 13 seconds. That's usually the range of time. So our bodies normally have enough blood and oxygen circulating in our system to allow our brain still to function for about five or six seconds in the absence of our heart beating. In fact the converse sometimes happens with coughing that coughing, in someone whose heart stops[,] coughing has been shown to maintain blood pressure and consciousness …
>
> How rapidly would you expect a person to recover from a period of unconsciousness – I mean - - - ?--- Usually within a couple of seconds.
>
> What would their state be afterwards, would there be any - - - ? --- They may be a little bit confused but that would usually be a couple of seconds. One of the reports that I read described – and these are sort of papers from 30/40 years ago before detailed monitoring, but they would described [sic] people becoming flaccid during the cough syncope, so during the syncopal episode, loss of consciousness, and the muscle tone would just deteriorate and they would fall to the ground, but usually that's associated with cessation of coughing, and when you stop coughing everything sort of returns to normal.

> So it's the speed of recovery which is usually within a couple of seconds, in the descriptions I've read.
>
> In that period of unconsciousness would the person be capable of any purposeful movement? - - - Well if they're unconscious they wouldn't.
>
> You said that the diagnosis of cough syncope, or indeed even a provisional diagnosis of cough syncope is done on history? - - - Correct.
>
> What to do you mean by that? - - - Well there is no definitive test for cough syncope that is in the medical literature. We're dealing with an extremely rare condition for which there is no test. Now my personal opinion is that, you know, you could argue that inducing coughing might predispose after the event, that you might be able to trigger, through intensive coughing, a loss of consciousness, but it's not in the text books, it's not an established test by any means. So there is no definitive test that confirms or refutes cough syncope apart from a classic description.
>
> So if the diagnosis or the provisional diagnosis is dependent upon history, on what is the accuracy of the diagnosis then solely dependent? - - - A hundred per cent.
>
> On what? - - - On the history of – provided by the patient.
>
> … how does one test the accuracy, the diagnosis then? - - - Well it's impossible to test, it really relies on the individual providing an accurate history of what went on.

72 In cross-examination, however, Dr Naughton agreed that he had never seen an episode of cough syncope and had never diagnosed an episode of cough syncope in any of his patients. Nor had any of his colleagues to whom he had spoken about the subject. He had never published an article on cough syncope or any book which mentioned the subject and he had never had a patient give a history which he considered to be indicative of cough syncope.

73 He agreed further that, after he had made a statement in May 2007, in which he opined that it was 'extremely unlikely' that the applicant had suffered an episode of cough syncope, he was cross-examined on the voir dire as to his expertise and had stated at that time that he could not agree that cough syncope is typically diagnosed by reference to history, because he was not aware of someone who had had a clear cut case of cough syncope and he would like to see it happen. He agreed that, at that time, he had been unaware from the literature as to whether or not taking a history was the appropriate way to diagnose cough syncope; that he could not comment on

how quickly people recover consciousness from cough syncope, or how long a person might typically remain unconscious after an episode of cough syncope; that he had been unaware of the degree of impairment of consciousness such persons may suffer when they wake up, or how long they might remain impaired; and that each of those matters lay outside his area of expertise. The voir dire was on 16 August 2007, only three weeks before the trial.

74 He also accepted that he was not an expert in cough syncope. He said, however, that he was educated about it; that he did take a history of it when it was presented to him; that it was 'certainly something' that he was aware of in patients who had chronic cough or episodes of cough, and about which he did ask questions as part of his job; and that he did seek to identify whether people were having syncopal episodes with coughing. He said that he was unfamiliar with the clinical unfolding of an episode of cough syncope, because he had never seen it, but that he read the literature and looked for descriptions from others.

75 He agreed that, at the time of the voir dire, the only literature which he had read on the subject of cough syncope was a general reference textbook for practitioners and medical students – 'The Textbook of Respiratory Medicine' edited by John F Murray – which covered a number of topics including cough syncope, and one article, the name of which he could not recall but which he 'broadly knew' was associated with the American Thoracic Society. He also agreed that since the voir dire, he had been provided with a list of articles relied upon by the defence and that he had done his best to find them but that he could not locate all of them.

The Judge's Ruling

76 In ruling against the applicant's objection to the admission of Dr Naughton's opinion, the judge said this:

> In this matter, Mr Morrissey helpfully and responsibly has raised a number of issues for pre-empanelment determination. I will state my conclusions on them as they involve a substantial amount of evidentiary material and reference to authorities. I will not give my reasons now, but shall at some

> convenient time during the trial[1] as we are about to empanel and I have got another case to deal with in the next five minutes.
>
> In relation to admissibility of expert evidence, that which to juries I always call specialist evidence, I consider that the evidence of Associate Professor Naughton is relevant and admissible. The evidence is essentially contained in his statement of 7 May 2007 attached to the Notice of Additional Witnesses of 8 May 2007 and extrapolated on a *Basha* inquiry before the Court.
>
> Associate Professor Naughton is a highly qualified physician and head of the general respiratory and sleep medicine service at the Alfred Hospital. He deposes that in his specialist opinion it is very unlikely that the accused medically suffered from an episode of cough syncope in the predicated circumstances. It will of course be necessary with this witness, as with all specialist witnesses, to give the jury directions as to the proper use and limitation of specialist evidence. Bearing that in mind I consider that the doctor is well qualified to express the opinion he has deposed to. He was cross-examined very helpfully on the voir dire by Mr Morrissey but that did not to me elicit anything which detracted from his qualifications to express the opinion he expresses. His opinion does not need to be predicated upon statistics in a naked sense or upon measurement in an overt sense. It can be predicated upon vast reading and knowledge, and accordingly I consider that his evidence is admissible.

77 Counsel for the applicant contended that the judge erred in determining the admissibility of Dr Naughton's evidence, by failing to apply the tests of admissibility adumbrated in *Makita (Australia)Pty Ltd v Sprowles*.[2] He submitted that, if the correct tests had been applied, it would have been plain that the opinion was inadmissible. Counsel argued that because of Dr Naughton's lack of reading in the area, his ignorance (at the time of the voir dire) of whether cough syncope is to be diagnosed on the basis of a patient's history, and his ignorance of the basic features of a bout of cough syncope and how to distinguish it from other relevant conditions, Dr Naughton was singularly unqualified to offer expert opinion on the likelihood of the hypothetical subject having suffered a cough syncope in the conditions propounded.

---

1 In fact, the judge never did give any reasons in support of his conclusion other than those stated.

2 (2001) 52 NSWLR 705, [85]; *R v Bjordal* (2005) 93 SASR 237; Heydon, *Cross on Evidence*, [29045].

The Makita Tests

78 Taking counsel's points in turn, we start with the seven tests adumbrated in *Makita* for the admissibility of expert opinion evidence. The first is that there must be a field of specialised knowledge or organised branch of knowledge in which the witness is an expert.[3] An organised branch of knowledge is normally one in which those trained or experienced share generally accepted principles and techniques, and it must so far partake of the nature of a science as to require a course of previous habit, or study, in order to the attainment of knowledge of it.[4] Plainly, medicine is a field of specialised knowledge within which there are organised branches wherein those trained or experienced share generally accepted principles.

79 The second is that there must be an identified aspect of that field of specialised knowledge in which the witness demonstrates that, by reason of specific training, study or experience, the witness has become an expert. The nature and extent of studies required, however, depend on the science in question. It is important to keep in mind that it is not only the general nature, but also the precise character of the question upon which expert evidence is sought to be given which is determinative of whether the putative expert's qualifications are sufficient.[5] Satisfaction of the second test is thus a question of fact and degree. For example, it has been held that it is not necessary for a general practitioner to have specialised in studies concerned with the rate at which alcohol metabolizes in order to give evidence of that rate based on analysis tables.[6] On the other hand, an emergency-room physician and a surgeon who treated an accused for knife wounds following the death of his wife were held not to be competent to give expert opinion evidence as to whether the wounds were self-inflicted.[7] In the former case, it was considered

---

3 *Clark v Ryan* (1960) 103 CLR 486, 501–2, 508.

4 Ibid 491 (Dixon CJ).

5 *Ajami v Comptroller of Customs* [1954] 1 WLR 1405, 1408 (PC); *Murphy v The Queen* (1989) 167 CLR 94, 120.

6 *R v Somers* [1963] 3 All ER CCA 808, 810 WLR 1306, 1310 (CCA); *Reg v Richards (Stanley)* [1975] 1 WLR 131.

7 *R v Anderson* (2000) 1 VR 1, 24 [58].

that the rate at which alcohol metabolizes was a matter within the ordinary knowledge of a general practitioner and, therefore, something on which he was entitled to refresh his memory from a publication of the British Medical Association which provided the current knowledge on the subject. In the latter case, the forensic analysis of knife wounds (in order to determine the probability of self-infliction) was found to be a specialised field of knowledge within medicine in which neither the physician nor the surgeon was able to demonstrate that he was qualified by study or experience.

80 As appears to us from the evidence earlier set out, cough syncope, although rare, is one of a number of neurological conditions within the ordinary knowledge of physicians, or at least something which it may be supposed is within the ordinary knowledge of a specialist thoracic physician. The fact that it is dealt with in a general student and practitioner text book like 'The Textbook of Respiratory Medicine', and was apparently well known to an emergency medicine specialist like Dr Bartley, tends to make the point. The evidence was that it is something about which doctors are taught or read and are expected to know, even if most of them never get to deal with a patient who is perceived to suffer from it. If follows, we think, that it was not essential for Dr Naughton to have specialised in the study of cough syncope as such in order to express an opinion concerning its occurrence and ætiology.

81 So to say is not to minimise the significance of Dr Naughton's confessed lack of study of the subject. Given his admission on the voir dire that his reading on cough syncope was confined to 'The Textbook of Respiratory Medicine' and the one journal article of which he could not remember the name, it was open to the jury to conclude that his opinion as to the likelihood of an attack of cough syncope may have been no better informed than that of a well read general practitioner. But that limitation goes to the weight of Dr Naughton's evidence, not its admissibility.

82 In assessing its weight, it was also necessary to bear in mind that Dr Naughton had great experience and profound learning in the physiology of the organs most affected by syncope. Consequently, assuming that the mechanism of

cough syncope is one or other of the two processes suggested in the literature, and there was general agreement among the experts on both sides that it is, Dr Naughton's specialist knowledge of the physiology of the organs most closely affected by cough syncope meant that he was well disposed to opine on the likelihood of a subject's heart and brain having functioned, in specified conditions, in the fashion which it is thought is productive or indicative of cough syncope.

83 The third and fourth requirements adumbrated in *Makita* are that the expert must identify the facts or assumptions on which his or her opinion is based and explain how the field in which he or she is expert applies to those facts or assumptions so as to produce the opinion.[8] In this case, it appears to us that Dr Naughton did that. As has been observed, he explained that there are two schools of thought as to the causative mechanism of cough syncope, namely: pressure in the chest associated with coughing that restricts the flow of blood returning to the heart, with a resultant transient reduction in forward cardiac output; and impairment of venous drainage from the brain to the thorax, with resultant back pressure and consequent interference with the circulation of blood through the brain. He also explained that, according to the literature and the enquiries which he had made of his colleagues, cough syncope is a particularly rare disorder which is by and large confined to middle-aged men suffering from chronic obstructive airway disease or similar disorders. The assumed facts on which his opinion were based were identified by the prosecutor in the passage of Dr Naughton's evidence in chief which we have set out in paragraph [68] above. And after that, Dr Naughton explained in terms of the thoracic physiology in which he is expert, why he supposed that the conditions to which the subject was assumed to have been exposed on the night of the incident were contra-indicative of organic dysfunction of the kind which is generally accepted to be productive or symptomatic of cough syncope.

84 Once again, we do not overlook Dr Naughton's lack of reading in the area of

---

8 *Ramsay v Watson* (1961) 108 CLR 642, 645.

cough syncope. It is significant because, although there was no doubt about his expertise in thoracic physiology, and hence his ability to comment on the likely reaction of thoracic organs to given physical conditions, it is at least conceivable that greater reading on the specific subject of cough syncope might have alerted him to clinical observations or other phenomena affecting the correlation between cough syncope and the organic dysfunction to which or with which it is customarily attributed or associated. Once again, however, that is a criticism which goes to weight, as opposed to admissibility and, if it had any substance, it was capable of being dealt with in cross-examination.

85 The fifth test is that the facts or assumptions on which the opinion is based be proved.[9] There is no difficulty with that in this case as they were not in issue. The assumptions which the prosecutor asked Dr Naughton to make were all based on the applicant's record of interview and the evidence of other witnesses.

86 The sixth and seventh tests, which may conveniently be dealt with together, are that the facts or assumptions on which the opinion is based must form a proper foundation for it, and the scientific or other intellectual basis for the opinion must be demonstrated. As is explained in *Cross on Evidence*,[10] that means that:

> the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed so as to produce the opinion propounded.

87 In this case, that effectively takes one back to the third test, of the expert demonstrating how the field in which he or she is expert applies to the facts assumed so as to produce the opinion proffered. For the reasons already given, we consider that that test was complied with.

---

9 *Paric v John Holland (Constructions) Pty Ltd* (1985) 62 ALR 85, 87–8; *R v Ping* (2005) 159 A Crim R 90, [43]; Heydon, *Cross on Evidence*, [29070].

10 Ibid [29075].

Lack of Reading On Cough Syncope

88 In substance, we have dealt already with the criticism of Dr Naughton's lack of reading in the area of cough syncope. For the reasons given, we consider that Dr Naughton was competent to state the generally accepted theories of the physiological mechanism of cough syncope and, because of his specialist knowledge of thoracic medicine, to express an opinion as to whether, if a hypothetical subject were exposed to stated conditions, the subject would likely have suffered from the sorts of organic dysfunction which are associated with cough syncope. As we have also observed, it may be that Dr Naughton's lack of reading in the specific area of cough syncope, threw doubt on the integrity of his opinion. But, as we have said, we regard that as a matter going to weight.

Knowledge of Means of Diagnosis

89 We turn to the criticism that, at the time of the voir dire, Dr Naughton was unaware from the literature whether or not taking a history was the appropriate way to diagnose cough syncope. We agree it is surprising that he was ignorant of that fact. It is demonstrative of Dr Naughton's lack of reading on cough syncope at the time of the voir dire. To that extent, it affects the weight of his evidence, as has been explained. But, in our view, it did not affect its admissibility. Whether or not Dr Naughton knew at the time of the voir dire that the only way in which to diagnose cough syncope was by taking a history, there is no doubt that he was competent to express an opinion as to whether, in given conditions, thoracic organs would react in a fashion which was consistent with the generally accepted mechanisms of cough syncope.

90 Furthermore, the effect upon Dr Naughton's credibility may well have been limited. After all, to say that the only way in which to diagnose cough syncope is by taking a history is to assume that there has never been a patient who has suffered an attack of cough syncope in the presence of a diagnostician. It does not imply that the physiological considerations to which Dr Naughton referred are not relevant to the

probability of the disorder having occurred. It is true that Dr King said in his evidence there was nothing in the practice of his specialty (*scil* neurology) which could be tested or measured to verify a diagnosis of cough syncope. As he put it, the diagnostician is solely dependent upon the history provided by the patient and, if available, other witnesses. But Dr King did not suggest that it would be impossible to diagnose cough syncope on the basis of the diagnostician viewing the attack as it occurred, or suggest that, where the diagnostician has not seen the attack occur, the physiological considerations to which Dr Naughton referred would not be a relevant consideration for the purposes of the diagnosis. In effect, the point really rises no higher than that, whereas in the literature it is accepted that it is permissible to diagnose cough syncope on the basis of history alone, and at the time of the voir dire Dr Naughton was ignorant of that consensus, Dr Naughton was of the view that he would like to see physical evidence of an attack before committing himself to a diagnosis of cough syncope. To that extent, Dr Naughton may have been out of step with the majority of the profession, or at least so much of it as are generally concerned with the diagnosis of cough syncope. But that does not necessarily impugn Dr McNaughton's expertise or point of view. A witness may be an expert and his or her opinion will be admissible even though not accepted by others, so long as is it not scientifically established to be false.[11]

Ignorance of distinction between features of cough syncope and other disorders

91 The criticism that Dr Naughton was ignorant of the basic features of cough syncope is in our view misplaced. It is true that Dr Naughton did not know the period of time for which a person who has suffered a cough syncope is likely to remain unconscious or how that compares with the period of unconsciousness which results from an epileptic fit. As he said on the voir dire, those matters were outside his area of expertise. But that does not alter the fact that, as a specialist thoracic physician, he was an expert in cough paroxysms and able to venture an opinion as to

---

11 *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292, 306; *R v Robb* (1991) 93 Cr App R 161, 165; Heydon, *Cross on Evidence* [29055].

whether such a paroxysm would likely result in a loss of consciousness. Given that by definition cough syncope is a loss of consciousness the result of cough paroxysm, his opinion was relevant and admissible.

