COURT: SUPREME COURT OF TASMANIA (COURT OF CRIMINAL APPEAL)

CITATION: *Pickett v Tasmania* [2022] TASCCA 12

PARTIES: PICKETT, Adrian Alwyn
v
STATE OF TASMANIA

FILE NO: CCA 1598/2022

DELIVERED ON: 20 September 2022

DELIVERED AT: Hobart

HEARING DATE: 26 August 2022

JUDGMENT OF: Pearce J, Brett J, Geason J

CATCHWORDS:

Criminal Law – Appeal and new trial – Verdict unreasonable or insupportable having regard to the evidence – Appeal allowed – Charges of aggravated burglary and aggravated assault based on contention that the appellant committed or aided and abetted the crimes – Wholly circumstantial case – Issues of post-offence conduct in assisting other perpetrators and flight – Not possible on the evidence to exclude reasonable hypothesis consistent with innocence – Substitution of verdicts of guilty to being an accessory after the fact.

M v The Queen [1994] HCA 63, 181 CLR 487; *Dansie v The Queen* [2022] HCA 25, applied.
R v Hillier [2007] HCA 13, 228 CLR 618; *R v Baden-Clay* [2016] HCA 35, 258 CLR 308, applied.
R v Edwards [1993] HCA 63, 178 CLR 193, considered.
Weissensteiner v The Queen [1993] HCA 65, 178 CLR 217, considered.
Criminal Code Act 1924 (Tas) ss 402(1), 403(2).
Aust Dig Criminal Law [3475]

REPRESENTATION:

***Counsel*:**
Appellant: F Cangelosi
Respondent: J Shapiro, L Ogden
Solicitors:
Appellant: The Cangelosi Firm
Respondent: Director of Public Prosecutions

Judgment Number: [2022] TASCCA 12
Number of paragraphs: 69

Serial No 12/2022
File No CCA 1598/2022

ADRIAN ALWYN PICKETT v STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
PEARCE J
BRETT J
GEASON J
20 September 2022

Orders of the Court:

1 Leave granted and appeal allowed.
2 Verdicts of guilty of aggravated burglary and aggravated assault set aside and verdicts of guilty of being an accessory after the fact to aggravated burglary and being an accessory after the fact to aggravated assault substituted.

Serial No 12/2022
File No CCA 1598/2022

ADRIAN ALWYN PICKETT V STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
PEARCE J
20 September 2022

1 The appellant was found guilty by a jury of aggravated burglary and aggravated assault. The crimes were alleged to have been committed on 17 February 2019. The sole ground of appeal is that the verdicts of guilt are unreasonable and cannot be supported having regard to the evidence.

2 Because the appellant's ground of appeal does not only involve a question of law, by virtue of s 401(1)(b) of the *Criminal Code* he needs leave to appeal. That application was not made in the notice of appeal. The respondent did not raise the point. The appeal should be treated as including an application for leave to appeal. I agree with Brett J that, for the reasons his Honour gives, leave should be granted and the appeal allowed. The verdicts of guilt should be set aside and substituted by verdicts that the appellant is guilty of being an accessory after the fact to aggravated burglary and an accessory after the fact to aggravated assault.

3 This Court should hear from counsel about sentence for those crimes.

File No 1321/2022

ADRIAN JOHN PICKETT v STATE OF TASMANIA

REASONS FOR JUDGMENT **BRETT J**
20 September 2022

4 The appellant and two other men, Craig John Smith and Damien Steven Matthews, were jointly charged with crimes arising from events which took place at a house at Colebrook on 17 February 2019. As a matter of convenience, I will hereafter refer to Mr Smith and Mr Matthews by surname. The house was occupied by the complainant, his father, his son and another man. In general terms, the prosecution case was that the three men had gone to the house early in the morning to assault and threaten the complainant. At least one of them was armed with a firearm. The motive for the attack was alleged to be an unpaid debt owed by the complainant to Matthews. It was alleged that one or more of the men had entered a sunroom, which served as the entry foyer of the house, and then bashed and kicked the door connecting the sunroom to the rest of the house in an attempt to get inside. The complainant held the door closed from inside, and while that was happening, two shots from a firearm were discharged into the house. The attackers were chased off by the complainant's father, who had retrieved his own firearm from secure storage. He fired two warning shots in the general direction of the men as they fled. The evidence supported an inference that at least one of the shots had struck and wounded one of the assailants.

5 The crimes alleged against the men jointly were aggravated burglary and aggravated assault, the latter arising from the use of the firearm, or alternatively recklessly discharging the firearm. The prosecution was unable to say which of the men had committed the culpable acts, but asserted that each of them was criminally responsible for those acts, either as the person who committed the crime or because he aided, abetted or instigated the person who did. The prosecution did not rely on common purpose under s 4 of the *Criminal Code*. Each accused pleaded not guilty to both counts, but, after a trial before Estcourt J, the jury returned a verdict of guilty of the primary crimes in respect of each of them. The indictment also contained charges of dangerous driving and unlawfully injuring property against the appellant only. These arose from an alleged attempt by him to evade police interception later in the morning of the same day. The other accused were not involved in this. The appellant pleaded guilty to these crimes at the outset of the trial, but evidence relevant to this conduct was led at the trial as part of the prosecution case against the appellant on the disputed counts.

6 The appellant now appeals against his conviction in respect of the crimes which were the subject of the jury's verdict. The sole ground of appeal is that the verdicts of guilt are unreasonable and cannot be supported having regard to the evidence.

The question for this Court

7 The evidence presented to the jury was exclusively contained within the prosecution case. None of the accused gave or adduced evidence.

