SUPREME COURT OF QUEENSLAND

CITATION:	*R v Baden-Clay* [2015] QCA 265
PARTIES:	**R** **v** **BADEN-CLAY, Gerard Robert** (appellant)
FILE NO/S:	CA No 188 of 2014 SC No 467 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 15 July 2014
DELIVERED ON:	8 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2015
JUDGES:	Holmes CJ and Fraser and Gotterson JJA Judgment of the Court
ORDERS:	**1. The appeal against conviction is allowed.** **2. The verdict of guilty of murder is set aside and a verdict of manslaughter is substituted.** **3. The respondent is to file and serve submissions as to sentence by 15 January 2016.** **4. The appellant is to file and serve submissions as to sentence by 22 January 2016.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant was convicted of murdering his wife – where three expert forensic witnesses gave evidence about a set of abrasions and scratches on the appellant's cheek – where they considered that the abrasions were typical of injuries caused by fingernails, but were equivocal about the cause of the scratches – where two of the expert witnesses considered that the scratches were inflicted after the abrasions – where the appellant gave evidence that the abrasions and scratches were all caused by him shaving with a blunt razor blade – where the appellant argues that the trial judge erred in directing the jury that if the appellant had attempted to disguise the abrasions by placing shaving cuts near them, that conduct could support an inference of guilt of murder or manslaughter – whether the trial judge erred

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted of murdering his wife – where her blood was found in a family vehicle and her body at a nearby creek – where the appellant argues that findings that the deceased's blood was left in the vehicle at the time she disappeared and that he transported her body to the creek were indispensable intermediate steps in arriving at the conclusion that he had unlawfully killed her – where the trial judge declined to direct the jury that they needed to be satisfied beyond reasonable doubt that the appellant transported the deceased's body to the creek – where the trial judge was not asked to direct the jury that they needed to be satisfied beyond reasonable doubt that the deceased's blood was left in the vehicle at the time of her disappearance – whether the trial judge erred – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of murdering his wife – where the appellant argues that the verdict was unreasonable because the jury could not properly have been satisfied of the necessary intent for murder – where the appellant argues that a reasonably open hypothesis was that the deceased had scratched the appellant in the course of a physical confrontation; the appellant had killed her unintentionally; and his subsequent conduct was attributable to panic – where the respondent argues that intent to kill could be inferred from marks on the appellant's face and body, lies told by the appellant about the cause of the abrasions on his face and his attempt to disguise them, the disposal of the deceased's body at the creek, and emotional and financial pressures which might have caused the appellant to behave with uncharacteristic violence – whether the post-offence conduct was consistent with consciousness of a lesser offence – whether there was a reasonable hypothesis consistent with innocence of murder open on the evidence – whether the verdict was unreasonable

Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
R v Ciantar (2006) 16 VR 26; [2006] VSCA 263, applied
R v DAN [2007] QCA 66, cited
R v Lennox [2007] QCA 383, cited
R v Turner [2010] QCA 156, cited
Shepherd v The Queen (1991) 170 CLR 573; [1990] HCA 56, cited

COUNSEL:	M J Copley QC for the appellant M R Byrne QC, with D C Boyle, for the respondent
SOLICITORS:	Peter Shields Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT:** The appellant was convicted by a jury of the murder of his wife, Allison Baden-Clay, on or about 19 April 2012. He appeals the conviction on the ground that the verdict was unreasonable and on three grounds concerning the trial judge's summing up. The first of the latter grounds was that his Honour should not have left to the jury, as post-offence conduct probative of guilt, evidence of what the Crown said was an attempt by the appellant to disguise scratch marks on his face. The remaining grounds were based on the contention that the trial judge erred in not directing the jury in respect of two matters that they needed to be satisfied beyond reasonable doubt before they could rely on them as establishing guilt: the first, that the deceased woman's blood had been deposited in her motor vehicle at the time of her disappearance, and the second, that the appellant had disposed of her body.

The Crown case

[2] The Crown case in general terms was that the appellant had killed his wife – smothering was suggested as a possible mechanism – at their house in Brookfield. He had dumped her body underneath a road bridge at Kholo Creek, having driven it there in her sports utility vehicle. It was not contended on the appeal that it was not open to the jury to find that the appellant had killed his wife, so some aspects of the evidence need not be canvassed. Because the reasonableness or otherwise of the verdict is to be determined on the Crown case at its highest, the appellant's evidence will be considered only insofar as it supplements aspects of the Crown case.

