

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2010 0395

ROBERT DONALD WILLIAM
FARQUHARSON

Applicant

v

THE QUEEN

Respondent

JUDGES

MAXWELL P, BUCHANAN and HARPER JJA

WHERE HELD

MELBOURNE

DATE OF HEARING

24 May 2012

DATE OF JUDGMENT

7 December 2012

MEDIUM NEUTRAL CITATION

[2012] VSCA 296

JUDGMENT APPEALED FROM

R v Farquharson [2010] VSC 462

CRIMINAL LAW - Appeal - Conviction - Murder - Applicant's children drowned when applicant drove car into dam - Circumstantial evidence - Whether jury required to be satisfied of particular facts beyond reasonable doubt - Whether defence of accident excluded - Whether verdict unsafe and unsatisfactory - Whether alternative verdict of manslaughter by criminal negligence open - Leave to appeal granted - Appeal dismissed.

APPEARANCES:

Counsel

Solicitors

For the Applicant

Mr P J Morrissey SC with
Mr C Mylonas and
Mr T Kassimatis

Victoria Legal Aid

For the Crown

Mr D Trapnell SC with
Ms K Argiropoulos

Mr C Hyland, Solicitor for
Public Prosecutions

MAXWELL P
BUCHANAN JA
HARPER JA:

Introduction

1 On Fathers' Day, 4 September 2005, the applicant had the care of his three children; boys aged 2, 7 and 10 years. The applicant was separated from Cindy Gambino, the mother of the children.

2 At about 7.00pm, when the applicant was driving along the Princes Highway to Winchelsea to return the children to their mother, his car left the highway as it came off a railway overpass. The car diverged to the right, left the bitumen, crossed the aggregate shoulder, descended an embankment covered with rough grass, broke through a fence, crossed another grassed area, struck the foliage of a tree and entered a dam, floating for some 28 metres before it sank in water seven metres deep. The applicant managed to get out of the car before it sank but the children did not. They drowned.

3 The applicant was charged with the murder of his children. After a trial in the Supreme Court, the applicant was found guilty. He successfully appealed against the conviction. The conviction was set aside and it was ordered that the applicant be retried.¹ At the conclusion of the retrial the applicant was again found guilty.

4 The applicant seeks leave to appeal against the conviction. For reasons which follow, we would grant leave to appeal on grounds 1 and 2 (but not 3), and dismiss the appeal.

Ground 1: unsafe and unsatisfactory

5 The first ground of the application is that the verdict is unreasonable or cannot be supported having regard to the evidence. The task of an appeal court

¹ *Farquharson v The Queen* (2009) 26 VR 410.

when this ground is raised was summarised in *R v Klamo*² as follows:

The approach required of appellate courts in considering the 'unsafe and unsatisfactory' ground involves the following steps:

1. The court of criminal appeal must ask itself whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.
2. In considering that question, the appeal court must bear in mind that the jury has the primary responsibility of determining guilt or innocence and has had the benefit of seeing and hearing the witnesses.
3. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.
4. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

A guilty verdict can only be said to have been 'reasonably open' to the jury if there was no aspect of the evidence which obliged – as distinct from entitled – the jury to come to a different conclusion. In *Libke v The Queen*, Hayne J (with whom Gleeson CJ and Heydon J agreed) said in relation to the 'unsafe and unsatisfactory' ground:

... But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

In other words, the question posed in *M v R*, namely:

Was it reasonably open to the jury to be satisfied beyond reasonable doubt of the accused's guilt?

requires the court of criminal appeal to decide:

... whether the state of the evidence was such as to preclude a jury acting reasonably from being satisfied of guilt to the requisite standard.

To adopt some helpful metaphors from recent interstate appellate decisions, the question is whether there was a 'solid obstacle to reaching a conclusion beyond reasonable doubt' or whether, instead, the 'path to a conviction was open'.³

6 As the High Court noted in *R v Nguyen*,⁴ in addressing the question whether it

² (2008) 18 VR 644.

³ Ibid 653–4 [38]–[40] (footnotes omitted).

⁴ (2010) 242 CLR 491.

was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty, the appeal court

must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.⁵

The same point was emphasised in *S K A v The Queen* as follows:

The starting point ... is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses.⁶

7 The central question in the trial was whether the deaths were deliberate or accidental – that is, whether the applicant deliberately drove into the dam intending to kill his children or whether the car left the road and entered the dam because the applicant lost consciousness following a paroxysm of powerful coughing.

8 This was a circumstantial case. The jury were asked to draw an inference of guilt from a combination of several facts. In closing the Crown case, the prosecutor relied on:

- the applicant's anger towards Ms Gambino;
- the improbability of the event having occurred accidentally, in the way described by the applicant;
- the applicant's strange behaviour after the drowning of his children;
- the expert evidence which was said to show the extreme unlikelihood of the applicant's having suffered a loss of consciousness from coughing;
- the evidence of a police accident reconstruction expert (Senior Constable Urquhart) that the applicant's vehicle appeared to have

⁵ Ibid 499 [33], quoting *M v The Queen* (1994) 181 CLR 487, 493. See also, *Rodi v The Queen* [2011] VSCA 48, [19]; *Mustica v The Queen* [2011] VSCA 79, [49]; *C R R v The Queen* [2011] VSCA 142, [23]-[29].

⁶ *S K A v The Queen* (2011) 243 CLR 400, 405 [13].

been consciously steered into the dam;

- the evidence of one Gregory King, about the so-called ‘fish and chip shop conversation’, in which the applicant had said in relation to Ms Gambino that he would ‘pay her back big time’; and
- the numerous changes in the account given by the applicant after the event.

9 The defence sought to meet each of these seven ‘strands’. As summarised in the appeal submission, the defence contended at trial that:

- the alleged motive of anger was ‘undermined by uncontradicted evidence of love for the children and relative beneficence towards Ms Gambino’;
- it was no less improbable that the applicant would plan to kill the children he loved;
- his post-death conduct fell ‘uncontroversially within a known spectrum of trauma response’;
- it was possible, according to all experts, that the applicant could, indeed, have suffered an episode of cough syncope;
- Senior Constable Urquhart was ‘slipshod, erroneous, lacking a factual basis in his opinions, in conflict on factual matters with his own colleagues, and in conflict with a respected expert in Mr Axup – and, in any case, did not exclude innocent causes for the car movements he alleged’; and
- Mr King was ‘unreliable and in conflict with other clear evidence’.

10 In oral argument, the applicant’s attack on the verdict concentrated upon two of these strands – the evidence of Senior Constable Urquhart and Mr King respectively – which the applicant’s submission described as ‘the two main elements of the prosecution case’.

11 As the Crown submission pointed out, the trial judge gave the jury

'prudential directions' that they could not act on either witness's evidence as an indispensable link in a chain of reasoning towards guilt, unless satisfied of its truth and reliability beyond reasonable doubt. The Crown submission was that this direction was favourable to the applicant, given that the Crown case was not a circumstantial case reliant on sequential reasoning. Rather, it was an accumulation of facts like 'strands in a cable'.⁷ Neither witness's evidence was 'an essential or indispensable link in a chain of reasoning towards guilt'.

12 In his reply, the applicant submitted that it was for this Court 'to make an independent assessment' of these two components of the Crown case. The submission emphasised that it was the reliability of these components, and not merely the credit of the witnesses, which was attacked.

13 According to the applicant's submission:

If the Court views a piece of evidence as fundamental to conviction, it must be satisfied beyond reasonable doubt of that piece of evidence. That is so whether the piece of evidence is a 'link in a chain' of evidence in the *Wigmore/Shepherd*⁸ sense, or a piece of evidence otherwise fundamental to conviction in the *Kotzmann* sense.⁹

The path of the car from road to dam

14 The evidence relating to the path of the car from the road to the dam comprised the observations of witnesses, a scale plan made by the police, photographs and theodolite measurements and opinion evidence from Senior Constable Urquhart that this path required inputs at the steering wheel from which it could be inferred that the applicant consciously steered the car into the dam. Counsel for the applicant pointed out that controversy attended nearly every aspect of this evidence.