8 While none of the accused made any formal admission, it was not argued by any of them that the events which constituted the crimes had not occurred in the manner described by the prosecution witnesses. In the appellant's case, the primary submission of his counsel at trial was that the jury should not be satisfied on the evidence that he one of the group who had perpetrated the crimes. It was argued that the evidence did not establish his presence at the house at the relevant time. It is common ground that the prosecution case against the appellant on this question was entirely circumstantial. Much of the prosecution evidence was not challenged by the appellant, although some of the detail of

the evidence of police involved in the evasion and dangerous driving which occurred later in the morning was disputed, at least in cross-examination and the closing address of the appellant's counsel. However, on the appeal, Mr Cangelosi conceded that this Court should assess the said ground on the basis that the jury accepted the credibility and reliability of the prosecution witnesses, including those whose evidence was disputed at the trial.

9 This concession by the appellant's counsel is entirely appropriate and consistent with the principles which guide the Court in determining the ground of appeal relied upon in this case. It is well established that the ultimate question for this Court in respect of such a ground is whether, after making its own independent assessment of the evidence "it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty"; *M v The Queen* [1994] HCA 63, (1994) 181 CLR 487. Any lingering doubt concerning the proper application of this test has now been resolved by the High Court in *Dansie v The Queen* [2022] HCA 25. In a unanimous judgment, the court made it absolutely clear that:

> "The function to be performed by the Court of Criminal Appeal is to determine for itself whether the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the accused is guilty of that offence."

10 It was noted, however, that this examination must, in appropriate cases, take into account any advantage the jury may have had "in seeing and hearing the evidence". The court endorsed the following statement to that effect from the joint judgment in *M:*

> "It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred [on the unreasonable verdict ground]."

11 The prosecution case in *Dansie* was wholly reliant on circumstantial evidence, and accordingly, their Honours' specifically addressed the particular considerations which arise in applying this test to a circumstantial case. It was made clear that it is for the appeal court to determine whether guilt is the only rational inference open on the evidence, rather than deferring to the jury's opinion about this question. It rejected any "prior formulations of principle" in decisions preceding *M,* which suggested a different test:

> "One example is to be found in the judgment of Menzies J in *Plomp v The Queen*, on which reliance was placed by the majority in the decision under appeal. Menzies J identified the question arising on the unreasonable verdict ground in *Plomp* as being 'not whether this Court [standing in the shoes of the court of criminal appeal] thinks that the only rational hypothesis open upon the evidence was that the applicant [for special leave to appeal] drowned his wife' but 'rather whether this Court thinks that upon the evidence it was open to the jury to be satisfied beyond reasonable doubt that the death of the deceased was not accidental but was the work of the applicant'. Menzies J went on to answer the question so framed by agreeing with the court of criminal appeal below 'that there was sufficient evidence upon which the jury, fulfilling their duty not to convict unless the inference of guilt was the only inference which they considered that they could rationally draw from the circumstances, could have convicted the applicant'[18]. The deference to the inference of guilt inherent in the verdict returned by the jury reflected in those statements does not accord with the approach to the exercise of the appellate function set out in the joint judgment in M."

12 The Court went on to describe the test to be applied in the context of a circumstantial case:

> *"Coughlan v The Queen* illustrates that an independent assessment of the evidence in a case in which the evidence at trial was substantially circumstantial requires the court of criminal appeal itself 'to weigh all the circumstances in deciding whether it was open to the jury to draw the ultimate inference that guilt has been proved to the criminal standard' and in so doing to form its own judgment as to whether 'the

> prosecution has failed to exclude an inference consistent with innocence that was reasonably open'".

13 On the question of the weight to be placed on the jury's advantage in such a case, their Honour's said:

> "The advantage that a [jury] might have had over a court of criminal appeal by reason of having seen and heard the evidence at trial will vary from case to case depending on the form in which the evidence was adduced at the trial and depending on the nature of the issues that arose at the trial. In a case such as the present, where the prosecution case was circumstantial, where the evidence adduced by the prosecution was largely uncontested and for the most part in the form of transcripts of unchallenged testimony, and where the appellant did not give evidence, the advantage must be slight".

14 These comments are clearly apposite to this Court's assessment of the prosecution case against the appellant, insofar as it related to proof of his involvement in and criminal responsibility for the commission of the crimes. As already noted, the case against the appellant on this question was wholly circumstantial, and the evidence largely uncontested. The appellant's concession that this Court should proceed on the assumption that it was reasonably open to the jury to accept the contested police evidence concerning the appellant's manner of driving during the police chase, and that this Court should assess the ground of appeal on the basis that it did accept that evidence, removes from consideration the only question in respect of which the jury had an advantage over this court in determining whether the prosecution has proved guilt. It follows that this Court must decide for itself whether guilt is the only rational inference available from the evidence.

The commission of the crimes

15 The complainant testified that he first became aware of the presence of men on his property when he was awoken early in the morning by banging and kicking on a door. He identified the door from photographs, which show that it connects a small room described as a sunroom to the rest of the house. It is clear from the photographs that the sunroom is the point of entry into the house. The attack on the door necessarily meant that the intruders had entered the sunroom, thereby satisfying the element of the crime of aggravated burglary, which requires proof of entry as a trespasser into a dwelling house.

16 The complainant estimated that this occurred at "about 6ish". This estimate is consistent with evidence which asserted that others in the house were still asleep and with the evidence of another witness, Brett Imlach, that "it was just coming daylight". The complainant held the door to resist entry while those outside continued the attempt to break-in. He saw a crow bar come through the door and then heard gunshots. He estimates hearing "at least two maybe three" shots. The complainant could not say how many people were outside but he heard one of the men screaming and "recognised Damien Matthews voice".