Mrs Baden-Clay's disappearance

[3] The Baden-Clays had lived with their three young daughters, aged five, eight and 10, at Brookfield. Mrs Baden-Clay was last spoken to by anyone other than her husband at about 8.30 pm on 19 April. In the early morning of 20 April, the appellant telephoned first his parents and, soon after, the police, expressing concern about his wife. His account was that he had gone to bed at about 10 o'clock the previous night, leaving her watching television. It appeared that she had gone for her early morning walk and not returned. He was a heavy sleeper and he was unaware whether she had actually slept in their double bed or had remained on the couch in front of the television.

[4] The appellant's father went to the Baden-Clay house; he saw that his son had some cuts on his cheek, which the latter explained as shaving cuts. A police officer who responded to the appellant's call also noticed scratches on the right-hand side of his face which he enquired about, and was given the answer that the appellant had cut himself shaving in a hurry. The constable asked the appellant some questions about his relationship with his wife. He volunteered that he had recently had an affair which had caused some tension with his wife, but they were receiving counselling. The officer examined Mrs Baden-Clay's handbag; her mobile phone was missing. Attempts to dial the number resulted in diversion to message bank. The phone was not subsequently found. It was established that the appellant's own mobile phone had been placed on a charger in the couple's bedroom at 1.48 am on 20 April and removed from it at 6.18 am.

[5] The appellant gave police who questioned him later in the day the following information. His wife was given to walking at about 5 am a couple of times a week. One of her walking outfits, which was grey in colour and consisted of a singlet top with three-quarter length pants, was missing. Mrs Baden-Clay had in the past suffered from depression for which she was prescribed Zoloft. She had been intending to leave home at 7 am on 20 April to attend a conference. The previous evening they had spent 15 minutes discussing the problems in their relationship, as a counsellor had recommended, and then had discussed their plans for the following day.

[6] The couple's three daughters did not wake during the night.[1] There was no sign of any struggle in the house, and later examination revealed no blood or any indication of a cleaning process. The appellant's four wheel drive and the vehicle which his wife had driven, a Holden Captiva sports utility vehicle, were both at the premises; the Captiva was parked in the carport.

The recovery and examination of Mrs Baden-Clay's body

[7] On 30 April 2012, Mrs Baden-Clay's body was discovered lying on its side on an embankment under the Kholo Creek road bridge at Mount Crosby. The bridge was 13 kilometres by road from the Baden-Clay house. The body was below the high tide mark; it was not visible from the bridge itself, which was about 14 metres above. The deceased woman was clothed in a blue or purple singlet top, dark three-quarter length pants, socks and shoes. Around her neck region was a jumper, which was mostly inside out. None of the clothing was damaged.

[8] Leaves from different species of plants were found about Mrs Baden-Clay's body. A botanist gave evidence that they included four species – crepe myrtle, cat's claw creeper, fishbone fern and lilly pilly – which he was able to identify in the Baden-Clays' garden, but not in the immediate vicinity of the Kholo Creek site where the body was found. Some leaves of the cat's claw creeper, the fern and the crepe myrtle were entwined in her hair. The crepe myrtle leaves were fallen leaves, the fern leaves were a mix of live and fallen leaves, and one of the cat's claw creeper leaves appeared to have been pulled from a live plant. Cat's claw creeper was growing about the carport of the Baden-Clay home, while leaf litter from the crepe myrtle and fern were found in the carport and the patio area of the house near its back door.

[9] Dr Milne, a pathologist who conducted the post-mortem examination on the body, said that its decomposition was consistent with death at some time in the previous 11 days (the period since Mrs Baden-Clay was last seen alive). Post-mortem changes to the body were consistent with its having been placed soon after death in the position in which it was found. The state of putrefaction and mummification was such as to obscure any injuries which had been sustained. There were no fractures to be seen on CT scan or on physical examination and no abnormalities in the internal organs. The carotid arteries were normal, and the hyoid bone, in particular, was not fractured or damaged. There was a probable area of bruising on the internal lining of the chest wall. If it were bruising, it would have been the result of a blunt force injury of mild degree (since there were no rib fractures). It could have been caused by the impact of something with the body or the body itself striking a surface. Dr Milne could not, however, rule out the possibility that it was a post-mortem development.

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[1] There was some evidence of screams emanating from the direction of their house but an independent witness gave evidence which indicated they were likely to have come from her teenage daughter, and the Crown did not ultimately rely on them as associated with Mrs Baden-Clay's disappearance.

[10] Dr Milne observed a small chip to one of Mrs Baden-Clay's teeth, but an odontologist was unable to say what caused it or its age. The latter did not see any sign of trauma to the hard tissues of the jaw or the teeth.

