

LOUISE JULIE MACPHEE

Applicant

and

THE QUEEN

Respondent

APPLICANT’S SUMMARY OF ARGUMENT

Part 1: The special leave questions

- 1. The substantive issue in the trial was whether the applicant caused the injuries which resulted in the death of her infant child. Does the manner in which this issue was resolved by the jury (and two Justices of Appeal) appear to be so contrary to a proper application of principle as to engage, in a significant way, the interests of justice in this particular case? 20
- 2. The concept of accident was not raised in the evidence, nor by the manner in which the trial was conducted. In such circumstances, can the Crown nevertheless lead evidence on the basis that it is necessary to rebut the ‘defence of accident’?

Part II: The facts

- 3. On 2 January 2002 the applicant gave birth to triplets Adam, Dylan and Hamish. She was said to be absolutely thrilled and excited with the prospect of having triplets. The applicant also has a daughter, R (born 1 July 1994).¹ These children were all living with her in a house at Daisy Hill, Brisbane after she separated from their father in October 2001.
- 4. The applicant was “very organised, capable” (T104 L17), “neat and tidy” (T76 L48; T97 L8, 44) and “handled the burden of the four children brilliantly” (T136 L137 L54). She was regarded a “fantastic”, (T110 L28) “wonderful”, (T130 L48) and “excellent” mother (T134 L25). The triplets appeared to be “very happy, contented babies” (T103 L18, T129 L46). There was no suggestion of frustration or aggression (T112 L50) or hint of depression (T139 L37) about the applicant. In fact, she was seen to be “glowing” (T139 L35). She enjoyed considerable support from family and friends (T106 L5, T110 L16, T128 L10). 40

¹ The pseudonym “R” was used by the Court of Appeal.

5. Shortly before 8 a.m. on 15 February 2002, the applicant noticed that Adam was not breathing. She called for assistance from neighbours. Attempts at resuscitation failed and he was pronounced dead. The applicant was absolutely distraught and “distressed beyond words” (T106 L12). The only people in the home that morning in the hours before Adam’s death were the applicant, the triplets and R, who slept in another room.

Adam’s injuries and the cause of his death

6. A post mortem examination performed by forensic pathologist Dr Rosemary Ashby on 16 February 2002 revealed that death was caused by brain damage following two obvious fractures (T200 L43; T195 L51; T185-6). Dr Ashby’s opinion varied but it seems that the fractures were consistent with either one or two blows (T205 L40; T206 L20). The survival time following the injury was “very short” and “almost certainly within the hour” (T208 L50). Some milk in the stomach suggested ingestion one to two hours before death (T199 L1).
7. Dr Ashby described the brain injury as “a torsional, twisting shearing movement of the brain and the membranes within the skull”. She considered it “unlikely” that dropping the child from shoulder height would be sufficient to cause such an injury. Williams JA at [8] recorded that specialist paediatric radiologist Dr Lamont, identified through post-mortem x-rays that:

“...there has been a very substantial amount of force applied to the head...much more substantial than normal ...a small amount of force, say, for example, somebody falling off a table of about the height of these tables here could easily cause a fracture of the skull, but those fractures tend to be linear, just a thin line in the skull. Here, we have a complicated fracture...this is force way beyond which you would expect to see in normal domestic life, even from an accidental fall say off a table ... very much more than I would expect of a normal handling of a baby” (T167, L20-39)

8. Dr Lamont also identified fractures to the sixth (right) and seventh (left) ribs which were “subtle and difficult to see” and “approximately a week of age”. He said that the rib fractures were likely to be caused at the same time from “a sudden impact on that rib at that point”. Consequently, on 7 and 13 March 2002, x-rays of the other triplets were taken and examined by Dr Lamont. Injuries were found on both infants.

Evidence of other injuries

Hamish’s injuries

9. Hamish’s right arm “showed a double line along the shaft of the humerus” which meant that the periosteum had been “pulled away or even pushed away from the shaft.” The injury was said to be, as at 13 March 2002, about “three to four weeks old” (T173 L10).
10. Also, “one of the vertebral bodies had been flattened slightly and squared off, indicating that there is a crush fracture of the third vertebra in the lumbar region”. “A most likely

cause would be picking the baby up and bobbing it down on its bottom so that the spine is crushed along its length.”(T173 L50)