17 While this was happening, the complainant called for help from his father, who was in his bedroom asleep. His father, who kept firearms lawfully in the premises, retrieved a rifle, loaded ammunition into it and went out to confront the intruders. He saw two men "both fairly chubby". They were running down the road. He fired two shots. He described the bullets as "30 grain CCI segmented, which means they break up on impact". He said that the men were about 80 metres away from him when he fired the shots, and that he aimed one "about two metres to the right" and the other "into the trees." He denied that the shots would have struck either man. However, other evidence, which I will discuss shortly, permits an inference that at least one projectile struck one of the men.

18 The complainant's evidence concerning the force used against the door and the discharge of firearms was supported by photographic, forensic and ballistics evidence. There was no significant dispute in respect of this evidence.

19 Brett Imlach was at the time living in a different house on the same property. His evidence was that he was awoken by a dog barking in his room. It was "coming daylight". He saw three people "one large guy two skinny guys" outside the complainant's house and went outside towards them. He heard one yelling "get off the property". At some point, he heard something that he described as a "shot", and then saw the men walk towards him. The large man was holding something, which he concluded was a rifle, although he could not "really see" what it was. One of the other men pushed the item "up in the air", and said "Don't shoot at him." After that, one of them yelled "Is that you Brett". Shortly after this, he heard "another couple of shots go off and all three of them scattered". They went "down the driveway, across the paddock".

20 Mr Imlach's evidence was that he did not recognise any of the men and was not able to see their faces. He implied that this was due to the state of light at the time. He agreed that he had known the appellant for "a number of years". When asked in cross-examination if he would have been able to recognise the appellant's voice had he been one of the men he heard speaking, he replied "Possible". He confirmed again that he did not recognise any of the men.

21 The evidence of the complainant's father and Mr Imlach as to their last sighting of the men is the only direct evidence as to how they left the property. There was evidence that the driveway is approximately 400 metres in length. There was no direct evidence as to how the attackers arrived at or left the property.

Motive for the attack

22 There was evidence which supported an inference that Matthews was one of the men who attacked the property, and also provided an explanation for the attack. This evidence concerned the existence of a debt due by the complainant to him. The prosecution asserted that it was a drug debt, although this was disputed on Matthews' case. His assertion seems to be that the debt related to an agreement with respect to the purchase of a property. In any event, the complainant's mother gave evidence that she had had prior conversations with Matthews concerning his claim that the complainant was in debt to him. On the day before the attack, Matthews had told her during a telephone conversation that he intended to go to the complainant's property to "hurt" him. She also testified that as soon as she found out about the attack, she telephoned Matthews and said to him "Why did you go up to the farm and take people up there" to which he replied "Yes it was me". He also made comments which indicated his intention to act in a similar way towards the complainant in the future. Although the complainant's mother was not cross-examined by counsel for the appellant or Smith, her evidence was challenged in cross-examination by counsel for Matthews. However, her testimony was not contradicted by other evidence, and there was nothing inherently incredible or inconsistent about it. In accordance with the principles already discussed, this Court should proceed on the basis that the jury would have accepted her as a credible and reliable witness.

Campania Post Office

23 The evidence of a female worker at the Campania Post Office and Service Station, confirmed by relevant CCTV footage, established that two motor vehicles arrived there in the early morning after she arrived at work. They came from the direction of Colebrook. One of the vehicles was a red Magna sedan. The male driver of this vehicle went into the shop to order coffee and food. The worker described him as "quite agitated" and "he had a lot of blood on his face and his hands seemed to have blood on them". She agreed in cross-examination that she had told police that he had "blood coming from grazes on the left side of his head", "cuts and abrasions on his hands" and that the injuries "appeared fresh". The witness subsequently identified this man from a photo board as the appellant. This identification was not challenged by the appellant's counsel.

24 While the first man was in the shop, the witness saw a second man putting fuel into the Magna. This man subsequently entered the store and paid for the food and fuel. He was identified by

the witness and by a police officer from CCTV footage as Matthews. This identification was also unchallenged.

25 The witness said that there was a third man seated in the front passenger seat of the Magna. This evidence is consistent with the CCTV footage. According to the witness, he did not get out of the vehicle but seemed agitated. She said that at one point, the man identified as Matthews was squatting beside the vehicle speaking to him. It seemed to her that he was "trying to pacify him, as if he was unwell". After this, she saw the second man stand up and walk to his right to the second car. The witness noted the registration number of both vehicles. The second vehicle was subsequently located at a property occupied by Matthews, and his fingerprints were found on that vehicle.

26 When the vehicles left, they travelled in the direction of Hobart.

27 There was no significant challenge by any accused to this witness's evidence. However, there are some aspects of it which require clarification in the light of the CCTV footage. Firstly, the time display on the footage indicates that the vehicles arrived at the service station at 7.18am. Evidence elicited during cross-examination established that the witness told police that she first saw the Magna at 7.07am and sent a text message to a police officer after the vehicles left at 7.20am. The text message, displaying that time, was admitted into evidence. The CCTV footage establishes that the vehicles were at the service station for about ten minutes. On the basis of the timing of the text message, the probability is that the earlier arrival time is correct.

28 Secondly, it is obvious from the footage that there are two persons in each vehicle when they arrive at the service station. The footage confirms that the appellant was driving the Magna and has a passenger. There is a very strong inference, when regard is had to other evidence, that this is Smith. The man identified by the witness as Matthews can be clearly seen getting out of the passenger seat of the second vehicle as soon as it arrives and parks at the side of the service station. The vehicle can be seen to move position after Matthews gets out. Clearly, someone else is driving that vehicle. As I will discuss in more detail later, the evidence generally does not permit a reliable conclusion concerning that person's identity.