[11] Dr Milne did not think Mrs Baden-Clay had died from natural causes, because there was no sign of any natural disease, but he could not establish the cause of death. Mrs Baden-Clay had high levels of sertraline (Zoloft) and its metabolite in her liver and a blood alcohol reading of .095. Dr Milne thought it unlikely that the cause of death was alcohol or sertraline toxicity but could not exclude it. (Evidence from experts in toxicology indicated that an overdose of sertraline would be unlikely to cause death and that the blood alcohol reading might be the product of fermentation through bacterial activity after death.) If Mrs Baden-Clay had fallen from the bridge to the bank where she was found, Dr Milne would have expected fractures, although if she fell into the water there might not be any detectable injuries. There was no indication that she had drowned, but because of the state of decomposition of the lungs, he could not exclude drowning; nor could he exclude death as a result of a fall from the bridge.

Evidence of pressures affecting the appellant

[12] A good deal of evidence was given about certain stressors affecting the appellant at the time of his wife's death: his financial difficulties and his involvement in an extra-marital affair. The Crown did not contend that the killing was premeditated, but suggested that the pressures on him might provide some explanation for uncharacteristic violence.

[13] The appellant operated a real estate agency. He owed some friends about $180,000 borrowed in connection with the business, although they were not pressing for payment. In December 2011, he told another friend, Dr Flegg, that in order to keep control of his business he needed to raise $400,000. In early March 2012, the appellant left a message for Dr Flegg, who had a friend return the call. The appellant, who sounded distressed, told her that he was having financial trouble and wanted to know if Dr Flegg could lend him a sum of money, about $300,000. Later, in a telephone call made on 11 March 2012, Dr Flegg let the appellant know that he would not make the loan. On 20 April 2012, when the appellant was giving information to police about his wife's disappearance, he said that the couple were, financially, "on the bones of [their] arse".

[14] In August 2008, the appellant commenced a sexual relationship with a Ms McHugh, an employee of the real estate agency which he operated. The affair came to his wife's knowledge in September 2011. Both Ms McHugh and the appellant gave evidence about what occurred. Ms McHugh said that the appellant regularly expressed his intention of leaving his wife but was concerned for her mental health and, in turn, the consequences for their daughters' welfare if he did so. When Mrs Baden-Clay discovered the affair, the appellant told Ms McHugh it had to end. Ms McHugh did not return to her employment at the real estate agency. She endeavoured to contact the appellant, but she gave up the attempt when he did not respond. The appellant said in evidence that once his wife became aware of the affair, he reached an agreement with her that he would show his commitment to her by not going out at night without her approval and by giving her the password for his phone so that she could check his texts, emails and call history.

[15] In December 2011, the appellant renewed the relationship by contacting Ms McHugh and asking her to meet him. When they met, he told her that he loved her and wanted

to end his marriage. Thereafter they had some contact by way of very brief phone calls and email through an account under another name. They met again on another occasion, the date of which he could not recall, before the beginning of April 2012. At that meeting the appellant indicated that he would be out of his marriage by 1 July 2012, but considered that he and Ms McHugh should not meet until that occurred. They remained in regular email and telephone contact. In an email of 3 April 2012, the appellant said that he had given Ms McHugh a commitment to which he intended to stick and would be separated (from his wife) by 1 July (an assertion which Ms McHugh did not believe, given his history of promises not acted on). He maintained his love for Ms McHugh in a later email of 11 April.

[16] On 27 March 2012, Mrs Baden-Clay saw a counsellor, Ms Ritchie, and on 16 April the appellant attended a counselling session with his wife. They discussed their difficulties. Ultimately, the appellant agreed that every second day he would devote 15 minutes to listening to his wife's expression of her feelings about the affair. (The appellant did not disclose that it was continuing.) The counsellor thought that Mrs Baden-Clay appeared hopeful when she left at the end of the session.

[17] On 19 April, Ms McHugh telephoned the appellant and told him that she was going to a property management conference the following day. He disclosed that his wife and another employee of the real estate agency would be attending the same conference. Ms McHugh was angry, saying that he should tell his wife about their relationship; that it was not fair to either of them that they should be in the same room together. She demanded to know the appellant's intentions. He said that he was thinking of selling the business after he left his wife. He did not respond to her request to see him. On the following day, 20 April, Ms McHugh telephoned the appellant, who, sounding distressed, told her that his wife had gone missing and they should not be communicating. The next day he advised her that the police would want to speak to her and she should tell the truth.