⁷ *R v Farquharson* (2009) 26 VR 410, 462-3 [200]-[204], [260]. Cf *Shepherd v The Queen* (1990) 170 CLR 573, 579-581, 583; *H M L v The Queen* (2008) 235 CLR 334, 351-2 [5]; *Roach v The Queen* (2011) 242 CLR 610, 620 [26]; *R v Gassy (No 3)* (2005) 93 SASR 454, 541-4 [350]-[362].

⁸ *Shepherd v The Queen* (1990) 170 CLR 573.

⁹ *R v Kotzmann* (1999) 105 A Crim R 243.

15 The path which the car followed was by no means clear. The scene was contaminated by pedestrian and vehicle traffic; observations were made in a setting of darkness and confusion; the defence was able to criticise the investigation for failure to obtain or inspect relevant materials, such as fencing and wire, and failure to take measurements of road camber, cross falls and surface marks.

16 There was no evidence as to the point at which the car began to diverge to the right. No marks were detected on the bitumen surface of the road and opinions varied, even among members of the police, as to which of the different sets of marks in the aggregate of the shoulder came from the applicant's car. The police believed the camber of the road tilted to the left, away from the dam. The defence, however, produced measurements of the camber and cross falls which showed that an unsteered car could be tipped to the right, towards the dam.

17 Visible wheel marks in the grass were photographed. Senior Constable Urquhart thought that the marks curved and then straightened, whereas an expert called by the defence, Mr Axup, said that there was a tightening curve with no straightening.

18 Senior Constable Urquhart said the fence would have had no effect on the car. Mr Axup said the fence could pull the car to the right.

19 Senior Constable Urquhart advanced the view that the car moved in a right, left and then right sequence: right to get off the road; left to straighten the vehicle; and right after the car broke through the fence. Mr Axup, on the other hand, described a constant curve, commencing with a right-hand turn to leave the road, followed by a tightening of the curve as it descended the slope and then a further tightening of the curve shortly after the fence. In his view, a car with no input at the steering wheel could follow the path which the applicant's car did.

20 The applicant submitted that Senior Constable Urquhart's evidence was 'significantly weaker' than it had been in the first trial, because:

- the evidence of a '220 degree' turn was abandoned;

- no evidence was given of the magnitude of any steering-wheel movements; and
- Senior Constable Urquhart conceded that an unsteered vehicle might well drift to the right (ie towards the dam), despite his previous evidence to the contrary.

21 We have reviewed the evidence given by Senior Constable Urquhart and by Mr Axup. There were, plainly enough, differences of opinion about the path followed by the car from the road to the dam, and about what inferences could be drawn from that evidence on the question of conscious or unconscious driving. Nothing emerged in cross-examination, however, which would have required the jury to reject Senior Constable Urquhart's evidence entirely. It was for the jury to determine what weight was to be given to his evidence, considered in the light of the contrary view of Mr Axup and the other parts of the Crown's circumstantial case.

22 We do not consider that this evidence was 'an indispensable link in a chain of reasoning' to guilt. It was a part of the Crown case, but it had no greater significance than any other part of the Crown case. For example, any consideration of the competing inferences advanced by Senior Constable Urquhart and Mr Axup had to take into account the essentially unchallenged evidence of Dawn Waite about the manner of the applicant's driving in the vicinity of the dam earlier that day. (We return to this evidence below.)¹⁰ The jury also had to consider, in this context, the applicant's claim that the car had a tendency to pull to the right. This claim was so effectively challenged in cross-examination by reference to the evidence of the mechanic who had rectified the problem, that the jury were entitled to view it as wholly discredited.

23 We turn to deal with the second strand of the case to which the applicant drew particular attention, namely the evidence of Mr King, which was the subject of a separate ground of appeal.

¹⁰ See [53]-[56] below.

Ground 2: the fish and chip shop conversation

24 Ground 2 was in these terms:

The learned trial judge erred in failing to direct the jury that, before convicting the accused, they must be satisfied beyond reasonable doubt of the accuracy of Greg King's account of the 'extreme version' of the fish shop conversation. Alternatively, his Honour erred in failing to exclude from the jury's consideration certain pathways to conviction which were not open on the evidence.

25 Mr King said that he had become a good friend of the applicant when they both worked for the Shire of Winchelsea and played in the local football team. He gave evidence of a conversation which he said he had had with the applicant, outside the local fish and chip shop, about two or three months before 4 September 2005. What follows is the account which Mr King gave in evidence.

26 The applicant's children were in the shop. Ms Gambino drove up in her car. When Mr King greeted Ms Gambino, the applicant became angry. Mr King told the applicant that he had to 'move on a bit' and the applicant replied, 'Move on. I get the shit car, she gets the good car.' The applicant then said, 'Nobody does that to me and gets away with it'.

27 The applicant complained about Ms Gambino and the children living in the applicant's house and that 'she wants to marry that fucking dickhead'¹¹ and that the applicant had to pay maintenance for the children. The applicant said, 'No way. I'm going to pay her back big time'.

28 Mr King asked, 'How is that, Robby?' to which the applicant replied, 'I'll take away the most important thing that means to her'. When Mr King enquired what that was, the applicant nodded his head towards the fish and chip shop window where his children were standing. When Mr King asked, 'What would you do?', the applicant replied, 'Kill them'. Mr King said, 'That's bullshit ... it's your own flesh and blood'. Mr King said to the applicant that he would go to gaol and the applicant said, 'No, I'd kill meself before it gets to that'. When Mr King asked him how, the

¹¹ This was a reference to Stephen Moules, with whom Ms Gambino was in a relationship.

applicant said, 'It will be close by'. Mr King asked, 'What?' and the applicant replied, 'An accident by the dam and I survive and the kids don't. It will be on a special day'. Mr King asked him what day. The applicant said something like Fathers' Day, so everybody would remember. The applicant said that he would be the last one to have them and that every Fathers' Day Ms Gambino would suffer for the rest of her life.

29 It was not disputed at trial that Mr King and the applicant had had a conversation outside the fish and chip shop, in which the applicant said in relation to Ms Gambino words to the effect that he would 'pay her back big time', after nodding his head towards the window of the shop where his children were. Nor did he deny having said to Mr King that he would 'take away the most important thing' from Ms Gambino. The applicant, however, disputed that he had made any threat to kill the children, and counsel for the applicant submitted that it would have been unreasonable for the jury to think that he did.

30 Counsel for the applicant relied upon the following matters:

- Mr King's failure to do anything or warn anybody as a consequence of hearing the threats allegedly made by the applicant;
- that Mr King was traumatised by news of the death of the children, suffering visions of the children drowning;
- Mr King's admission that on other occasions the applicant told him he loved his children;
- Mr King's admission that the applicant treated his children affectionately;
- that Mr King said he told his wife in detail of his conversation with the applicant, but his wife had no memory of being told;
- that, at the behest of the police, Mr King secretly recorded two conversations with the applicant in which Mr King failed to say to the applicant that he had threatened to kill his children;

- that Mr King gave different reasons in each of the two trials for not having asked the applicant in the covertly-recorded conversations about his threat to kill the children;
- that Mr King had learned by heart the written statement he had made to the police; and
- that, in his final address, the prosecutor had not invited the jury to accept that the applicant had threatened to kill his children.

31 The submission for the applicant was that Mr King's evidence was 'of a particularly high level of significance in the circumstances of the case'. His evidence of the 'extreme version' of the conversation was said to be crucial to the Crown case because, if accepted, it constituted evidence of:

- motive viz a hatred for the children as well as for Ms Gambino;
- an intent to kill the children; and
- a plan to kill the children, to extricate himself and to avoid blame.

In addition, according to the submission, this evidence might have been used by the jury to resolve a doubt about the reconstruction evidence and to undermine the medical evidence based on the applicant's history.