29 Thirdly, it seems probable from the footage that Matthews left the service station in the Magna, rather than the second vehicle. Hence, when the Magna leaves the service station, it is occupied by the appellant as the driver, Smith in the front passenger seat and Matthews, presumably in the rear seat. This conclusion is consistent with evidence as to observations made within a short time at the Bridgewater Fire Station. However, the worker did say in cross-examination that she saw the man, who she later identified as Matthews, get into the passenger seat of the second vehicle before the cars drove away.

The Bridgewater Fire Station

30 Fire fighters at the Bridgewater Fire Station testified that a man, subsequently established to be Smith, was delivered to the fire station in a maroon Magna motor vehicle at some time between 7.20am and 7.45am. It was clear that the man had suffered gunshot wounds. A power lead was wrapped around his leg in the nature of a tourniquet. He told fire fighters that he had shot himself while "crawling through a fence". There were two other men in the vehicle. After dropping Smith at the fire station, those two men drove away in the Magna. They did not wait for him to receive treatment or for the arrival of an ambulance.

31 Smith was subsequently taken by ambulance to hospital. Agreed facts established that he arrived there at 8.38 am. A diagnosis was made that he had suffered a gunshot wound to his left posterior thigh. Pieces of shrapnel were removed from the wound.

DNA evidence

32 Police collected numerous swabs and other forensic samples, many of which were subjected to biological examination and DNA profiling analysis. Some pertinent aspects of this evidence are:

- Some of the results connected Smith and Matthews to the crime scene. Four swabs taken from the driveway at the complainant's premises returned positive tests for human blood. DNA analysis established high grade matches to Smith (100 billion in favour of Smith being a contributor to the DNA profile). Further, a swab taken from a metal pole located by police in the driveway of the premises produced a DNA profile with a high grade match to Matthews. The evidence did not establish the presence of blood in this sample.

- A police officer who attended on Smith when he was at the Bridgewater Fire Station seized a brown leather belt and a power board that he found near him, while he was being treated by ambulance and fire fighters for his injuries. Swabs of the belt found possible blood with mixed DNA profiles. There were high grade matches to both the appellant and Smith in respect of these profiles. The power board contained extensive red brown staining. Human blood was detected again with a high grade match to Smith. This evidence is consistent with both items being used to treat Smith's injury prior to his arrival at the fire station.

- Samples taken from an axe seized from the Magna and a jumper being worn by the appellant at the time of his arrest returned positive tests for human blood and high grade DNA matches to Smith.

- The DNA of another man, Craig Devine, was also found on the power board. Mr Devine's t-shirt, which was subsequently seized and examined, also contained blood with a high grade match to Smith.

Post offence conduct – dangerous driving

33 The appellant's conduct which was the subject of counts 3 and 4 involved driving the Magna dangerously in an effort to evade police. The evidence supporting the relevant conduct was given exclusively by a number of police officers. Although the appellant pleaded guilty to those charges before the commencement of the trial, the credibility of those officers was challenged by the appellant's counsel, particularly in respect of aspects of his manner of driving. However, it is this evidence that the appellant's counsel has conceded should be assessed by the Court on the assumption that the jury accepted the credibility and reliability of the version given by the witnesses.

34 A summary of that evidence is as follows. At 9am on 17 February, four police officers in two unmarked police vehicles saw the appellant seated in the driver's seat of the stationary Magna in a residential street in Chigwell. The officers were in plain clothes but were wearing vests identifying them as police officers. When one of the police vehicles stopped behind the appellant's vehicle, he reversed the Magna "hard" striking the front of the police vehicle. He then drove away at speed, pursued by the police vehicles, both of which were displaying activated emergency lights. As he did, he swerved towards a police vehicle, either briefly connecting with it or narrowly avoiding a collision. The pursuit continued, during which he again drove his vehicle into collision with a police vehicle. This collision caused the Magna to spin and stop, but he then deliberately rammed a police vehicle in a further attempt to escape. When he was arrested, police found Craig Devine in the passenger seat. He was also arrested.

The firearm

35 There was no evidence that police located the firearm used in the attack. It was not located in the Magna after the appellant's arrest. There was no suggestion that it was located during a search of Matthew's residence on 19 February. However, in addition to spent casings matched to the complainant's father's firearm, police found two spent .22 Magnum calibre casings outside the

complainant's house, in a location consistent with having caused gunshot damage to the house. A ballistics expert expressed the opinion that they were consistent with having been discharged from a firearm of the same type as the complainant's father's weapon, a .22 Magnum rifle, but that weapon was eliminated as the source of the casings. The clear inference is that they came from the firearm discharged by one of the assailants into the house, as described by the complainant.

Police interview

36 The appellant was interviewed by police shortly after his arrest. The video record of the interview was played to the jury. The appellant denied involvement in the crimes at Colebrook. He denied being at Colebrook at the relevant time, although he also said that he did not know where it was. He claimed that he was driving around, that he "went to a lot of places", and said that this would have included going to Devonport "last night". There were a series of questions asserting his presence at the "Colebrook store". The questioner had obviously confused Campania with Colebrook. The appellant's answers were equivocal but the confusion renders that part of the interview meaningless in any event. He claimed that he had later fled from police because he did not realise they were police and thought they were people he had been fighting with and were attempting to hurt him.