92 Once again, his ignorance of some relevant effects of cough syncope, in particular the period of unconsciousness which it is likely to produce, may be thought to reflect upon the reliability of his ultimate opinion that a person of a particular state of health, if subjected to specified conditions, would be most unlikely to suffer cough syncope. But at the risk of repetition, that goes to weight, not admissibility. The basis of his opinion, at least as finally expressed in evidence (if not at the time of the voir dire), was that the specified conditions would be unlikely to result in the kinds of organic dysfunction which are generally accepted as causative or emblematic of cough syncope.

Change in Basis of Opinion

93 It is also necessary to say something of the improvement in Dr Naughton's evidence between the time of the voir dire and the time of giving evidence at trial. As has been seen, at the time of the voir dire, Dr Naughton's reading on the subject of cough syncope was at best rudimentary. By the time of the trial, he had read considerably more and, as a consequence, was more conversant with what had been written about the diagnosis of it on the basis of history and its incidence among patients other than those suffering from obstructive airway disease and similar maladies. Whereas Dr Naughton's opinion at the time of the voir dire was, on one view, no more than that because cough syncope is an extremely rare phenomenon, it was highly unlikely that the applicant had suffered cough syncope on the night of the incident, by the time of trial his opinion had been improved to a logically defensible thesis based upon his expert knowledge of thoracic physiology. At trial he opined as to the improbability in specified conditions of a subject of a particular state of health suffering such organic dysfunction as to cause or be consistent with the generally recognised mechanisms of cough syncope.

94 Evidently, the fact of that improvement or change of basis of opinion provided fertile ground for attack on Dr Naughton's credibility, and defence counsel exploited it extensively in the course of cross-examination. Defence counsel put to Dr Naughton, in effect, that to begin with he had jumped to conclusions which were really nothing more than an *ipse dixit* based upon the rarity of cough syncope, and that the inherent weaknesses in his opinion having been exposed at the voir dire, he had then gone away and read up on the literature against a background of having committed himself to an opinion from which he was unwilling to depart.

95 Needless to say, all of that was capable of bearing significantly on Dr Naughton's credibility, and may well have done so. But contrary to the submissions of counsel on behalf of the applicant, we do not accept that it went to the admissibility of the opinion. For, although the rules of admissibility of expert opinion evidence require the expert to demonstrate the facts or assumptions and reasoning process which are advanced in support of an expert opinion, they do not require the expert to identify the basis on which his or her opinion was initially formed. The expert is not to be confined to defending the opinion on the basis that it was initially formed. If there is a difference, it goes to weight and, depending upon the circumstances, could result in exclusion in the exercise of discretion. But it does not affect admissibility of the opinion.[12]

Form of Dr Naughton's Opinion

96 Finally, with respect to Dr Naughton's evidence, counsel for the applicant submitted that, if Dr Naughton were entitled to express an opinion concerning cough syncope, it should have been confined to a statement that cough syncope is a rare condition occurring most often in middle-aged men with obstructive airway disease and that, if a given individual of a specified state of health were subjected to identified physical conditions, it would be 'unusual' for the individual to suffer an episode of cough syncope. More particularly, counsel submitted, Dr Naughton

---

12 Heydon, *Cross on Evidence*, [29045], *Australian Securities and Investments Commission v Rich* (2005) 218 ALR 764, [91]–[136].

should not have been permitted to express a conclusory opinion that it was 'extremely unlikely' that the individual would suffer an episode of cough syncope, because so to conclude would be to transgress upon a matter properly left to the jury; involve unstated assumptions as to disputed facts; function as a comment on the truth of the applicant's account of what occurred; and apply an uncertain standard of 'extremely unlikely' which was impressionistic and which blurred the line between legal and medical standards.

97 None of that appears to us to go to the admissibility of Dr Naughton's opinion. Subject to exclusion in the exercise of discretion, provided Dr Naughton satisfied the *Makita* tests, his opinion was admissible in the form in which he chose to express it. If his considered opinion was that an episode of cough syncope in the circumstances postulated was 'extremely unlikely', and he was able to support that opinion in accordance with the *Makita* tests by reference to the assumed facts on which it was based and to reasoning upon an area of medicine in which he was expert, it was not a valid objection to his conclusion that it was capable of being re-expressed in a fashion that was less damaging to the applicant. As an expert, Dr Naughton was entitled to express his opinion, not just the considerations which he regarded as relevant to its formation.

98 Nor did it transgress upon matters properly to be left to the jury for Dr Naughton to express an opinion in the form that a hypothetical individual of the same state of health as the applicant, if subjected to conditions to which it was known that the applicant was subjected on the night of the incident, would have been most unlikely to suffer an episode of cough syncope. For, whatever be the current status of the ultimate issue rule,[13] the issue for the jury in this case was whether the applicant blacked out before driving his car into the dam, not the probability that a person of his state of health in similar circumstances would suffer from an episode of cough syncope (although of course the latter is plainly relevant to

---

13 *Murphy v The Queen* (1989) 167 CLR 94, 110–111.

the former).[14]

99 Additionally, as is observed in *Cross on Evidence*,[15] there is now a greater willingness on the part of courts, born of the necessity to rely upon expert medical opinion evidence on matters in which lay persons have no learning or experience, to admit expert opinion as to the ultimate issue. It is a daily occurrence when one is concerned with questions of fitness to stand trial and mental disability and other medical conditions on which lay persons are unable or ill-equipped to conjecture. In our opinion, that was so here, where what was in issue was a medical condition which even among those skilled in the area was regarded as rare and about which there was reasoned debate as to incidence and causation.

100 We allow that it would have been preferable if Dr Naughton had been confined to an opinion expressed in terms of a hypothetical subject of similar state of health to the applicant and subjected to the same conditions as the applicant on the night of the accident. To have done so would have assisted the jury in observing the direction, which was given to them, that they were not bound by any of the experts' opinions. If there is to be another trial we suggest that the evidence be dealt with in that fashion, as indeed by and large it was at this trial, as opposed to the statement of opinion which was tested on the voir dire. For present purposes, however, it is enough to observe that we do not consider that the opinion was inadmissible in the way in which it was expressed. Nor do we consider that the judge is shown to have erred in refusing to exclude the opinion in the exercise of the *Christie* discretion. The opinion of Dr Naughton had a probative value. It had no potential unfair prejudicial effect as the term is explained by Gleeson CJ in *Festa v The Queen*.[16] Despite the criticisms upon Dr Naughton's credibility, they did not require his opinion to be excluded in the exercise of discretion.

---

14 Cf *Director of Public Prosecutions v A and BC Chewing Gum Ltd* [1968] 1 QB 159, 164.

15 Heydon, *Cross on Evidence*, [29015].

16 (2001) 208 CLR 593, [22]. See also *R v Swaffield* (1998) 192 CLR 159, [64]; *R v Papakosmas* (1999) 196 CLR 297, [91]–[97] (McHugh J).

101 It follows from what we have said about Grounds 7 and 8 that both grounds fail.

Grounds 10 and 30: Adequacy of the charge in summarising the evidence and argument

102 It is convenient to refer at this point to the submission advanced in support of ground 10 and which also forms a part of ground 30, in which complaint is made that the trial judge inadequately summarised the medical evidence and arguments on which the defence relied and gave undue emphasis to those parts of the evidence on which the Crown relied. In particular it was submitted that the defence criticisms of Dr Naughton's expertise and his evidence were not sufficiently addressed in the charge.

103 A judge's charge must deal with the issues raised in the trial.[17] It must be tailored to the circumstances of the case so that the jurors have sufficient knowledge and understanding of the relevant evidence and the issues to which it relates to discharge their duty to decide the case according to the evidence.[18] These obligations may be more onerous where the trial is a lengthy one involving expert evidence which is in controversy.[19] It is for the trial judge to craft the oral directions in such a way that ensures that the oral exposition is sufficient.[20] No set formula need be followed.[21]

104 We consider the directions given concerning the medical evidence in general and Dr Naughton's evidence in particular were balanced and the defence arguments fairly presented. The criticisms made of the charge in this regard cannot be sustained. Ground 10 fails.

---

17 *R v AJS* (2005) 12 VR 563.

18 *Domican v R* (1992) 173 CLR 555; *R v Demiri* [2006] VSCA 64.

19 *R v Zilm* (2006) 14 VR 11; *R v Leusenkamp* (2003) 40 MVR 108.

20 *R v Thompson* (2008) 187 A Crim R 89, [139].

21 *R v Andrakakos* [2003] VSCA 170 [11], [19]–[20].

Grounds 11–17: Concerning the Path of the Vehicle

105 Grounds 11–15 and 17[22] allege that the trial judge erred in the manner in which his Honour treated the 'engineering and reconstruction' evidence.

Grounds Relating to Urquhart

106 The complaint made under grounds 13, 14 and 15 is that Sergeant Urquhart was permitted to give evidence which went beyond his area of expertise. In particular, it was submitted that the learned trial judge applied a wrong test in determining the scope of his expertise with the consequence that the witness was permitted to give inadmissible evidence.

107 It was common ground between the parties that the Crown was entitled to call Urquhart to give expert evidence as to the course of the vehicle. The defence submitted at trial and on appeal that Urquhart's expert evidence ought to have been confined to his observation and interpretation of physical crime scene data. That data included skid marks, rolling prints, damage to fences and trees. It was accepted by the applicant that Urquhart could, if the data permitted, express an opinion as to speed, changes in the direction and potential causes for any change in the direction of the vehicle.

108 The applicant submitted that Urquhart gave inadmissible opinion evidence that the vehicle was 'under control' prior to entering the dam and that there had been three steering movements of the vehicle including one involving a steering-wheel turn of 220 degrees. It was also said that Urquhart gave inadmissible evidence of the 're-enactment' behaviour of a dissimilar vehicle and of a computer simulation.

109 Each contention is addressed in turn.

The evidentiary basis for the opinion that the car was under control

110 The conclusion by Urquhart that the vehicle was 'under control' immediately

---

22 Ground 16 was treated as abandoned.

prior to entering the dam was said to be beyond the expertise of Urquhart and that the trial judge erred by failing to correctly apply *Makita* in determining whether Urquhart could give such evidence.

111 The issue of 'control' and the impermissible inferences that might arise from the use of that phrase were raised when Urquhart gave evidence on the voir dire. It was submitted that Urquhart was not qualified to express an opinion as to whether the driving was 'deliberate'. The use of words such as 'control', it was said, might confuse the jury and was outside his expertise.

112 In dealing with that objection, the judge referred to the *Makita* test in the following unexceptionable terms:

> In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached; that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, or diminished weight. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v The Queen* [1999] HCA 2, on 'a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise' (at [41]).

113 Following the examination of Urquhart, his Honour ruled as follows:

> … I think that Mr Morrissey confused the psychological with the physical in his analysis on the question of control. It is, I think, inappropriate for the witness to express any opinion as to whether the driving in question was 'deliberate' and whether the driving in question was 'voluntary' because both

> involve significant applications of mind: in the first matter, if I can be tautological, an element of deliberation, and in the second matter, if I could be analytical, an element of will. In my view the element of 'under control' and the element of 'conscious' are within the witness's competence because essentially they relate to physicality: that is to say a conclusion derived from the fact that no other physical entity, such as slope, camber, speed et cetera – i.e. the laws of physics – could account for the course of the car – ergo control: that is, conscious human input. That seems to me to be a competent mode of analysis by this engineer.
>
> The issue, as I see it at this stage of the trial, is whether the accused has been proved by the prosecution to have acted consciously, voluntarily and intentionally, that is with the requisite intent, in driving the vehicle into the dam in order to cause the death of his three children. That is a matter the prosecution has to prove … it is critical that the prosecution must prove the elements of intention and of consciousness and voluntariness.
>
> The accused on the other hand, said to the police in approximate terms that, 'I had a coughing fit and blacked out', which again is something readily understandable. It seems to me that the issue between the parties on that primary matter is relevantly and competently addressed by Senior Constable Urquhart, because the element of control, i.e. consciousness, is different from and less than the element of deliberation and the element of voluntariness. I consider the witness is competent to express the opinion sought to be led. The factual issues, such as the interrelationship such as it is between the evidence of Mr Urquhart and that of Sergeant Exton are matters of debate before the jury.

114 Counsel for the applicant argued before us that the ruling violated the *Makita* criteria. Although it was conceded that the qualifications of Urquhart allowed him to give evidence as to his view of the path of the vehicle and the steering inputs that might be required to follow that path, it was submitted that whether the driver was 'in control' was not a conclusion that was within Urquhart's field of knowledge. It was also submitted that the evidence did not permit any conclusion as to who made those inputs or the circumstances in which they were made. That would require evidence about what was occurring in the car. Once the jury heard evidence of steering inputs, they might have accepted that these were explained by events other than the 'control' of the accused. Possible causes of inputs include involuntary movements during unconsciousness, or the actions of the child in the front seat of the car. Urquhart had no basis for excluding these causes over that of conscious driving. Accordingly, it was said, there was no evidentiary basis for the opinion that the car was under control.

115 The gravaman of the complaint was that the word 'control' implied consciousness and the use of the word invited the jury to draw that inference.

116 We accept that the use of the term 'control' carried with it a potential danger as it might be taken to imply conscious and voluntary steering. The expertise of the witness could not extend further than opinion of the 'steering inputs' deduced from the evidence at the scene. The most likely inference to be drawn from the fact of 'steering inputs' was a matter for the jury.

117 In giving his evidence, however, Urquhart was careful to speak in terms of 'steering inputs' and not, despite the trial judge's ruling at the voir dire, in terms of 'control' by the driver. A 'steering input' was defined by Urquhart as 'an application to the steering wheel one way or another'.[23] This definition left it to the jury to conclude whether the application to the steering wheel had been made by a driver who was consciously steering the vehicle.

118 The Court was referred to a number of passages of Urquhart's evidence that were said to involve impermissible use of the term 'control'. The first occurred in examination in chief where Urquhart was asked about what he found at the incident scene:

> **Extract 1**
>
> Mr Rapke …you walked up and down the highway that night looking for indications on the road as to where this car had been prior to leaving the road?
>
> Witness: Correct.
>
> Mr Rapke 'Found Nothing?'
>
> Witness: 'Nothing'
>
> Mr Rapke: 'Is there a significance in that?'
>
> Witness: 'The significance is that there was not what I call an over-steer event that caused the vehicle to lose control'.

---

[23] See also cross-examination where 'inputs' was defined as 'physical contacts to the steering wheel'.

Extract 2

Mr Rapke: 'What about the grassy area that you walked through where you saw the tyre prints, what's the difference in friction between the road and grass and what is the effect of that difference?'

Witness: 'Grass obviously has a lower friction value than the road surface, particularly if it's wet – you can feel it walking across a grassy oval, your feet might slip – it feels [more] slippery underfoot than walking across a road, so the grass will always have a lower friction value that the road surface. The effect of that is that a car travelling across a grass surface is less stable, that means that any great steering inputs will be more likely to cause the loss of control that I was talking about than the same input on a road surface.'

119 Later, the Crown asked the witness to confirm his 'preliminary conclusions based on the evidence found at the scene:

Extract 3

Mr Rapke: 'there was no emergency breaking or loss of control steering input?'

Witness: 'Yes'.

Mr Rapke: 'What is your opinion about whether the vehicle was at any time out of control, in the sense of demonstrating marks on the road indicating lack of control by the driver'.

Witness: 'If I could answer that by referring to the simulation videos. The three videos that show the constant steering input, where the car's travelling sideways and starting to spin around, at that point in time, no matter what the driver had have done if that had occurred, the vehicle was not recoverable, that is, there's no steering inputs that the driver could have done that would have recovered the vehicle. Under that scenario I say that the vehicle is out of control, the difference being that the actual path travelled by the vehicle showed no separation of the tyre marks, no rotation of the vehicle about its axis, so there was no sideways movement, there was no rapid changes in the steering from hitting an object, there was no gouging in the road – in the grass surface from bouncing or on the tyre marks, there was a continuous movement of the vehicle across the road, across the grass, designated by the steering inputs to the steering wheel'.

Mr Rapke: 'Without any steering input by the driver what would that vehicle have done as it travelled down the highway?'

Witness: 'As we saw in the video drive throughs where I released the steering wheel it's my view that a vehicle travelling along that stretch of road will either have, depending on its speed, veered off the road to the left or maintained its line and essentially travelled within the lane leading up to the point where the road then starts to curve around to the right'.

Mr Rapke: 'Finally, did you uncover any evidence at all that could account for the sudden departure of the vehicle to the right off [sic] the road other than by input from the driver?'

Witness: 'No'.

Mr Morrissey 'I object again. The sting is the last word, input by the driver. Input at the steering wheel I don't object to but if it goes further I object to it.'

His Honour: I've already rule[d] on that and I make the same ruling.