32 Without Mr King's evidence, the applicant submitted that the evidence of motive became tenuous, the evidence of intent to kill became speculative; and the evidence of planning vanished (along with the consequential attacks on the accused's conduct). Furthermore, the controversy besetting the reconstruction evidence could not be resolved.

33 The Crown's position, at trial and on the appeal, was that proof of the applicant's guilt did not depend upon proof of the 'extreme version'. The judge did not accept the defence submission that the jury should be directed to acquit the applicant unless satisfied beyond reasonable doubt of the 'extreme version'. According to the applicant's appeal submission, his Honour thereby left open an erroneous path to conviction – that is, some jurors may have reasoned to guilt despite declining to accept Mr King's 'extreme version' beyond reasonable doubt.

34 We do not accept these submissions. The 'extreme version' was not an indispensable element in the Crown case. Indeed, the prosecution did not in final address rely on that version at all. The Crown was under no obligation to prove motive. Nevertheless, the version of the Mr King conversation which the applicant accepted was itself very significant because it disclosed – at a time relevantly proximate to the death of the children – the intensity of the applicant's animosity towards Ms Gambino and, in particular, the applicant's use of language conveying an intention to seek revenge.

35 Put another way, what was most important about Mr King's evidence was the extent to which it was confirmed by the applicant, both in the covertly-recorded conversations and in his evidence at the trial. Given the difficulties of recollection, which were such a prominent feature of the applicant's answers under cross-examination, that confirmation was capable of being viewed as adding strength to the prosecution case. So, too, was the implausibility of the applicant's attempts to give a benign explanation for his threat to 'pay her back big time'.

The 'last-minute decision' hypothesis

36 Particular complaint was made about the jury having been left to consider a version of the case in which the applicant did not make his decision to kill the children until shortly before the car entered the dam. At trial, defence counsel objected to this 'brain snap' hypothesis being left to the jury, because the applicant had not been cross-examined about it. Counsel maintained on appeal that this version should not have been left.

37 In the course of his opening, the prosecutor said to the jury:

Furthermore, to find him guilty you do not need to be satisfied when it was he formed the murderous intent to kill his children. It may have been an intention he had harboured continuously from the time of the fish and chip conversation or even earlier. It may have been something he thought about from time to time but acted upon only on the day. *It might be something that had never occurred to him until just before he drove into the dam.* You may not be able to decide the matter at all one way or another. But if you are satisfied beyond reasonable doubt that he deliberately drove into that dam intending

to kill his children your proper verdict will be guilty on each count of murder.

38

In closing, the prosecutor returned to the topic, in these terms:

The Crown doesn't have to prove that the accused had a motive to kill these children or when or why this motive arose or when exactly it is he decided to put this into effect. Whether it was a spur of the moment killing or one planned for months does not need to be proved. There certainly are indications that it was at least in his thoughts for some months but that's not to say that there was any concluded plan or intention.

39

When defence counsel subsequently objected that the 'last-minute decision' theory had not been put to the applicant and 'just can't be left' to the jury, his Honour responded in these terms:

If the jury don't, are not prepared to act on King's evidence, if they are not prepared to conclude that the relationship between the accused and his children was poor, if they conclude that the relationship between the accused and Cindy Gambino was benign, as you put it, if they accept generally that he was getting on with life and all the rest of it, and therefore the motive that the Crown relies on and specifically relied upon is undermined, it is hard to imagine they are going to find him guilty on the basis of a last minute decision. *I mean, that combination of circumstances would surely raise a reasonable doubt that would result in acquittal, I would have thought, given the way the Crown has put its case.*

40

Defence counsel persisted:

Your Honour, I think the jury needs to be told that because otherwise a false path to conviction would have been left open.

Counsel maintained that this possibility should not be left to the jury 'because it is just fanciful'. The following exchange then took place:

HIS HONOUR:

... is it open to me to give the jury a direction that they must not convict on that basis when it is — I mean, I have told them they have to decide whether or not the elements of the crime are proved. If they were satisfied that the relevant intention, and acting voluntarily, the rest of it is not evidence that has to be, not, they don't have to prove a motive, they don't have to prove the plan, they just have to prove the elements of the offence. Am I empowered to tell them that they can only look at it one way?

[COUNSEL]:

Well, with respect - - -

HIS HONOUR:

What gives me the authority to — I mean, I think, frankly, the prospect of that happening is almost unimaginable. I mean, the jury thoroughly understand the way the Crown put its case and the response and I

think the jury themselves would think it might be close to perverse to have a reasonable doubt about all those matters or to be not persuaded by all those matters and then say, oh, no, you know, within a hundred metres of the dam he decided he would do it spontaneously, I can't imagine that they would reason that way.

[COUNSEL]: Your Honour, look, I have nothing to add to what I put.

41 In argument on the appeal, counsel for the applicant sought to draw an analogy with the situation described by Ormiston JA in his dissenting judgment in *R v Rudebeck*.¹² There, the offence charged was culpable driving causing death. The Crown case relied on two aspects of the accused's conduct; namely, his having driven at high speed and his having driven while severely fatigued. Ormiston JA concluded that, insofar as the Crown case was based on fatigue, a reasonable hypothesis consistent with innocence had not been rebutted. Although it had been open to the jury to find that driving at excessive speed was an operative cause of the deaths, it was impossible to know on what basis the jury had reasoned to conviction. 'If it is possible that they upheld a basis for the Crown case which cannot be supported, then the verdict cannot stand', his Honour concluded.¹³

42 There is no analogy, in our view, with the present case. In the present case, there was only one path to conviction so far as the applicant's state of mind was concerned. The jury had to be satisfied beyond reasonable doubt that he had deliberately driven the car into the dam with the intention of killing his children. The Crown did not need – and did not attempt – to prove that the murderous intent was formed at any particular time. We respectfully agree with the trial judge's comment (set out above)¹⁴ that, had the jury harboured a reasonable doubt about those aspects of the Crown case which were directed at establishing animosity between the applicant and Ms Gambino, and anger on the applicant's part about the post-divorce situation, it was unlikely that they would have regarded as plausible a contention that the applicant had at the last minute – and for no apparent reason –

¹² [1999] VSCA 155.

¹³ Ibid [81].

¹⁴ See [40] above.

decided to drown his sons.

43 But the converse does not follow, in our view. That is, a late decision to drown the children would not have been inconsistent with the Crown's case. It did not follow that, because the applicant was hostile to Ms Gambino and angry about his situation, he must have developed a clear plan in advance about how and when he would 'pay her back big time'. Consistent with that case, there were a number of possibilities about when he had formed the intention to kill.

The wider Crown case

44 Whether or not the verdict is unreasonable or cannot be supported having regard to the evidence depends upon an evaluation of the entire Crown case, which depended upon the combined effect of a number of different pieces of evidence, rather than upon a chain of reasoning in which each step was dependent on first establishing a previous step. The Crown case is not to be segmented and particular segments subjected to separate analysis.¹⁵ The strength of the Crown case consisted in the combined effect of a much greater body of evidence than those aspects singled out by counsel for the applicant. As Lord Simon of Glaisdale said in *R v Kilbourne*,¹⁶ circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities'.¹⁷

45 As the Crown correctly submitted, the evidence of Mr King and Senior Constable Urquhart was not to be considered in a vacuum – either by the jury or by this Court – but in the context of the entire circumstantial case mounted by the Crown.¹⁸ That case rested on a considerable body of evidence, which dealt with:

- the breakdown of the applicant's marriage in 2004 and the effect which that had upon him;

¹⁵ *R v Hillier* (2007) 228 CLR 618, 637–8 [46]–[48].

¹⁶ [1973] AC 729, 758.

¹⁷ Cited by McHugh J in *Shepherd v The Queen* (1990) 170 CLR 573, 592, and in *Pfennig v The Queen* (1995) 182 CLR 461, 542.

