

SUPREME COURT OF QUEENSLAND

CITATION: *R v Clark* [2009] QCA 2

PARTIES: **R**
v
CLARK, Steven John
(appellant/applicant)

FILE NO/S: CA No 374 of 2007
SC No 891 of 2007

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction
Application for Extension (Sentence)

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 February 2009

DELIVERED AT: Brisbane

HEARING DATE: 17 October 2008

JUDGES: McMurdo P, White AJA and McMeekin J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The appeal against conviction is dismissed**
2. The application for an extension of time to apply for leave to appeal against sentence is refused

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – appellant found guilty after trial of attempted murder of ex-wife by procuring an unknown male to shoot her at her house – evidence given by many witnesses that appellant had offered them money to kill the complainant, or had told them that he was organising a "hit" on the complainant – judge directed jury that the case was circumstantial and they could not find the appellant guilty unless the only rational inference to be drawn from the evidence was of guilt – appellant argued on appeal that a *Shepherd* direction should have been given to the effect that the statements made to the witnesses must have been proved beyond reasonable doubt – whether the judge misdirected the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER

MATTERS – evidence given of the relationship between the appellant and the complainant – evidence given of a "bug" allegedly placed on the complainant's phone line, the appellant slashing a waterbed and other matters – judge directed jury that the evidence did not directly relate to the shooting – appellant argued that judge should have directed the jury that the relationship evidence could not be used to infer a propensity in the appellant to commit the offence – whether such a direction should have been given

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – appellant did not apply for leave to appeal against sentence in his notice of appeal against conviction orally – appellant's pro bono counsel applied for an extension of time to apply for leave to appeal against sentence – appellant sentenced to 16 years imprisonment – offence was pre-meditated and calculated – complainant suffered serious physical and emotional injuries – whether extension of time should be granted

Corrective Services Act 2006 (Qld), s 182(2)(a)

Chamberlain v The Queen [No 2] (1984) 153 CLR 521; [1984] HCA 7, considered

R v Laing [2008] QCA 317, cited

R v Reeves [2001] QCA 91, cited

R v Saad (2005) 156 A Crim R 533; [2005] VSCA 249, cited

R v Witchard [2005] 1 Qd R 428; [2004] QCA 429, cited

Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, applied

COUNSEL: P E Smith for the appellant/applicant (pro bono)
M J Copley for the respondent

SOLICITORS: Fisher Dore for the appellant/applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McMURDO P:** On 22 November 2007 in the Supreme Court at Brisbane the appellant, Steven John Clark, was convicted of attempting to murder his former wife, Sonya Maree Clark, at Ipswich on 16 April 2004. He was sentenced to 16 years imprisonment, and 578 days spent in pre-sentence custody was deemed to be time already served under the sentence. In late December 2007, he appealed against his conviction. At the hearing of this appeal, his barrister, Mr P E Smith, also applied for an extension of time for leave to appeal against sentence.

The appeal against conviction

- [2] The sole ground of appeal against conviction ultimately pursued by Mr Smith on behalf of Clark is as follows:

"1. That a miscarriage of justice occurred in this case in that:

- (a) the learned trial judge erred in failing to direct the jury that before it could convict it had to accept the evidence that threats were made by the appellant to kill his wife beyond reasonable doubt; and
 - (b) the learned trial judge erred in failing to direct the jury against the use of propensity reasoning concerning the background evidence."
- [3] Before returning directly to the ground of appeal, it is helpful to summarise the evidence at trial and the prosecution and defence case. The prosecution case was that Clark, either personally, or through some unknown party, counselled or procured an unidentified man to kill the complainant at her Ipswich home on the evening of 16 April 2004. The complainant suffered multiple gunshot pellet wounds to her chest and abdomen and would have died from those injuries but for surgical intervention. Defence counsel effectively conceded in his closing address to the jury that the unknown man who discharged the gun intended to kill the complainant and attempted to kill her. It was also common ground between the prosecution and defence at trial that Clark was in Quilpie on the evening of 16 April 2004 at the time the complainant was shot and that Quilpie was about a 12 hour drive from Brisbane.
- [4] It was accepted by trial counsel and the judge that the prosecution case was circumstantial, relying on the combination of a number of inferences to be drawn from the prosecution evidence. The man who shot the complainant was not identified and there was no direct evidence that he shot her at Clark's request. The judge explained to the jury, without objection from counsel, that the circumstantial case against Clark essentially consisted of the evidence of his motive to have the complainant killed; that he told a number of witnesses that he was going to have her killed; and his statements after the shooting which the prosecution claimed amounted to admissions of guilt.

