ANDREW MARK MALLARD v THE QUEEN BC9604360

Unreported Judgments WA · 106 Pages

SUPREME COURT OF WESTERN AUSTRALIA COURT OF CRIMINAL APPEAL

MALCOLM CJ, IPP and WALLWORK JJ

No. CCA 204 of 1995

4-5 June 1996, 11 September 1996

960505

Headnotes

Criminal law and procedure — Evidence — Confessions — Oral interviews followed by video taped interview to corroborate admissions in oral interviews — Video recording facilities available — Desirability of video recording all interviews — Whether admissions made voluntarily — Whether exhortations "to tell the truth" constituted an inducement — Whether evidence should have been excluded on unfairness grounds — Whether evidence of oral admissions should be excluded because of failure to use video equipment when available — Desirability of police adopting rule of practice that where video facilities are available the whole of a suspect's interview should be recorded on video — Purpose of video recording is to corroborate evidence of admissions made in the course of the video recorded interview — Purpose is not to obtain corroboration of admissions previously made in unrecorded interview — The desirable practice to be given effect by the courts in respect of interviews since 22 June 1995 — Video taped interview corroborated admissions previously made and admissions made in the video taped interview itself — Despite

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Criminal law and procedure — Evidence — Confessions — Oral interviews followed by video recorded interview to corroborate admissions in oral interviews — Whether direction of the kind formulated in McKinney v The Queen (1991) 171 CLR 468 required — Confession in oral interviews corroborated by admissions made in video recorded interview — Direction given by trial Judge sufficient — Some admissions made by the appellant could only have been made by the perpetrator of the crime — Jury entitled to find that when appellant used the third person he was referring to himself.

Criminal law and procedure — Appeal — Verdict — Whether unsafe or dangerous — Whether jury must have had a reasonable doubt — Whether conduct of prosecutor such as to make verdict unsafe or dangerous.

Criminal law and procedure — Evidence — Evidence of accused himself which showed his bad character, including lying, cheating and stealing — Cross- examination regarding lying and bad character relevant directly or indirectly to the issue of guilt, defence of alibi and voluntariness of alleged confessions — Cross-examination permissible even if it also went to credit — Whether jury also entitled to take bad character into account in relation to credit.

Criminal law and procedure — Evidence — Corroboration — Lies — Directions to jury.

criticisms of the practices adopted in this case the admissions were voluntary and evidence of them should not have been excluded on grounds of unfairness.

Case(s) referred to in judgment(s):

Attwood v The Queen (1960) 102 CLR 353;

Beamish v R [1962] WAR 85;

Chidiac v The Queen (1991) 171 CLR 432;

Donnini v The Queen (1972) 128 CLR;

Edwards v The Queen (1993) 178 CLR 193;

Jones v Director of Public Prosecutions [1962] AC 635;

Kelly v The Queen unreported; CCA SCt of WA; Library No 940590; 27 October 1994;

M v R (1994) 181 CLR 487;

McKinney v The Queen (1991) 171 CLR 468;

Morris v The Queen (1987) 163 CLR 454;

Pelham v The Queen unreported; CCA SCt of WA; Library No 950505; 25 September 1995;

R v Chitson [1909] 2 KB 945;

R v Couper (1985) 18 A Crim R 1;

R v Court (1836) 7 CandP 486; 173 ER 216;

R v Gillham (1828) 1 Mood CC 186; 168 ER 1235;

R v Kurasch [1915] 2 KB 749;

R v Sleeman (1853) 7 Cox CC 245;

R v Sraek [1982] VR 971;

R v Stewart [1993] 2 TasR 274;

R v Wild (1835) 1 Mood CC 452; 168 ER 1341;

R v Woodward unreported; SCt of WA; Library No 950117; 22 March 1995;

Sell v The Queen unreported; CCA SCt of WA; Library No 950319; 22 June 1995;

Van Der Meer v The Queen (1988) 62 ALJR 656;

Webb (1994) 74 A Crim R 436

Case(s) also cited: Nil

Malcolm CJ

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INTRODUCTION
This is an appeal against conviction. On 15 November 1995 the appellant was convicted after a trial which commenced on 2 November 1995 of the wilful murder of Pamela Susanne Lawrence at Mosman Park on 23 May 1994.
The notice of appeal dated 20 November 1994, which appears to have been prepared by the appellant himself, contained only one ground, namely, that the learned trial Judge "erred in admitting into evidence oral conversations at CIB Police office on 10 June and 17 June 1994". At the outset of the hearing of the appeal application was made by counsel for the applicant for leave to amend the grounds of appeal by substituting for the original ground five other grounds. The notice of motion dated 27 May 1996 also contained a ground 6, namely: "There was a miscarriage of justice in that new and fresh evidence raises the reasonable possibility that the appellant was not the perpetrator of the offence committed. PARTICULARS
Particulars of the new and fresh evidence relied upon will be provided at or before the hearing of the appeal."