120 We think these criticisms to be misplaced. As can be seen from these passages, the use of the term 'control' needs to be considered in the context in which it was used by Urquhart. In particular, in testifying as to the path of the vehicle towards the tree and what was said to be a steering input that caused the vehicle to navigate around the tree, it was relevant and within the expertise of the witness, to give evidence as to whether the vehicle was capable of being controlled at that point. If the vehicle could be shown to have been skidding uncontrollably, then it would not have been possible for the jury to infer that a deliberate steering input had caused it to avoid contact with the tree. Led for this limited purpose, the question of whether the vehicle was out of control (in the sense of being controllable) was validly raised as a matter of evidence. The Crown invited the inference to be drawn that the three steering inputs had been made with conscious intention by the applicant, primarily to aim the car towards the dam and secondly to avoid driving the car into the tree. It was relevant to that purpose, for evidence to be led as to whether the car was capable of being under 'control', at least to the extent of demonstrating that *had* the driver been conscious, the car could be steered along the path identified by the expert. We conclude that no error was made in allowing opinion evidence of 'control' to be admitted.

121 Of the extracts referred to the Court, only in the final part of extract 3 was Urquhart invited to express an opinion as to whether there was a 'purposeful' input from the driver. That should have been avoided. But it was not subsequently suggested by either party that Urquhart had expressed the opinion that there had been a conscious or purposeful steering input by the driver. In our view, the jury would have been left with no doubt from Urquhart's evidence, submissions and charge that the tenor of the evidence given by Urquhart was in terms of 'steering inputs'. No error is made out.

122 Under Ground 11 it was alleged that the prosecution failed to disclose certain evidence relating to the path of the vehicle. The non-disclosures alleged in the written submissions included the late disclosure of crime scene photographs on Day 8 of the trial (described throughout the trial as the 'Peter's photographs'), inadequate disclosure as to which of the roadside marks had been used by Urquhart as a basis for his opinion as to the path of the vehicle and a lack of disclosure of the basis for that part of the expert evidence of Urquhart and Exton which related to 'control' of the vehicle.

123 This ground was but faintly pressed. In oral submissions it was conceded that any failure to disclose on its own would not give rise to a right to a re-trial. Having regard to the conclusion we have come to on other grounds, it would in any event have been unnecessary to consider this ground in any detail. As was conceded by counsel for the applicant in oral argument, no discharge application was made in relation to what was said to be the late disclosure of information relating to the path of the vehicle. In relation to the 'Peter's photographs', the disclosure was inadvertent, the defence was advised as soon as the prosecution became aware of the existence of the material, defence counsel was given time to consider how the new evidence might affect the conduct of the trial and defence counsel were then offered more time but declined the invitation. In relation to what was said to be other alleged failures to disclose facts, the applicant has not shown that they were material or that any prejudice was suffered by the applicant in the conduct of his case.

Opinion that the course of the vehicle demonstrated 3 steering movements, including one 220 degree steering wheel input

124 It was the applicant's case that there was an insufficient evidentiary basis for Urquhart's opinion that there had been three steering inputs after the point at time at which the applicant claims to have lost consciousness. Counsel for the applicant submitted that this evidence infringed the '*Makita* test' as it was based upon unproven facts or assumptions.

125 The 220 degree turn was said to be a particularly damaging opinion, positing a significant turn of the steering wheel. It was said that the opinion rested on the unproven facts that the vehicle turned from the left lane (rather than having drifted into the right lane already); and that only three changes of course occurred rather than a series of small changes. Accordingly the opinion should have been excluded because the basis for it was not articulated, or had not been proven.

126 The opinion of 220 degree steering wheel turn followed by two further turns was based upon calculations of the steering inputs that would be necessary for the vehicle to travel along the path determined from the crime scene evidence. The evidentiary basis for the identified path was primarily based upon observations made by Urquhart at the scene. He testified that he arrived at the scene just after midnight. He conducted a 'walk through' examination of the area. This included walking up and down the highway looking for indications on the road as to where the vehicle had been prior to leaving the road. He found two tyre tracks in the grassy area – a rolling print with the vehicle travelling in a straight line. He also found a set of tyre marks. At this time he also made observations of the gravel in the area where he concluded that the vehicle left the road. He said that at the time he had arrived, there had been two marks that had been painted. He said he made his own independent assessment. Although the angle at which they had been marked out was incorrect, he concurred with the position and made his own assessment of the angle.

127 His initial conclusion from those gravel marks was that the vehicle had left the road at a sharp angle to the right. He returned to the scene on 7 September 2005 in the morning. He testified that he saw no material that would affect his preliminary conclusions.

128 Observation of the tyre marks formed the basis for the computer modelling to assess the steering input required to take the vehicle off the road and towards the dam. The steering input required was assessed at 16.6 degrees being the amount the tyres had to turn for the vehicle to leave the road at the angle assessed by Urquhart.

This was then extrapolated to a 220 degree turn of the steering wheel.

129 It was said that the basis for the opinion of a 220 degree turn of the vehicle was that it was assumed the vehicle was in the left-hand lane of the road before it commenced to move sharply to the right. The defence case was that the possibility of a series of small inputs to the wheel as the vehicle drove down the Princess Highway could not be excluded, which meant that the vehicle may have actually been in the right-hand lane and veering further right before it further changed course and left the road towards the dam. This hypothesis was put to Urquhart in re-examination. He testified that even if the vehicle had drifted slowly across the road, a right-hand change in direction would still have been required. According to Urquhart, on either hypothesis there must have been an input to the steering wheel.

130 In our view, Urquhart was entitled to give evidence based on the articulated assumption that the car was travelling in its correct lane. There was admissible evidence upon which this assumption could be made. In his record of interview the applicant recalled coming over the overpass. The vehicle left the road a very short distance after the overpass. He said he was 'just driving' and did not suggest that he was doing anything unusual and that he 'had both hands on the wheel'. He said he was not speeding and that he was conscious not to do so because he was with the kids. The 'drive throughs' demonstrated that without any input the car would have travelled straight (or if anything veered to the left).

131 The defence made plain in cross-examination of Urquhart that they challenged his assumption that the vehicle was in its correct lane after the overpass and suddenly veered right. The defence suggested that there was insufficient evidence to support this assumption. The weight to be given to this aspect of the evidence of Urquhart was an issue squarely raised before the jury. This ground is not made out.

Re-enactment Using a Dissimilar Vehicle

132 On the 22 September 2005, Urquhart conducted a series of drive-through tests as part of his attempts to reconstruct the incident. He testified these tests were undertaken to see how the vehicle might have travelled without any steering input. To do this he drove a test vehicle at three different speeds down the overpass, towards where the applicant's vehicle left the road. These tests were filmed from the inside of the vehicle so as to see the effect of the cross fall of the road on the handling of the vehicle. The simulations were played to the jury.

133 As we have said, Urquhart testified that the simulation showed that at a lower speed of 64kph the vehicle veered to the left. At 82kph and at 101kph it essentially held its line. Urquhart concluded that to diverge off the road to the right required a steering input to the right by the driver. The applicant submitted that the tests should not have been admitted as Urquhart used a notably dissimilar vehicle; and drove a course not shown to resemble that of Farquharson's car on 4 September 2005. The applicant further submitted that Urquhart followed an unscientific procedure by failing to measure the camber of the road, or perform a sufficient number of tests. Finally, it was submitted that television helicopter footage showed several other drive throughs showing the vehicle veering towards the dam.

134 The Crown submitted that the car used in the test drive was a 1990 VN Holden Commodore. This was the same model as the car retrieved from the dam. The defence relied upon the evidence of James Raymond Jacobs, a mechanic, who said that the applicant's car had an issue with its wheel alignment that caused it to drift slightly to the right and that it had done so when tested by Jacobs when driving over the overpass. The applicant's vehicle was, however, examined and its wheel alignment was found to be within the manufacturer's specification. The contention that the test car was so dissimilar as to render the tests inadmissible is not made out.

135 The submission that Urquhart drove a course not shown to resemble that of the applicant was founded on the basis that the drive through took place with the

vehicle in the left-hand lane of the Princes Highway immediately after the overpass. As is detailed above, it was open on the facts for the expert to conduct the drive through on the (articulated) assumption that the vehicle was travelling in its correct lane.

136 The submission that the test was 'unscientific' focused on Urquhart's admission that he failed to measure the camber of the road. At trial and on appeal the applicant relied upon evidence that, contrary to expectation, the cross falls on the road would cause a vehicle to drift to the right. Counsel put the suggestion to Urquhart that the failure to measure the camber of the road meant that the drive through test was 'of no value whatsoever'. Urquhart strongly disagreed. On appeal the applicant was unable to point to any way in which knowledge of the camber could have affected the practical result of the drive through tests which, as we have said, showed the test vehicle veering to the left at low speed and maintaining a straight line at the higher speeds. This complaint is not sustained.

137 There was television camera footage, of five preliminary drive throughs that Urquhart conducted prior to the tests presented to the jury. The purpose of those, Urquhart explained, was to gauge at what sort of speeds it might have been possible for a driver to steer off the road. With the road closed to traffic, tests were conducted from the middle of the road and not the left-hand lane. It was put to Urquhart that these tests were filmed by Channel 7. They showed the car drifting over to the right-hand lane. Urquhart testified that he was steering to the right. The matter was the subject of cross-examination. Whether Urquhart's explanation was believed was a matter for the jury. That this fact might have impacted upon the admissibility of evidence relating to the drive through was not pressed on the appeal. The complaint is not made out.

138 Finally, it was said that the re-enactment was more prejudicial than probative. The re-enactment was undoubtedly an important aspect of the Crown case. Evidence as to what the vehicle would have done if it was not being steered was relevant in assessing the applicant's account of unconsciousness. Had the test

resulted in the vehicle veering towards the dam, it would have been supportive of the applicant's account. As it was, the evidence was supportive of the Crown's contention that the vehicle had been steered by the applicant. The defence was able to lead evidence from Axup as to his opinion of what a vehicle would do if there were no steering inputs. No persuasive argument was advanced on the appeal why the test should have been considered unfairly prejudicial. This complaint is not made out.

The Evidence of the Computer Simulation

139 The computer program 'PC Crash' was used to create a computer simulation that was played to the jury. Urquhart explained the purpose of the simulation was to model conclusions from the data found at the incident scene. At the trial, the simulation was used to calculate the steering input required for the car to follow the identified path. The DVD containing the simulation was played to the jury.

140 Three challenges were made to the simulation. The first was that it was irrelevant. We do not agree. There is nothing to this complaint. The simulation provided the basis that led to Urquhart's conclusion that there were three steering inputs. It was properly admitted as evidence of that basis.

141 The second challenge was that it contained assumptions made by Urquhart that were not established by evidence. On appeal, the applicant concentrated upon the assumption that the vehicle started from the left-hand lane. As we have explained above, that assumption was open on the evidence. Once articulated, the question whether that assumption was proven was a matter for the jury as was the weight to give to testimony including the result of the simulation that rested on that assumption.

142 Finally, it was said that the simulation was more prejudicial than probative. This ground was not pressed in oral argument. Given the purpose of the simulation as discussed above, no sufficient reason was advanced why the simulation should have been excluded as a matter of discretion.

143 These grounds were not developed in oral argument. Counsel for the applicant relied upon written submissions in which it was said that Exton gave 'unsolicited and unqualified' opinion evidence about the course of the vehicle. Particular reference was made to the following passage of evidence:

> Did you look for tyre prints or marks of tyres in the area? 'Yes, sir'.
>
> What did you find? – Sir, I found where a motor vehicle had left the road on the right-hand side heading towards Winchelsea. Those wheel marks left the bitumen surface at an approximate angle of about 30 degrees. It travelled down the battered embankment ---
>
> Mr Morrissey: I object to this now, I'm sorry. Pardon me. The observation of actual marks I don't object to, but an opinion as the course of the vehicle I do object to. I take it that that's ---
>
> His Honour: He's just describing the marks and directions, he's not doing any more than that.
>
> Mr Morrissey: Your Honour, might it be clarified whether that's the case, because the way I understood it was different.
>
> Mr Rapke: (To witness) I'm asking you to describe what you saw; ok?
>
> His Honour: Just get him to describe what he saw. That's what you're doing.
>
> Mr Rapke: That's what I thought I was doing but I might not have been? --- Thank you, Mr Rapke. As I said, sir, the rolling tyre prints left the right-hand side heading towards Winchelsea on an approximate angle of about 30 degrees. After leaving the sealed surface it negotiated down a battered embankment or a slight embankment, where the surface started to level out slightly. Then the front of the vehicle would have dropped into a spoon drain, which is basically a very wide drain that's fairly shallow in the shape of, say, a dessert spoon. They continued on, and of course as it got through the spoon drain the grass got sort of longer and underneath of the car started to push the grass down towards the ground surface. It continued on into a farm fence where it has struck two upright wooden posts of fairly solid construction. That it's tensioned the wires in that fence until they became so taut that they broke. The car continued on, sir ---
>
> Mr Morrissey: I have to intervene, your honour, I'm sorry.
>
> His Honour: I think he's describing the impact on the grass and the ground, as I understand it. I know he hasn't expressed it precisely that way, but that's what I understand he's doing.

144 The Court was further referred to other parts of the evidence of Exton which included the opinion that the vehicle could not have travelled as it did without a

conscious steering input. The applicant concentrated on that part of re-examination where the Director asked the witness about the rough terrain over which the vehicle had travelled. The witness saw no evidence that the vehicle had deviated across that surface. Following an objection to the question as to what the car might have done, given the terrain, had there not been a driver holding the steering wheel, the Director asked what the vehicle might have been expected to do had there not been 'pressure at the wheel' - that mode of expression being suggested by defence counsel. Exton responded:

> **Exton** ... So the situation is if you've got a slight camber, a smooth bitumen surface, the car would deviate. Over this portion of area on the northern side of the Princes Highway I would have expected the vehicle to deviate quite abruptly, certainly at the spoon drain, definitely at the fence, and then more moderately between the fence and the dam. I could never imagine that car taking that gentle arc in that way over that area of ground with some control in the vehicle.
>
> **His Honour** 'Control', we will take that to mean pressure on the steering wheel? ... My apologies, your Honour, with pressure on the steering wheel.
>
> **Mr Rapke** 'Thank you very much.'

145 That evidence formed the basis for an application to discharge the jury. It was submitted that the evidence went beyond his expertise. The evidence was said to be prejudicial and without basis, as it suggested that the vehicle must have been under the control of the driver otherwise it would not have stayed on that path.

146 The Director submitted that, as a qualified motor engineer, the witness was qualified to express the opinion that he did. Furthermore he observed that it is a matter of common experience that if a car drives over surfaces like those travelled by the car, including tussocks of grass, potholes, deviations, divots and so forth, a vehicle will not maintain its line without a steering input or pressure on the steering wheel. Thus it was submitted that the witness was not prohibited from expressing the view that a car travelling over rough terrain is likely to deviate without a steering input. It was submitted that even if the opinion did go beyond his expertise, the objection could amount to no more than an argument about the weight that the jury should attach to the evidence.

147 His Honour ruled as follows:

> I consider there is no cause for discharging the jury in this case, let alone any degree of need, let alone a high degree of need. I consider the opinion expressed by Sergeant Exton was a competent opinion to be expressed. So far as it involved expertise, I consider he has the expertise as stated at 874 [of the transcript]. Some of it may not involve expertise at all but simply be a matter of observation and applied commonsense. So far as it is expertise, he is qualified to express it and I refuse the application to discharge the jury.

148 We see no basis to impugn his Honour's ruling. This ground is not made out.

Ground 17: Directions on expert evidence

149 Ground 17 relates to the adequacy of the summing up of the trial judge in respect of the accident reconstruction experts (Urquhart and Axup) and the key accident scene police witnesses (Exton, Courtis, Peters). His Honour's approach to all of this evidence was to instruct the jury by summarising counsel's argument on each of the issues concerning the accident reconstruction rather than by independently setting out the evidence for the jury. This approach was the subject of objection before and during the charge. On appeal it was submitted that this approach failed to adequately bring to the jury's attention all of the evidence and arguments that the defence relied upon to demonstrate that the path of the applicant's car was consistent with the applicant being in an unconscious state. It was this evidence, it was said, that was the key to establishing a reasonable doubt.

150 To illustrate the submission the applicant drew attention to a number of alleged deficiencies in Urquhart's testimony. They included his failure to test the cross-fall of the road, his error as to the markings which indicated where the applicant's vehicle left the roadway, his inability to explain certain pale markings in the grass – said to be consistent with vehicle tracks – shown in some of the photos, his assumption that the vehicle was in the left lane when it turned sharply to the right, his conclusion that the third steering input was to avoid hitting the tree when it may have been the fencing wire which caused the vehicle to move right, his failure to simulate the applicant's driving at 60kph or to simulate the applicant's driving from the middle or the right-hand side of the road and his concession that the path

of the vehicle was consistent with a series of smaller inputs.