The complainant's evidence

- [5] The complainant gave the following evidence. She met Clark when they were both at school. They began going out when she was 15 years old. They lived together from 1994. They had a son in 1997 and a daughter in 2000. They married shortly before the birth of their daughter. The complainant considered that their relationship had ended from 29 October 2002. They continued to live together in the same house until late 2002 when Clark moved out. He returned for a brief time but the complainant moved out with the children in early January 2003. In November 2002, the complainant went out while Clark looked after their children. When she returned, he was able to describe her movements that night although he had not been present. About a week after Clark moved out, she found the phone line under the house had been cut. A device the size of a matchbox with a small circuit board was attached by alligator clips to the phone line. When she moved house and unpacked her water bed, it had two knife slashes through it and was unusable. About a week later her car, a RAV 4, was stolen from outside her work. She immediately rang Clark. He finally admitted that he had it. He said he would return the vehicle and the Christmas presents for the children which were in it if she reconciled with him and gave him \$16,000.
- [6] One day late in 2003, just before she was to attend a Family Court hearing, Clark took their son from school without her knowledge. She immediately collected their

daughter from day care. She saw Clark at the day care centre but he ran off. He did not have their son with him. She went to the police and to her solicitor. Later that day, she saw Clark and their son in the mall. They had an altercation during which she brushed away some paperwork he was carrying. He claimed that she had assaulted him and he took their son to the police station. Clark obtained a domestic violence order against her. She then took out a domestic violence order against him.

- [7] She commenced divorce proceedings on 17 November 2003. On 16 April 2004, she heard a knock on the door. A man said he was Bruce Willis in a voice she did not recognise. When she answered the door the man shot her in the stomach.

The evidence of events involving Clark prior to the shooting

- [8] Mark Kyle gave the following evidence. He operated an electronics store at Lutwyche. Clark, whom he knew, attended his shop in 2002 or 2003. He said he was having marital problems and was separated from his wife. He enquired about a "bug" the size of a matchbox with two pieces of wire with alligator clips that could be used to listen into telephone calls. He thought "his missus might have been playing up". Kyle showed him such a device, showed him how it worked and explained that it was readily available. Clark told Kyle he wanted one to check up on his wife.
- [9] The complainant's cousin, Shaun Mathewson, remembered visiting the complainant at her home after her separation from Clark. She showed him a piece of wire with a small round piece about two inches long.
- [10] Jason Fairweather gave evidence that Clark stayed with him after Clark separated from his wife. Between February or March and June 2003, Clark told Fairweather that he had a wire tap and a bug to listen in on phone lines. Clark showed Fairweather the device: it had two alligator clips. He said he was going to put it on the phone pole, or where the phone connected, in front of his place. He asked Fairweather to follow his wife but Fairweather refused.
- [11] Andrew Shard, an old school friend of the complainant's, had an intimate relationship with her at about the time of the break-up of her marriage. Around Christmas 2002 she showed him a small green plastic circuit board with two wires coming from it about half the size of a credit card with alligator clips and the words "phone in" on the board.
- [12] Denley Strange, a neighbour of Clark and the complainant when they lived at Glenmorganvale, gave the following evidence. Clark came to his home on two or three occasions. Clark said that he and the complainant were not getting on and he thought she was having an affair. From the Stranges' house, Clark could walk up over a ridge and look back on the Clarks' house. He asked Strange if he could borrow a soldering iron to fix a phone device he was listening in on. Strange did not lend him the equipment.
- [13] Kim Mogg, a radio technician, gave the following evidence. He met Clark about 12 years ago through their mutual interest in CB radios. In about 2004, Clark first told him that he wanted his wife killed. Clark complained that she would not let him see their children. Mogg suggested that he see a solicitor. Clark responded that he would just have her killed. Clark had several other conversations with Mogg over a two month period in which he said he wanted the complainant killed. Mogg did not