The use of the post offence conduct evidence

37 There is no question that the evidence summarised above permits an inference of guilt against the appellant. That much is conceded by the appellant's counsel. However, counsel submits that the circumstances are also capable of innocent explanation. In particular, it is submitted that the prosecution has not excluded as a reasonable possibility that the appellant was not involved in this attack at all, and only came into contact with the perpetrators in innocent circumstances sometime between the commission of the crimes and his arrival with them at the service station in Campania, about an hour later. Counsel submits that nothing that happened after this is inconsistent with that innocent hypothesis. In particular, it is submitted that the appellant's flight from the police later in the morning adds nothing to the strength of the prosecution case because it is explainable in ways which are consistent with innocence, including those given in the police interview. In written submissions, counsel submitted that the "post offence conduct thus remained 'intractably neutral' because of the paucity of evidence other than post- offence conduct tending to point to the commission of the crimes by the appellant".

38 These submissions raise a question as to the correct approach to the use of post-offence conduct, in this case flight from the police, in the context of a circumstantial case. At the trial, the appellant's counsel sought a "prudential direction" in respect of the jury's use of that evidence. The direction sought was that the jury should not use the evidence of flight as part of the circumstantial case against the appellant unless satisfied beyond reasonable doubt that his reason for fleeing from police was because he was conscious of his guilt with respect to the crimes charged in the indictment. The submission relied upon the discussion of the question by Porter J in *Neill-Fraser v Tasmania* [2012] TASCCA 2, which includes the following passage:

> "A judge may choose to direct, as a matter of prudence, that a particular fact or matter in a circumstantial case should not be used unless the jury is satisfied beyond reasonable doubt of that fact or matter. A judge is not required to form the view that the evidence is an indispensable link in a chain of reasoning before giving such a direction. Consciousness of guilt evidence is often the subject of a 'prudential direction': see for example the discussion in *R v Ciantar* [2006] VSCA 263; (2006) 16 VR 26."

39 The learned trial judge acceded to this submission, but limited the requirement that the jury "would need to be satisfied as to consciousness of guilt beyond reasonable doubt" to a circumstance in which the jury formed the view that it could not rely on any other evidence to establish guilt. His Honour also directed that the evidence of flight could be used as "part of the totality of the evidence

presented by the Crown … just like any other piece of circumstantial evidence". In that case, while the jury should consider other innocent reasons which might explain that conduct, it could have regard to that evidence as part of the circumstantial case if satisfied that he had fled for that reason. The use of the evidence in this way did not require satisfaction of that fact beyond reasonable doubt.

40 In my view, his Honour's directions were prudent and appropriate in the circumstances of this case, and in accordance with principle. The appellant makes no complaint about these directions in this appeal, but it is worth considering briefly the correct approach to the assessment of a circumstantial case. While I acknowledge the point made by Porter J that such a direction may be called for as a matter of prudence in the particular circumstances of a case, a direction which requires satisfaction beyond reasonable doubt of a consciousness of guilt, before post offence conduct such as flight can be used in a circumstantial case, in many cases will be inconsistent with the requirement to consider the evidence as a whole. In general terms, in a true "strands in the cable" circumstantial case, it is necessary to ensure that the significance of one piece of evidence is not considered in isolation from other evidence. The strength of the available inferences depend upon the combined effect of all of the circumstances, and it is the coincidence of those circumstances which invariably underpins the inferential reasoning involved in such a case. The error of a piecemeal approach was identified and rejected by the High Court in *R v Hillier* [2007] 228 CLR 618, approved in *R v Baden-Cl*ay [2016] HCA 35 258 CLR 308. In *Hillier*, Gummow, Hayne and Crennan JJ emphasised that it "is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence". Their Honours continued:

> "Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs CJ and Mason J said in *Chamberlain [No 2]*https://jade.io/ - _ftn58:
>
> 'At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence: cf *Weeder v The Queen*.
>
> Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together': per Lord Cairns, in Belhaven and Stenton Peerage, cited in *Reg v Van Beelen*; and see *Thomas v The Queen* and cases there cited.'
>
> And as Dixon CJ said in *Plomp*:
>
> 'All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done.' ".

41 In *Baden-Cl*ay, the High Court, in a unanimous decision, said:

> "For an inference to be reasonable, it "must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence" (emphasis added). Further, "in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence" (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal."

42 This approach to circumstantial reasoning is recognised in cases which deal directly with the use of "consciousness of guilt" evidence. There is no question that if flight was the only piece of corroborative evidence relied upon to demonstrate guilt, then, as the trial judge directed, the jury could not use the evidence in that way unless it was satisfied beyond reasonable doubt that there was no rational explanation for the flight other than a consciousness of guilt. This is consistent with the principles stated by the High Court in *R v Edwards* (1993) 178 CLR 193, 68 A Crim R 349, a case which deals with post offence conduct in the form of lies. However, in that case Deane, Dawson and Gaudron JJ qualified the application of those principles in this way:

> "But in truth there is no circularity of the kind suggested. It is convenient to confine ourselves to the requirement that there be a consciousness of guilt, but the same analysis is applicable to the requirement that the lie relate to a material issue. Although guilt must ultimately be proved beyond all reasonable doubt, an alleged admission constituted by the telling of a lie may be considered together with the other evidence and for that purpose does not have to be proved to any particular standard of proof. It may be considered together with the other evidence which as a whole must establish guilt beyond reasonable doubt if the accused is to be convicted (See *Shepherd v. The Queen* (1990) 170 CLR 573). If the lie said to constitute the admission is the only evidence against the accused or is an indispensable link in a chain of evidence necessary to prove guilt, then the lie and its character as an admission against interest must be proved beyond reasonable doubt before the jury may conclude that the accused is guilty. But ordinarily a lie will form part of the body of evidence to be considered by the jury in reaching their conclusion according to the required standard of proof. The jury do not have to conclude that the accused is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the accused is or is not guilty beyond reasonable doubt."