The bloodstain in Mrs Baden-Clay's SUV

[18] Mrs Baden-Clay's Captiva sports utility vehicle had been purchased at the end of February 2012. It had three rows of seats in it, the third of which was capable of being folded down to extend the vehicle's boot. When police first inspected the vehicle, the back row of seats was folded down in that way, with baskets of toys placed on it. When, however, the seats were put up, a bloodstain with a flow rivulet attributable to gravity was discovered over the back wheel arch cowling on the driver's side. It was a transfer stain: the result of blood being transferred from a person or object onto the surface. DNA extracted from a swab of the stain matched Mrs Baden-Clay's DNA profile. Neither the age of the bloodstain nor the volume of blood which had produced it could be determined.

[19] The older two of the Baden-Clay children both described the usual seating arrangements in the car: the adults in the front seat, and the children in the middle row. Neither recalled any injury to their mother which might explain the deposit of blood. The appellant's own evidence was that he was unaware of any injury to his wife which could have resulted in the bloodstain.

The marks on the appellant's face and body

[20] Photographs of abrasions to the appellant's face, one set taken at 1 pm on 20 April and another at 1.22 pm on 21 April, were tendered in evidence. They show a set of

abrasions on the appellant's right cheek, which may be described as orange in colour. The abrasion on the left side of the cheek (looking at the photograph) is about 27 millimetres long and is slightly curved at the bottom. It appears to be about two millimetres wide. On the right side are two abrasions running vertically, one below the other, separated by only a millimetre or so. The higher of those is perhaps 3.5 millimetres at its widest point. Below them, and to the left of the first abrasion, is a set of small scratches with small red spots of dried blood, perhaps five or six millimetres in length.

[21] On 21 April 2012, acting on legal advice, the appellant went to see two medical practitioners, one in the morning and one in the afternoon, in relation to the abrasions on his face. He told both that the marks were caused by shaving in a hurry using a blunt razor. The first, Dr Beaven, observed three superficial abrasions which looked to be fairly recent. She asked him why he had not noticed that he was bleeding and in how many motions the wounds had been sustained. The appellant initially said one motion, and then said it must have been a couple; but he had not noticed himself bleeding, because he was rushing. The second general practitioner, Dr Kumar, noticed two marks on the appellant's right cheek, one four centimetres long and .5 centimetres wide and the other two centimetres long and .5 centimetres wide. She thought that the marks on the face seemed wide for a razor cut, but it was possible they were caused in shaving in a rush.

[22] As well as the marks on the appellant's face, Dr Kumar noted a superficial scratch on the left side of his neck and some marks on his chest on the right side near the right shoulder. The appellant attributed the marks to having scratched itchy areas caused by a caterpillar which had landed on his neck. He demonstrated how he had scratched, and Dr Kumar was satisfied that he had caused the marks in that way. (A number of witnesses who had been at a school cross-country race with the appellant on the morning of 19 April confirmed that he had complained of being bitten by something and of consequent itchiness.)

[23] A forensic medical officer, Dr Griffiths, examined the appellant at 7.15 pm on 22 April. He saw two abrasions on the appellant's right cheek, separated by about a centimetre. The one on the left was about 25 millimetres in length and about 2.5 millimetres wide. That on the right had a slight curve in it and was about four millimetres wide.[2] The wounds were irregular and appeared broad, in contrast to an incised wound or a simple cut; he regarded them as abrasions rather than cuts and thought they resembled scratch marks caused by fingernails. He did not recall seeing the small red scratches. Dr Griffiths had also noted some redness on the neck and some abrasions on the upper chest, with a bruise around the area of the right armpit. Dr Griffiths thought that the marks on the neck were caused by human fingers. The mark around the armpit might have been a strap mark left by wearing a backpack. The other area of abrasion on the chest could have been caused by fabric being forced against the skin.

[24] Three medical experts gave evidence of conclusions drawn after examining the photographs of the appellant's face taken on 20 and 21 April. The first was Dr Stark, a specialist forensic physician specialising in interpretation and causation of injuries. Looking at the 20 April photograph, she said that the orange abrasions were made within a day or so before it was taken, but it was not possible to be precise. They had resulted from contact with a rough surface and were typical of fingernail scratches,

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2 This is the wound described in [20] above as constituted by two vertical abrasions separated by a millimetre.

although she could not say "100 per cent" that they were. They were not typical of even a blunt razorblade injury, of which it was to be expected there would be a finer abrasion; but she could not completely exclude the possibility. Ordinarily someone who nicked themselves with a razor would not continue to cause further injury or abrasions of the width involved. The difference in their appearance from the redder scratches suggested "maybe two sets of injuries caused at different times". The yellowing of the abrasions was some evidence of their healing, suggesting that the red scratches were caused slightly later. The red scratches were more consistent with the use of a razor, although again she could not say "100 per cent" that they were so caused; it was "possible", she said in re-examination, that a fingernail produced them.