believe Clark's statements. On one occasion, Clark arrived with \$10,000 in a Bendigo Bank bag. He said it was the proceeds from the sale of his four wheel drive. He asked Mogg to hold on to the money for him. A couple of days later he said it was the money to have the complainant killed. Clark sat down at Mogg's computer and produced a document with a 10 point plan setting out how he intended to arrange the killing of his wife. It had the complainant's name, her car registration number and her address in Ipswich on it. The first point was that he did not want the children to be present when it happened. Clark had previously pointed out the complainant's home to Mogg. Clark told him that he had four copies of a photograph of the complainant made for whoever was going to do "the job" on her. Mogg identified a tendered photograph of the complainant¹ as very like the photograph which Clark showed him.

- [14] For some months Clark continued to send Mogg frequent phone messages to the effect that "the job was on and she'll be dead soon". It became monotonous. In about March 2004 on the way to Melbourne, in a town called Tarcutta at about 6.00 pm, Clark asked Mogg if there was any way he or his brother knew of getting "the job" done any cheaper than \$40,000. Mogg told him that he was an idiot and there was no way he or his brother would become involved. Clark asked him to pull the breeches and bolts out of Clark's firearms. Clark said he would send them to his solicitor so that when the complainant was shot and killed the police could not blame him. He assisted Clark in making his guns inoperable because Clark had a damaged left hand. Clark also asked him about bugs or listening devices and he told Clark where he could buy them.
- [15] After he learned of the shooting, Mogg contacted Clark and told him about it. Clark asked him how he knew. Mogg said he had seen it on television. Clark responded, "Cool." A little later, he said, "The stupid bastard missed the bitch." Mogg asked what he meant. Clark continued, "Well, she's not dead."
- [16] In cross-examination Mogg agreed that the police, with Mogg's knowledge, had placed listening devices in his house and car after the shooting to tape his conversations with Clark. No conversations implicating Clark were recorded over many hours. Mogg denied that this was because Clark had never told him anything incriminating and that Mogg's evidence implicating Clark was fabricated. Clark's barrister suggested that, had Mogg broached these topics with Clark when the police listening devices were activated, Clark would have not have known what he was talking about; Mogg would have embarrassed himself in front of the police. Mogg rejected that suggestion and maintained that his evidence was truthful. Mogg agreed with Clark's barrister that the 10 point document which he claimed Clark had prepared on his computer had never been retrieved from the hard drive. Mogg said this was because Clark deleted it and a virus had subsequently infected his computer. He agreed that Clark did exaggerate; he spoke a lot of "rot"; Mogg did not believe half the "stuff" Clark said. He did not believe Clark would ever have his wife killed.
- [17] Mogg's partner, Kym Tyler, gave the following evidence. An envelope addressed to Mogg containing something which looked like a photo arrived by post. She heard conversations between Clark and Mogg in which Clark said he wanted to have the complainant "bumped off". She also heard a conversation in which he said "something like he was wanting to have her killed". At that point she interrupted,

¹ Exhibit 6.

told Clark he was being silly and walked off. This conversation took place about nine or 10 months after she became aware that Clark had separated from the complainant. She remembered Clark using the computer to produce a document and telling Mogg to be sure it was deleted. She agreed that Clark occasionally used their computer and internet access and that he was a "classic exaggerator". The first time she heard him talking about the complainant "being bumped off" she thought he was exaggerating. She agreed that on the second occasion she became concerned because "there was something in his tone".

