AELERT seminar on the implications of the *R v Baden-Clay* [2016] HCA 35 for environmental prosecutions

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Take home points:

1. The High Court's recent decision in *R v Baden-Clay* [2016] HCA 35; (2016) 334 ALR 234 has important implications for environmental prosecutions particularly where circumstantial evidence such as post-offence conduct is relied upon to establish the identity of the offender.

2. The decision is a short, clear and unanimous statement of the law by the High Court that will be very helpful for explaining to Magistrates relevant principles for the use of circumstantial evidence in summary prosecutions of environmental offences.

3. Environmental compliance officers, investigators and lawyers should be aware of its implications for issues such as proving vegetation clearing and similar offences where satellite imagery is relied upon to establish elements of an offence but there is no direct evidence of the identity of the offender.

Extract from decision of the principles for cases that turn on circumstantial evidence:

Hypothesis consistent with innocence

[46] The prosecution case against the respondent was circumstantial. The principles concerning cases that turn upon circumstantial evidence are well settled.[15] In *Barca*,[16] Gibbs, Stephen and Mason JJ said:

> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v R*.[17] To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v R*;[18] see also *Thomas v R*."[19]

[47] 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"[20] (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".[21] (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal.[22]

15. *Barca v R* (1975) 133 CLR 82 at 104; 7 ALR 78 at 95 (*Barca*).
16. *Barca* at CLR 104; ALR 95–6.
17. (1911) 13 CLR 619 at 634; 17 ALR 566 (*Peacock*).
18. (1963) 110 CLR 234 at 252; [1964] Qd R 170; [1964] ALR 267 at 275 (*Plomp*).
19. (1960) 102 CLR 584 at 605–6; [1960] ALR 233.
20. *Peacock* at CLR 661, quoted in *Barca* at CLR 104; ALR 96.
21. *R v Hillier* (2007) 228 CLR 618; 233 ALR 634; [2007] HCA 13 at [46] (*Hillier*) (footnote omitted).
22. *Hillier* at [48]. See also *Chamberlain v R* (1984) 153 CLR 521 at 535; 51 ALR 225 at 237 (*Chamberlain*).

Extract from decision on post-offence conduct:

Post-offence concealment and lies

[72] The respondent's false denials to police about his ongoing affair, his suggestion to Ms McHugh that she should "lie low", and his enquiry of her as to whether she had revealed the affair to the police were all capable of being regarded by the jury as evidencing a strong anxiety to conceal from police the existence and true nature of his affair with Ms McHugh. This anxiety could reasonably be seen as indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not an unintended, tragic death of his wife, but an intentional killing.

[73] In *R v White*,[49] 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."

[74] In *White*, Major J went on to say that there may be cases where post-offence conduct, such as the accused's flight or concealment, is so out of proportion to the level of culpability involved in a lesser offence that it might be found by the jury to be more consistent with the more serious offence charged.[50] There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder.[51] There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter. As Major J said:[52] "The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute."

[75] In *Lane v R*,[53] the Court of Criminal Appeal of the Supreme Court of New South Wales rejected the contention that a count of manslaughter of the accused's child should have been left to the jury as an alternative to murder. The Court held that the jury were entitled to take the post-offence conduct of the accused as evidencing consciousness of guilt of murder. In particular, the Court held that the lies told by the accused "alone were sufficient to provide the evidentiary foundation for an inference that … she acted with the intention of killing."[54] Their Honours went on to say that the false accounts given by the accused "provide no factual foundation for an inference that the manner in which she killed [her child]" would establish manslaughter by criminal negligence.[55]

[76] 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.

[77] 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.

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49. [1998] 2 SCR 72 at [27] (*White*).
50. *White* at [32].
51. *R v Ciantar* (2006) 16 VR 26; 46 MVR 461; [2006] VSCA 263 at [38]–[40] and [65]–[67]; *R v DAN* [2007] QCA 66 at [89] and [99].
52. *White* at [32].
53. (2013) 241 A Crim R 321; [2013] NSWCCA 317 (*Lane*).
54. *Lane* at [111].
55. *Lane* at [111].