No such particulars had been provided as at the date of hearing on 4 June 1996. There was no objection on behalf of the respondent to the substitution of grounds 1 to 5 as set out in the notice of motion, but there was an objection to ground 6 in the absence of particulars. Counsel for the appellant sought an order that his application in respect of ground 6 be adjourned. It was apparent that the adjournment was being sought on the basis that new or fresh evidence might be available, a matter still to be investigated, not that new or fresh evidence was available. In the circumstances, the Court

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granted the appellant leave to amend by substituting grounds 1 to 5 in the notice of motion for the original ground. No order was made in relation to proposed ground 6. The Court made it clear, however, that unless an application was made before judgment was delivered on the appeal and leave to amend granted, the appeal would be determined on the basis of grounds 1 to 5. No further notice has been given of any further application to amend.

THE CROWN CASE

The Crown case against the appellant was that the murder occurred on the night of Monday 23 May 1994. This was the night of a storm which was of some significance to witnesses in their recollection of relevant events.

Mrs Lawrence was a shopkeeper and jewellery maker who conducted a jewellery making business and jewellery shop known as "The Flora Metallica" in Glyde Street, Mosman Park. She was assisted in the business by a Mrs Jacqueline Barsden who was working at the shop on 23 May between 9.55 am and 3.00 pm. She explained the nature of the business and the daily routine and what happened on that day. There was a shed at the back of the shop which was used as a workshop. Mrs Lawrence spent most of the day in the shed where there was equipment for gold plating and coppering. It seems that in the middle of the day Mrs Lawrence said that she was going shopping. She went out and returned to the shop at 2.00 pm. At about 2.10 pm she went down to the shed. Mrs Barsden left for the day at about 3.00 pm. She closed the front door of the shop so that it could only be opened from the outside with a key, but it was not deadlocked. It could be opened from the inside.

Mrs Barsden had a daughter named Katherine who was a pupil at St Hilda's Girls School. At about 4.20 pm that afternoon she telephoned her Mother, Mrs Wood and asked her to pick up Katherine from the school.

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That evening some time after 6.00pm Mrs Lawrence was found face down on the floor of the shop in a pool of blood. She was a woman 160 cms tall and weighed 66 kgs. She had suffered severe head injuries which had caused underlying fractures of her skull in three different locations. Some of the wounds or lacerations had bluish or greenish material in them. There was a group of injuries on the right side of the front of the head involving the forehead and just above the forehead. There was a group of injuries on the left side involving the forehead and the temple. Finally, there was a group of injuries on the back of the head. There was bruising to the right side of the forehead and the right temple consistent with a fall or collapse. The injuries were consistent with a number of blows to the head in each of the areas of injury resulting in fractures to the skull. The injuries were consistent with Mrs Lawrence having been struck with a blunt instrument.

There was no immediate suspect identified by the police who examined some 664 possibilities. As a result, the police identified 136 persons of interest, one of whom was the appellant. He was interviewed on four occasions at Graylands Mental Hospital when he gave inconsistent accounts regarding his movements at relevant times on the night in question. The appellant was subsequently interviewed by Detective Caporn on 10 June 1994 when the Crown contended that he gave nine different and at times inconsistent variations of his movements on the night. That interview extended over a period of some eight hours and 20 minutes, although the periods during which he was interviewed totalled four hours and 54 minutes. There were several breaks during the interview which totalled three hours and 26 minutes. In the course of that interview, the appellant described the actions of a third person ("He") and described what this third person had done. It was the contention of the Crown that in the course of that interview the appellant's description of what the third person had done constituted a confession. The interview was

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terminated when the appellant bit Sergeant Caporn on the leg. During the course of that interview it was alleged that the appellant said he had disposed of the murder weapon by throwing it into the sea at North Fremantle, where he had travelled by train.

The appellant was interviewed again on 17 June 1994 and interviewed by Sergeant Brandham. During the course of that interview it was alleged that he made two further inconsistent alibi explanations and then made a confession.

The appellant gave notice of alibi at the trial and advanced a further alibi, which included him knocking on various doors on the night in question and getting no answer. The significance of this alibi was that the notice of alibi was tendered into evidence, the appellant gave evidence of it, but his evidence was rebutted by the evidence of Crown witnesses who said that they were at home at the time but had heard no-one knocking at their door. In one particular case, a Mr Clark had painted his front door that day. As a result of the storm, he had put up cardboard in the door frame. The Crown placed considerable reliance on this evidence by way of rebuttal of the alibi.
It was clear that evidence of the alleged confessions was essential to the Crown case at the trial. The confessional evidence was said to be of particular significance because the Crown case was that, during the interviews on 10 and 17 June 1994, the appellant correctly detailed certain aspects of the crime and accompanying facts which only the perpetrator could have known.
The confessional evidence was not the only evidence. There was also a body of circumstantial evidence which formed part of the Crown case. The appellant had been placed in the lockup at Police Headquarters in East Perth at about 2.40pm on Monday 23 May 1994. He was released approximately an hour later. A taxi driver gave evidence that he picked up the appellant in Perth between 4.00pm and 4.10pm and took the appellant to the Bel Air Flats at