- [18] Nikki Carmody gave the following evidence. She had known Clark since they were at high school together. On one occasion Clark visited her work to purchase a fish tank. When she went to his home to install it, he showed her a photograph of his children and a piece of paper. The complainant's name, a description of the complainant's job, her work address and the figure "\$10,000" was written on the paper in black tip pen. Her boss, Sharlene Moore, handed her the paper. Carmody asked Clark what it meant. He said that it was "a job" and "to do harm". She took the piece of paper home. Clark said that "it had to be done either way, Sharlene or [Carmody]". On a subsequent evening, Clark came to dinner at Carmody's home. She heard Clark speaking to Carmody's boyfriend David Severinsen about "a large payout of \$25,000.² And it had to be done before the settlement because he wanted to take the kids somewhere". He had an A4 sheet of paper with writing and numbers on it. Later that night, Clark offered to lend her \$10,000. He had offered her money before but she had refused. On this occasion she accepted because she was having difficulty getting a car. He gave her \$10,000 cash in a calico bag. She was to repay him in lump sum amounts when he returned.
- [19] In cross-examination, she agreed that she told police in her second statement that Clark had said in front of Sharlene, "I want you to find someone to shoot [the complainant]." She agreed that, in her first statement to police in May 2004, she said that Clark had told her nothing about his relationship with the complainant. She agreed that before she gave the second statement she was examined in a Crime and Misconduct Commission ("CMC") hearing in which it was clear that the CMC was considering whether she and David Severinsen were involved in the shooting of the complainant. Only then did she give the police information incriminating Clark.
- [20] David Severinsen's evidence was as follows. He met Clark in about 2004. Clark was a friend of Severinsen's then partner, Carmody, and her family. One night, Clark came over to their house and said "he wanted a hit done on his wife". Severinsen was then a nominee member of the Nomads motorcycle club, Ipswich chapter. On a number of subsequent occasions Clark again raised this subject. He once wrote "\$100,000" on a piece of paper which he pushed across the table to Severinsen, who again refused to be involved. On a later occasion, Clark and Severinsen met at a BP service station at Blacksoil. Clark said that if Severinsen was not prepared to do the job on the complainant, Clark would find somebody else. At all times, Severinsen said that he declined to take up Clark's offer. Apart from \$10,000 which Clark gave to Carmody, no other money passed between them.
- [21] In cross-examination, Severinsen agreed that in May 2004 he told police officers that Clark had never asked him to have the complainant murdered. He agreed that

² This may be incorrectly transcribed because the prosecutor later refers to this amount as "\$250,000" at AB 210 line 10.

the first time he had said anything to implicate Clark in the shooting of the complainant was when he was summonsed to appear before the CMC.

- [22] Clint Morris gave the following evidence. He met Clark in 2001 or 2002 through their mutual interest in shooting. Morris was formerly a member of an infantry unit. Clark telephoned him and said that he had separated from the complainant; Clark did not want the complainant to have anything to do with the children and he wanted custody. Clark questioned Morris about his military background, including whether he had done sniper training. He asked if Morris would be interested in shooting the complainant for him; Clark would supply a rifle which could not be traced. He said he "wanted the bitch dead". He offered Morris \$25,000 but Morris refused. Clark continued to offer Morris larger sums but Morris continued to refuse them.
- [23] In cross-examination, Morris said that the first time he spoke to his cousin, Wesley Kneipp, about Clark asking him to kill the complainant was at the Ipswich Magistrates Court hearing of this matter in 2006. Although he travelled with Kneipp to the court, they did not discuss it on the way. He also agreed that he had suffered post-traumatic stress disorder and depression; he had been treated with electric shock therapy and detained as an involuntary patient in a psychiatric hospital. He agreed that shock treatment could affect his memory.
- [24] Wesley Kneipp gave evidence that he had known Clark for about 11 years. He knew that Clark and the complainant had separated. On a couple of occasions, in response to Kneipp enquiring about Clark's wife and children, Clark replied "She'll be dead soon." Clark said that he wanted to find someone to "roll her over, like, do a run through the house". On another occasion, Clark said that "he's seeing bikies and seeing an ex-army guy to do a job for him ... To shoot his missus." In cross-examination, Kneipp agreed that Morris and he were cousins; they travelled to the committal hearing together. He denied discussing these events with Morris on the way to the committal. He gave police a statement about these events in January 2006 when they contacted him.
- [25] Jessica Bennett, Clark's cousin, gave the following evidence. Clark visited her home at St George between Christmas 2003 and Easter 2004 to do some washing. He showed her a Kodak envelope which contained a photograph of the head of a woman and a typewritten note. The note referred to having someone shot for a certain amount of money. She did not give her statement to police until January 2006. She did not want to be involved.
- [26] Bradley Burwell's evidence was as follows. He had known Clark for about 14 years. He was aware that Clark and the complainant had separated. A few months afterwards, Clark telephoned him and said that he was going to get the complainant "done in and he knew the right people". Burwell told Clark to wake up to himself and to think of his children. On another occasion, Clark telephoned him and said that "it was in the pipeline" or "it's happening". This conversation took place about a month or two before the complainant was shot. In cross-examination, Burwell said that he did not go to the police because he did not think Clark would go through with those suggestions; Clark was an exaggerator.
- [27] Sonya Monagle met Clark in about 2002. She comforted him when his marriage broke up and he was recovering from an accident. He regularly visited her home in St George and discussed his marital problems. Monagle was in a sexual