¹⁸ *Shepherd v The Queen* (1990) 170 CLR 573, 586.

- the relationship which the applicant's former wife had formed with Mr Moules and the applicant's fear that he would be supplanted as the father figure to his three children;
- the applicant's antipathy towards his former wife and the financial pressure he was under at the time his children died;
- his anger that he had received notification of a requirement to increase the amount of child support he was to pay to his former wife; and
- his annoyance that his former wife had retained the better of the two motor cars the family owned.

46 As discussed further below, the circumstantial case also rested on evidence showing:

- that when the applicant's vehicle was recovered from the dam, the lights were switched off and the ignition was turned off;
- that the applicant had failed to take any steps to assist his children after he got out of the dam; and
- the applicant's general demeanour and behaviour in the immediate aftermath of the accident and later when he returned to the site of the accident.

Breakdown of the applicant's marriage

47 The applicant and Ms Gambino commenced a relationship in the early 1990s. They married in 2000 and separated in November 2004. The applicant moved to his father's house. As part of the separation agreement, Ms Gambino, as the primary carer of the children, retained possession of the newer family car, while the applicant retained possession of a much older car. The applicant paid child support to Ms Gambino and contributed to other expenses of the children. Shortly prior to the deaths of the children, the Child Support Agency advised the applicant that there was to be an increase in the child support payable by him.

48 Prior to the separation, Ms Gambino formed a close friendship with Mr Moules. After she separated from the applicant, Ms Gambino continued that friendship and eventually became romantically involved with Mr Moules. The applicant was angry and bitter about the relationship and the impact he thought it had on his children. He was particularly angry when the eldest boy, Jai, told him that Mr Moules had scolded him. He told one friend that, if he saw Mr Moules driving the family car, he would 'drag him out of it'.

Financial strain

49 After the separation, witnesses gave evidence that the applicant often complained about the financial strain the separation was causing him, the condition of his car and the impact of the separation agreement on his ability to acquire his own house.

The applicant's attitude to his wife

50 The applicant told his treating general practitioner that he was angry as a result of his relationship with his wife. He told the doctor that Ms Gambino was having a relationship with another person, which upset him.

51 The applicant sought counselling from a psychologist. The applicant expressed concern to the psychologist about his financial position and frequently expressed anger at Ms Gambino's relationship with Mr Moules.

52 A friend of the applicant, one Michael Hart, said that some three months prior to the accident the applicant was in pain and angry at the fact that the children were going to be raised by someone other than him. At about the same time, the applicant told Ms Hatty that he was 'going to take the kids off' Ms Gambino. When she asked if he was going for custody, he just 'shrugged his shoulders'. This evidence was uncontested.

The applicant's driving immediately prior to leaving the road

53 At about 7.00pm on 4 September 2005, Ms Waite was driving her car towards Winchelsea when she came up behind another car travelling in the same direction, which the defence accepted was the car driven by the applicant. Ms Waite said that the car in front braked at least three times. It was going considerably slower than her car. She estimated its speed at between 50 and 60 km/h. (The applicant had told police that he was travelling under the speed limit of 100 km/h.)

54 According to Ms Waite, the applicant's car was veering from one side of the road to the other, and did so at least three times. The vehicle was also slowing down and speeding up. Ms Waite said that she could see nothing on the road which could have been a cause for that vehicle's braking or movements. She noticed that the driver kept looking to his right. When these matters were put to the applicant in cross-examination, he could provide no explanation for the observed course, or the varying speed, of the car.

55 Ms Waite eventually overtook the car. As she went past, she noticed there was a fair-haired boy in the back seat behind the driver's seat. She did not see anyone in the front passenger seat, but there were at least two children in the back seat.

56 After she overtook the applicant's car, Ms Waite sped up and drove on. She looked in her rear vision mirror and saw headlights coming down from the overpass and then veering right. At the time she believed the car had turned right down the road or track from the highway.

57 Ms Waite's daughter, who was in the car, also observed the applicant's car slowing down and speeding up and swerving on the road.

The applicant's conduct after his car entered the dam

58 Shane Atkinson and Tony McClelland were driving to Geelong from Winchelsea at about 7.30pm on 4 September 2005 when they were hailed by the

applicant near the overpass. They stopped and ran back to the applicant, who said, 'Oh no, fuck, what have I done?' The applicant said he had put his car into a dam and said, 'I've killed the kids'. He said that he had had a coughing fit or had 'done a wheel bearing' and his car went into the water and he was the only one to get out.

59 The applicant told Mr Atkinson and Mr McClelland that he wanted to go to Winchelsea to tell Ms Gambino that he had killed his kids before he told anyone else. Mr Atkinson and Mr McClelland offered to get into the dam but the applicant said it was 'too late, they've already gone'. Mr Atkinson suggested the applicant should ring the police or ambulance and offered his telephone twice, but the applicant kept saying he wanted to go back to Winchelsea and tell Ms Gambino.

60 Mr Atkinson and Mr McClelland then drove the applicant to Ms Gambino's house. Ms Gambino said that when he arrived at her house, the applicant was dripping wet and 'sort of hysterical but a little bit disoriented'. He said something like, 'I've killed the kids', or, 'They're in the water'. He told Ms Gambino that the children had drowned and that he tried to get them out but could not.

61 Ms Gambino took Mr Moules' son and the applicant in her car and the applicant directed her to the overpass on the highway. Ms Gambino ran down to the area near the dam and asked the applicant where the car was. Ms Gambino found the broken fence and saw tyre marks.

62 Mr Moules arrived. He asked the applicant where the children were. The applicant said he did not know. The applicant then asked Mr Moules for a cigarette. The applicant told Mr Moules that he did not know how he ended up in the water, that he could not remember. He said, 'I blacked out and when I woke up the car was in the water'. He also told Mr Moules that he had a coughing fit and blacked out. When Mr Moules asked him why he had not got the children out, the applicant again said he did not know.

63 Mr Atkinson and Mr McClelland went back to the dam. The applicant asked them for cigarettes. Mr McClelland observed the applicant 'nodding his head sort of

lurching back and forwards, sort of wheezing a bit and he was just standing there absolutely soaked’.

64 Mr Moules dived into the dam and searched for the children for about an hour. A member of the Country Fire Authority also entered the water to assist Mr Moules, and State Emergency Service volunteers also assisted. The applicant stood in front of the car, with his arms folded, watching. According to Mr Moules, the applicant did not look upset. Ms Gambino, by contrast, was ‘extremely hysterical’.

65 The applicant told the first police officer who attended the scene that he had had a chest pain and blacked out over the bridge. He made no mention of a coughing fit. He told the officer that he tried to get the children out but could not. The policeman said that the applicant’s tone of voice was normal and he gave no indication that he was upset or distressed.

66 A paramedic who treated the applicant said that he did not ask about the welfare of his children.

The interview at the hospital

67 The applicant was interviewed at the Geelong Hospital shortly before 10.00pm on the evening of the drownings. At no point in the course of the interview did the applicant ask police what had become of his children. When asked in cross-examination to explain this surprising lack of enquiry, the applicant said, ‘I just answered the questions’.

68 Equally surprisingly, when Senior Constable Courtis asked the applicant at the beginning of the interview how he was going, the applicant replied, ‘Good’. He could give no explanation in cross-examination of why he had answered in that way, given that his three children had died earlier that evening. When Senior Sergeant Smith said, ‘do you realise that [the] children [have] not made it out of the car?’, the applicant responded, ‘Ah, I gathered that’. According to the police interviewers, the applicant showed no signs of distress. He appeared to understand the questions he

was being asked and gave considered answers.