151 It was contended that the defence case as to the inadequate factual foundation for Urquhart's opinion and the experiments he conducted, the reliability of the data he used, the soundness of his methodology and the inadequacy of the crime scene investigation, were not sufficiently summarised or explained to the jury in the charge.

152 It was further submitted that the jury did not receive adequate assistance to enable them to soundly scrutinise the controversial expert opinions or resolve the conflicts between experts. There was a danger, it was said, that the jury would regard the opinions as less accessible to critical appraisal. Against this, the Director submitted that the trial judge's approach to summing up the evidence was appropriate and was in fact the most effective way of communicating the facts and arguments to the jury, in the context of the complex and lengthy expert testimony given at trial.

153 We have already referred to the duty of the trial judge to summarise the evidence relevant to the facts in issue, and to do so by reference to the issues in the case. We noted that there is no formula by which this is to be done.

154 In *R v Andrakakos*[24] the trial judge's summary of the issues and the evidence by recourse to counsel's arguments was the subject of approval.[25] Cases such as *R v VN*[26] and *R v Thompson*[27] have also expressly approved such an approach. Much will depend on the trial judge's assessment of the quality and comprehensiveness of the addresses to the jury. In the present case the trial judge was additionally influenced by the length and complexity of the expert evidence.

155 It is not uncommon for defence counsel to feel that their attack upon

---

24 [2003] VSCA 170.

25 Ibid [11], [19].

26 (2006) 15 VR 113.

27 (2008) 187 A Crim R 89. See also *R v Sali* [2005] VSCA 382, [12].

witnesses has not been given the prominence in summing up that they feel it deserves. When a conventional charge is given the trial judge is neither bound to put every argument advanced by the defence nor to give such arguments as are summarised the same emphasis as counsel has given them. That part of the charge is usually the opportunity to remind the jury, often in the most fleeting way, of the primary arguments of the parties. Different considerations arise where the trial judge employs closing addresses as the vehicle for identifying particular issues and the evidence that relates to them. The summary of the arguments must then, of necessity, be at least so comprehensive as to ensure that important issues are clearly identified and some reference made to the evidence affecting them. But in long trials involving a very large number of factual issues, some selectivity as to the important issues is inevitable. The trial judge is not required to raise every issue or advert to all of the evidence. Whether the evidence needs to be summarised in any detail is very much a decision for the trial judge who will be influenced by considerations which include the nature of the issues and the quality of counsel's closing addresses.

156 The trial judge, having concluded that the arguments of the parties effectively identified the important issues and drew attention to the evidence that bore upon them, was entitled to use the arguments of the parties as the means by which the jury should be reminded of those issues and the evidence that related to them. It should not be overlooked that by the time of the charge, there had been extensive and very able cross-examination of each of the prosecution experts on each issue, and the defence had subsequently called its experts who in turn had been effectively cross-examined on those issues. Following comprehensive addresses of a high quality by both parties, the jury already had a well developed understanding of the issues and the evidence relevant to those issues. We are left in no doubt that in adopting the approach that the trial judge did, the jury was given adequate directions as to the issues and the evidence that bore on them so as to enable the jury properly to discharge their duty.

Grounds 22, 23: Post offence conversations, whether capable of evidencing consciousness of guilt, whether error in the directions given

157 Grounds 22 and 23 are concerned with the admissibility of King's evidence as evidence of consciousness of guilt and the directions given to the jury. After making his first statement to police on 9 September 2005, King covertly recorded a conversation with the applicant on 15 September 2005 with the apparent purpose of putting King's first version of the fish and chip shop conversation to the applicant to obtain admissions. A transcript of that first covertly recorded conversation was tendered at the trial as Exhibit H. As it appears to us, the parts of that conversation which are directly relevant for present purposes are these:

KING: Yeah I know, but something's been bugging me though.

APPLICANT: Yeah, I know. It's all right.

KING: But down at the, remember down at the fish shop? Out the front?

APPLICANT: When?

KING: Had that discussion.

APPLICANT: About what?

KING: Rob, this is what's been eating me up. That's why I've,

APPLICANT: What discussion was that?

KING: Remember when you said, when Cindy pulled up and you said to her 'I'll pay you [her] back big time', I hope it's got nothing to do with it.

APPLICANT: No. No way.

KING: Because that's why I've been,

APPLICANT: No, no, no, no, no. And then you know I would never, no.

KING: Because, all right I know, because listen. Because they're coming to interview me.

APPLICANT: They did?

KING: They will, they're coming to interview me tomorrow.

APPLICANT: Right. But that's, I can tell you don't stress.

KING: And I know that I'm, I'm freaking out.

APPLICANT: Don't freak out, just tell who I am, what I represent and all that. I never ever would do anything like that.

KING: Righto mate, now look that's why I've been off work.

APPLICANT: Don't ever think, all –

KING: I shook and all.

APPLICANT: All you have to say to them is who I am. As far as you know we got along, because she's told them we get along.

KING: Yeah.

APPLICANT: It was just a figure of speech of me being angry, but I would never ever do anything like that. I've got to live with this for the rest of my life and then, and it kills me.

KING: Oh, but that's what's been killing me.

APPLICANT: And I've been up there, I've told the truth. I looked everyone in the eye and I've told the truth, and I have.

KING: Yeah.

APPLICANT: I'm not lying to anyone. All you've got to do is say 'He's a good bloke, I've known him for a long time. He's always been good with the kids'. And if they ask about us, say 'Well yeah, as far as I know they got along'. Or if you don't know something, say 'Oh I don't know that'.

KING: Like I'm just scared mate, I'm scared.

APPLICANT: They're not gonna ask ya. Don't be scared.

KING: Oh yeah. Alright.

APPLICANT: Look at the positive things, I mean they've interviewed her.

KING: Hum.

APPLICANT: They've said she said 'No way known would he do anything like that', and I wouldn't. What, I'm not a mongrel.

KING: Hum.

APPLICANT: And I'm not a bastard, and I'm not an arsehole, I'm not a cunt. I would never ever, ever. That has never ever entered my mind. What I meant by paying her back, was when one day I'll stand here with a woman in front of you and see how you like it, that's what I meant.

KING: Yeah, well all that.

APPLICANT: All right, just don't worry about it.

KING: Hum.

APPLICANT: All you say, say you know me, I've always been a good bloke. 'He's always spoils his kids, used to see him riding around on the bikes with the kids. And taking them to the footy, playing footy with them. Always,'

KING: Yeah, that's right.

APPLICANT: I mean that's what you've got to say, always say all the positive things that you know.

KING: Yeah.

APPLICANT: And all the times you know, you'd be going for a walk you see us going on the bikes for a bike ride.

KING: Hum

APPLICANT: That's what you've got to say, all the positive things, yeah. Heavily involved with the kids with their sports, all things that I was.

KING: Hum.

APPLICANT: Look at all the good things that you saw that I done.

KING: Yeah. Oh yeah, all right, right. Right.

APPLICANT: And you know, that's all you've got to do.

KING: Right.

APPLICANT: That's it. You can't say something like that, because then they'll get thinking. We, we did get along.

KING: Yeah.

APPLICANT: Yeah, we did in the end.

KING: Right.

APPLICANT: I mean, look, she doesn't blame me.

KING: Hum. Yeah all right, all right. I just had to get it.

APPLICANT: Yeah, stop for a bit.

KING: Because Rob, it's hey, it's driving me crazy mate.

APPLICANT: I know, but I would never ever, ever do that. I mean if I, yeah I tell you right now, if I did that on purpose I would've killed myself.

KING: Hum, righto mate.

APPLICANT: Because I had, I've looked everyone in the eye, and I told

the truth.

KING: Yeah.

APPLICANT: I've had this flu, I had a coughing fit, I've blacked out. That is no bullshit.

KING: Right, right. I'm going, I'm going.

…

APPLICANT: All you've got to do, if you think negative, you're going to come across negative. I'm not, look so you can say what you want to say, that's your business.

KING: Hum.

APPLICANT: But all you've got to do is look at the positive thing there, 'He's involved with the sports, he's gotten involved in karate because that's what they wanted to do'.

…

158 King made his second statement to police in October 2005, and in that version of events said that the applicant not only proclaimed his intention to get even with Cindy 'big time' but also that he intended to take away from Cindy the thing in life which was most important to her and that he had had a dream in which his car went into a dam and he got out but his children did not. It will be recalled, that was called the dream allegation.

159 King then had a second covertly recorded conversation with the applicant on 13 October 2005, in order, presumably, to put the dream allegation to the applicant in the hope of obtaining admissions. A transcript of that further covertly recorded conversation was tendered at the trial as Exhibit I. The aspects of that which appear to be directly relevant for present purposes were these:

KING: Hum. Yeah, I've been the same. I've been the same mate. Actually Rob I'm struggling real bad.

APPLICANT: Yeah I know, we all are.

KING: Yeah, but you know what I'm struggling over Rob.

APPLICANT: Huh?

KING: You know what I'm struggling over.

APPLICANT: What?

KING: That conversation mate, it's killing me.

APPLICANT: No, but it was never like that.

KING: Yeah I know, yeah.

APPLICANT: That's what I keep telling ya, you've got to get that out of your head.

KING: I know but, but not just that 'pay her back big time', what about the other stuff you told me?

APPLICANT: Oh well that was while, bullshit talk of being upset, now I was over all that. It was just,

KING: I know that, I know.

APPLICANT: It was just early in the piece of things what people say and that, and she used to just say things about me and all that.

KING: Yeah, but.

APPLICANT: But then it's, but we sorted all that out.

KING: Yeah I know, but Rob you said to me about taking away the most important thing that meant to her.

APPLICANT: Not that. Not that, no way known.

KING: But, but you look,

APPLICANT: No not that, I didn't mean anything like that. I just meant she, she was getting into me about stuff. Ask me, you know like I want to get myself ahead in life and she's going to realise…

KING: Yeah, I know.

APPLICANT: I wanted to go forward.

KING: Yeah, right. But then I said to you, 'What's it, and what do you mean by that Robby?' And you, you, and you nodded your head towards that window in the fish and chip shop mate.

APPLICANT: I meant her [sic, she] would, meant that [sic, she] would wake up one day saying 'hey shit, he's not that bad of a bloke, I really should of [sic] stayed where I am'.

KING: Yeah, and what about the, what about when I said 'oh you don't even dream of that '? Remember?

APPLICANT: Don't what?

KING: You don't even dream of that. I said 'you don't even dream it' and you said some, you, I want this all off my chest.

APPLICANT: Yeah, but Greg I could never.

KING: Because it's eating inside me like a cancer.

APPLICANT: I would never ever in all my life do anything like that, ever.

KING: And you can, …

APPLICANT: I could not look people in the eye and say that. The only people that are keeping me going is Cindy saying that the boys don't want to see me unhappy, and my honesty in what's happened. My integrity to stand and tell, and Cindy backs me 150% that knows I'll never ever do that. And that's what's keeping me going, is those two things.

KING: Well.

APPLICANT: She had a three hour, ten page interview with them [the police]. She told them that I never smacked the children, I always put them first in everything.

KING: I, I understand Rob, but why would you say that to me?

APPLICANT: I think when we talked …

KING: Is it because when she, when she turned up you got, you got angry?

APPLICANT: I was just angry, I just turn up and she is throwing her nose up. Like you know 'Look I'm driving this good car and look at you', and I just meant 'One day I'm going to be better than [y]ou, one day I'm going to have a house'. Like my counsellor has backed me 150%.

…

KING: But you, look, and then, [b]ut that wasn't all though, that wasn't all. It's something that I said to you.

APPLICANT: Then I hope that, I mean, I meant,…

KING: All right, all right, I, I want to just get my head clear because it's fucking, it's wrecking me.

APPLICANT: Yeah, that's it. I know.

KING: It's wrecking me.

APPLICANT: But I would never ever do anything like that.

KING: Yeah, but the other thing was I said 'Oh you don't even dream of doing things like', and you, you said to me, right?

APPLICANT: Look, I'm,…

KING: I'm not going to lie to ya, you said to me, Rob you said to me 'Oh funny you should say about dreams, I have an accident and survive it and I, they don't', that's what you said to me.

APPLICANT: I never, never said that. I never said that.

KING: Well that's what I've been thinking, right?

APPLICANT: No, no, no, you're getting it all wrong, you're getting it all twisted. I meant one day she's going to wake up that I'm not as weak as piss as what she thought, and it sets off I'm going to accomplish something. I was seeking a goal, but I didn't have to go to counselling any more.

…

KING: Well no, oh well I'll just get, I've got to get, get some ideas, that's the only thing.

APPLICANT: Yeah, but don't go mentioning that because that will start something up that's not there. I mean,…

KING: Hum. Yeah.

APPLICANT: I mean, I, I mean you didn't tell the police that.

KING: No, no.

APPLICAINT: I mean, so that's, because that's not fair. They're, they're trying, they're not trying, they're, they've Cindy said everything supporting me.

KING: Hum. That's good.

APPLICANT: It's because it's true.

KING: Hum. Yeah, all right, there 's someone coming.

APPLICANT: Yeah, look maybe, I think if you just clear that out of your head you're going to feel a lot better.

…

KING: Yeah well, well main [sic], like you know when I asked you that thing bloody about the dreams that you kept, that just, that was.

APPLICANT: I didn't have dreams.

KING: Just when that conversation there was, there was something there about I said, 'Don't even dream about it Rob'. And you said 'Well funny about dreams the way I have an accident, and'…

APPLICANT: No. No no no no no no.

KING: That's what's been killing me in the brain mate,…

APPLICANT: No.

KING: 'I have an accident and the kids, they die'.

APPLICANT: No I had. No I had dreams and aspirations of becoming successful.

KING: No.

APPLICANT: That's what my dreams then just were.

KING: Well that's what I thought you said, right?

APPLICANT: No. My dreams was [sic] to be, get a better job, earn some good money, set up a life for myself and the kids.

…

KING: Hum. Obviously I, I'll go to, I've got to got to counselling but I'll just talk about the accident. That's what it is, the accident going over me, all right?

APPLICANT: Yeah.

KING: I'll have to talk about it mate. And I've got to get, …

APPLICANT: Yeah, but for God's sake please don't mention that sort of stuff,

KING: No.

APPLICANT: That you misinterpret what I said. Because then they're going to have it on file, and they're going to have to go to the police with that. That's going to incriminate me.

KING: Yeah all right, right.

APPLICANT: And I don't want that because it's not true.

160 King then made his third statement on 4 December 2005 containing the extreme allegation and in which, in effect, he recanted the allegation that the applicant had spoken of having a dream in which the children died.

161 There was no covertly recorded conversation in which King put the extreme allegation to the applicant. Nor was there any explanation as to why that was not done or attempted. But at trial, King gave evidence in accordance with the extreme allegation version of the fish and chip shop conversation and the Crown went to the

jury on the basis not only that they should accept it as being accurate but also that it could be seen from passages of Exhibits H and I (which the prosecutor highlighted for the jury) that the applicant had used a number of methods in an attempt to persuade King 'to a different point of view' or to 'view the conversations in a different light', including coaching King on what to say to police and counsellors, and 'emotional blackmail'. And in the Crown's submission to the jury, that was evidence of consciousness of guilt:

> What the accused feared … was Mr King spilling the beans on what [the accused had] said at the [fish and chip] shop and those comments, if repeated to the police, justifiably incriminating him in the murders of his children'.
>
> …
>
> This evidence, this evidence of the manipulation by the accused, but particularly the exhortation not to tell the police and not to tell the counsellors or anybody else about this, has a special character in the law. It's evidence which the Crown says evinces or evidences what the law calls consciousness of guilt.