relationship with Clark for about six weeks. He asked her whether she knew anybody who would "do in" the complainant. She tried to talk him out of it. He became very upset.

- [28] Monagle found out the complainant had been shot from a news report on television. Clark later telephoned her. He said he was in Darwin and "on the run". He told her that police officers would be coming to see her. She said that Clark "said he'd done it, talking about what he did with [the complainant]".
- [29] In cross-examination she agreed that she gave inconsistent evidence at the committal hearing as to how long into their six week sexual relationship he first mentioned having the complainant "done in". She agreed that during one of Clark's telephone calls from Darwin, he told her that he had not been involved in the shooting of the complainant. At the committal proceedings, she gave evidence that she asked Clark whether he had actually got a hit man to shoot the complainant and he just laughed and responded "What do you think?" She agreed that their relationship ended when he "dumped" her. She denied that she hated him and was lying because he jilted her. She maintained that she was giving honest evidence.
- [30] Michael Wilson gave the following evidence. He met Clark in about 2003 or 2004 in St George. One night when they went kangaroo shooting, Clark said that he would like to have his kids more often. Wilson was "sort of shocked" when Clark "just out of the blue" said he would "like a hit done on [the complainant], like have her gone" so he could have the kids more. He was present when Clark met a man at the BP service station at Blacksoil but he could not hear what Clark discussed with the man. In cross-examination he agreed that he gave evidence to the CMC to the effect that he knew nothing about Clark's wife until the detectives told him about her.
- [31] Rebecca Brown gave evidence that she became acquainted with Clark over the UHF radio. He discussed the complainant and his children. He mentioned that if the complainant was not around the kids would automatically be with him. In late 2003 or 2004, he told her that he owed someone a large amount of money (she thought about \$10,000) that he had to pay off.
- [32] Sian Fisher gave evidence that she had bought Clark's house in February 2003 after he had separated from his wife. She was asked, "What did he tell you he was going to do?" She responded, "More or less do her in and take the kids."
- [33] Robert Cork gave evidence that he had known Clark since 1992. In August 2003, Clark stayed with him for a few weeks. Clark spoke of his separation from his wife and how hard it was to see his children. He purchased Clark's Landcruiser for \$10,000 and made arrangements for Clark to return to Brisbane to attend settlement negotiations with the complainant. Clark cashed this \$10,000 cheque on 25 September 2003.

The evidence of Clark's admissions against interest after the shooting

- [34] As well as the evidence which I have set out earlier from Kim Mogg³ and Sonya Monagle,⁴ the following witnesses gave evidence of conversations with Clark after the shooting of the complainant, which were capable of being construed as admissions against his interest.

³ See [15] of these reasons.

⁴ See [28] of these reasons.