69 The applicant did, however, make a point of asking repeatedly about his own position. The first exchange was as follows:

- [APPLICANT]: But sir, can I, can I ask one question?
- S/SGT SMITH: Yeah mate you can ask as many questions as you like
- [APPLICANT]: I've never ever been in trouble before so what's the likely scenario for me?
- S/SGT SMITH: Well mate, at this stage what we, all we know is that you've been in an accident where you've driven off the road and you're your kids have been in the car, I mean ...
- [APPLICANT]: So what sort of s ...
- S/SGT SMITH: Well, mate at this stage I don't, it's so early, we're not looking at you for doing anything wrong, I mean,
- [APPLICANT]: I know that, it's just something I've got to live with for the rest of my life.
- S/SGT SMITH: Well that's the thing, I mean ...
- [APPLICANT]: But, I mean, what I'm trying to say is I can, I can go through and check that I've got no record and those sorts of stuff ...
- S/SGT SMITH: Is there any, look, is there anything you want to tell us, I mean, that's ...
- [APPLICANT]: No, well that's exactly as it happened I mean I got no reason to lie or anything of that nature.

70 Later in the interview there was this further exchange:

- [APPLICANT]: Well I mean mate, what sort of things gonna happen to me now like, I mean
- S/SGT SMITH: Well, mate ...
- [APPLICANT]: You don't know til you do the investigation?
- S/SGT SMITH: You, well I don't know we, we're at the moment mate we're only, we're just trying to find out what happened. Um, we're not, we're not even been to the, we haven't even been to the crash site yet, we're on our way down there now. Um, there's another crew gone down, mate, ah, that's the way it goes, you just have to see what happens from here

[APPLICANT]: What would the likely scenario, no idea?

S/SGT SMITH: No idea mate, look at this stage we just don't know.

71 In our view, the jury were entitled to view the applicant's apparent lack of interest in, and absence of distress about, the fate of his children as consistent with, and confirmatory of, the Crown case and as wholly inconsistent with the deaths having been accidental. Plainly enough, it strained credulity that a father who (on his own version) had accidentally caused the death of his three children should have been so extraordinarily calm and considered when questioned about the drownings in the immediate aftermath. We deal further with this issue below.¹⁹

The applicant's health up to 4 September 2005

72 Ms Gambino gave evidence that the applicant often suffered from a cough, which was annoying, but she never saw him cough to the point of unconsciousness.

73 On 18 August 2005, the applicant attended upon his general practitioner with an upper respiratory tract infection, for which the doctor prescribed antibiotics. Some five days later the applicant returned to the doctor, as he had developed a very chesty cough and had aching ribs. The doctor thought that the applicant was suffering from a lower respiratory tract infection. The applicant did not tell the doctor that he had coughed to the point of passing out.

74 On 1 September 2005, the applicant told a friend (Darren Bushell) that a few days earlier he had been driving and pulled up at the Winchelsea Roadhouse. Mr Bushell said that the applicant 'thought he'd pulled up and started coughing, come to against the rocks about 20 metres away'. Mr Bushell told the applicant that he should not drive in that condition and should 'get it checked'. The applicant said he recalled the incident and that he had been dizzy and was continuously coughing. He agreed in cross-examination that he had never lost consciousness as a result of coughing before the day of the accident. The applicant had not done anything to

¹⁹ See [105]-[112] below.

have it checked.

75 On 2 September 2005 the applicant was seen at work to be coughing with a 'hard, dry, grabbing cough'. It took his breath away and his face went red.

Evidence as to the applicant's health on and after 4 September 2005

76 The applicant was seen at the Geelong Hospital by a doctor in the emergency department. He said that he had a violent coughing fit and came to when he was in the water. The doctor made a provisional diagnosis of cough syncope.

77 On 30 September 2005, the applicant attended upon a Dr Gore and told him that he had a cough which had been there roughly a few weeks. The doctor diagnosed a lower respiratory infection and prescribed antibiotics and a steroid inhaler. There was no discussion of blackouts in the course of that consultation.

78 The applicant gave evidence that, while he was in prison after he was first convicted, he was sitting on a chair when he started coughing. The next minute he was on the ground with medics and prison officers around him. He had fractured his leg.

79 On 11 June 2010, when the applicant was at his sister's house, he started coughing, put his hands on the side of a chair and the next minute he was on the floor.

Cough syncope

80 Dr King, a neurologist, gave evidence that paroxysmal coughing and resultant low blood pressure could cause a loss of consciousness. He said that about 80 per cent of those who suffered from cough syncope had chronic lung disease such as emphysema, whooping cough or chronic asthma.

81 Professor Naughton, the head of general respiratory and sleep medicine at the Alfred Hospital, gave evidence that it was extremely unusual for someone to lose

consciousness following an episode of coughing. It usually occurred in the case of those who suffered an underlying cardiac or neurological function, where the blood supply between the chest and the brain was impaired. It could also occur with people with underlying pulmonary disease, for example, emphysema, cystic fibrosis, or underlying bronchiectasis. He said that the period of unconsciousness would be expected to last between a couple of seconds and five seconds. He said it was extremely unlikely for cough syncope to be suffered by persons with normal lung function with no neurological or cardiac problems. He said that it was highly unlikely that a person answering the applicant's description, with the post-accident behaviour ascribed to him, had suffered from cough syncope. He said that those who suffered from cough syncope generally suffered from a bad cough, often with underlying lung disease.

82

Dr Steinfort said that the description given by the applicant was 'a classical description of ... an episode of cough syncope'. Dr Steinfort said that the applicant's evidence at the trial (that he had never lost consciousness as a result of a coughing fit or for any other reason prior to 4 September 2005) was inconsistent with what he had told Dr Steinfort at the consultation. The applicant was unable, in cross-examination, to explain this conflict. He was likewise unable to explain why he had not taken his foot off the accelerator or applied the brake when the coughing began to take hold.

The applicant's evidence

83

The applicant gave evidence on oath. He said that when he was approaching the overpass on the Winchelsea Road he started coughing and 'It just grabbed hold of me, ... that's all I remember'. The next thing he recalled when he came to was his son calling him, grabbing him and saying something about water. He had no recollection of turning off the ignition or the headlights of the car. He thought that his son went to open the door. His son said that his feet were wet. The applicant remembered it being dark. He leaned across and shut the door and told his children to settle down and he would get them out.

84 The applicant opened the car door and stepped straight into the water. It was freezing. He bobbed back up and noticed that the car was sinking. The applicant said that he dived down a few times. He screamed for help and then went into 'some kind of shock or something'. He did not recall how long he was in the water. At some point he swam towards the bank. He went to the road and tried to wave down cars. He remembered saying that he had had an accident, that the children were in the car and he thought they were dead.

85 The applicant said that his demeanour, and the numerous inconsistencies between the accounts which he gave to the persons after the accident, were the product of shock and trauma and he had difficulty remembering many details of the events themselves.

Circumstances inconsistent with accident

86 As the judge correctly directed the jury, in order to find the applicant guilty of murder, the Crown had to exclude the applicant's version of events beyond reasonable doubt. The jury's verdict shows that they were so satisfied. That is, they were able to exclude beyond reasonable doubt the possibility that the deaths had occurred by accident.

87 On the appeal, the Crown submitted that it was well open to the jury to reach that conclusion. We agree. We have had the opportunity, as did the jury, to consider both the objective facts and the successive accounts given by the applicant, both at the scene and then in subsequent interviews with police, and then in the course of his evidence-in-chief and cross-examination. In a long and searching cross-examination, the prosecutor gave the applicant full opportunity to clarify his account of events, to explain inconsistencies between versions he had given previously, and to account for what were said to be inexplicable aspects of his conduct. This process equipped the jury particularly well to assess the circumstantial case brought by the Crown and the innocent hypothesis advanced by the defence.

88 As defence counsel said to the jury in his final address:

The issue is, does the Crown prove that that individual man actually did decide to kill those three boys, that he really did decide to do that and that he went and did it. It's the human being that's supposed to have done that and it's in that human being's shoes that you will have to put yourself in your imagination to assess what was the true situation. You have to try to see things the way he would have seen them and to confront situations the way he had to confront them. Only that way can you test out the prosecutor's theories and assertions to you that he must have hated Cindy, that he must have hated those children, that he must have wanted to drown them in a dam on Father's Day to punish Cindy Gambino because he got the bad car and because he had some other very minor petty grievances.