[25] A forensic medical officer, Dr Hoskins, distinguished between the orange abrasions and the small red scratches shown in the photographs. The abrasions were characteristic of fingernail scratches, in that they were ragged, about the size to be expected and approximately parallel with each other. He thought it extremely implausible that they could have been caused by the appellant's razor. The smaller marks were more of the character of scratches than abrasions, and could have been produced by a blade. He could not absolutely exclude that they were caused as part of a continuous process with whatever had caused the first injury, but the fact that there was fresher dried blood on one of the scratches, while the scabbing in the abrasions was drier and browner, suggested that the abrasions were caused earlier. They were probably sustained between six and 24 hours prior to the taking of the 20 April photograph, while the presence of darker blood in the scratches suggested they were less than six hours old. In cross-examination, Dr Hoskins conceded that he could not say whether the scratches were separately caused or were part of the larger abrasions; he could not say with certainty that the abrasions were earlier, although they had that appearance; and he accepted that the ageing of areas of injury was not a precise science.

[26] Dr Hoskins also examined photographs of the marks on the appellant's torso. He said that the two marks on the neck could be explained by a scratch through clothing. The marks to the chest were very superficial scratching and it would not be surprising if the appellant had caused them himself. The injury around the right armpit seemed to be bruising which was consistent with the straps of a backpack being pulled up, clothing being pulled upwards and backwards, or a fingernail scratch through clothing.

[27] A forensic physician, Professor Wells, said that the abrasions on the appellant's face were the product of a form of blunt trauma where an object which had a roughened surface had removed pieces of skin; what came to mind on seeing them were fingernails or an animal's claw. He could not reconcile the use of the appellant's razor with the production of those marks. The smaller wounds could be produced by a blade or by the same implement which had caused the abrasions. He could not comment on whether the abrasions and smaller scratches had been caused at the same time. Shaving injuries were likely to be around skin protuberances and to produce a finer or more incised wound than the abrasions. The parallel nature of the abrasions would mean that the blade had been applied at the same angle repeatedly.

[28] Professor Wells had also looked at the photographs of the marks on the appellant's trunk. There was bruising on the left shoulder which could have been the product of the dragging of fingernails through a shirt. Similarly, there was bruising on the chest which could have been caused by a fingernail or a blunt force impact, through fabric. The right armpit marking was consistent with clothing having been pulled forcibly against the skin.

Whether there was evidence to support the direction on concealment of facial injuries

[29] The trial judge gave an *Edwards*[3] direction in respect of the use the jury could make of the appellant's assertions that he had caused all his facial injuries while shaving, if they found them to be false; no issue was taken about that direction. In addition, however, his Honour, over objection, directed the jury that if the appellant had attempted to disguise the abrasions by placing shaving cuts near them in an attempt to provide an innocent explanation for the injuries, that conduct could support an inference of guilt of murder or manslaughter. His Honour gave the usual cautions as to the use of the evidence and in particular emphasised that it was necessary to give careful consideration to whether the conduct could support an inference of murderous intent, as opposed to unlawful killing without that intent.

[30] The appellant contended that the directions should not have been given, because there was no evidence or no sufficient evidence available to support a finding that the appellant had sought to disguise the abrasions. It was necessary for that finding to be made that the Crown establish, firstly, that the small red scratches were made at a different time from the three orange vertical abrasions and, secondly, that they were made by a means different from that which had inflicted the abrasions. Dr Stark had acknowledged the difficulty of ageing injuries and expressed her view of the respective ages of the orange and red marks only at the level of possibility. She had in re-examination accepted that the red marks might have been caused by a fingernail, leaving two possibilities open. Dr Hoskins conceded that he could not say with certainty that the redder injuries were caused at a different time, and Professor Wells was not able to make any comment. Professor Wells thought that the red scratches could have been produced by a blade but also might have been a product of the same implement as the abrasions.

Conclusions

[31] Having regard to the expert evidence, the jury could start from the premise that the orange abrasions were, indeed, fingernail scratches. The preferred view of all three experts who had examined the photographs was to that effect; and Dr Griffiths, who actually saw the abrasions, similarly considered that they appeared to be fingernail scratch marks. The experts were certainly more equivocal about the cause of the red scratches. That was, however, immaterial, given that at no stage was it asserted by the defence at trial that the red scratches were produced by anything other than a razor. The appellant volunteered no other cause for them; his evidence was that he had cut himself repeatedly while shaving, resulting in "two fairly long slices" from his face. It was put to him in cross-examination that the marks "at the bottom" (the red scratches) were shaving cuts, but that the other injuries were not; he maintained that all were shaving cuts. Plainly the defence case was that the small red scratches were the product of careless razor use, not fingernail scratches. The expert evidence, on the other hand, was certainly sufficient basis to conclude that the abrasions were caused by fingernails. It follows that it was entirely open to the jury to conclude that a different mechanism was involved in the two different forms of injury.