Dylan’s injuries

11. An x-ray taken on 7 March 2002 revealed “quite a mature” fracture of Dylan’s seventh rib. It had been there “for some weeks” and was “likely to be [a result of] a squeeze of the ribs” (T176 L24). An x-ray taken of his spine on 13 March showed “a similar flattened vertebra to his brother Hamish with a fracture of the fourth lumbar vertebra”. This injury could not be dated (T176 L45). He also had “a very similar periosteal reaction as the one on Hamish along the left arm – along the left humerus” which was also about three to four weeks of age (T176 L53-55). This and the similar injury to Hamish could have been the result of “something like a Chinese burn”.² The x-rays of Dylan’s legs also showed shin fractures, which were 2 to 3 weeks old, on both sides (T178 L21). Dr Lamont was of the opinion that “you need much more substantial force than simply picking up a baby by his feet in that way” to cause that sort of injury. Dylan’s injuries were likely to have been caused within a short period of time to each other (T178 L7-35).
12. The injuries sustained by both infants would have caused “substantial” pain at the time (T178 L50). However, they had not been previously noticed by any of the several people who had close and frequent involvement with them. These people were involved in changing nappies and bathing. Marks were never noticed (T105 L36, T112 L18, T127 L10, T130 L40) and there was no indication that they were sore (T105 L55; T107 L8).

Issue at trial

13. R and the applicant were the only persons present in the short time before Adam’s death. The applicant’s counsel at trial contended that R was responsible for the injuries sustained by Adam.
14. R was then 7½ years old and weighed 42.8 kgs which is “considerably in excess of the average weight of a child of her age”. She was 1.325m tall which placed her in the top 25% of children her age. She was about the size of an average 12 yr old at the time. She was “always wanting to hold the boys” (T104 L57); treated them “like dolls” and didn’t quite seem to understand how to look after them (T105, L5). On a prior occasion she jabbed Hamish in the stomach area in a manner that was described as being “really nasty” (T128 L48). This caused him to scream and become really upset (T129 L15). An adult who chastened her said R “sort of looked at me. She didn’t really say anything” (T126). Another said that R did not seem at all affected by the death (T113 L4).
15. R was interviewed by police on 16 February. She denied picking up Adam the day before when her mother went into the shower. She also said that she had seen Adam fall

² ‘Chinese burn’ n. informal “a burning sensation inflicted on a person by placing both hands on their arm and then twisting it”: *Concise Oxford* 10th Edition. These assaults are common amongst school children (T183 L45).

“off his rocker on 3 occasions” (Ex 12A P15 L46)³, “not that long before he died...the day before”. She referred to the fact that the triplets “cried all night” and as a result she “couldn’t sleep” (Ex 12A; P7 L22). She said that Adam was making a “funny noise” when her mother was in the shower, after she had “fed him” gave him “a cuddle” and put him down (Ex 12A; P9 L22).

16. The following day, the applicant was visited by her friend, Jody Ferran, who is a specialist neurosurgical and mental health nurse. Ms. Ferran was approached by R who asked her why Adam had died. R went on to ask if she (R) had made Adam die. After being reassured by Ms. Ferran that this was not the case, she asked "what if I dropped him?" Upon further questioning from Ms. Ferran, R gave an account in which Adam had been dropped on the carpeted floor between the bouncers which were lined up at the front door. She declined to answer a question as to when she had done that, but volunteered that she had heard Adam "breathing funny" at the time when her mother was in the shower. Although prompted for further information, R "just became very restless and went inside" (T143, L50).
17. The applicant did not give or call evidence at her trial. In statements to police she completely denied any involvement in causing any injury to any of her children (T81, Exhibit 14). Her several accounts were largely consistent. Put briefly, she explained to police that she woke about “6 a.m. after hearing one of the boys” and found Adam to be awake and the others sleeping; changed his nappy and clothes and placed him on a bouncer in the lounge room; woke the other two and did the same with them; fed each of them, Adam manually; placed Adam back in the bouncer; had some toast for her own breakfast; saw that they all seemed asleep; asked R, who she had seen to be about earlier, to make her bed and went to have a shower. Then about 8 a.m. when she went to collect Adam to take in the car she noticed that something was wrong, did not feel a pulse and went and got help from her neighbours.

Part III: The applicant’s argument

Ground 1 - Misapplication of principle/Interests of Justice

18. If there is any reasonable possibility that R caused the injuries which killed Adam then the applicant is entitled to an acquittal. In the Court of Appeal, Holmes J at [159] found that such a possibility existed. One way of demonstrating that such a possibility exists is notionally to assume that R was charged with the killing Adam.
19. A Crown case against R would include evidence of:
- (a) Motive – competition for attention, sleep deprivation (Ex 12A P7 L20; COAT 42, L33⁴)

³ These references are to pages of the transcript of the police interview with R on 16.02.02 (Exhibit 12A), tendered at T71 L50.

⁴ “COAT” – is a reference to the Court of Appeal transcript of argument.