89 What is striking, in our view, is that so much of what occurred was very difficult to reconcile with the applicant's claim that the deaths were accidental. Put another way, almost nothing which occurred accorded with what might reasonably have been expected had the driving into the dam in truth been an accident, as the applicant maintained. First, and most obviously:

- the car's ignition was off;
- the headlights, which had been on while the applicant was driving, were turned off; and
- the heater, which the applicant said had been on during the drive because it was a cold evening, was turned off.

90 The jury were entitled, in our view, to conclude that these were deliberate acts of the applicant, done at some point after the vehicle left the road. The applicant could give no explanation for having done any of these things. On one occasion – when talking to Ms Gambino – the applicant had suggested that he had 'stopped the car thinking, you know, just in case it was a fire'. No such explanation was given to police, however, and at the trial he ventured the wholly implausible suggestion that the eldest boy (who was in the front passenger seat) might have turned off the ignition.

91 Critically, in our view, the applicant did nothing to release any of the three boys from the seatbelts which were fastened. He said quite clearly to Ms Gambino

after the event that he had not undone their seatbelts. When asked in cross-examination how he could have left their seatbelts fastened when the car was in the water, the applicant was unable to explain. The jury were entitled to view this failure as inexplicable, and wholly inconsistent with accident. Damagingly to his credit, the applicant sought to blur this issue in other parts of his evidence. When it was put to him in cross-examination that he had not tried to unbuckle his children, he replied, 'I think I could have. ... I may have tried to do that'. Later he said, 'I remember something about getting unbuckled, but I don't know if I actually reached over ...'

92 Had it, indeed, been an accident, it seems unimaginable that the applicant would have:

- declined the offers from Mr Atkinson and Mr McClelland to dive into the dam to try to find the children;
- declined their offers of a telephone to call for help; or
- left the scene without knowing finally what the fate of the children was.

What matters for present purposes, of course, is that the jury were entitled to take that view.

93 The applicant was questioned extensively about whether, after leaving the car, he had dived down to try to find and save his children. In our view, the jury were entitled to conclude that he had not. The applicant said nothing to the ambulance officers during the journey to Geelong about any attempt to save the children. Nor, in the course of what appeared to be otherwise coherent and considered answers to questions, both in the hospital interview and in the formal record of interview, did the applicant make any mention of having dived, even when specifically asked to describe what he had done to save the boys.

94 The applicant told police he had 'tried and tried and tried' to save the boys. When asked to specify what he had done to save them, he replied, 'Well, I went

around [the car] and I – I went and swam to the road to get people to help me, cos I – I just can't recall everything'. There was no mention of diving. Eventually, when specifically asked by police whether he had dived, he replied, 'I think I did'.

95 On the other hand, much of what occurred was consistent with, and confirmatory of, the Crown's case. We refer, for example, to:

- the fact that the rear passenger side door was locked, something which the applicant sought unconvincingly to attribute to his two-year-old son;
- the child lock on the rear driver's side door was engaged which, again, the applicant was unable to explain; and
- the applicant's repeated use of the phrase 'I've killed the kids', rather than something like 'I've had a terrible accident'.

96 Of particular significance, in our view, was the applicant's insistence, to those who first stopped at the scene, that he be taken to see Ms Gambino. The applicant gave various explanations for this, none of them at all convincing. In the course of the police interview on 6 September 2005, two days after the drownings, the following exchange took place:

QUESTION: Why did you want to go to Cindy?

APPLICANT: To get help. I had no phone, nothing to ring anyone or anything. I did – well, not that that was my concern – I – I don't know. I said, 'I need to see her to tell her, "Look, we've had an accident", or "take me to the police"'. I – I don't know. She was probably the first thing – the first person I thought of. I don't know. I can't answer that.

QUESTION: Alright. So you first – what you're saying is, your first thought was to tell your wife?

APPLICANT: I was –

QUESTION: Not to get help?

APPLICANT: To get help. Well, I – I don't know. I said to the guys, I said, 'Look, I've got to get to my wife' and that. I think they might have said, 'Well, we'll ring the police', or something. I can't recall.

QUESTION: Okay.

APPLICANT: I don't know exactly the events in that car, what happened.

97 When cross-examined about these answers, the applicant was unable to suggest any way in which Ms Gambino might have been able to provide assistance. And, as the prosecutor pointed out, the statement that the applicant 'had no phone' gave a quite misleading picture of the situation at the side of the dam. As noted earlier, the applicant had been offered the use of a phone and had refused.

98 The jury were entitled, in our view, to view the applicant's conduct in insisting on being driven to see Ms Gambino as confirmatory of the Crown case. That is, it was consistent with his expressed desire to 'pay her back big time' that the applicant wanted to make sure that she was the first person who heard about the deaths of the children, and that he was the bearer of the devastating news. This conclusion was all the more obviously open to the jury because the applicant was unable to offer any other explanation for his conduct.

99 Turning to the applicant's credit, the effect of the prosecutor's cross-examination was that the jury were entitled, in our view, to take a very adverse view of his credibility. As the prosecutor demonstrated by his questions, the applicant's account of the crucial aspects of the accident had changed so often, and in such significant ways, that there was in the end no clear version. Several important details emerged for the first time in evidence-in-chief, as the prosecution pointed out in its final address. We refer in particular to the variations in the applicant's account as to:

- when the coughing started;
- what the situation was like when he first regained consciousness;
- what caused the sinking of the car;
- what he did after he ended up in the water;
- whether he tried to unbuckle the children; and

- whether he dived down or not.

100 There was a particular difficulty about the different versions given by the applicant regarding the cause of the car's sinking. His first version, given to the ambulance officers, was that it was caused by the opening of the front passenger door by his eldest son. No such account had been given to Mr Atkinson and Mr McClelland, however, and at trial the applicant maintained that he had leant over and shut the passenger door, which prevented the water from coming in.

101 The only explanation which the applicant was able to give for such changes in the accounts he gave, and for the omission from earlier accounts of important matters later mentioned, was that he could not have been expected to remember all the details. He was in 'a state of shock and confusion', he said, and could not have been expected to be 'clear headed' in the aftermath of the accident. These explanations might have been more cogent had the applicant been – as might have been expected – in a state of hysterical distress following the death of his children.

102 The evidence of his mood and demeanour was, however, all to the contrary. He showed no distress when Mr Atkinson, and later Mr Moules, arrived at the scene, nor when interviewed at the hospital later in the evening, nor during the formal record of interview. The jury heard sound recordings of these interviews during the trial. There is nothing in the transcripts of the interviews to suggest that the applicant was suffering from any confusion or difficulty of recollection during this period. As noted earlier, he had sufficient presence of mind during the hospital interview to make repeated enquiries about what was likely to happen to him in view of what had happened. At the time, he explained his inability to provide details of what had occurred by repeatedly saying that 'it was just all so quick' and 'just a complete blur'.

103 In our view, the jury were entitled to treat the applicant's observed demeanour, and the record of the matters about which he did – and did not – express concern in the immediate aftermath of the deaths, as confirmatory of the

Crown case. That is, it was open to the jury to conclude that the applicant was behaving exactly as might have been expected if this had been a deliberate act and that this was the explanation for his otherwise inexplicable lack of concern about the children's deaths.

104 The defence called expert evidence from Dr Gordon to establish the effect of trauma on perception and memory. What occurred would have been 'enormously traumatic' for the applicant, Dr Gordon said, and it was likely that he would have experienced a 'wall of helplessness'. In Dr Gordon's opinion, the applicant's conduct after the event fell within the known spectrum of trauma response, although in some important respects it was at the 'unusual' end.²⁰ Whether and to what extent this evidence raised a doubt about the conclusions to be drawn from the applicant's conduct was, of course, a matter for the jury.