[32] If the jury were satisfied that the wounds were inflicted by different means, their precise timing was not critical; the only question was whether the red scratches were

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

sustained later. Dr Stark and Dr Hoskins both considered that the appearance of the red scratches and orange abrasions suggested that the former occurred after the latter. Neither expressed an opinion in absolute terms, but that did not mean that the jury were not entitled to consider their evidence and the tendered photographs and make a finding on the balance of probabilities. They could be assisted in doing so by what the experts said about the significance of the colour of the blood in the marks in assessing the stage of healing and consequently the age of the wounds. It was open to them, after considering all the features of the injuries, to reach the conclusion that they had been inflicted separately, by different means and with the red scratches occasioned later. That conclusion being open, the direction was properly given.

The standard of proof in relation to the blood stain and the disposing of the body

[33] The two remaining grounds concerning the judge's summing up turned on whether his Honour should have directed the jury of a need for satisfaction beyond reasonable doubt in respect of, firstly, the appellant's having left Mrs Baden-Clay's body at Kholo Creek and secondly, the deposit of her blood in the Captiva at the time of her disappearance. At trial, defence counsel had contended that the jury would have to be satisfied beyond reasonable doubt that the appellant had disposed of his wife's body at Kholo Creek before that circumstance could be relied on to prove that he had caused her death; it was an indispensable link, he said, to finding that the appellant had killed her. The trial judge rejected that submission and directed the jury that disposal of the body at Kholo Creek would be relevant as tending to prove that the appellant had killed his wife, although not that he had murdered her. No similar submission was made at trial in relation to the bloodstain in the Captiva, but the failure to direct in respect of the matter was said to have occasioned a miscarriage of justice.

[34] The appellant's contention in respect of these grounds was that if the jury were not satisfied that he put his wife's body in the creek, they could not be satisfied beyond reasonable doubt that he caused her death; so that that matter was a necessary link in reasoning to guilt and had to be proved beyond reasonable doubt.[4] The argument in respect of the blood stain was that finding that it had been left in the Captiva on 19 or 20 April, and not before that, was an indispensable intermediate fact in reasoning to the conclusion that the appellant had placed the body in the creek, so that the jury needed to be satisfied beyond reasonable doubt of that fact before they could find that he had caused his wife's death.

Conclusions

[35] Neither prospective finding – that the blood was left in the vehicle on the night in question or that the appellant placed the body of his wife at Kholo Creek – was an indispensable fact to reaching a conclusion that he had killed her. Both were capable of assisting to prove guilt, but neither was essential. The jury could properly have found that Mrs Baden-Clay had been killed by her husband on the basis of finding: that she had been with him on the night of 19 April; that she had died about the time of her overnight disappearance; that the leaves in her hair suggested that her death had occurred at their home; that there had been difficulties in the marriage; that there had been a physical altercation between them, as evidenced by the fingernail scratch marks; and that the appellant had lied about those marks in a way suggestive of a guilty mind. It was not then necessary for them to reach any particular view about how the body arrived at the creek, although, of course, to find that it had been taken

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4 *Shepherd v The Queen* (1991) 170 CLR 573 at 585.

there by the appellant in the Captiva would certainly go to reinforce the conclusion of guilt.

[36] A component of the appellant's submission was that the jury should have been told that before the blood stain could feature in their considerations they had to be satisfied that it had been left in the car on 19 or 20 April. It was not necessary for the trial judge to articulate that proposition: nothing could have been more obvious. It was certainly open to the jury to accept that the bloodstain in the Captiva had been left there on 19 or 20 April. The Baden-Clays had owned the vehicle for less than two months. There was no other explanation of how the blood came to be there. On the evidence, Mrs Baden-Clay did not sit in the back row of seats, and neither the two older daughters nor the appellant himself could recall any injury to her which might explain the deposit of blood.

[37] There was no error in the trial judge's direction so far as the standard of proof concerning the conveyance of Ms Baden-Clay's body to Kholo Creek was concerned, and no omission in the directions relating to the bloodstain such as to give rise to any miscarriage of justice.