- [35] Kathleen Pearce gave evidence that she had known Clark for about 10 years. She knew he and the complainant were separated. Clark told her that the complainant had been shot. He came to her house about a week or two after the shooting. He said, "The kids shouldn't have been there. The next time the job will be done properly." She asked him if he "did it". He said, "No, don't be silly" and walked out. Under cross-examination she conceded she had not mentioned this conversation in her original statement to police in May 2004. She told the police about this conversation in a later statement after she became aware that Clark had a sexual relationship with her then 16 year old daughter of which she disapproved.
- [36] Sharon O'Malley gave evidence that Clark rang her one Sunday morning and told her the complainant had been shot. When she asked him how she was shot, he replied, "She was gut shot." She asked him who had done it. He said, "It was a Red Shield door knock." She asked him what he meant. He responded, "She was shot through the door." He said he was in Quilpie at the time and could prove it. He told her that the police would be calling on her. He asked her to keep her ear close to the ground and if she heard anything to contact him. He told her not to tell anybody that she had spoken to or seen him because he was going to jail. She asked him what he meant by that. He responded, "Well, you know, I could have missed something."

The defence case at trial

- [37] Clark did not give or call evidence. The defence case at trial which emerged from the cross-examination of prosecution witnesses and defence counsel's address was as follows. The prosecution had not proved beyond reasonable doubt that Clark was involved in the shooting of the complainant. The evidence given by the many prosecution witnesses was inherently unreliable and often inconsistent with their earlier accounts to police. The prosecution had not established any connection between the \$10,000 Clark received for the sale of his car and the evidence that he was paying someone to kill the complainant. The case was a circumstantial one. The complainant may have had unknown enemies who would wish to do her harm. There was no evidence about the source of the money that Clark was supposed to have given the shooter. The evidence was that Clark was an exaggerator. If he had made such statements to witnesses like Mogg, Tyler, Severinsen, Carmody, Kneipp, Morris, Bennett, Monagle and Wilson, the jury could not be satisfied that there was any real substance to the statements. This was especially so because the evidence of all these witnesses was full of inconsistencies, was inherently unreliable and could not be accepted.
- [38] The learned trial judge's fair and thorough summary for the jury of the submissions made on Clark's behalf by his experienced senior counsel is recorded in 11 pages of transcript. In essence, it was that the prosecution case was built on the evidence of demonstrably unreliable witnesses who had given inconsistent versions and had motives to lie. The prosecution had not established Clark's guilt beyond reasonable doubt; the jury should find him not guilty.

Should the judge have given a direction to the jury in terms of *Shepherd v The Queen*?⁵

- [39] Mr Smith contends that *Shepherd* required the judge to direct the jury that they could only act on the evidence of the witnesses who claimed that Clark threatened

⁵ (1990) 170 CLR 573; [1990] HCA 56.

to kill the complainant if they were satisfied of the truth of that evidence beyond reasonable doubt. He submits that this error, either alone or in combination with the alleged error identified in appeal ground 1(b), amounts to a miscarriage of justice. He argues that the appeal should be allowed, the conviction set aside and a new trial ordered.

[40] In *Shepherd*, Dawson J, with whom Mason CJ, Toohey and Gaudron JJ agreed, explained that *Chamberlain v The Queen [No 2]*⁶ is not authority for the proposition that a jury, in a case resting upon circumstantial evidence alone, may only properly draw an inference of guilt from facts individually proved beyond reasonable doubt.⁷ Their Honours noted, however, that *Chamberlain [No 2]* recognised that where it is necessary for a jury to reach a conclusion of fact as an indispensable intermediate step in the reasoning process towards an inference of guilt, that conclusion must be established beyond reasonable doubt. Their Honours also noted that whether there is a need for a trial judge to direct the jury in this way will depend on the circumstances of each case.⁸ Such a warning is neither necessary, nor even appropriate, where the evidence consists of strands in a cable rather than links in a chain.⁹