Relevance of the conduct evidence

105 There was debate during the appeal hearing about the purpose for which the jury could use the evidence to which we have referred, concerning the applicant's actions after the car entered the dam, including over the succeeding days. Senior counsel for the applicant argued that this evidence could be used only for a limited purpose – to test his claim that he loved his children – and that

in terms of its probative weight ... it is policed and there's a girdle around it because of what the Crown said was its use. It's not to be used in any other way.

Specifically, counsel submitted, it could not be used in considering whether the defence of accident had been excluded.

106 The limitation on permissible use of this evidence was said to be confirmed by the judge's direction to the jury. His Honour told the jury that the evidence dealing with 'the period between the time that [the applicant] got himself out of the dam until he was taken to the Geelong hospital' was admitted

²⁰ The judge identified these unusual features of the applicant's conduct in the course of his charge.

as being relevant to the relationship which existed between the accused and his wife, Cindy Gambino, and his children ... The prosecution say you can use this evidence to demonstrate the nature of the relationship between him, Cindy Gambino and his children, and they say in effect that the evidence helps you to determine the motive that the accused might have had by establishing that there was a state of animosity that existed between the accused and his ex-wife and children and therefore making it less likely that the incident was accidental. *Such evidence is therefore relevant to the proof of the issue of the intent of the accused.*

On the other hand, the defence put to you that there was no animosity or no significant animosity between the accused and his wife and none at all between the accused and his children and that his behaviour, as it was explained by Dr Gordon, was consistent with him having undergone a very significant accidental trauma. And [defence counsel] puts to you in effect that that evidence explains substantially, if not totally, the reason why he acted in the way that he did.

107 According to the Crown's supplementary submission, the permissible use of the evidence was not so limited:

The applicant's unusual behaviour at the dam and in the hours following the incident was relied upon by the prosecution to demonstrate the implausibility of the applicant's version of events (namely that this was a tragic accident outside of his control) and the nature of his true feelings and relationship towards Cindy Gambino and their children. This conduct could therefore ... be relied upon by the jury as proving that the applicant's conduct was not accidental, but was voluntary and intentional.

108 In our view, the Crown's submission must be upheld. The applicant's conduct – and the inferences to be drawn from it – were a central element of the Crown's circumstantial case. The Crown case as presented to the jury, both by cross-examination and in opening and closing addresses, laid great emphasis on the way that the applicant had behaved in the relevant period, what he had done and not done, and what he had said and not said. One of the prosecutor's principal themes was that the applicant's actions and responses were inconsistent with the deaths having been accidental, and that his evidence to the contrary should be disbelieved.

109 The prosecutor took up the question of the applicant's conduct at the very beginning of his final address. He reminded the jury of the various matters to which we have referred, in submitting that the applicant had not behaved as a loving father would have been expected to behave if the drowning deaths of his children had in

truth been accidental. The prosecutor said:

In many respects ... the behaviour claimed by the accused in the course of the event where his car became submerged in the dam and his children died, completely defies belief. In many respects his observed behaviour immediately and for some time after that event was odd in the extreme if he was indeed truly a loving and a grieving father.

His behaviour was not explained by the expert evidence you have heard from the trauma person in this trial in any way. His conduct if anything spoke volumes about the true nature of his feelings towards those three children and perhaps towards his ex-wife. It was the conduct of a person who had indeed undergone a traumatic event but one of his own making, and who had inadequate skills or presence of mind or poise to be able to consistently make a good fist of pretence.

110 There was no objection by the defence to the evidence being relied on in this way. On the contrary, the defence recognised that this was a key element of the case which had to be met, and sought to meet it. As noted earlier, expert evidence was called to show that the applicant's behaviour could be adequately explained as a response to trauma. In final address, defence counsel relied heavily on the expert evidence as providing an innocent explanation of 'things where Mr Farquharson's behaving in a way that objectively speaking is bad'. Counsel said of his client's conduct beside the dam:

It's not nice. It's sad, it's confused, you are looking at it and you are wanting to turn away from it. But it doesn't mean he's a killer.

111 As the judge correctly told the jury, the evidence of conduct was relevant to the critical issue of the applicant's intent. The conduct of an accused, both before and after an alleged offence, is admissible for this purpose.²¹ The Crown, in effect, was inviting the jury to conclude – in the language of Dixon CJ in *Plomp v The Queen*²² – that 'it would put an incredible strain on human experience' to reconcile the applicant's conduct with his evidence – and his case – that the deaths were accidental.

²¹ See, for example, *Plomp v The Queen* (1963) 110 CLR 234, 242-3; *Wilson v R* (1970) 123 CLR 334, 344; *R v Anderson* (2000) 1 VR 1, 12, [30]; *Clark* (2001) 123 A Crim R 506, 575-6. See also *R v Vjestica* [2008] VSCA 47, [111].

²² (1963) 110 CLR 234, 243.

112 Moreover, the applicant's conduct was one of the seven strands clearly identified by the prosecutor, and by the trial judge, as making up the Crown's circumstantial case. As the jury were correctly instructed, their task was to consider the circumstantial case as a whole. Defence counsel acknowledged to the jury in final address that they had quite fairly been urged by the prosecution to 'weave together' the different strands of the Crown case. How they did so, and what inferences they drew, was a matter for the jury. As we said earlier,²³ no part of the circumstantial case could be separated from the other parts, nor have its use by the jury circumscribed in the way now contended for.

Conclusion

113 In argument on the appeal, the applicant's counsel placed strong emphasis — as he had done at the trial — on what was said to be 'a high level of improbability that the applicant would murder his beloved children'. Whatever grievance the applicant might have had towards Ms Gambino, it was said, killing the boys would have been a 'startlingly disproportionate' response.

114 There was obvious force in these submissions. The idea of a father killing his children is ordinarily viewed as unimaginable. In the present case, however, that submission had to confront the formidable difficulties to which we have referred, concerning the applicant's conduct before, during and after the fatal incident. As we have said, his conduct — viewed in the light of the defence case of accident — was strikingly improbable and counter-intuitive in a variety of respects.

115 These were quintessential jury questions. It was for the jury to draw on their experience of human behaviour in evaluating these competing (im)probabilities. As noted earlier, that is precisely what defence counsel intended when he urged the jury, in assessing the applicant's conduct, to 'go into his shoes'. Having reviewed the whole of the evidence, we are of the opinion that it was sufficient to establish the applicant's guilt to the requisite standard. The nature of the Crown case meant that

²³ See [44] above.

a great deal of the evidence could be viewed by the jury as mutually supportive, so that the acceptance of one circumstance or event enabled other circumstances to be more readily accepted. We consider that it was open to the jury acting reasonably to be satisfied of the applicant's guilt beyond reasonable doubt.²⁴

Manslaughter by criminal negligence

116 The third ground is that the trial judge erred in not leaving to the jury a verdict of manslaughter by criminal negligence. This was not a verdict which, in either of the two trials, the applicant sought to put to the jury as being open to them. It was not the subject of the judge's charge in either trial. Counsel did not, in either trial, suggest that the judge should do so. The issue was not raised on the first appeal. Now, for the first time, it is urged as an important aspect of this application for leave. For reasons which follow, this ground is not reasonably arguable, in our view.

117 The applicant now contends that 'this Court should be in no doubt that there was a viable – almost an overwhelming – case of negligent manslaughter, on the evidence available at the end of the trial'. This being so, the argument continues, manslaughter by criminal negligence should have been left to the jury. The judgment of Barwick CJ in *Pemble v The Queen*²⁵ is the point of departure:

Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interests of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.²⁶

118 The evidence identified by the applicant as supporting the 'almost overwhelming' case of negligent manslaughter tends towards two conclusions.

²⁴ *M v The Queen* (1994) 181 CLR 487; *R v Klamo* (2008) 18 VR 644, 653–4 [38]–[40] (Maxwell P); *R v Rodi* [2011] VSCA 48, [19] (Ashley JA).