162 In the judge's summing up to the jury, his Honour repeated verbatim the content of a number of the passages from Exhibits H and I which the prosecutor had highlighted, and then directed the jury as follows:

> So I will give you a direction of law about this. You will recall this morning I said I will give you one further direction of law, so this is the direction of law about how you may use – you decide whether you do use it or not but how in law you may use Mr Farquharson's repeated statement to Mr King do not mention that. *What the prosecution says is these were exhortations by Mr Farquharson to Mr King not to reveal the truth about the fish and chip conversation, not just the little 'I'll pay her back big time' but the 'I hate them', the dam, Father's Day, 'She'll always suffer' – that group of statements.* What the prosecution says is in this Mount Moriac tape [Exhibit I] Mr Farquharson was exhorting, leaning on, pressuring Mr King not to reveal the truth about the fish and chip conversation and the prosecution says he was leaning on Mr King because Mr Farquharson did not want the truth to come out – that is how the prosecution puts the case.
>
> The defence says on the contrary it is the other way round; these are the statements of an innocent man who does not want to get caught up in the horror of being accused of murdering his children and all the legal process which would flow from that. So it is a plea by an innocent man, not a statement by a guilty man exhorting Mr King not to tell the truth. That is how the two sides put it. As I am sure you understand, ladies and gentlemen, they both put it very clearly to you. Let me give you this direction of law. Depending upon what facts you find, you are entitled to use the exhortations of Mr Farquharson and to Mr King as proof of guilt of the crimes charged,

> murder. As a matter of law you are entitled to use them as proof of guilt of the crime charged, murder, if you find the following things. Firstly, if you are satisfied that the statements and exhortations by Mr Farquharson to Mr King were borne out of his consciousness of guilt of the crime of murder and his appreciation that Mr King, if he told the truth, would reveal the admissions outside the fish and chip shop. That is that they would tend to implicate Mr Farquharson in the crimes charged.
>
> For you to do that, you have to be satisfied of the following things. Number one, you would have to be satisfied that Mr Farquharson was exhorting Mr King not to advance the truth.
>
> Next that that exhortation not to tell the truth was deliberate and directly connected with the offences which occurred on Father's Day and not because of fear of being wrongly charged or through forgetfulness or shame or embarrassment or any of those human things short of consciousness of the crime charged.
>
> Further, you would need to be satisfied that the exhortations not to reveal the truth of the fish and chip conversation revealed acknowledgment of involvement in the crimes charged as ultimately they were laid.
>
> Finally, you would need to be satisfied by independent evidence of those things, that is by other evidence, which if you are satisfied of them would be his statements and actions at the dam and the rejection of the occurrence of coughing on the evidence.[28]

163 It is not clear what his Honour intended to convey in the last paragraph or what was meant by the phrase 'his statements and actions at the dam.' His Honour had already instructed the jury that the Crown was not relying upon the applicant's dam-side conduct as proof of the applicant's intent. We shall come to the dam-side conduct, however, when we deal with ground 25.

164 At a later point in the judge's charge, defence counsel sought a discharge of the jury on the basis inter alia that the consciousness of guilt evidence had been presented in 'a distorted way'. Defence counsel submitted in an outline of argument which he presented to the judge in support of that application that:

- The verbal acts relied upon by the Crown were not put.
- The explicit denials of guilt, amidst those very comments, were not put.
- Instead, reference was made to a variety of comments by Farquharson on which the Crown was said to rely, which were apt to mislead

---

[28] Emphasis added.

the jury.

165 In turn, the Director acknowledged that 'perhaps a great deal' of the direction, although it followed the prosecution's formulation, was probably wrong. The trial judge was invited to redirect the jury about consciousness of guilt to instruct them that they needed to be satisfied the applicant exhorted King not to tell the truth about the whole of the fish and chip conversation. In what appears to have been a reference to the last paragraph of the direction we have quoted, the prosecutor submitted that, as the Crown was not relying on consciousness of guilt as corroboration of some other aspect of its case, it was unnecessary to instruct the jury that independent verification of King's evidence was necessary.

166 The judge rejected the application for discharge out of hand, and then moved on to deal with other submissions as to the adequacy of his directions.

167 The following morning, after further discussion, it was agreed by both parties that each passage of Exhibits H and I upon which the Crown relied should be identified with precision. The jury was then instructed in these terms:

> The reason I have asked you to come in, ladies and gentlemen, is I wish to give you a brief further direction of law. It is to do with what Mr Farquharson said to Mr King at Mount Moriac in that second taped conversation [Exhibit I]…The specific matter is the 'don't say that' passages in that… conversation…
>
> I gave you a direction of law, ladies and gentlemen, about this matter and it was not fully correct and I will give it to you now fully and correctly and I hope that assists you. Being a direction of law you must comply with it. You of course decide the facts and you decide the significance of the facts as you decide the meaning of the facts, that is your domain, ladies and gentlemen.
>
> There are a number of parts in that Mount Moriac conversation where Mr Farquharson said to Mr King, 'Don't say that', and that is what I am directing this direction of law to you.
>
> The direction of law is this. Depending upon what facts you find you are entitled to use the statements and exhortations of Mr Farquharson to Mr King, not to reveal the truth about the whole of the fish and chip conversation, as proof of the crimes charged, murder. You are entitled to do so if you are satisfied that *the statements and exhortations of Mr Farquharson to Mr King, not to reveal the truth about the whole of the fish and chip conversation*, were born of Mr Farquharsons' consciousness of guilt of the crimes charged, murder, and of Mr Farquharson's appreciation that the fish and chip conversation would tend to implicate him in the crimes charged, murder.

> For you to do that you have got to be satisfied of the following things. First, that Mr Farquharson was exhorting Mr King not to advance the truth about the whole fish and chip shop conversation. Second, that those exhortations by Mr Farquharson were deliberate. Thirdly, that those exhortations by Mr Farquharson were directly and materially connected to the crimes charged of murder. Fourth, that those exhortations by Mr Farquharson were born of a realisation by him of his guilt of the crimes charged, murder, and not just that he was involved in the children's deaths as the person responsible for driving the vehicle, or through shame, regret, embarrassment, fear, panic, stress, worries about his own mental health; as distinct from consciousness of guilt of the crimes charged, murder. *And not through concern of being wrongly charged with murder or wrongly implicated in a crime he did not commit*.
>
> Finally, you have to be satisfied that those exhortations by Mr Farquharson to Mr King were born of a realisation of his guilt of having consciously, voluntarily and deliberately driven the children into the dam with the intention of causing their deaths.
>
> …
>
> You appreciate that the prosecution here says that Mr Farquharson said those things to Mr King to prevent him saying that to anyone else, because Mr Farquharson was conscious it would implicate him in the crimes charged, murder.
>
> The defence says that you should find that Mr Farquharson said those things so that he would not wrongly be charged with a murder he did not commit. That is how the two sides put the argument, and I am sure you understand you each side puts it.[29]

168 Thereafter, the judge specifically identified each of the applicant's statements in Exhibit I on which the Crown relied as indicative of consciousness of guilt, and then concluded with this:

> I have identified those passages, ladies and gentlemen, you have got them in your transcript, you can hear them on the tapes, to be specific about what my direction of law relates to, but of course you look at the thing in context, you look at what was said before and after, what it was referring to, what was being said between the two men. Do not take them out of context, look at them in context, but I have identified them so you know what I am directing the specific matter of law to.

169 The jury would have understood this re-direction as replacing that part of the directions of law that they had previously been given which concerned the matters which the judge had specified in the re-direction. It will be necessary to consider the fact that his Honour said nothing about how the jury were to treat the others matters

---

[29] Emphasis added.

relied upon by the Crown which he had previously referred to.

170 Under cover of ground 22, counsel for the applicant argued before us, as he had before the judge, that the taped conversations recorded in Exhibits H and I were not admissible as evidence of consciousness of guilt because the applicant had throughout the conversations steadfastly maintained his innocence of the offences charged and because it was demonstrable that the applicant was denying that he had ever said that he had a dream concerning an accident from which he escaped and the children did not.

171 Alternatively, counsel submitted, evidence of consciousness of guilt should only be admitted if it appears clearly to be capable of demonstrating a fear of disclosure. Here, however, because King only ever put a limited range of truncated and relatively innocuous allegations to the applicant – not the more detailed and damning extreme allegation version of the fish and chip shop conversation to which King finally deposed in evidence – it was impossible to say or at least it was doubtful what it was about the fish and chip shop conversation of which the applicant's responses were said to evince fear of disclosure.

172 We do not accept that the applicant's responses to King's suggestion were incapable of evidencing consciousness of guilt. In our view, it would have been open to a jury, if properly instructed, to conclude that the applicant's responses were born of the applicant's consciousness of having deliberately killed his children and fear that disclosure of the truth of the fish and chip shop conversation would reveal his guilt.

173 In effect, the Crown's argument as to consciousness of guilt proceeded by the following steps:

1) The applicant's responses to King's references to the fish and chip shop conversation were an attempt to persuade King 'not to tell the police… about the fish and chip shop conversation.'

2) What the applicant feared was 'King spilling the beans on what [the applicant] said at the shop'.

3) The reason that the applicant so feared disclosure of what he had said at the fish and chip shop was because he was conscious of having murdered his children and he feared that disclosure of the fish and chip shop conversation would incriminate him in their murders.

174 Logically, there is nothing wrong with that argument. If an accused engages in conduct calculated to prevent the disclosure of something capable of implicating him or her in the commission of an offence, it is conceivable that the conduct may properly be interpreted as evincing consciousness of guilt. For example, if an accused attempts to hide a weapon known to have been used in a homicide, or to hide a motor car involved in a hit and run accident, or to destroy clothes seen to have been worn by a burglar, a jury may infer that the accused is motivated by consciousness of guilt of the offence charged and fear that disclosure of the item will reveal his or her involvement in the offence. Similarly, where an offender has a conversation with a friend, of which the contents are capable of incriminating the offender, and thereafter engages in conduct calculated to prevent disclosure of the incriminating sections of the conversation, it is open to a jury to infer that the offender's conduct is motivated by consciousness of guilt of the offence and fear that disclosure of the contents of the conversation will reveal his or her involvement in the offence.

175 That is not the end of the matter, however, for although the taped conversations were admissible, it was conceded by the Director that there were a number of 'not insignificant defects' in the way in which the consciousness of guilt material was presented to the jury, and we consider that concession to have been rightly made.

176 The directions as to consciousness of guilt mandated by *Edwards v The Queen*[30]

---

30 (1992) 173 CLR 653 ('*Edwards*').

are aimed at the reasoning which a jury may use to infer guilt from post-offence lies. The underlying principles apply equally to the reasoning which a jury may use to infer guilt from other post-offence conduct, such as flight and concealment.[31] But the transposition of *Edwards* directions from lies to other forms of post-offence conduct, such as concealment of something physical, may sometimes prove difficult. In the present case, it involved a complex process of sequential reasoning which required careful instruction.

177 Where the Crown alleges post offence conduct in the form of concealment of something incriminating it is essential at the outset to identify precisely what it is that is said to have been concealed. It is also necessary to recognise that there are likely to be differences between cases involving an attempt to hide an item of physical property and cases involving an attempt to hide the contents of a conversation. In a case involving an item of physical property, there is unlikely to be much doubt about the property in question. One will usually know that what was hidden was a weapon of a particular calibre or a motor car of a certain model or an item of clothing of specified colour or design, or whatever else it might be, and thus readily form a view as to whether the accused's efforts to prevent disclosure of it were motivated by fear that disclosure would implicate him or her in the commission of the offence charged. Contrastingly, in a case like this, involving attempts to suppress a conversation, there may be real doubt about the terms of the conversation (unless of course it has been recorded) and so, therefore, real doubt as to whether the accused's efforts to prevent disclosure were necessarily motivated by fear that there was something in the terms of the conversation which would implicate him or her in the commission of the offence charged.

178 Consequently, in a case like this involving an attempt to prevent disclosure of a conversation, it is almost always necessary to identify the terms or at least the precise substance of the conversation alleged and to ensure that the jury are made

---

31 *R v Nguyen* (2001) 118 A Crim R 479, 489[20]; *Conway v The Qu*een (2002) 209 CLR 203, 237–8 [94]–[95]; *R v Chang* (2003) 7 VR 236; *R v Ciantar* (2006) 16 VR 26, 40 [44]; *R v Berry & Wenitong* [2007] VSCA 202, [101].

aware that, before they can infer consciousness of guilt from the accused's efforts to suppress the conversation, they must be satisfied that the terms or precise substance of the conversation were as alleged and thus that the accused's efforts to suppress the conversation were motivated by fear that disclosure of those terms or precise substance would implicate him or her in the commission of the offence charged.

179 We say that it will almost always be necessary, rather than invariably so, because there are cases where the mere fact of the conversation (regardless of its terms) may be capable of implicating an accused in the offence charged. Such cases, however, need not concern us here. The mere fact that the applicant had a conversation with King outside the fish and chip shop two or three months before Fathers' Day said nothing of itself which was capable of implicating the applicant in the murder of his children. Proof of the terms of the conversation was critical. Unless the jury were satisfied of what was said during the conversation, they could only ever speculate as to whether the applicant's attempts to suppress its disclosure were born of a fear that disclosure would implicate him in the murder of his children. In our view, therefore, it was essential for the judge to direct the jury that before they could infer consciousness of guilt they had to be satisfied of the terms of the conversation.

180 As has been seen, the judge went to some lengths to identify the passages of Exhibits H and I on which the Crown relied and to convey to the jury that they had to:

> [be] satisfied that [those] statements and exhortations of Mr Farquharson to Mr King not to reveal the truth about the whole of the fish and chip shop conversation, were born of Mr Farquharson's guilt of the crimes charged, murder, and of Mr Farquharson's appreciation that the fish and chip conversation would tend to implicate him in the crimes charged, murder.

181 Unfortunately, however, his Honour did not direct the jury that they had to be satisfied that the terms of the fish and chip shop conversation, of which the applicant was alleged to fear disclosure, were the extreme allegation version which the Crown alleged them to be. Rather, as will be seen from the redirection which we have earlier set out, his Honour appears to have taken it as given that the terms of

the fish and chip shop conversation were as the Crown alleged them to be, or at least included 'not just the little "I'll pay her back big time" but also the extreme allegation version "I hate them", the dam, Fathers' Day, "She'll always suffer" – that group of statements.' Then his Honour moved directly to the question of whether it could be inferred from the applicant's exhortation to King in the two earlier recorded conversations, in which King did not put the extreme allegation version of the fish and chip shop conversation to the applicant, that the applicant was motivated by fear of disclosure of a fish and chip shop conversation of which the terms more or less coincided precisely with the extreme allegation version.

182 So to say is not to exclude the possibility that the jury could have been satisfied that the terms of the fish and chip shop conversation were the extreme allegation version which the Crown alleged it to be, or at least sufficiently close to what was alleged, to then be satisfied that the applicant's attempted suasion of King evinced a consciousness of guilt. But as matters stand, it is impossible to say with any degree of certainty that the jury followed that process of reasoning. The fact that King twice changed his version of events before giving evidence, and the fact that he never put to the applicant the extreme allegation version of events which he gave in evidence, or even all of his first and second statement versions of events, were matters which required the jury's closest and most careful consideration. The jury should have been instructed clearly as to the need for them to first determine the terms of the fish and chip shop conversation and whether its content included all or only part of what King alleged, and for that purpose to have the relevant evidence drawn to their attention. Without that there was a real danger that the jury would simply assume, without necessarily being satisfied, that the applicant's responses to King's relatively innocuous allegations were in effect a recognition that the fish and chip shop conversation was in terms or to the effect of the much more serious extreme allegation version, and thus evinced fear of disclosure of a conversation in those terms. Indeed, the judge might have caused the jury to make just that mistake by instructing them that 'what the prosecution says is these were exhortations by Mr Farquharson to Mr King not to reveal the truth about the fish and chip

conversation, not just the little "I'll pay her back big time" but the "I hate them", the dam, Father's Day, "She'll always suffer" – that group of statements' which was conflated into 'the whole of the fish and chip shop conversation' in the redirection.

183 The Director argued that, even if that were so, the absence of adequate direction was in this case immaterial. He submitted that the Crown's case was a powerful circumstantial amalgam comprised of accident reconstruction evidence (to establish conscious steering inputs), medical evidence (to establish the improbability of an attack of cough syncope), and King's evidence of the applicant's statements during the fish and chip shop conversation (that the applicant hated his children and that, in order to get even big time with Cindy for what he regarded as her perfidy, he was going to kill his children in an accident in a dam from which only he would escape, on a day like Fathers' Day so that everyone would always remember). As against all that, the Director submitted, the added effect of consciousness of guilt was barely likely to register in the jury's cognitive processes.

184 That submission cannot be sustained. While we accept that the Crown case became a strong one if King's extreme allegation version were accepted, the Director's submission rests upon the assumption that the adverse inference which the jury was invited to draw from the taped conversations did not contribute to the jury's state of satisfaction concerning King's allegation. As we have explained, however, the jury could not properly have drawn that adverse inference unless they were first satisfied as to the terms of the fish and chip shop conversation, and the difficulty is that the jury were not directed that they could not draw that inference without first being satisfied of the terms of the fish and chip shop conversation. They were told only of the need to be satisfied that the applicant's exhortations to King to suppress the conversation were born of consciousness of guilt. Consequently there was a real risk of the jury reasoning impermissibly backwards from the applicant's responses to King (as recorded in Exhibits H and I) to the conclusion that the terms of the conversation were as King alleged (in his evidence), and thus concluding by an impermissible process of reasoning that the applicant was

guilty. The existence of such a risk led to the following observations in *Edwards*:[32]

> There is, however, a difficulty with the bare requirements in *Reg. v Lucas* that a lie [or conduct] must be material and that it must be told [or committed] from a consciousness of guilt. … A bare direction that consciousness of guilt is required does not provide sufficient guidance as to what matters indicate its presence. Unexplained, such a direction allows the jury to decide, in the light of all the evidence, that a lie [or conduct] was told [or committed] with a consciousness of guilt and then to use that finding to corroborate some part of the evidence that led to the finding of a consciousness of guilt.