[41] It is noteworthy that the experienced senior counsel appearing for Clark at trial did not seek such a direction. In my view, it is debatable whether the prosecution case against Clark was entirely or largely based on circumstantial evidence. On one view, his statements to witnesses that he wanted to have his wife killed and he would pay someone to do it are direct evidence from him of his guilt. Certainly, if the jury accepted that Clark's statements after the shooting to Kim Mogg, Sonya Monagle, Kathleen Pearce or Sharon O'Malley were truthful admissions of guilt, the prosecution case was not circumstantial. But in any case, the judge generously and prudently identified the prosecution case to the jury as one relying principally on circumstantial evidence and on the evidence of many witnesses as part of that circumstantial case. His Honour directed the jury in these terms:

"To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be a rational inference, but also that it should be the only rational inference that can be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is your duty to find [Clark] not guilty. This follows from the requirement that guilt must be established beyond a reasonable doubt."

[42] As Dawson J observed in *Shepherd*,¹⁰ this customary direction given in cases turning on circumstantial evidence is no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt.

[43] Even accepting that the case against Clark was largely circumstantial, each piece of evidence from the many witnesses that Clark told them that he had approached or was approaching another or others to procure them to kill the complainant was, at best, for Clark, a strand of steel in a very strong cable. It was not an independent, weak link in a chain. This was not a case where any one intermediate conclusion of

⁶ (1984) 153 CLR 521; [1984] HCA 7.

⁷ (1990) 170 CLR 573; [1990] HCA 56 at 585.

⁸ (1990) 170 CLR 573; [1990] HCA 56 at 585.

⁹ (1990) 170 CLR 573; [1990] HCA 56 at 579.

¹⁰ (1990) 170 CLR 573; [1990] HCA 56 at 578 (Mason CJ, Toohey and Gaudron JJ agreeing).

fact needed to be proved beyond reasonable doubt: cf *R v Saad*¹¹ and *R v Laing*.¹² The judge's directions to the jury were appropriate in the circumstances. They did not amount to any error of law.

- [44] Mr Smith's contention, that a miscarriage of justice occurred because the judge did not direct the jury that they had to be satisfied beyond reasonable doubt of the evidence that threats were made by Clark to kill the complainant before acting on that evidence, is wrong.

Was the judge's direction to the jury as to the relationship evidence between Clark and the complainant adequate?

- [45] Mr Smith contends that the judge's direction to the jury about evidence relevant only to the relationship between the complainant and Clark was flawed in that it did not contain a direction not to use this evidence as demonstrating propensity. He submits that there is a danger that the jury may have wrongly used the evidence as proof of guilt. He especially emphasises the evidence about the listening bug on the telephone which achieved some prominence in the trial.

- [46] The judge gave the following direction:

"In dealing with the evidence relevant to their relationship it is important that you take that evidence in the right context. The evidence about the bug, the waterbed slashing and the surveillance by Mr Clark of [the complainant] related to a period of more than a year before the shooting and is not put forward by the prosecution as evidence that is directly relevant to the shooting. None of those things, or the other relationship evidence dealing with the taking out of domestic violence orders against each other, or the evidence of Mr Clark taking his son from school, is directly related to the alleged offence. Rather, the evidence is relevant to help you put into context the nature of the relationship between Steven Clark and [the complainant]."

- [47] Again, it is noteworthy that the experienced senior defence counsel who appeared for Clark at trial did not seek any such re-direction. The direction given was the very one asked for by defence counsel before counsel's closing addresses and the judge's summing up to the jury. The direction was appropriate in the circumstances. It made it abundantly clear to the jury that the evidence was only relevant to the relationship between the parties and had no direct relevance to the shooting. It did not amount to an error of law.

- [48] The contention that the judge erred in failing to direct the jury against the use of propensity reasoning in respect of this evidence is also without merit.

Appeal against conviction – conclusion

- [49] Clark has not made out either of the contentions in his ground of appeal against conviction. The appeal against conviction must be dismissed.

The application for an extension of time for leave to appeal against sentence

- [50] In the notice of appeal, which was filed within time, Clark has struck out both the option to appeal against conviction and sentence, and the option to appeal against

¹¹ (2005) 156 A Crim R 533; [2005] VSCA 249 at 557 [81].