43 The High Court also considered this question in *Baden-Clay:*

> "In *R v White*, in the Supreme Court of Canada, Major J said:
>
> 'As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role.'
>
> It was open to the jury, in this case, to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife.
>
> However, even if the evidence of post-offence conduct were neutral on the issue of intent, that alone would provide no basis to conclude that the reasonable hypothesis relied upon by the Court of Appeal was open on the evidence led at trial. To so conclude is to adopt an impermissible 'piecemeal' approach to that evidence. All of the circumstances established by the evidence were to be considered and weighed, not just some of them".

44 These comments and principles should be applied by this Court when considering the significance of the flight evidence. While there were other potential reasons for flight by the appellant, and the evidence of itself could not have supported a finding of guilt, the immediacy and violence of his reaction upon seeing the police cars, and the desperation demonstrated by him during the police chase, were cogent pieces of circumstantial evidence to be taken into account with the other evidence presented by the prosecution. The strength of the circumstantial case will depend upon the combined force of that evidence.

An hypothesis consistent with innocence

45 The prosecution evidence supported the presence of at least two, and probably three offenders at the house during the commission of the crimes. There was also a significant body of evidence which identified Matthews and Smith among the offenders. The evidence placing Matthews at the scene included the identification of his voice by the complainant, the complainant's father's evidence that he heard someone demand payment of money, which is to be considered in the context of the evidence of the complainant's mother concerning Matthews' desire to recover a debt and his admission to her of involvement, and forensic evidence linking Matthews to a metal rod found at the scene. Smith's presence is clearly demonstrated by the forensic evidence linking his DNA to blood found at the scene and by his gunshot wounds. His counsel conceded his presence there in his opening address to the jury.

46 The evidence also established a close connection between the appellant and the other accused in the immediate aftermath of the crimes. Within no more than an hour after their commission at Colebrook, the appellant arrived at the Campania service station driving a vehicle, with the wounded Smith in the passenger seat. Mathews arrived at the same time in a second vehicle, and paid for the fuel and the food purchased by the appellant. Forensic evidence linked the appellant's belt to Smith, suggesting that it had been used to apply first aid to his wounds. Its likely use as a rudimentary tourniquet suggests that the appellant was dealing with Smith's wounds in close temporal proximity to their infliction. The appellant and another man then delivered Smith to the Bridgewater Fire Station, rather than take him directly to hospital. They left without waiting for his treatment or the arrival of an ambulance.

47 These circumstances strongly support an inference that the appellant was present with the other accused at the complainant's property when the crimes were committed. The possibility that he had somehow come across these men in innocent circumstances in the aftermath of the crimes, early in the morning and in a relatively remote rural location, was so implausible as to amount to "mere conjecture." There was no evidence that supported such a hypothesis. There was nothing suggested by the appellant in his police interview to that effect. Further, the appellant, as was his right, did not give any evidence to explain how he came to be in the area, or otherwise came into contact with the men in innocent circumstances. The relevance of the failure of an accused to explain incriminating circumstances, where an innocent explanation, if it exists, must depend on facts within his knowledge, was explained by the High Court in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-228 as follows:

> "in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused."

48 This passage has been approved by the High Court on a number of occasions, including *RPS v The Queen* (2000) 199 CLR 620 and *Baden-Clay*. While *Weissensteiner* was concerned with comment by a trial judge to a jury about the accused's failure to give evidence, the above passage was accepted in *Baden-Clay* to encapsulate principles which "would have required consideration" by the court of criminal appeal for the purpose of the same assessment as that being undertaken by this Court.

49 In my view, these principles are relevant to the circumstances of this case, a least in respect of the hypothesis advanced by the appellant's counsel. The improbability and highly coincidental nature of any innocent involvement of the accused with the other men in the period intervening between their departure from the property after the crimes and their arrival at Campania meant that if there was such an explanation, the facts relevant to it must be solely within the knowledge of the appellant. The lack of evidence to support such an explanation tells against regarding the explanation as rational or reasonable.

Another hypothesis

50 There is another hypothesis which arises on the evidence and requires consideration. This hypothesis was not suggested by any party at the trial or on appeal. It was raised by the Court during the hearing of the appeal and is based on observations made by members of the Court from the CCTV footage of the events at the Campania service station.

51 The prosecution case was that three offenders had travelled to the property and committed the crimes. As already discussed, there is evidence supporting the presence of both Smith and Matthews in the vicinity of the house during the commission of the crimes. The evidence, particularly the testimony of Brett Imlach, supports a finding that a third man was also present as part of the group. None of the men were seen again by those present at the property after the complainant's father had discharged his firearm in their direction, and there is no evidence of anyone seeing them arrive at or leave the property.

52 However, as already noted, on the basis of the CCTV footage, there is no question that there were at least four persons occupying the two vehicles that arrived at the Campania service station. It can be inferred that both vehicles had travelled from the complainant's property to Campania after the commission of the crimes. This inference arises from the timing and coincidence of their arrival in Campania and the fact that a man who can be placed at the property during the crimes is in each vehicle. Further, the same reasoning which suggests the improbability of the appellant innocently meeting up with the offenders during the aftermath of the crimes, also establishes the improbability of anyone in either vehicle doing so. The inescapable conclusion is that the group that went to the property in fact consisted of four persons travelling in the two vehicles.