Unreasonable verdict

[38] The appellant accepted that it was open to the jury to be satisfied beyond reasonable doubt that he had unlawfully killed his wife, but contended that they could not properly be satisfied of the necessary intent for murder. There were no injuries on the body of a kind to indicate an intent to kill or do grievous bodily harm. Nor was there any sign of blood or evidence of a clean-up in the house to suggest violence. There was no evidence at all that there had ever been any violence in the relationship between the couple. Nothing had changed in the appellant's marriage to make him take the step of intentionally killing his wife. His business was under some financial pressure, but that pressure was no different in April from earlier in the year, and his creditors were not pressing for payment. There was no evidence of the circumstances in which the fingernail scratches were inflicted on the appellant; they were conceivably caused by his wife in an angry attack on him. If the appellant had lied about their cause, he might have done so in panic, knowing that he had caused the death, without necessarily having done so intentionally.

[39] A reasonably open hypothesis was that the appellant's wife had attacked him, scratching his face. In endeavouring to make her stop he had killed her without intending to do so, with his conduct thereafter being attributable to panic. An argument by the respondent that the disposal of the body was capable of giving rise to an inference that it was done to conceal evidence of an intentional killing amounted to nothing more than speculation; there was no evidence that the deceased woman had sustained any injuries which could have indicated how she had died.

[40] The respondent contended that the jury could infer an intent to kill from a number of matters. The first was the evidence of pressure on the appellant, financial and emotional, which could have led him to behave with uncharacteristic violence in the context of a physical altercation. There was a likelihood that the following day Ms McHugh would confront Mrs Baden-Clay. The marks on the appellant's face and body, it was submitted, supported the thesis of a violent confrontation. There was consciousness of guilt evidence which the jury could have accepted as demonstrating the appellant's intent to kill or do grievous bodily harm: the appellant's lies about the

cause of the abrasions on his face and his attempt to disguise them. Defence counsel at the trial had made an implicit concession that the evidence was available for that purpose by submitting that it should be left for the jury's consideration as relevant to both murder and manslaughter. Indeed, the respondent submitted, the appellant's disposal of his wife's body could similarly be relied on as going to prove intent, and the trial judge had been in error in failing to direct the jury to that effect.

Conclusions

[41] It is unlikely that the jury would have had much hesitation in accepting that there had been an altercation at the house, most likely outside in the patio area given the leaf material found in Mrs Baden-Clay's hair. They could properly conclude that she had suffered a lethal injury there of a type which occasioned very little bleeding, having regard to the forensic evidence. And they could readily conclude that the appellant had taken his wife's body to Kholo Creek and left it there. The critical question was whether it was also open to conclude that when the appellant caused his wife's death he intended to do so, or at least to cause her grievous bodily harm.

[42] It is important to note that the Crown did not at trial contend that the killing of Mrs Baden-Clay was in any way premeditated or that the appellant might have been motivated by some benefit he stood to gain from his wife's death.[5] The respondent's written submissions here spoke of the identified financial and emotional pressures as going to

> "motive, as that term is understood to signify an explanation for uncharacteristic conduct";

contending that, having regard to them, the jury could find that the appellant

> "acted uncharacteristically, but nevertheless deliberately and with intent".

But that does not seem an apposite use of the word "motive". To explain why somebody might be in a volatile emotional state is not to provide a motive for his conduct; to say that he might act out of character in using violence does nothing to establish a reason or purpose for his doing so. It was not, of course, incumbent on the Crown to establish a motive, but to do so might have assisted in proving an intent to kill or do grievous bodily harm. The evidence of financial stress and the extra-marital affair suggested a context of strain between the couple which might well have culminated in a confrontation; but it did not provide a motive or point to murder rather than manslaughter.

[43] There is nothing about the facial scratches to indicate the circumstances in which they were inflicted; whether they occurred in the course of a heated and perhaps physical argument or in resisting a murderous attack. Although it was suggested that what had been characterised as a strap mark near the appellant's left armpit might be consistent with Mrs Baden-Clay's having pulled at her husband's clothing in a struggle, the Crown at trial did not seek to rely on any of the other marks on his body as having been occasioned in any physical conflict with his wife. The prosecutor's address specifically referred to the facial scratching as the only injury inflicted by her. That is not surprising, because the appellant's explanation for the marks on his neck and chest, that he had been bitten by something, and scratched, was supported by the evidence of other witnesses, and was acknowledged as entirely possible by the medical experts. Having

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[5] Although there was evidence of an insurance policy on Mrs Baden-Clay's life, the Crown at trial disavowed any suggestion that the appellant had killed her in order to benefit from it.

effectively disavowed reliance on the evidence of other marks on the torso, the Crown cannot properly point to it now; but in any event it would not seem to advance the notion of a physical altercation much further than the facial scratches.

