

***R v Thomas* [2020] QCA 236 (30 October 2020) – Queensland Court of Appeal**

‘Appeal against conviction’ – ‘Application to adduce further evidence’ – ‘Evidence’ – ‘Intent’ – ‘Murder’ – ‘Provocation’ – ‘Strangulation’

Charges: Murder x 1.

Proceedings: Appeal against conviction; application to adduce further evidence.

Facts: The appellant man was found guilty of the murder of his female partner following a trial confined to the issue of intent. On 24 October 2015, the victim was found with injuries to her neck consistent with strangulation and rib fractures consistent with resuscitation or blunt trauma. Evidence at trial included: evidence from several of the victim’s former partners and her aunt; records of text messages/phone calls between the appellant and the victim commencing on 9 May 2015 (showing a volatile relationship); the appellant arranging to purchase a flight ticket overseas after the victim’s death; the appellant’s confession he killed the victim to a friend (that he had been humiliated and had “grabbed her and...squeezed”, accompanied demonstrating use of two hands); and evidence from a forensic pathologist of the victim’s injuries.

Grounds of appeal:

1. The trial judge erred in law by admitting exhibit 41, which contained six inadmissible photographs, causing a miscarriage of justice.
2. The trial judge failed to direct the jury as to how exhibit 41 could be used, thus creating the danger of impermissible reasoning by the jury.
3. The trial judge failed to direct in relation to motive.
4. The verdict was unreasonable and cannot be supported by the evidence.
5. The trial judge failed to leave the partial defence of provocation.
6. The trial judge’s failure to direct the jury in relation to opinion evidence may have caused a miscarriage of justice.
7. A collation of faults caused the trial to miscarry.

Held: The appeal was dismissed.

Grounds 1 and 2: Exhibit 41 (photographs of bruising suffered by the victim in November 2014, identified by a former partner of the victim) was tendered by the prosecutor at the request of the appellant's trial counsel for a forensic purpose. The fact that the appellant's counsel abandoned the forensic purpose he had in mind for exhibit 41 did not mean that the evidence became prejudicial ([32]-[38]).

Ground 3: The trial judge did not fail to give a direction concerning motive which was requested by the appellant's counsel, stating in summing up: "Any positive evidence that the defendant lacked a motive to cause [Jane's] death or to do her grievous bodily harm is also relevant. It would be another circumstance to be taken into account in his favour in a case based on circumstantial evidence" ([39]-[42]).

Ground 5: The trial judge did not err in failing to leave open to the jury the partial defence of provocation (where the act was caused "in the heat of passion caused by sudden provocation...before there is time for the person's passion to cool"). First, the appellant's trial counsel expressly disavowed reliance on provocation, making it clear that the only live issue was intention. Second, there was no evidence of acts of provocation which might have led to loss of self-control. The evidence did not show any particular link between the alleged humiliation and strangulation. Third, there was no evidence to suggest provocation would have caused a loss of control in a reasonable person ([43]-[48]).

Ground 6: There was no merit in the appellant's contention that evidence from the victim's aunt that "whether she was an alcoholic or not...she didn't deserve...what she got" may have introduced factors of prejudice or emotion to the jury, or influenced their decision, and the trial judge should have directed the jury to disregard those claims. The jury would not have been concerned that the victim's aunt made a personal comment, and no direction was sought by the appellant's counsel ([49]-[53]).

Ground 7: None of the failures of defence counsel to object to the prosecution's case demonstrated that defence counsel's conduct denied the appellant a fair trial ([54]-[62]).

Ground 4: The principles relevant to the role of the appellate court, and pre-eminence of the jury were recently re-stated in *Pell v The Queen* and *R v Baden-Clay*. There was ample evidence (from the pathologist and the appellant's friend) to support the jury's conclusion that when the appellant squeezed the victim's neck, he did so with the intent to kill or cause grievous bodily harm. He applied pressure to her neck, and with two hands. In particular, "[t]he level of force necessary, the length of time it was applied for, the fact that the fingers moved around and the fractures to the neck all provide a foundation to infer the requisite intent". It was open to the jury to be satisfied beyond reasonable doubt of the defendant's guilt of murder ([63]-[71]).

The appellant's application to adduce fresh evidence was refused. The evidence requested to be adduced would have been in the hands of the defence counsel at the time of the trial, or it was irrelevant ([72]-[76]).