- (b) Opportunity – whilst the applicant was in the shower
- (c) A relationship with the triplets marked by inappropriate behaviour; the same evidence revealing a propensity to behave violently to a member of this "one entity": jabbing Hamish in the stomach (T126 L35)
- (d) Lies which might have been used to prove guilt (denying the jab to Hamish (Ex 15A P133)⁵ or which adversely reflected on her credibility, and therefore on her self serving denial (a story about Adam being dropped (Ex 12A P20 L10; cf. T111 L10))
- (e) A curious inquiry – "what if I dropped him?" – which, in conjunction with other evidence, could be construed as an admission (cf. *Woon v. R* (1964) 109 CLR 529. Or, as Holmes J put it [155], "a consciousness of guilt tentatively being explored")
- (f) A preparedness to venture methods by which Adam might have been injured (Ex 12A P15 L45, P21 L20 & Ex 13A P15 L25)⁶ which were implausible, but might be thought to be attempts to deflect suspicion.
20. By reference to any test applied by any Court or prosecuting authority throughout the common law world, there was a *prima facie* case against R. There is nothing about R's age which precludes arrival at this position. The evidence revealed that she:-
- (a) Weighed 42.8kg
- (b) Was 132.5 cm or 5' tall; and
- (c) Could and had handled the triplets in the absence of an adult (Ex 14 P5).⁷
21. Furthermore, the fact that R was of school age offered some support for the proposition that it was she who had inflicted the "Chinese burn" injuries (T183 L45).
22. There was nothing in the evidence to detract from the proposition that R caused the injuries sustained by each child. Making full allowance for her age and leaving aside notions of *doli incapax*, had she been charged, R would have had a case to answer. Of course the applicant does not have to assume such an onus, nor go that far. The concept of a *prima facie* case against R subsumes the concept of a reasonable possibility, which is all that the applicant had to raise. The evidence referred to in paras. 19(a) – (f) above, does at least that.
23. In contrast, the state of the evidence relevant to these issues insofar as it might be thought to implicate the applicant is:
- (a) Motive - "It's one of the worst motive cases I've ever seen ..." per Holmes JA (COAT 43 L38), see also paragraphs 3 and 4, above
- (b) Opportunity - equal with R

⁵ These references are to pages of the transcript of the video evidence of R on 03.06.04 (Exhibit 15A), tendered at T98 L25.

⁶ These references are to pages of the transcript of the police interview with R on 17.02.02 (Exhibit 13A), tendered at T79 L5.

⁷ These references are to pages of the statement of the applicant dated 17.02.02 (Exhibit 14), tendered at T82 L5.

- (c) Relationship - see paragraphs 3 and 4, above
- (d) Lies - none

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There are no other statements nor other behaviour attributable to the applicant indicating consciousness of guilt – the evidence disclosed nothing other than objectively appropriate behaviour. And, there was no attempt by the applicant to implicate R or deflect suspicion towards her.

- 24. However, the manner in which the issue was resolved by the jury and two Justices of Appeal suggests that there has been misapplication of the relevant principles, the onus of proof has been somehow wrongly attributed, or the burden of proof wrongly weighed.⁸
- 25. The case was one in which two alternatives presented on the evidence, each carrying a certain horror. It may be that, notwithstanding the instructions the jury received, the possibility that an acquittal might be construed as an indictment of R was too great and too awful for this particular jury to contemplate. Had the test in *M v The Queen* (1994) 181 CLR 487 properly been applied, then the Court of Appeal should have entertained and expressed a reasonable doubt, and entered an acquittal.
- 26. There has been a failure to acknowledge and give effect to all of the evidence in the trial. A proper and dispassionate appraisal of the evidence necessarily leads to the recognition that there was at least one reasonable interpretation of the evidence which ought to have resulted in the applicant's acquittal.

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Ground 2 - Admissibility of evidence of the other injuries to Dylan and Hamish

- 27. Whoever caused the injuries to Dylan and Hamish committed acts which may have been criminal offences. Evidence of their injuries (see paras 9 -12 above) therefore disclosed the uncharged conduct. They were offences which occasion a high degree of revulsion. The applicant objected to the admission of this evidence.
- 28. It is instructive to examine the manner in which the reception and use of this evidence was justified and explained.
- 29. At trial the crown prosecutor argued that he was:

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"entitled to lead the injuries to negative accident which will bear upon the likelihood of the injury to Adam having been accidentally caused, whether it be by R or by any other person. It is, in my respectful submission, a matter of ordinary human consideration that the jury may well wonder whether this could have been caused accidentally. The number of injuries, the fact that they are found upon - or the two siblings which we are dealing with, leads to an objective improbability, in my submission, such as to make the evidence probative and to allow for the administration on the *Pfennig* and indeed on the *O'Keefe* tests ..." (T32, L40-50).