53 There is no evidence that would permit the identification of the fourth person. Police did find the fingerprints of a named female on the driver's side door and window of the second vehicle. These were located during a forensic examination conducted on 19 February, two days after the crime. The fingerprints of Matthews were found in and around the front passenger seat which is, of course, consistent with his presence in the vehicle as seen in the CCTV footage. The vehicle had been seized by police during the search of a residence at Seven Mile Beach on 19 February. It was also an agreed fact that it is not possible for a fingerprint expert to tell how long a print has been on an item. The upshot of this evidence is that it is impossible to conclude that it was the female who was the driver of the second vehicle that went to the complainant's property. It could just as easily have been an unidentified male.

54 This evidence leaves open as a reasonable possibility that, although the appellant was among those who travelled to the property, it was the other three who went onto the property and committed the relevant crimes, and the appellant stayed in a motor vehicle at the bottom of the driveway while this took place. There is no evidence that supports the presence of the appellant as one of the three men who are at the house when the crimes are committed. The only evidence that the prosecution can point to in that regard is that of Brett Imlach, in particular that one of the men called him by name, which suggests that that person recognised him. As already noted, Mr Imlach said that he had known the appellant for years, and he may have been able to recognise his voice but that he "couldn't tell who

it was". This evidence, therefore cannot rebut the hypothesis, that the appellant was the fourth person and remained with the vehicles. It is a rational inference arising on the evidence.

55 In my view, it was not open to the jury, and it is not open to this Court, to exclude this scenario as a reasonable possibility. It matters not that neither the prosecution nor the defence advanced or made submissions to the jury about it.

Is the hypothesis consistent with innocence.

56 The next question which arises is whether the hypothesis is one which is consistent with the innocence of the appellant, or whether on this view of the facts, it was open to the jury to find the appellant guilty of each crime in any event. In my view, on the basis that this hypothesis was not excluded by the prosecution, it was not open to the jury to find the accused guilty of either crime. The difficulty for the prosecution in this regard is that it did not present its case on the basis that the appellant, if he had remained in the vehicle, and had not been one of the three persons at the house during the commission of the crimes, was criminally responsible for those crimes in any event. The prosecution case squarely asserted that the appellant was one of the three persons at the house, and that accessorial liability arose under one of the limbs of s 3. Given that there was no direct evidence that the appellant had committed any of the relevant acts, or had done anything to aid their commission, the minimum requirement for a finding of guilt against him was that he had abetted their commission. The learned trial judge correctly directed the jury that to find an accused guilty of abetting, they would need to be satisfied that he intended to encourage the principal offender and that that person was in fact encouraged by his conduct. He also directed the jury that the relevant accused must have knowledge of the essential facts necessary to establish the crime charged, including the state of mind of the principal offender.

57 Although the jury was correctly directed that mere presence in the absence of these facts is insufficient to establish criminal responsibility, the prosecution asserted at the trial that the requisite state of mind, including knowledge of the essential facts of the crimes, could in the circumstances of this case be inferred from the presence of the alleged abettor during their commission. This submission was justified by the evidence. It was clearly open to the jury to be satisfied to the requisite standard that each of the three persons who were actually present at the house during the relevant events bore criminal responsibility for what any of them did while they were at the house.

58 However, different considerations apply in the case of a person who remained in a vehicle at the bottom of the driveway during the commission of the crimes. In particular, the requisite state of mind of that person, including knowledge of what the other three intended to do at the property, cannot be inferred beyond reasonable doubt. It can be inferred that that person would have known that the others were going to the property for the purpose of recovering Mr Matthews's debt. However, although it may be suspected or even probable that the person knew that the men were intending to use unlawful means to do so, it would be impossible for the jury to be satisfied of this knowledge beyond reasonable doubt. In the context of this scenario, to establish guilt on the basis of accessorial responsibility under s 3 of the Code, it would be necessary for the jury to conclude that the only rational inference open was that the fourth person knew, before the group went to the house, that one of them had possession of a firearm, and that their intention was to use it to threaten the complainant, and to break into his house. The fact that the group travelled in two cars leaves open the reasonable possibility that the fourth person did not know that a person from the other car had possession of a firearm. Further, the evidence cannot exclude the reasonable possibility that the prior discussion was that one of the other three, probably Matthews was simply intending to knock on the door and confront the complainant about the debt without doing any more.

59 Further, on the basis of this hypothesis, an inference of guilt against the accused is not strengthened by the other strands of the circumstantial case. Everything that occurred afterwards,

including the events at Campania, the Bridgewater Fire Station and the appellant's flight from police later in the morning, can be explained by the involvement of the appellant as an accessory after the fact. The strength of the circumstantial case is to establish the appellant's presence as one of the group that went to the property, but does not otherwise assist the prosecution in establishing his guilt.

60 An alternative basis of criminal responsibility in such circumstances might arise under s 4 of the Code. However, in my view, this basis of criminal responsibility is precluded from our consideration because it was not relied upon by the prosecution during the trial. In any event, it would not have been open to the jury to infer the existence of the requisite unlawful common purpose, because there was at the very least, a reasonable possibility that all that was intended, as far as the fourth person was concerned, was for these men to lawfully request payment of the debt.