185 Given the innate improbability of a sane man killing his infant sons, even as a means of getting even with a perfidious ex-wife, and what may be thought the significant unlikelihood that, if a man were determined to kill his children in that manner, he would proclaim his intentions in advance to someone who might report the matter to the police, we think that the jury could well have focussed on the suggestion of consciousness of guilt as a basis for reasoning backwards to a conclusion, which otherwise they might have resisted, that King's extreme allegation version of the fish and chip shop conversation or some disputed part of his account should be accepted.

186 It follows in our view that the way in which the issue of consciousness of guilt was left to the jury in this case gave rise to the appreciable risk that it had a significant impact on the outcome of the case and thus to have caused a miscarriage.

187 Under Ground 23, counsel for the applicant further argued that, if the contents of Exhibit I were admissible as evidence of consciousness of guilt, the judge's directions were inadequate. It will be apparent from what we have already said that we accept that the directions were inadequate. But the failure to instruct the jury of the need to be satisfied of the terms of the fish and chip shop conversation was not the only deficiency in the judge's directions as to consciousness of guilt, as the Director conceded.

188 As we have said, the starting point was the content of the fish and chip shop conversation. The judge should have instructed the jury that they needed to

---

[32] (1993) 178 CLR 193, 210; see also *R v Laz* [1998] 1 VR 453, 466.

determine the content of the fish and chip shop conversation before embarking on a consideration of the inferences which might be drawn from the applicant's alleged attempt to conceal the conversation. Logically, there were at least three views which the jury could take of the fish and chip shop conversation and, in our opinion, it was necessary for the judge to point out each of those possible views to the jury for their consideration:

1) We have noted already that the applicant admitted that he had said certain things in the fish and chip shop conversation. They were that: 'when Cindy pulled up [he] said to her 'I'll pay [her] back big time'; that 'the other stuff [he] told [King]' 'was while, bullshit talk of being upset'; that when King asked him: 'What's it, and what do you mean by that Robby?' the applicant had 'nodded [his] head towards that window in the fish and chip shop'; and, possibly, that he 'said to [King] about taking away the most important thing that meant to [Cindy]'. The first possible view, therefore, was that the jury may only have been satisfied that the applicant said the things which he had admitted he said.

2) The second possible view was that the jury may have been satisfied that, in addition to the admitted expressions, the applicant also said the further things which King put to him in the taped conversations, namely: 'Well funny about dreams the way I have an accident, and'… 'I have an accident and the kids, they died'. If so, the jury may also have considered the applicant's denial that he had said anything about a dream of an accident to be false.

3) The third possible view was that the jury may have been satisfied that, in addition to the matters put by King to the applicant in the taped conversations, the applicant said all of the other things which King testified were said in the conversation, namely, what the judge described as not just the pay her back big time but the 'I hate them', the dam, Fathers' Day, 'She'll always suffer' – that group of statements.

189 Secondly, having determined the content of the fish and chip shop conversation, the jury had to embark upon a process of inferential reasoning to determine whether the applicant's responses to King in the covertly recorded conversations were intended to conceal all or some aspect of the fish and chip shop conversation which they found to have taken place. Consistently with what was said in *Ciantar*,[33] the judge should have directed the jury as to the 'acts, facts and circumstances' relied upon by the Crown to support the inference for which the Crown contended.

190 His Honour failed to do so and, in our view, thereby created a risk of the jury overlooking one or more possibilities which, had they been alerted to their existence and been directed to consider their ramifications, could have made a difference. Further, as we have previously explained, that risk was accentuated by the fact that the judge told the jury, incorrectly, that King had mentioned the Fathers' Day threat during the course of the covertly recorded conversations.

191 Thirdly, once the jury had, by inferential reasoning, made a finding as to what it was that the applicant sought to conceal, the process of reasoning to a conclusion of consciousness of guilt necessitated drawing a further inference that the applicant realised that the conversation implicated him in the crimes charged. In turn, that required the jury be able to exclude any other reasonable explanation of the applicant's attempt to conceal the conversation. Consequently, as part of the direction called for by *Edwards*, and explained in *Ciantar*,[34] the judge should have instructed the jury that the process involved inferential reasoning and, as part of that process, should have reminded the jury that it was not permissible to draw an inference of consciousness of guilt unless they were able to exclude all other reasonable possibilities.

192 Fourthly, because of the way in which the Crown put its argument on consciousness of guilt, there was a range of such reasonable possibilities as to what

---

33 (2006) 16 VR 26, 51[85].

34 Ibid 52 [87].

could be inferred from what is described as the applicant's exhortations which the jury needed to consider and, in order to make that comprehensible for the jury, it was highly desirable that the judge outline at least some of those possibilities for the jury's consideration. They included the following:

1) The first possibility was that the fish and chip shop conversation was not as King suggested in Exhibits H and I, and consequently that the applicant's denials of King's suggestions during Exhibits H and I were righteous denials – in the sense that the applicant was innocent of the crime charged but feared that, if King repeated the false allegations made in Exhibits H and I, the police would wrongly suspect the applicant of having committed offences of which he was innocent. In effect that was the explanation relied upon by the defence at trial: King had misinterpreted what the applicant said to him during the fish and chip shop conversation and the applicant was concerned that if King repeated his misinterpretations to the police the applicant would be falsely implicated in the commission of the offences.

2) A second possibility was that the fish and chip shop conversation was as King suggested in Exhibits H and I, but that the applicant's attempts to persuade King not to repeat them were righteous – in the sense that the applicant was innocent of the crime charged but feared that, if King repeated what he said about the conversation, the police would suspect the applicant of having committed offences of which he was innocent.

3) A third possibility was that the fish and chip shop conversation was as the Crown alleged it to be (namely, King's extreme allegation version to which he deposed in his evidence) but nevertheless that the applicant's attempts to persuade King not to repeat the more limited things which King mentioned during the recorded conversations were still righteous – in the sense that the applicant had not committed the crime charged but feared that, if King repeated the contents of the fish

and shop conversation, the police would suspect the applicant committed offences of which he was innocent.

4) A fourth possibility was that the fish and chip shop conversation was as King alleged it to be and that the applicant's attempts to persuade King not to repeat it were indicative of guilt – in the sense that the applicant had committed the crimes charged and feared that, if King repeated what he said about the conversation, the applicant's guilt would be revealed to the police.

193 We reject a submission made by the Director that such directions were not required in view of the judge's earlier general direction to the jury about drawing inferences. We are conscious that to require the explicit identification of possibilities in that fashion would in some respects make the task for the jury more than usually complex, and the task for the judge of directing the jury more than usually burdensome. Unfortunate though that may be, however, it seems to us that it was more or less the inevitable consequence of the Crown advancing a case of consciousness of guilt which was as subtle and complex as this one was. Once the Crown elected to pursue the notion that consciousness of guilt could be inferred from the applicant's responses to King's insinuations of a different and less serious version of the fish and chip shop conversation than that to which King deposed, it opened up the range of logical possibilities which we have identified and, if justice were to be done, they needed to be considered. Otherwise, there was at least a real chance of the jury overlooking one or more possibilities which, had they been alerted to their existence and been directed to consider their ramifications, could have made a difference.

194 As it was, the judge did not say anything explicit about the process of inferential reasoning which was involved or say anything directly of the need to be able to exclude all other reasonable possibilities. Instead, his Honour simply referred in general terms to a number of theoretical, innocent explanations as to why a person may seek to conceal an incriminating fact, and instructed the jury that,

before inferring consciousness of guilt, they had to be satisfied that the applicant's exhortations to King 'were born of a realisation by him of his guilt of the crimes charged and not just' one of those other possible innocent explanations. Moreover, contrary to what was said in *Ciantar*,[35] his Honour did not mention the explanation given by the applicant during the course of the covertly recorded conversations, and which was relied upon by the defence at trial, that King had misinterpreted what the applicant said to him during the fish and chip shop conversation and that the applicant was concerned that, if King repeated his misinterpretations to the police, the applicant would be falsely implicated in the commission of the offences.

195 Fifthly, as has been seen, it was part of the Crown case at trial that the applicant had engaged in sustained manipulation of King during the course of the covertly recorded conversations, in his endeavour to conceal the fish and chip shop conversation. The prosecutor had argued that the manipulation took a variety of forms – exhortations, coaching and emotional blackmail – and made forceful submissions to that effect in his closing address. The judge then referred to that aspect of the Crown's case immediately before giving the jury directions concerning consciousness of guilt. But when redirecting the jury on consciousness of guilt, his Honour instructed them to focus only upon the applicant's statements to King: 'don't say that', and his Honour did not give the jury any further direction concerning the 'sustained manipulation' or the many portions of the covertly recorded conversations which his Honour had referred to in his initial directions to the jury. The redirection focussed only on the identified passages of the covertly recorded conversations.

196 In argument before us, the Director conceded, that the Crown had relied on the alleged sustained manipulation to support an implied admission, and it was for that reason that the trial judge dealt with it immediately prior to giving the jury directions concerning consciousness of guilt. In those circumstances, there should have been no doubt that it was necessary for the jury to have regard to all of those

---

35 (2006) 16 VR 26, 52 [86].

matters when considering whether or not the taped conversations could sustain an inference of a consciousness of guilt. Yet, in effect, the only guidance which the judge gave the jury on those matters, other than to identify passages in the covertly recorded conversations, was to tell the jury that they should look at those identified passages 'in context, you look at what was said before and after, what it was referring to, what was being said between the two men'. In the result, the jury were left largely uninstructed as to the allegation of sustained manipulation and the other passages of the taped conversation to which the judge had initially referred.

197 Sixthly, during the course of the covertly recorded conversations, the applicant vehemently denied the dream or any other indication that he intended to kill his children and, although the Crown did not rely on his denials as lies, the prosecutor invited the jury to act upon King's evidence and to reject the applicant's denials. If the jury accepted that invitation, it was not at all unlikely that they would treat the applicant's denials as false denials, and, therefore, as part of what the Crown contended was the applicant's alleged attempts to conceal the fish and chip shop conversation. In those circumstances, it was necessary that an *Edwards* direction be given in respect of his denials even though the Crown was not relying on them as such as evidence of guilt.[36]

198 The Director submitted that it was unnecessary that such a direction be given as a 'denial of the Crown case' does not constitute 'an *Edwards* lie'. That submission involves a misconception. The applicant was not denying 'the Crown case' but was denying that he had said specific things to King during the fish and chip shop conversation. In the alternative, the Director argued that there was no miscarriage because the denials formed part of the concealment and were adequately addressed by the directions given concerning consciousness of guilt and concealment; more precisely, that, if there were an attempt to conceal part of the conversation, that conduct subsumed the lies constituted by the false denials and therefore no separate direction was required. The difficulty with that, however, as we have shown, is that

---

36 *R v Cuenco* (2007) 16 VR 118, 123 [15]–[18].

the alleged concealment may not have related to the Fathers' Day threat but only to the admitted expressions.

199 The jury should have been instructed that, once a determination was made of what the applicant said to King in the conversation, the whole of the taped conversations, including those parts which the prosecution alleged reveal 'sustained manipulation' or 'blackmail', and those parts which the jury may have concluded constituted a false denial, had to be taken into account. Therefore, an *Edwards* direction, with appropriate adjustment to deal also with concealment, needed to be given in relation to the entirety of the taped conversations.

200 Finally, and significantly, counsel for the applicant argued that, although the Crown case was constituted of circumstantial 'strands in the cable', the fish and chip shop conversation was likely to be so influential that it should be treated as, or as if it were, an essential link in the chain of reasoning to guilt and, therefore, as needing to be proved beyond reasonable doubt. It followed in counsel's submission that the judge should have directed the jury that they could not infer consciousness of guilt unless satisfied *beyond reasonable doubt* that the fish and chip shop conversation was in the terms alleged by the Crown or was otherwise indicative of guilt, and that the applicant's efforts to suppress the conversation were motivated by consciousness of guilt.

201 Ordinarily, if post-offence conduct is relied upon as part of a circumstantial case to establish consciousness of guilt, it is not necessary for the jury to be satisfied of the occurrence of the post-offence conduct or its character beyond reasonable doubt.[37] But where the post–offence conduct constitutes an indispensable link in the chain of reasoning to guilt, the jury must be instructed that they cannot act on that evidence unless satisfied of it beyond reasonable doubt.[38] There are also some cases, of which we think this to be one, where, although consciousness of guilt is not necessarily an indispensable link in the chain of reasoning to guilt, it appears to be of

---

37 *R v Ciantar* (2006) 16 VR 26, 40 [44]–[45].

38 Ibid 43, [54].

such significance to proof of the Crown case that the jury should be warned as a matter of prudence that they ought not act on it unless satisfied of the occurrence of the conduct and its significance beyond reasonable doubt.[39]

202 The Director argued that it would have been open to the jury to be satisfied of the applicant's guilt beyond reasonable doubt on the basis of only the accident reconstruction evidence and the medical evidence. That being so, he submitted, it must follow that the evidence of consciousness of guilt was not an essential link in the chain of reasoning to guilt. Contrary to the notion of the consciousness of guilt evidence being such a significant part of the Crown case as to warrant a reasonable doubt warning as a matter of prudence, the Director repeated his submission that the consciousness of guilt evidence was but a small sub-part of only one of the three major strands of the Crown's circumstantial case and so, regardless of which way it went, it could not be supposed to have had a significant influence on the jury's conclusion.

203 We reject that submission. We allow that the evidence of the fish and chip conversation and the evidence of consciousness of guilt need not necessarily have been indispensable links in the chain of reasoning to guilt. Logically, it was possible, albeit perhaps unlikely, for jurors to be persuaded of guilt beyond reasonable doubt on the basis of the other evidence alone. But given that the offences were both extraordinary and counter-intuitive, we think it likely that at least some jurors may have required the added satisfaction of King's evidence as to the fish and chip shop conversation, and possibly also the inference of consciousness of guilt, in order to be persuaded of the applicant's guilt. Hence, therefore, in our view, an appropriate beyond reasonable doubt warning was required as a matter of prudence.

204 We repeat that the jury were not bound to regard the evidence of the fish and chip shop conversation, or of consciousness of guilt, as essential to their process of reasoning. It follows that it would have been an unwarranted usurpation of the

---

39 *R v Laz* [1998] 1 VR 453, 468–469; *R v Franklin* (2001) 3 VR 9, 50 [121]–[123] (Ormiston JA).

jury's function to direct the jury simply that they could not act upon King's evidence of the fish and chip shop conversation, or on the basis of the evidence of the consciousness of guilt, unless satisfied of that evidence beyond reasonable doubt. But we think that the jury should have been told that, if the fish and chip shop conversation or consciousness of guilt were essential to their reasoning process, they needed to be satisfied of those things beyond reasonable doubt. Perhaps the best way to have done that would have been to direct them that, unless they were prepared to convict in the absence of King's evidence as to the contents of the fish and chip shop conversation, they had to be satisfied of that evidence beyond reasonable doubt.

205 The Director referred to a number of instances in which the proviso had been applied in cases where there had been error in the directions given concerning consciousness of guilt. He submitted that the errors in the present case had not produced a substantial miscarriage of justice. We do not agree. The applicant's conversations with King lie at the heart of the Crown case and if they were not indispensable, were critical to, and likely to have been highly influential in, the jury reaching their conclusion of guilt. In our view, it is clear in this case that the proviso cannot be applied.

Grounds 20 and 21 – Non disclosure of charges pending

206 Under cover of grounds 20 and 21 the applicant complained that the trial miscarried because of the prosecution's failure to disclose, prior to verdict, that King had charges for indictable offences pending. This error was said to be compounded by the failure to disclose that the police were prepared to provide a letter of support upon his plea and sentence. Neither the prosecutor nor the judge knew of these matters.

207 The charges eventually laid against King alleged indictable offences committed on 24 December 2006. King made admissions as to certain offences in a tape-recorded interview with police on 27 May 2007. A brief of evidence against

King was submitted for approval for prosecution by police in August 2007, and was in fact authorized for prosecution on 20 September 2007, only a few days after King had completed his evidence in the trial.

208 The charges were heard on 6 December 2007, when King pleaded guilty to a single charge of 'recklessly causing injury'. All other charges were withdrawn by the prosecution. A letter of support by the investigating police was tendered. King was convicted and was placed on a 12 month bond to be of good behaviour with no conviction and fined $750.

209 It was submitted by the applicant that the failure of the Crown to disclose prior to King's testimony at trial or before verdict that he was likely to be charged with indictable offences, constituted a serious miscarriage of justice as it deprived the defence of a legitimate ground on which to challenge his testimony. Armed with that knowledge, it was submitted, the defence would have suggested to King that he had a motive to give evidence in accordance with the highly damaging 'extreme allegation'.