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⁸ *R v Macphee* [2005] QCA 175 at [84] and [96].

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30. He also said that:

"This evidence, if admitted to rebut accident, as I had earlier submitted will go to the question of relationship between the accused and her children ..." (T36 L41-44; cf. T28, 10-20⁹).

31. Her Honour the learned trial judge ruled that:

"... the evidence of injuries Dylan and Hamish at about or shortly after the death of Adam from a fractured skull is admissible to negative any conclusion that in some unknown fashion he met his death by accident.

It is highly unlikely that all those injuries to the other babies could have been inflicted by R. The evidence reasonably supports the inference that the accused is guilty of the unlawful killing of Adam and is, as a whole, reasonably capable of excluding all innocent hypothesis" (T89 L30-40).

32. Her Honour's opinion that it was – "highly unlikely" – was just that – an opinion of hers. There was no evidence which spoke directly to the likelihood or otherwise of R inflicting the injuries on Hamish and Dylan (cf. 19 to 22 above). Her Honour then told the jury, on a number of occasions, that they could use this evidence to conclude that death was not an accident (T315 L40; T318 L28; T322 L30; T324 L45). They were also told that they had to be "satisfied" (without reference to any standard) that the applicant was responsible for the injuries to Dylan and Hamish before they could use that evidence (T315 L12; T322 L45; T324 L35). They were told that they could use it "to assist in deciding" if the applicant was responsible for Adam's injuries (T322, L40). Beyond that the jury received little guidance about this evidence.

33. It is worth referring to the Crown's position in the Court of Appeal if only to lay to rest any notion that the presence of this evidence could be justified on the basis of "relationship", and therefore, as her Honour noted (T89 L25), have only to meet some less stringent test for admissibility.

34. The following exchanges made this clear:

Fryberg J: "... Are you going to be contending that it was admissible for any other purpose than to rebut accident?"

Mr Copley: Well, there was a ---

Fryberg J: Just answer yes or no.

Mr Copley: No, no.

Williams JA: That's including identity ---

Mr Copley: Sorry, I should say it was also relevant to identity but, first of all, it was admissible for the purposes of accident. The suggestion was faintly raised that it was relevant to the relationship between the mother and the babies but that never found any expression in the summing up so ---

⁹ The trial judge noted the non-application of s.132C of *Evidence Act* (Qld).

Fryberg J: And you're not contending for that now.
 Mr Copley: It's pointless to do so. The jury didn't get any direction along those lines ..."
 (COAT26 L28-48).

And,

Fryberg J: "So it is propensity then?
 Mr Copley: Well, it's admitted to rebut accident. That was what - that was what - why the
 - and for something called relationship evidence which didn't go anywhere."
 (COAT48 L23-28).

35. The suggestion that it was "relevant to identify..." was also explored:

Holmes J: "But how would they ever conclude that she (the applicant) caused the other
 injuries?
 Mr Copley: How? By reference to the amount of force that was required to do it."
 (COAT31 L33).

36. The evidence as to the amount of force required to cause the injuries to Hamish and
 Dylan was limited. As regards the rib fracture and the injuries to the shin bone, the
 evidence only established that the degree of force must have been greater than that
 expected during normal handling of a child (T170 L33; T178 L5). Dr Lamont opined
 that the force need to cause the "crush fracture" needed to be "very substantial", but that
 the "most likely cause" (see para 10 above, T173 L50) required no more than an ability
 to lift the child and "bob it down on its bottom".

Argument – “evidence of other injuries”

37. This body of evidence was not admissible on any basis. The concept of accident,
 whether as it is understood in s.23 of the *Criminal Code* (Qld) or in any other form, was
 never relevant. If R could have been responsible for the death, it did not matter whether
 she did so accidentally. Neither the medical evidence, nor the conduct of the trial nor
 any aspect of human experience¹⁰ could have allowed the issue of accident to arise.

38. The Crown's effort to introduce this evidence was a clear breach of the principle that it
 may not:

"credit the accused with fancy defences in order to rebut them at the outset with some damning
 piece of prejudice" - *Thompson v. The King* (1918) AC 221 at 232.

39. The Queensland Court of Appeal in this case, as it did in *R v. Smith* [1997] QCA 350,
 relied upon the High Court's decision in *Griffiths v. The Queen* (1994) 76 A Crim R 164
 as authority for the proposition that such evidence is admissible.