²⁵ (1971) 124 CLR 107.

²⁶ *Ibid* 117–18.

First, that on the fatal evening the applicant was tired and unwell, with the flu and a bad cough. Secondly, that on the previous Tuesday (30 August 2005), he had a coughing fit while in his car in the parking area of the Winchelsea Roadhouse. As noted earlier, the applicant concedes that '[h]e had never coughed to unconsciousness'. The Winchelsea Roadhouse coughing fit, however, 'impaired' his consciousness for 'a couple of minutes', to the extent that the car rolled 20 metres into some rocks before it came to a halt. According to the applicant he was 'very dizzy' during this incident. In addition, there was evidence from two witnesses, both friends of the applicant, one of whom had advised the applicant against driving, and the other who had queried whether, given the applicant's health, he should travel to Geelong.

119 The breadth of this advice is clear in relation to one of the friends (Mr Bushell) but not the other (Mr Hart). On Thursday 1 September 2005, the applicant had informed Mr Bushell of the Winchelsea Roadhouse incident, which had occurred two days before. Mr Bushell told the jury that, on hearing about this, he 'just told him [the applicant] he shouldn't drive around like it and to go and get it checked, that was all'.

120 On the day the children died, Mr Hart and the applicant met at Mr Hart's home in Winchelsea and discussed a joint trip to Geelong. Mr Hart noticed that the applicant did not appear well, and asked, 'Do you really think you should be going?'

121 By contrast to the relatively strong evidence of Mr Bushell, that of Mr Hart provides very weak support for the conclusion that he believed that the applicant was unfit to drive. It is at least as likely, given that the matter was not further explored with the witness, that he merely assessed the trip to Geelong as perhaps having adverse consequences for the applicant's health. Thus, while the evidence about the incident in the Winchelsea Roadhouse car park is significant, it does not in our opinion amount to an 'overwhelming case' upon which to mount a prosecution for manslaughter by criminal negligence.

122 It must be recalled, as the Crown's submission pointed out, that manslaughter by criminal negligence requires the act that caused the death to be done

in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.²⁷

In our view, the evidence at the trial did not approach that level.

123 The critical point, however, is that manslaughter by criminal negligence was not the case which the prosecution ever sought to mount, or the applicant to defend. The Crown case was the complete reverse. The factual premise of a criminal negligence case was the very thing the Crown sought to exclude – that is, the murder case which the prosecution advanced could only be established if the jury were satisfied beyond reasonable doubt that the applicant had not suffered any episode, severe or otherwise, of cough syncope, let alone an episode of such severity as to cause him to lapse into unconsciousness.

124 As the applicant himself in his revised written case accepts, there were seven strands of the cable by which the prosecution endeavoured to sustain a verdict of murder.²⁸ Not one of these strands is relevant to the case for manslaughter by criminal negligence; indeed, each is antithetical to such a verdict. In particular, one of the seven strands upon which the Crown case relied was that the evidence demonstrated the 'extreme unlikelihood' that 'a man like the Applicant' suffered from cough syncope.

125 For his part, the applicant – while seeking to raise in the minds of the jury a reasonable doubt on the basis of his having suffered cough syncope – did not attempt to persuade them that there was an 'overwhelming case' for its occurrence. Still less was he concerned to introduce evidence of the other part of the 'manslaughter by criminal negligence' equation. It was absolutely no part of the

²⁷ *R v Nydam* [1977] VR 430, 445. See, also, *R v De'Zilwa* (2002) 5 VR 408; *R v Scott* (2003) 141 A Crim R 323, 327 [8], 332-4 [16]-[19].

²⁸ See paragraph [8] above.

applicant's case that he was aware of any danger that he might, while driving, suffer a bout of cough syncope sufficiently acute to endanger the lives of those in his car.

126 This places this case in what, as far as we are aware, is a unique position. The typical case involving alternative verdicts arises when the prosecution proves, or might be thought to have proved, some but not all of the elements of the case for the verdict sought by the Crown. The elements proved, or which the jury might have been satisfied were proved, are, nevertheless, sufficient to support an alternative verdict. In such cases, it will often be required of the trial judge that he or she tell the jury that the alternative verdict is open to them if they are satisfied beyond reasonable doubt of the facts necessary, at law, to sustain such a verdict.

127 None of the elements of manslaughter by criminal negligence were elements in the prosecution case that the applicant murdered his three children. Were the judge to have put that case to the jury, he would have been required to instruct them that they could not return a verdict of guilty of manslaughter unless they were satisfied beyond reasonable doubt that all the elements by which it is constituted had been made out. Invariably, the jury in every criminal trial is instructed in such terms, with the rider that the burden is upon the prosecution to make out the case for a guilty verdict. Not so, if the applicant's submissions on this appeal were to be accepted. Rather, the judge would be required to tell the jury that the burden of proving the crime of manslaughter was not upon the Crown, because the Crown not only disavowed it, but had endeavoured to disprove at least some of the elements upon which a verdict of manslaughter depended.

128 The applicant in his revised written case states that ground 3 is based upon *Gillard v The Queen*,²⁹ *Gilbert v The Queen*,³⁰ *Getachew v The Queen*³¹ and *R v Nguyen & Nguyen*.³² In each of these cases, the prosecution sought a verdict for a crime the

²⁹ (2003) 219 CLR 1.

³⁰ (2000) 201 CLR 414.

³¹ [2011] VSCA 164.

³² [2010] VSCA 23.

elements of which were also elements in a lesser crime arising from the same alleged circumstances. That is not this case, where the Crown must prove the absence of a circumstance (cough syncope), whereas the lesser crime of manslaughter has as one of its elements the presence of cough syncope. The present case is therefore distinguishable from all four of the authorities relied upon by the applicant.

129 In charging the jury at the conclusion of the second trial in this case, his Honour instructed the jury that the Crown was required to prove beyond reasonable doubt 'that the accused did not suffer an attack of cough syncope on the night of 4 September which caused a loss of consciousness'. The notions of fairness about which Barwick CJ spoke in the passage from his judgment in *Pemble v The Queen*³³ would surely have been called into question had his Honour gone on to tell the jury that if they had a reasonable doubt about that, they might examine whether they could come, beyond reasonable doubt, to the opposite conclusion – even though that conclusion was not raised as a possibility, or as an issue, by either side and even though the Crown had not assumed the burden of proving it.

130 It is unlikely that the applicant would have asked for a direction of the kind to which we have adverted above, assuming that the possibility entered the minds of his advisers. It may be that the notion is so far outside the ordinary realm that they did not think of it, and that explains its being raised for the first time on this appeal. Or perhaps they did think of it, and the forensic decision was that not only would it not be to the applicant's advantage, but that were the Crown to raise that possibility it would be opposed as resulting in unfairness.

131 If a request for such a direction had been made, the judge would of course have considered it. His Honour would have been bound to also consider the Crown's response, since it might wish to argue that such a charge would be unfair to the prosecution. For present purposes, however, the point is that in the absence of a request from either side – and especially in the absence of a request from the

³³ (1971) 124 CLR 107, 117–18; see above [117].

applicant – the judge would in our opinion have been wrong to charge the jury in the way for which the applicant now contends.

132 *Alford v Magee*³⁴ is binding authority for the propositions that the only law which it is necessary for the jury to know is so much as will guide them to a decision on the real issue or issues in the case, and that a judge presiding over a criminal trial is ‘charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are’.³⁵ Manslaughter was never an ‘issue’, real or otherwise, in this case. The strictures of *Alford v Magee* do not apply where a judge is obliged to charge the jury with instructions about a possible alternative verdict even though neither side has raised that possibility, which is therefore not an issue between them. But the undoubted wisdom of the *Alford v Magee* principle is such that it ought not be departed from except in circumstances which, in our opinion, do not obtain here.

³⁴ (1952) 85 CLR 437.

³⁵ Ibid 466. See also *R v A J S* (2005) 12 VR 563, 577 [54]-[57].