61 In argument, counsel for the respondent submitted that the principles in *Weissensteiner* apply to this hypothesis with equal force to that of the possibility of an innocent post-offence meeting, and hence, in the absence of evidence to support it, it can be rejected by this court as a rational or reasonable possibility. I do not agree with this submission. The innocent meeting theory is one with little inherent probability. Without explanation or evidence, it remains inherently improbable and nothing more than "mere conjecture." The possibility that the accused remained in the vehicle, did not directly take part in the commission of the crimes, and did not have the requisite guilty knowledge was an inference on the evidence presented by the prosecution which was of equal probability as an inference that he was one of the group that was present at the house when the crimes were committed. Because both inferences were available on the prosecution evidence, it would, in effect, impermissibly reverse the onus of proof to select the guilty inference in preference to the one consistent with innocence simply because the appellant did not give evidence. As Mason CJ, Deane and Dawson JJ pointed out in *Weissensteiner:*

> "Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and a jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

62 In any event, a further constraint that arises in respect of our consideration of a guilty verdict based on this hypothesis is that it simply did not form part of the prosecution case. Notwithstanding that there was clear evidence supporting the inference that four people had travelled to the property, the prosecution presented its case on the basis that three people had jointly perpetrated the crime, and that the appellant was one of them. If the prosecution had asserted at trial that the appellant might be guilty on the alternative basis that notwithstanding that he may have remained in the car at the bottom of the driveway, he still bore liability for the acts of the others under either s 3 or s 4, then the defence would have been in a position to deal with the issues which arose from such an allegation. But this did not happen. The prosecutor opened the case to the jury on the basis that there were three men at the house and that each was criminally responsible for the acts of any of them. It is pertinent to note that in his opening address, counsel for the prosecution asserted that Matthews was driving the second vehicle when it arrived at the Campania Service Station. The same assertion was repeated in the prosecution's closing argument. As has already been discussed, this is inconsistent with the CCTV footage which shows Matthews get out of the passenger side of the vehicle as soon as it arrives, and the vehicle move while he is out of it. The prosecution case did not deal in any way with the hypothesis that the appellant might have remained in the vehicle.

63 As a matter of fairness and principle, the prosecution, at the point of an appeal, should be held to the case it presented at trial: *King v The Queen* [1986] 161 CLR 423, 22 A Crim R 436. The unfairness of permitting the prosecution to rely upon a basis of criminal responsibility which was not

asserted at trial is patent. The appellant has lost the opportunity to address that question by evidence, including that adduced through the cross-examination of prosecution witnesses and by deciding to give or call evidence himself.

64 It follows that the evidence leaves open a hypothesis consistent with innocence, in particular that the appellant remained in the vehicle and did not have the requisite prior knowledge when the crimes charged in the indictment were committed by the other three persons. Accordingly, it was not open to the jury to return verdicts of guilty of the charges alleged in counts 1 and 2 of the indictment.

Alternative verdict

65 It follows from what I have written above that in my opinion, the appeal should be allowed, the verdicts of guilty in respect of counts 1 and 2 quashed and the sentence imposed for those crimes set aside. However, in that event, the circumstances of this case require consideration of the provisions of s 403(2) of the *Criminal Code*. That section provides as follows:

> "Where an appellant has been convicted of a crime, and the jury could on the indictment have found him guilty of some other crime, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved him guilty of that other crime, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other crime, and pass such sentence, not being a sentence of greater severity, in substitution for the sentence passed at the trial, as may be warranted in law for that other crime."

66 This Court applied this provision in *Otto v Tasmania* [2021] TASCCA 15, an appeal against conviction for murder, which was allowed on the same ground as that asserted in this case. The prosecution had relied on a wholly circumstantial case, and the Court concluded after examining the evidence, that guilt in respect of the crime of murder was not the only rational inference to be drawn from the whole of the circumstances. However, the evidence was sufficient to satisfy a jury of facts which established the alternative crime of being an accessory after the fact. Porter AJ, with whom Geason J and I agreed, said this:

> "Section 403(2) of the *Criminal Code* provides that where an appellant has been convicted of a crime, and the jury could, on the indictment, have found the person guilty of some other crime, and on the finding of the jury it appears to the Court that the jury must have been satisfied of the facts which proved him guilty of that other crime, the Court may substitute for the verdict found by the jury, a verdict of guilty of that other crime. The first condition is satisfied by s 340 of the Code which provides that on an indictment for a crime, the accused person may be convicted of being an accessory after the fact. In fact, the alternative of being an accessory after the fact to murder was left to the jury in this case.
>
> The second limb of s 403(2) was considered by this Court in *Richardson v The Queen* [1978] Tas R 178. The Court quashed a conviction for rape, and had to consider the alternative of indecent assault when that had not been left to the jury. It was held that the jury's satisfaction did not have to appear only from the verdict, but may also appear from such facts of which the jury must have been satisfied. At 186, Crawford J (with whom Green CJ agreed) said a substituted verdict was open if, on the evidence, a jury properly directed could have convicted an appellant of the alternative. See also Nettlefold J at 188-189."

67 In my view, it is appropriate in this case for this Court to utilise its power under s 403(2) to substitute a verdict of guilty against the appellant of the crime of being an accessory after the fact in respect of each relevant crime. Even on the assumption that the appellant remained in the vehicle and did not have prior knowledge that the crimes were to be committed, it is inconceivable that when the other men returned to the vehicle with a firearm and one of them having sustained gunshot wounds, that the appellant would not have been made aware of what had transpired at the house. The evidence clearly establishes to the requisite standard that on any view of the facts, he thereafter assisted the

other men. The only rational inference open on the evidence is that his purpose in doing so included to enable them to escape punishment. I therefore have no difficulty in concluding that the jury must have been satisfied of the facts necessary to establish the crime of being an accessory after the fact in respect of each crime charged in counts 1 and 2 on the indictment. I would therefore, in addition to the orders already discussed, substitute a verdict of guilty of being an accessory after the fact to such crimes.

68 In my view, the Court should hear from counsel before determining how to proceed in respect of the question of sentence.

ADRIAN JOHN PICKETT v STATE OF TASMANIA

REASONS FOR JUDGMENT **GEASON J**
20 September 2022

69 I have had the advantage of reading Brett J's judgment. I agree that the appeal should be allowed and with the orders his Honour proposes. There is nothing I wish to add.