¹⁰ The Crown made it clear at the outset that Adam could not have injured himself (T36 L33).

40. *Griffiths* is clearly authority for the proposition that accident is raised when an accused says "... it was an accident". However, the Court was concerned only to determine whether the jury in that case should have received "instructions" on the question of accident. Brennan, Dawson and Gaudron JJ observed (at p.167):

"A plea of not guilty puts all elements of the offence charged in issue and a trial judge is wrong to withdraw any element in issue from the jury, no matter how cogent a Crown case may be. That is not to say that a particular direction must be given as to each element of an offence in a case where no contest as to a particular element is raised in the conduct of the trial and where the evidence does not itself raise an issue as to the existence of that element. It is one thing not to give a direction on an issue; it is another to withdraw an issue from the jury's consideration. In this case, the trial judge erroneously withdrew from the jury critical issues, the burden of proof of which lay on the Crown." (Emphasis added)

It is clear enough that the Court in this passage was not asserting that accident must be left for the jury, and therefore disproved by the Crown, in every case. In particular, *Griffiths* is not authority for the proposition that the jury were required, in the applicant's case, to return a verdict of not guilty unless they could negative the proposition that the injuries were accidentally caused (cf. Williams JA at [72]. This jury need never have considered the concept. The view expressed by Williams JA at [72] and implicitly approved of by Fryberg J [93] and Holmes J [153] is at odds with the approach taken by the Queensland Court of Appeal in *Skerritt* (2001) 119 A Crim R 510 at 512¹¹, 516-7.

41. Nothing in these cases, nor in any decided since *Thompson* affects the reasoning in the quoted passage (paragraph 38). There remains a prohibition against the Crown manufacturing issues, or artificially anticipating defences that are not going to be raised, as a device which enables the introduction of otherwise inadmissible evidence. Nor was the evidence relevant as any class of "propensity" evidence. R had been seen roughly handling and even attacking the children. It could never be said of the injuries to them that there was "no reasonable view of the evidence consistent with the innocence of the accused" - *Pfennig v. The Queen* (1995) 182 CLR 461, at 483-4.
42. It is for this reason that a case such as *R. v. G.J. Smith* (1915) 11 Cr App Rep 229, much relied upon by the Crown in the Court of Appeal, is of no assistance. Any analogy with a case of "brides in the bath" will be incomplete unless there are two husbands.
43. The protection identified in *Pfennig* cannot be circumvented by collapsing the propensity evidence into the category of a "circumstance" in a circumstantial case. It was still evidence of (someone's) propensity to injure small children and carried a high degree of extraneous prejudice by reason of the emotions it was likely to excite.

¹¹ *Skerritt* (2001) 119 A Crim R 510 at 512 per McPherson JA: "The onus of excluding it [s.23], if raised at the trial, rests on the Crown and it must be discharged to the satisfaction of the jury, which of course means to their satisfaction beyond reasonable doubt. But that is so only if it is raised on the evidence, which as is shown by the authorities referred to by Williams JA [25-31] in his reasons, means "fairly raised" by the evidence; and usually also, if the accused is legally represented, only if it is relied on by counsel in the course of the trial".

44. The applicant's trial was fundamentally tainted at the point when this evidence was admitted. The summing up did not and, in reality could not, retrieve the situation. The jury were provided, without legal justification, a body of evidence which could not have assisted that which they were required to do. It was, however, capable of creating an insurmountable barrier of prejudice which prevented rational engagement on the triable issues. As a result, a miscarriage of justice has occurred.

Part IV: Reasons why special leave should be granted.

45. The interests of justice in this case required that the applicant could not have been convicted of killing her child.
46. The Crown's contention that evidence may be led to rebut a defence which is not open raises a question which has general importance to the administration of the criminal law.

Part V: Costs

47. The applicant seeks an order for costs.

Part VI: Table of the authorities, legislation and other material

48. *Criminal Code* (Qld), all.
49. *Woon v. R* (1964) 109 CLR 529.
50. *Makin v. Attorney-General (New South Wales)* [1894] AC 57.
51. *Thompson v. The King* (1918) AC 221.
52. *Noor Mohamed v. The King* [1949] AC 182.
53. *Griffiths v. The Queen* (1994) 76 A Crim R 164.
54. *Pfennig v. The Queen* (1994-1995) 182 CLR 461.
55. *Skerritt* (2001) 119 A Crim R 510.
56. *R v. Smith* [1997] QCA 350.
57. *R v. Smith* (1915) 11 Cr App Rep 229.
58. *M v. The Queen* (1994) 181 CLR 487.

Part VII:

59. The applicant seeks to supplement this summary with oral argument.

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