[44] Putting aside the idea that the pressures on the appellant provided a motive in any conventional sense of the word, the respondent's argument on intent rested on the consciousness of guilt evidence. Notwithstanding the respondent's submission to that effect, it does not appear that defence counsel at trial did concede that the facial scratches were properly left as relevant to murder. When the matter was first broached, his primary position was that the jury ought to be told that if they concluded that a lie was told, it could not establish more than a consciousness of guilt of killing. In our view, however, the directions given in that regard were correct. Indeed, we would accept the respondent's submission that the evidence of the disposal of the body could, as a circumstance in a larger case, properly be left to the jury as relevant to both manslaughter and murder. The fact that, like the scratches on the face, it was equivocal as between the two crimes did not mean that it was not properly admitted and left for the jury's consideration as to both:

> "As with other forms of circumstantial evidence of guilt, a jury may accept evidence of lies and other post-offence conduct and act upon it without being satisfied beyond reasonable doubt that the evidence establishes guilt (that is to say, without being satisfied that there is no other explanation of the lies and post-offence conduct which is reasonably open on the facts)."[6]

However, to say that equivocal circumstantial evidence is admissible for consideration in the context of the case as a whole is not to say that it can support a finding of intent for which there is no other evidentiary support.

[45] The respondent pointed out that this Court should have regard to the fact that in determining the question of intent, the jury had the advantage of seeing the appellant testify.[7] That is entirely correct. The jury could properly have rejected every word the appellant said as a lie. But that would, with the exception of his explanation of the scratches on his face, have done nothing to advance the Crown case. Conclusions that he had lied in that regard and that he had taken steps to dispose of his wife's body were properly to be taken into account, as evidence of a consciousness of guilt, in the context of all the evidence in the case.[8] But the lies, or the lies taken in combination with the disposal of the body, would not enable the jury to draw an inference of intent to kill or do grievous bodily harm if there were, after consideration of all the evidence, equally open a possibility that all of that conduct was engaged in through a consciousness of a lesser offence; in this case, manslaughter.

[46] In some cases, post-offence conduct may take its complexion from other circumstances: evidence of motive, forensic evidence suggesting a bloody or protracted killing, statements of intent by the accused or, in the case of concealment of a body, that there are injuries to the victim which would point to a deliberate killing. But in the present case there was no evidence of motive in the sense of a reason to kill, and the appellant had never intimated any intention of harming his wife. There were no signs of blood

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6 *R v Ciantar* (2006) 16 VR 26 at 40.

7 *M v The Queen* (1994) 181 CLR 487 at 494.

8 *Ciantar* at 40; *R v DAN* [2007] QCA 66 at [133] – [134]; *R v Turner* [2010] QCA 156 at [28]; *R v Lennox* [2007] QCA 383 at [52].

or disarrangement at the house and no convincing evidence of noise; suggesting that there was no repeated infliction of injury and that whatever occurred was quick. Post-mortem examination did not identify any injury to the body which the appellant might have been motivated to conceal. That may well have been due to decomposition; but it can only be a matter of (impermissible) conjecture as to whether that was the case.

[47] This case falls in the category described by the Victorian Court of Appeal in *Ciantar*:

> "… there may be some circumstances in which post-offence conduct is equally consistent with two or more possible offences or is otherwise intractably neutral. Where that is so, it may not be open, even on the totality of the evidence, to draw an inference that the accused had a consciousness of guilt of some particular conduct at the time that he told lies or performed some act which the prosecution relies upon as constituting post-offence conduct"[9].

[48] Thus, while findings that the appellant lied about the cause of his facial injuries and had endeavoured to conceal his wife's body should not be separated out from the other evidence in considering their effect, the difficulty is that, viewed in that way, the post-offence conduct evidence nonetheless remained neutral on the issue of intent. To put it another way, there remained in this case a reasonable hypothesis consistent with innocence of murder: that there was a physical confrontation between the appellant and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm; and, in a state of panic and knowing that he had unlawfully killed her, he took her body to Kholo Creek in the hope that it would be washed away, while lying about the causes of the marks on his face which suggested conflict. Smothering, the Crown's thesis, was a reasonable possibility, but while there was also another reasonable possibility available on the evidence, the jury could not properly have been satisfied beyond reasonable doubt that the element of intent to kill or do grievous bodily harm had been proved.

Orders

[49] In consequence, the appeal against conviction must be allowed, the verdict of guilty of murder set aside and a verdict of manslaughter substituted. Counsel for the respondent should file and serve submissions as to sentence by 15 January 2016, with the submissions for the appellant to be filed and served by 22 January 2016.

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9 At 39.