¹² [2008] QCA 317 at [36].

sentence, leaving only the option to appeal against conviction. He stated in that notice of appeal that he was sentenced to 16 years imprisonment and that he was representing himself. The notice of appeal set out three clear grounds of appeal, all of which were subsequently abandoned. He has not provided any explanation as to why he did not apply for leave to appeal against his sentence within time. That lack of explanation would not be fatal to his application if he demonstrated that the interests of justice favoured an extension of time to appeal.

- [51] Mr Smith, in an effort to persuade the Court that the interests of justice warrant the granting of the application, emphasises the following matters. Clark was 33 years old at the time of the offence and 35 years old at sentence. He had no previous convictions. He had a good work history. Whilst the offence was serious, it was "with the backdrop of a marital breakdown" and his "primary motivation for the offending was the children". He submitted that the appropriate range was 12 to 14 years imprisonment and that a sentence of 16 years imprisonment is so far outside the proper range that it is manifestly excessive.
- [52] Clark was convicted of one of the most serious offences against the criminal law short of actual murder. Over a lengthy period, he planned the murder of his former childhood sweetheart, wife and mother of his children. If, as Mr Smith submits, Clark was concerned for his young children, it is impossible to see how their interests would be furthered by murdering their mother with whom they lived and who apparently took good care of them. Clark did not have the benefit of the mitigating factors of co-operation with the authorities or an early plea of guilty. His conduct of the trial and, indeed, of this appeal, demonstrates that he still has no remorse or insight into the seriousness of his offending. The primary judge, after sitting through an eight day trial, formed the view that this was "within the worst category of cases of attempted murder because of the premeditation, planning and enrolment of other people to assist in its execution". That observation seems entirely apposite. His Honour also noted the calculating way in which Clark planned the offence which suggested that he may continue to be a danger to the complainant when released from prison. It is only good fortune, and not through any actions or intentions of Clark, that she was not killed. The effects on her and the children have been devastating. The complainant has undergone major surgery; she will be on medication for the rest of her life; she still carries nine to 12 shotgun pellets in her body; she has lost part of her left breast and has suffered other traumatic consequences which will permanently affect her health and her ability to work. The psychological effects of the crime on her young son, in particular, presently appear to be severe.
- [53] The sentence imposed, which will require Clark to serve at least 12.8 years imprisonment before being considered for parole eligibility,¹³ appropriately reflects the need for general and personal deterrence of this gravely anti-social behaviour. Thankfully, in our community, men and women expect to be able to end a failed relationship without their former partner resorting to violence of any kind, let alone the intentional and potentially deadly violence present in this case. The sentence is not manifestly excessive. It is supported by decisions of this Court in *R v Reeves*¹⁴ and *R v Witchard*¹⁵ where sentences of imprisonment of 14 and 15 years

¹³ *Corrective Services Act 2006* (Qld), s 182(2)(a).

¹⁴ [2001] QCA 91.

¹⁵ [2005] 1 Qd R 428; [2004] QCA 429.

respectively were imposed. Both were slightly less serious examples of attempted murder than the present case.

- [54] The interests of justice do not warrant the granting of an application for an extension of time to apply for leave to appeal against sentence. The application is refused.

Orders

1. The appeal against conviction is dismissed.
2. The application for an extension of time to apply for leave to appeal against sentence is refused.

- [55] **WHITE AJA:** I have read the reasons for judgment of the President and am grateful for her Honour's careful analysis of the evidence. I agree with her Honour that the evidence against the appellant was overwhelming notwithstanding the weaknesses in much of it. There were no misdirections by the learned primary judge on any of the grounds raised.

- [56] I also agree that the application for leave to extend time should be refused and endorse the President's observation about the need for strong general deterrence in a case such as this.

- [57] **McMEEKIN J:** I have read the reasons for judgment of the President. I agree with her Honour's reasons, the comments that she has made in relation to the sentence imposed, and as to the orders that she proposes.