210 It is axiomatic that there must be full disclosure in criminal trials. The prosecution has a duty to disclose all relevant material.[40] A failure of proper disclosure can result in a miscarriage of justice.[41]

211 The pre-condition for prosecution disclosure is, of course, that the material is in the possession of, or the information is known by, the prosecution. In argument reference was made to an affidavit provided by the informant Detective Sergeant Gerard Damian Clanchy dated 18 August 2008. Clanchy deposed that:

> On or about the 28th May 2007 I was contacted by Mr Baker who told me that he had interviewed Mr King for offences arising out of a fight at a hotel on Christmas eve and that a brief would be submitted in due course. I believed at that time that the investigation into the fight was still ongoing and that what charges, if any were to be laid was still to be determined. At no time was there any agreement, understanding or direction that any charges to be laid against Mr King were to be delayed or deferred until after Mr King gave

---

40 *Cannon v Tahche* (2002) 5 VR 317.

41 *Mallard v R* (2005) 224 CLR 125.

evidence against Mr Farquharson.

212 It was accepted by the Director that there is no distinction for disclosure purposes to be drawn between the prosecution in the present trial and the police informant on King's charges. Accordingly, the Crown must be taken to have known prior to the trial (at least from 28 May 2007) that King may have been charged with an indictable offence.

213 The question is, therefore, whether this information is of the kind that ought to have been disclosed. On appeal the Director did not dispute that it was appropriate to adopt the test set out in *R v Spiteri*.[42] There, the Court held that the Crown has a duty to disclose material which can be seen on a sensible appraisal by the prosecution:

(a) to be relevant or possibly relevant to an issue in the case;

(b) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;

(c) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).

214 A number of limits were also set out to these obligations:

The prosecution duty of disclosure does not extend to disclosing material:

(a) relevant only to the credibility of defence (as distinct from prosecution) witnesses

(b) relevant only to the credibility of the accused person;

(c) relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false;

(d) for the purpose of preventing an accused from creating a trap for himself, if at the time the prosecution became aware of the material it was not a relevant issue at trial.

215 It was not suggested that any of these exceptions would be applicable to the information in the present case. The significance of the non-disclosure therefore falls to be determined by whether on a sensible appraisal by the prosecution the

---

42 (2004) 61 NSWLR 369.

information about King was relevant, or possibly relevant, to an issue in the case.

216 On this appeal it was said by the Crown that the information about King was not sufficiently relevant to an issue in the case. The information was described as evidence of bad character, and that it could not have been used in cross-examination. Further, it was submitted that the evidence had no probative value in the circumstances of this case. Those circumstances were said to include the fact that the defence had not sought to attack King on the basis of his credibility, but rather, on his ability to recall the matters that made up his evidence. King was attacked primarily on the basis that his highly damaging account of the 'extreme' version of the fish and chip shop conversation was the result of confusion caused by trauma. Accordingly, whether King had a motive to give evidence preferable to the Crown could not bear upon whether he was believed as no-one was suggesting that he was a liar. Furthermore, the Director drew attention to the fact that King gave evidence at the committal on 14 August 2006 which was in accordance with his final statement, made 19 December 2005. The incident which gave rise to the indictable offence occurred on 24 August 2006. Later at the trial of the applicant, King again gave evidence in accordance with his statement. So it was said that even if the defence had known of the incident, it could not have been used to attack King's credibility as his evidence was consistent with his earlier statements and evidence which preceded the commission of the indictable offence. Any attempt to attack the testimony of King on the basis that it was tailored to win favour with the Crown, would have little probative weight as it was contradicted by King's account on the record prior to the incident.

217 Against this Counsel for the applicant submitted that the defence did not concede that King was a truthful person. He contended that, at trial, there was no known basis for directly challenging his truthfulness. It was not, therefore, to the point to argue that the defence had not sought to attack the credibility of King. It would have done so had this information been available. He submitted that the evidence had probative weight in two ways. First, it would have been submitted

that King was a witness of bad character. On appeal it was said that the offences charged showed that he was a 'violent drunken bully who hunted in a pack during an assault'. Second, that he was a witness with an interest in giving evidence consistent with the more 'extreme' version of the two accounts. He had a need to please the police to get the benefit of a beneficial plea bargain and a letter assisting him in court when it came to his own sentence hearing.

218 In our view the information was rationally probative and should have been disclosed. It behoved the informant and the police to do so. While this evidence might have been of limited value, given the fact that King maintained a consistent account from a period beginning prior to his offence, we accept the likelihood that this would have been relied upon by the Defence as evidencing an incentive for King to maintain his final account of the fish and chip conversation containing the extreme allegations. The probative value of this evidence must be considered in conjunction with the prosecution suggestion at trial that the witness had no reason to lie. This is the subject of separate complaint under the next ground of appeal. Such a suggestion may have heightened the probative value of the evidence that ought to have been disclosed. This ground is made out.

Ground 18 – Why would King lie?

219 It was submitted by the applicant that the prosecutor and trial judge erred in reminding the jury that King's reply to defence criticism was to ask, 'Why would I lie'? It emerged in this way during cross-examination:

> MR MORRISSEY: At the time when the conversation happened if Mr Farquharson had have said anything like the extreme things that your evidence now contains you'd have done something about it Mr King, wouldn't you, if he really said it.
>
> KING: He said it. Why would I lie about something like that?

220 Later a similar statement was made by King:

> [DEFENCE COUNSEL] The reason you didn't call Cindy, the police or anyone else is because these extreme claims, sorry, these extreme statements you attribute to Farquharson were not in fact made at all; do you agree?

[KING] That conversation took place.

[DEFENCE COUNSEL] All right?

[KING] Why would I – why would I want to go and do that to somebody.

221 Attention was drawn to these comments in the closing address of the prosecution where it was said:

> We put to you, ladies and gentleman, that Mr King is a truthful witness, he's got no reason to lie.

222 Later comments by the prosecution were also said to impliedly refer to this aspect of King's evidence:

> … do you not think that if Mr King had the slightest doubt in his own mind about the accuracy of his recall that he would've admitted that? Why wouldn't he admit it? There's no punishment for admitting that you've made an error, that (transcript indistinct) wrong. He doesn't stand to collect any reward for the conviction of Mr Farquharson for these murders. Did he not strike you, ladies and gentlemen, as a patently honest man, striving to be as accurate as he possibly could and loathing every minute that he was here in this witness-box and in the limelight?

223 The trial judge, then, in his charge referred to the prosecutor's closing remarks which were said by the defence to be a reference, by implication, to King's statement, 'Why would I lie'? The trial judge said:

> … ladies and gentlemen – Mr Rapke said why would this friend of Mr Farquharson come forward this way? No reason.

224 No request was made by Counsel for the applicant for a direction following King's evidence, nor was any request made for a re-direction after the trial judge had made the comments in his charge.

225 On this appeal, it was said that the comments by King and the prosecutor and the reminder of them in the charge, either individually or in combination, infringed the principle established in *Palmer*.[43] In that case, a defendant charged with sexual offences had been cross-examined as to whether he could suggest any reason why the complainant would lie about the conduct said to constitute the offence. Allowing

---

43 *Palmer v R* (1998) 193 CLR 1; see also *R v Hewitt* (1998) 4 VR 862, 866–9; *R v Russo* (2004) 11 VR 1, 13 [37]-[38].

the appeal, it was held that this was an impermissible line of questioning. In its reasons the Court said:

> if it were permissible generally to cross-examine an accused to show that he has no knowledge of any fact from which to infer that the complainant has a motive to lie, the cross-examination would focus the jury's attention on irrelevancies, especially when the case is 'oath against oath'. In such a case, to ask an accused the question: 'why would the complainant lie?' is to invite the jury to accept the complainant's evidence unless some positive answer to that question is given by the accused. As Gleeson CJ, speaking for the Court of Criminal Appeal of New South Wales said in *F*:
>
> > the 'central theme ' of the case, according to the trial judge, could be found in the question, 'Why would the complainant lie'? That is a question, often left unspoken, which usually hovers over cases of this nature … Whist that question, sometimes spoken, sometimes unspoken, is often of great practical importance, it is never 'the central theme' of a criminal trial. At a criminal trial the critical question is whether the Crown has proved the guilt of the accused person beyond reasonable doubt. Just as the law does not require the Crown to prove a motive for the criminal conduct of the accused, the law does not require the accused to prove a motive for the making of false allegations by a complainant.

226 The Court referred to the contrary position in Victoria at that time. This was expressed by Callaway JA in *R v Rodriguez*,[44] where his Honour said:

> It is true that there is no onus on the accused to prove a motive for the complainant's allegations. It is also true that absence of motive cannot, in cases like these, be inferred from absence of evidence of motive. But neither of those heresies is necessarily embraced when a jury is invited to ask themselves the question 'why would the complainant lie?' in the course of assessing her or his credibility. Other things being equal, and that is an important qualification, the complainant's account is more likely to be true if a motive or possible motive for lying cannot be discerned and less likely to be true if it can be.

227 That view was disapproved in *Palmer* where the Court said:

> with respect, a complaint's account gains no legitimate credibility from the absence of evidence of motive. If credibility, which the jury would otherwise attribute to the complaint's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished … the correct view is that absence of proof of motive is entirely neutral.

---

44 [1998] 2 VR 167.

228 *Palmer* was subsequently applied by this court in *PLK*.[45] That case was unlike *Palmer* in that it was not one in which the applicant had been asked in cross-examination whether he could suggest a reason why the complainant could lie. In that case a specific motive to lie had been advanced during cross-examination of the defendant. In her closing address the prosecutor sought to attack the suggested motive. It was held that by attacking the motive to lie put forward by the defence, the risk was created that the jury may have thought that rejection of that motive would additionally bolster the credit of the complainant. No direction was given by the trial judge to ensure that this challenge was only used in a permissible way.

229 During argument the parties referred to *R v Geary*.[46] That was a drug trafficking case, where the defence in closing argument raised the fact that the six key witnesses for the prosecution might have given evidence on the basis of the indemnity they had received. That was described by the defence as a 'get out of gaol free card' constituting 'a powerful inducement' to implicate people. In his address the Crown Prosecutor suggested that as they had already implicated people other than the accused, they had nothing to gain by 'falsely accusing a man who was not implicated'.

230 It was submitted by the applicant in *Geary* that this impermissibly invited the jury to consider the 'course of reasoning' proscribed by *Palmer*. This was rejected by the Court on the basis that it would be absurd, if defence counsel was entitled to raise the prospect that Crown witnesses were liars, but that the prosecutor could not then in closing address explore the issue as to what motivation those witnesses might have to lie.[47] In reaching this conclusion the Court said:

> [27] In that regard it should be noted that in *Palmer* the majority referred at 9–10 to passages from the judgment of Hunt C.J. at C.L. in *Uhrig* (unreported, Court of Criminal Appeal (N.S.W.), 24 October 1996) and in particular the following passage:
>
> 'What this Court said in *R v F* and in *R v E* should not be interpreted

---

45 [1999] 3 VR 567.

46 [2003] 1 Qd R 64.

47 Ibid [26].

> as excluding arguments being put to the jury, by either counsel or the judge, relating to the validity of the motive to lie which has been asserted in relation to a witness in the particular case.'
>
> [28] That is also the position adopted now in Victoria: see *R. v. P.L.K.* [1999] 3 V.R. 567 at 572, 573 and 581.

231 By reference to these authorities it was submitted by the applicant that the use of the term 'why would I lie' by the witness, and reliance on that evidence by the prosecution and the trial judge was said to displace the burden of proof in an improper manner. So it was submitted by the applicant that the effect was that the jury may have regarded King's credit as being illicitly bolstered. This was said to be particularly damaging given that, unknown at the time of the trial, King may have had undisclosed criminality and exposure to the criminal law. As the applicant submitted, this case is clearly distinguishable from *Geary*, as the impugned comments did not relate to a particular motive to lie advanced by the defence.

232 In response, it was very fairly conceded by the Director that it was an error to make reference to the comment 'why would I lie' in his closing address. This error was, however, said to be somewhat 'corrected' by the directions from the trial judge as to the proper burden of proof, and also the further comments of the Director in his closing address that:

> … the onus of proving the guilt of the accused rests upon the Crown – it did at the beginning of the trial and it does at the end of the trial. There is no onus, there's no obligation on Mr Farquharson to prove his innocence – and at no time, and certainly not now, does that burden or proving guilt shift from the Crown.

233 The Crown, furthermore, sought to distinguish this case from *Palmer* and subsequent decisions on the basis that the credit of King was not in issue. This was not a case where the defence alleged that the witness was lying. Rather, the defence chose only to point to the inconsistency between the 'dream allegation' and the 'extreme allegation' as evidence that King was mentally confused and had no clear memory of the fish and chip shop conversation. Whether or not the jury believed King lived or died solely on the basis of whether they could be satisfied that King was mentally capable of recalling the terms of the fish and chip shop conversation.

Whether King had a motive to lie was irrelevant to this, because no-one was asserting that he did.

234 We are satisfied that error has been shown. In the ordinary course, this error might not, however, be material as there was no suggestion that King was a liar. In view of the conclusion we have reached on other grounds, it is unnecessary to determine whether this ground in combination with the failure to disclose the prior conviction of King, gave rise to a substantial miscarriage of justice.

Ground 19: The defence criticisms of King were not adequately addressed in the charge

235 It was submitted by the applicant that the learned trial judge erred in failing to put fully to the jury the defence criticism of Mr King's evidence. Consideration of grounds 22 and 23 required some examination of the directions that were given concerning aspects of King's evidence. This ground was not the subject of any oral submission but the gravaman of the complaint formed part of ground 30 which raised the question whether the charge was balanced. Having regard to the conclusions we have reached in relation to the other grounds, it is not necessary to further consider this complaint.

Ground 24: The learned trial judge erred in declining to admit evidence relevant to the jury's consideration of the alleged consciousness of guilt of Mr Farquharson

236 The applicant sought to introduce excerpts from telephone intercepts (TI) between the applicant and various persons in the period between 11 and 21 September 2005. The defence contended at trial that the content of the intercepted conversations provided a foundation for a rebuttal of the inference that the applicant had exhibited a consciousness of guilt in his taped conversations with King set out in exhibits H and I to which grounds 22 and 23 related. It was submitted at trial that in those telephone intercepts, the applicant said he was not guilty, did not want to be wrongly charged by investigating police, and expressed emotional trauma and a fear

that the police investigation was likely to cause him a nervous breakdown. The emotion was said to be audible and explicit. On appeal it was said that this evidence tended against the inference that the applicant's 'exhortations' were implied admissions as the telephone calls gave an innocent context to the exhortations which might otherwise have seemed unusual to the jury.

237 The trial judge ruled the telephone intercepts inadmissible for the following reasons:

> These are statements which are self-serving hearsay statements made by an accused out of Court and as a consequence of the general rule precluding out of Court self-serving statements [they] are not admissible. They are no more admissible than the accused going around Winchelsea saying to people he is innocent and that would not be admissible either.
>
> Mr Morrissey called in aid two particular matters to defeat the normal exclusionary principle of out of Court self-serving statements. One is Mr Morrissey wants to elicit the material to show that the accused had additional pressure, not only of being possibly wrongly charged with an offence but also having a mental breakdown. Further, Mr Morrissey has sought to rely upon the material as to its tone.
>
> In my view neither argument suffices to make this material admissible. There is a substantial amount of material, as Mr Rapke reviewed at T1557 to T1558 of the general state of the accused, plus of course the material in the King tapes which has already been played before the jury. As to that last matter, Mr Morrissey has said this TI material is different from the King material because the King material could be said by the prosecution to be manipulation by the accused of Mr King to stop Mr King going to a counsellor and thereby the material getting to the police. Doubtless that is what the prosecution will say. Mr Morrissey has said that this extraneous material, the TI material, does not have that characteristic and therefore should be admitted on that account because it is different from the purpose-specific King material which is to prevent King going to a counsellor.
>
> In my view that is a distinction without a difference. The reality is that these are self-serving statements made out of Court; they have no admissibility for testimonial purposes; no admissibility otherwise; and I rule that they are not admissible.
>
> A further issue was raised by Mr Rapke, in my view it is not necessary to go to this but I simply record it – as to the TI intercept between 11 and 21 September 2005, is that inherent in them is the spectre of a lie detector test, which was in fact conducted on 20 September 2005. Mr Rapke has put that if the TI self-serving proclamations of innocence, with their emotional panoply, go in, the prosecution, in order to properly present that material, would need to have in the lie detector test aspects of it because, Mr Rapke said, they are integral to the holistic entity. Demonstrably it would be undesirable for the accused if any lie detector reference went in, let alone any suggestion that he

> failed it. That plainly should never go before the jury, and it will not. But Mr Rapke's submission is that not to have the lie detector reference in these TI materials unfairly puts the Crown in a wrongful position. I think that is right but I do not rely upon that in itself. I think antecedently the material is simply self-serving and inadmissible, and I so rule.

238 The Court was provided with a schedule which referred to the telephone intercepts and the primary statements made by the applicant in those intercepts upon which the defence had wished to rely. The judge's ruling excluding such evidence, it was submitted, had created a miscarriage of justice as the applicant was deprived of material which supported his characterisation of his part in the conversations with King contained in exhibits H and I; namely that he was a stressed man fearing the further stress of an unjustified investigation, based upon what turned out to be an incorrect recollection by King.[48]

239 The general rule precluding the admission of self-serving out of Court statements and the exception which permits exculpatory utterances to be admitted where they are 'mixed' with inculpatory statements was recently considered by this Court in *R v Rudd*.[49] Redlich JA (with whom Maxwell P and Vickery AJA agreed) said.

> Ordinarily, a statement which is purely exculpatory or self-serving is not evidence of the truth of its contents and is not admissible. The clear exception is usually expressed as follows. A self-serving statement will be admissible where it forms part of a mixed statement made before the accused is charged, which contains both inculpatory and exculpatory passages. Hence, where one party puts in evidence a statement made by the other, the whole of the statement, including self-serving parts, becomes evidence of the truth of what was stated. The genesis of the exception is the essential notion of 'fair play'. The exception is identified in Cross as being that 'when an admission is read, everything ought to be read which is fairly connected with that admission'. Thus a statement of the accused placed in evidence by the Crown becomes evidence for the accused as well as against him. The accused is not confined to passages of his statement that qualify or explain the admissions upon which the Crown relies[50]

---

48 The 'dream of an accident' raised by King in his conversations with the applicant in Exhibits H and I was recanted by King in evidence and was replaced by the explicit statement that the applicant intended to drown the children on Fathers' Day in a dam.

49 [2009] VSCA 213.

50 Ibid [43].

Later his Honour stated:

> In addition, the mixed statement exception is broad enough to admit exculpatory statements not made at the same time as the inculpatory statement relied upon by the Crown, provided that the exculpatory statement is made in circumstances which connect it to the purpose upon which the admissibility of the inculpatory statement rests.[51]

240 The telephone intercepts cannot be viewed as part of a 'mixed statement' nor can they be brought within the exception to the rule explained in *Rudd.* The trial judge in our view rightly ruled the intercepts inadmissible.

241 Before leaving this ground we observe that the defence at trial wished to have excluded from the content of the telephone intercepts, any passages which referred to the lie detector test to which the applicant submitted. The prosecution resisted the suggestion that the conversations could be so edited. The implication that arose from the defence submission was that the applicant would not have persisted with the application to have the telephone conversations admitted in the event that those passages were not removed. No argument was advanced on the appeal that the trial judge was incorrect in concluding that to have removed the passages which referred to the lie detector test would have unfairly unprejudiced the Crown.

242 This ground is not made out.

Ground 25: Failure to give an adequate Zoneff warning regarding the evidence of the 'dam-side' conduct of the applicant

> Regarding the evidence of the 'dam-side' conduct of Mr Farquharson, the learned trial judge erred by failing to give adequate directions to guard against the danger that the jury might misuse this evidence as admissions by conduct.

243 It is convenient to refer to the trial judge's summary of this particular evidence which was addressed in the course of the applicant's no case submission at the conclusion of the prosecution evidence.[52]

When the accused first spoke to the first of two persons who came to the

---

51 Ibid [57].

52 See Ruling No 10 2007 VSC 464.

> scene, Mr Shane Atkinson, the accused said he had either had a coughing fit or had done a wheel-bearing and two minutes later asked for a smoke. In cross-examination Mr Atkinson said that the accused said, 'I must have had a coughing fit and passed out. I woke up in the water', which statement was not made at the commencement of the conversation but during its progress. To the other person who first arrived, Mr Toni McClelland, the accused said 'it must have been a wheel-bearing'. Then shortly after that he said 'I must have had a coughing fit, I woke up in the water and I couldn't get the kids out'. To the first police officer who arrived, Snr Constable Harmon, at 8.10pm from Geelong Uniform, the accused said 'I've had a chest pain and I just blacked out of the bridge and the car went into the dam'. The accused did not mention anything to the first police officer at the scene about a coughing fit. The accused said to a number of persons attending the scene, notably the first two, Mr Atkinson and Mr McClelland 'its too late' in response to the young men offering to dive into the dam to seek the children. The accused in his interview, exhibit L, by the homicide squad on 6 September, at question 100 said that he thought 'if I can wave someone down they might be able to come and help me'. At question 103 he said 'I swam to the road [sic] and walked back to the road and tried to wave people down to stop and help me'. At question 418 he said 'I went and swam to the road to get people to help me'. The accused did not ask for help to the persons who first came to the scene. Rather, the statements by the accused at the scene were 'its too late'. Indeed to Mr Atkinson, 'its too late. No, don't go down there' – referring to the dam. Further, the accused refused the offer of telephone 000. No person who attended the scene observed the accused attempt to rescue the children.
>
> That is the factual state of the evidence at the scene. The jury would be entitled to act upon the conduct of the accused as being so contrary to ordinary human behaviour and especially so contrary to ordinary paternal behaviour, as to be capable with other material of founding an inference of guilt in this case.[53]

244 On appeal it was submitted that his Honour in his charge had given an inadequate *Zoneff* direction regarding the conduct of the applicant upon emerging from the dam. In fact the trial judge did not seek to give a *Zoneff* direction at all. He instructed the jury as follows:

> If you find on the evidence, ladies and gentlemen, that beside the dam, after the accused came out of the dam and when people arrived, the accused did nothing to help the children, you are entitled to use that finding, if you make it, on the question of the truthfulness of the accused when he said to the police and others, 'I tried to help the children.'
>
> You are also entitled to use him not helping the children beside the dam, if you find that, on the question of his general relationship with his wife and children. But you are not entitled to use not helping the children beside the dam as evidence of intention to kill them. It can only be used on the question of, did he tell the police the truth when he said, 'I tried to help them,' or not, and on the question of his general relationship to his wife and children.

---

53 Paragraphs [6] and [7].

245 It was not in dispute that the Crown did not rely upon this evidence, nor could it have, to support a consciousness of guilt. The trial judge having instructed the jury that it could only be used for two purposes, and no others, it was unnecessary that he further specifically instruct the jury that they could not use it as evidence of consciousness of guilt. This ground is thus not made out.

246 Under cover of ground 30 the applicant also complained that the trial judge gave excessive attention to the applicant's conduct at the dam in the aftermath of the incident, by a detailed restatement of the evidence; and a failure to remind the jury of the cross-examination or the countervailing evidence of Roberts which answered the allegation that the applicant showed a lack of concern for his children. This was said to constitute prejudicial overemphasis as the applicant contended that it was the clear position of both parties that this material had limited relevance. Given the limited purposes which the judge ascribed to this evidence, it is not entirely clear why the applicant's conduct at the dam-side received the attention which it did.

247 In the event that the Crown is to again rely upon this evidence in a re-trial, it is necessary to make some observations about this evidence and the direction which should accompany it. First, contrary to the trial judge's direction to the jury, it was the Crown's submission to this Court that it did rely upon this evidence as circumstantial evidence which bore upon the issue of the applicant's intent. The prosecutor's closing address shows that it was submitted to the jury that the applicant's dam-side conduct should be viewed as 'bizarre' and 'troubling' and not the sort of conduct that one would accept from a loving father who desperately wanted to save his children. The prosecutor had also submitted to the jury that the applicant had embellished his account to investigators that he had done all he could to assist his children and that his conduct at the dam demonstrated that he was an 'unreliable historian'.

248 As the joint judgment in *R v Gojanovic*[54] states, relationship evidence is

---

54 [No 2] [2007] VSCA 153, [87] (Ashley, Kellam JJA, Kay AJA).

admissible provided it is relevant to an issue between the Crown and the accused. The joint judgment contains the following important passage:

> [it] is insufficient for the evidence to be admissible simply on the basis that it relates to or bears upon a relationship between the accused and the victim. Rather, as evidence arising from the relationship, it must as a matter of logic add to or detract from the probabilities of the Crown case in respect of one or more of the elements of the offence which must be established by the Crown. Those principles are not in dispute and derive from cases such as *Wilson v The Queen*; *R v Iuliano*; *R v Hissey*; *R v Anderson*; *R v Frawley*.
>
> In *Anderson's* case Winneke P (with whom Phillips and Chernov JJA agreed) stated that such evidence is particularly relevant where the state of mind of the accused at the time of the offence is in issue.[55]

249 If the conduct of the applicant at the dam was admissible – and we are not to be understood as expressing any view about the questions of its admissibility as it was not raised on the appeal – it could relate to the applicant's relationship with his wife and children, which in turn would be relevant to the issue of the applicant's intent[56] – or it could relate the truthfulness of his assertion to investigators that he tried to help the children, which in turn would be relevant to the credibility of the applicant's account.

Ground 27: The adequacy of Directions concerning Robert's evidence.

250 The thrust of the complaint made under ground 27 is that the trial judge failed to adequately sum up the evidence of Greg Roberts to the jury. As described above, Roberts was a grief counsellor who sought to explain the dam-side conduct of the applicant, including the request for cigarettes and a lack of any obvious display of grief or concern.

251 The applicant's counsel was content to rely upon his written submissions in relation to this ground. The complaint made under this ground is similar to the complaint made concerning the summing up of the evidence of Urquhart. Furthermore, it was said the trial judge failed to draw sufficient attention to the

---

55 Heydon J had expressed a similar view in *R v Clark* [2001] NSWCCA 494, [85]-[109].

56 *See Wilson v The Queen* (1971) 123 CLR 334 and the reference in a number of the judgements to the dicta of Kennedy J in *R v Bond* [1906] 2 KB 389, 397 and 398.

evidence of Roberts, given the potential for prejudice that might flow from evidence of the dam-side conduct. It was also said that this evidence was improperly summarised and was dealt with together with the medical evidence, thereby reducing its prominence and importance before to the jury.

252 There is nothing to this ground. If anything, as was pointed out by the Crown, summarising this evidence alongside the medical evidence might have inadvertently given the evidence of Roberts (a social worker and not medically qualified) a gravitas that it might not have otherwise possessed. The trial judge properly summarised his evidence and, having done so, it was a matter for the jury to consider the weight which it ought to have been afforded. This ground is not made out.

Ground 30: Misdirections – Charge Unbalanced

253 We have largely addressed the specific complaints about the adequacy of the directions in dealing with each of the strand of the Crown case.[57] Ground 30 was argued at a more general level it being contended that the charge was unbalanced. Under cover of this ground the applicant complained that the trial judge had failed to remind the jury of the alternative views of the evidence relevant to the path of the vehicle into the dam and had failed to put the defence arguments about matters which undermined Urquhart's and Dr Naughton's evidence and the adequacy of the police investigation. As we have said, it was open to his Honour to select the method which he did to remind the jury of the issues and the evidence which related to them. We consider that the directions which were given were sufficient.

254 Other aspects of the charge were the subject of complaint but given the conclusions that we have reached on other grounds it is unnecessary to give any

---

[57] The applicant acknowledged that in view of the complaints raised under ground 10, which concerned the adequacy of the directions on the medical evidence, ground 17, which concerned the adequacy of the directions on the engineering and reconstruction evidence, ground 19 which concerned the adequacy of the directions on King's evidence , ground of 23 which concerned the adequacy of the directions on consciousness of guilt, and ground 27 which concerned the adequacy of the directions on Roberts evidence, ground 30 would be pursued only at a more general level.

further consideration to this particular ground.

Grounds 1 and 2: Unsafe and Unsatisfactory Grounds

255 Ground 1 raises the contention that the verdict was unsafe and unsatisfactory because there was insufficient evidence to sustain a conviction on any count. Under ground 2 it is said that the verdict was unsafe and unsatisfactory because the jury ought not to have been satisfied of the guilt of the applicant on any count.

256 The grounds of appeal have required us to give detailed consideration to each of the three principle strands of the Crown case. The first, the scientific and engineering evidence related to the movement of the applicant's vehicle. That evidence raised the hypothesis that the vehicle would not have travelled as it did unless it had been purposefully steered and controlled. The second was the medical evidence which was directed to excluding as a reasonable hypothesis consistent with innocence that the applicant had blacked out at the wheel of his vehicle as a consequence of a coughing fit. Third was the admissions made by the applicant to Gregory King some months before the fatal incident that he hated his wife and children and that he intended to pay back his wife 'big time'. The evidence of King that the applicant had said he would take away the thing most precious to his wife, her children, and that this would occur on Fathers' Day and would involve a dam and an accident in which he got out but his children did not was, if accepted, cogent evidence of the applicant's guilt.

257 We accept that, if the jury were satisfied that the terms of the conversation were as alleged in King's third statement, a finding that the applicant's responses in Exhibit I were born of consciousness of guilt would add little to the jury's satisfaction that the applicant was guilty of murder. When coupled with the accident reconstruction and medical evidence, the fact that the applicant had told King that he hated his children and intended to kill them in a drowning accident on Fathers' Day from which only he escaped, and the fact that his children were indeed killed in that fashion on that day, would almost certainly be enough without more for the jury to

be satisfied beyond reasonable doubt that the applicant was guilty of murder.

258 In addition to the three principle strands of evidence, there was other circumstantial evidence relied upon by the Crown. First, there was the marital break-up between the applicant and his wife in 2004 and its affect on the applicant. Secondly, there was the fact that the applicant had been suffering from a chronic depressive illness since 2000 and was on anti-depression medication at the time of the crime. Thirdly, there was the fact that the applicant's former wife had formed a romantic attachment with a man, Stephen Moules. The Crown relied upon the affect that this had on the applicant. There was evidence that the applicant feared that Moules would supplant him as the father figure to his three children. Fourthly, there was evidence of the applicant's antipathy towards his former wife. Fifthly, the applicant was under financial pressure at the time of the crime and was angry that he had received recent notification of a requirement that he increase his child support to his former wife. Sixthly, there was evidence that the applicant was annoyed at the fact that his former wife had retained the better vehicle. Seventhly, when the applicant's vehicle was recovered from the dam the lights were switched off and the ignition was locked. Eighthly, there was evidence consistent with the view that the applicant had failed to take any steps to assist his children after his got out of the dam. Ninthly, there was other evidence of the applicant's general demeanour and behaviour in the aftermath of the fatal incident and later that evening when he returned to the dam-site. Tenthly, there was evidence in the taped conversations Exhibits H and I regarding the applicant's attempts to dissuade King from talking about his alleged conversation with the applicant at the fish and chip shop in June/July 2005 from which a consciousness of guilt might be inferred. Finally, we should refer to counsel for the applicant's frank acknowledgement that if Urquhart's evidence of three steering inputs was accepted, predicated as it was on the assumption that the vehicle was on its correct side of the road before the first input, that evidence, in conjunction with the evidence of King could support the verdict.

259 The applicant's criticisms of the strands of the Crown case, the evidence of consciousness of guilt and the applicant's conduct at the dam site have all been the subject of consideration in the context of the specific grounds of appeal concerned with those subjects. It is unnecessary to revisit those criticisms. In addition, the applicant placed particular emphasis on a number of features of the trial. First, it was said that that there was no evidence that the applicant was aware of the condition of cough syncope before the accident. Secondly, cough syncope could not be excluded as an innocent hypothesis, particularly in the light of Dr Steinfort's evidence and Dr Naughton's unsatisfactory testimony. Thirdly, the circumstances in which King came to make the extreme allegations gave rise to a reasonable doubt about his evidence. Counsel placed emphasis upon the fact that King's account changed in a crucial way and that his wife had no recollection of him mentioning the conversation with the applicant to her. It was said that the applicant's guilt could not be established unless the jury were satisfied beyond reasonable doubt about King's evidence and that as there was no corroboration of King the verdict was unsafe.

260 In our view the criticisms advanced of the Crown case do not individually or collectively preclude the conclusion that the evidence was sufficient to establish the applicant's guilt beyond reasonable doubt. This was not a circumstantial case in which the Crown relied upon 'links in a chain'. The accumulation of circumstantial evidence was sufficient to establish guilt, the acceptance of one circumstance enabling other circumstances to be more readily accepted. In our view there was no aspect of the evidence which must have led the jury to entertain a reasonable doubt about the applicant's guilt.[58] That is to say it was open to a jury acting reasonably to be satisfied of guilt to the requisite standard.[59]

261 Grounds 1 and 2 are not made out.

---

58 *Libke v The Queen* (2007) 230 CLR 559; *R v Klamo* (2008) 18VR 644, [38]-[40].

59 *M v The Queen* (1994) 181 CLR 482.

Conclusion

262 The applicant has succeeded on a number of grounds. We would grant the application for leave to appeal, determine the appeal instanter, allow the appeal and order that there be a retrial.