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2 Murray Avenue, Mosman Park. He could not be precise about the time, but it was between 4.45pm and 5.00pm. There was evidence that, at the preliminary hearing, his recollection was that he had dropped off the appellant just before 5.00pm. There was also evidence that the taxi driver's next fare was shortly after 5.20pm when he received a call outside Mosman Park Railway Station.
Two witnesses, Mr Mouchmore and Mrs Murtagh, gave evidence describing a person they had seen in Glyde Street about 4.40pm or 4.45pm. The learned Judge commented to the jury that it would be difficult to conclude on that evidence that the person they described and the person they saw was the appellant. A Mrs De Florenca gave evidence of two persons she described as having been in the area of Mrs Lawrence's shop at around 5.00pm. The trial Judge commented that this evidence was not such as to give rise to a doubt if the jury concluded, on the basis of other evidence, beyond reasonable doubt that the appellant killed Mrs Lawrence.
Mrs Raine described a man she had seen on the ground floor of the Bel Air Flats on the evening of 23 May. Her evidence, if accepted, strongly suggested that the person she saw was the appellant. Her evidence was contested by the appellant. If the encounter took place, it would have been about 5.15pm or as late as 5.25pm. Mrs Raine described the person she saw as carrying an iron bar. Other evidence suggested that the murder weapon was a wrench or spanner. The person she saw also had a carton of Choc Milk. This particular fact did not tie in with other evidence. According to the police record, the appellant had only $2 in his possession when he was in the lockup that day. When dropped off by the taxi he absconded without paying the fare.
The learned Judge in his summing up said that the evidence of Mrs Raine was only relevant if the jury were satisfied that the person she saw was the appellant. Mrs Raine also gave evidence that the person she had seen

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on the night of 23 May was the same person as she saw in Murray Street the next morning. At that time, the appellant was in the process of being arrested by police in Murray Street. Mrs Raine later identified the appellant as the person she saw by picking him out from a photo board. The jury were given a comprehensive warning regarding the dangers involved in relation to identification evidence generally and the use of a photo board in particular.
Significant evidence was given by a Miss Katherine Barsden, the daughter of Mrs Jacqueline Barsden who worked at the shop. As at 23 May 1994 Miss Barsden was 13 years of age. She was aged 15 at the time she gave her evidence. On the evening of 23 May 1994 she was picked up by her grandmother at St Hilda's Girls School in Bayview Terrace, Mosman Park. Her grandmother was driving a light green Toyota Corolla Seca sedan. Miss Barsden's evidence was that when she got into the car she observed the time to be 5.00pm on the digital car clock. Between two and five minutes later, but much closer to two than five, the car pulled up at the traffic lights at the T junction of Glyde Street and Stirling Highway, opposite Flora Metallica.
Her evidence in chief was: "I looked into the shop, the lights were on and the front door was closed. As soon as I looked into the shop there was a man standing there, so I kept looking and he was standing not where a customer would normally be - next to the right hand side of the pinup board - next to or behind the L-shaped display area."
She described what she saw as follows: "The man was 30-35 years old, medium build, slight beard, orange strawberry blond colour, scarf on his head, rustic orange border, slight pattern of blue or green. I kept staring and I felt the moment that he saw me or we made eye contact he bobbed down and I kept looking for another 30 seconds and he didn't reappear. In those 30 seconds the lights changed to green and the car moved off. I didn't see Mrs Lawrence."

BC9604360 at 10

In his summing up the learned trial Judge commented that Miss Barsden gave the time quite precisely and identified with precision the position of the person she saw in front of the counter in the shop. Her evidence that she locked eyes with the person, who behaved suspiciously by ducking out of sight, was important evidence.

Mrs Wood, Miss Barsden's grandmother, confirmed Miss Barsden's evidence of the time she got into the car at St Hilda's and the vehicle stopping at the Glyde Street traffic lights. Her evidence was that Miss Barsden said: "There's someone in mummy's shop."

Mrs Wood then said: "Have a good look."

A police officer gave evidence that he had checked the clock in the vehicle shortly afterwards and it was found to be accurate.

The appellant himself gave evidence which, subject to a question of interpretation to which I will refer later, was an admission that he was in the shop and that he was seen by a passenger in a car which was stopped at the traffic lights and with whom he locked eyes. The importance of the evidence was that, if it was accepted that it was the appellant seen by Miss Barsden in the shop, it placed him there just after 5.00pm. It was significant evidence of opportunity.

There was an "A" frame outside the shop on the afternoon of 23 May. At 3.00pm, Mrs Jacqueline Barsden, who had been attending the shop, brought in the "A" frame, left the shop and locked the door. Later, it appears that Mrs Lawrence found herself locked out. Mr Lawrence then attended at the shop. He was there between about 4.00pm and 4.20pm. His house was about two minutes away by car. When he arrived at the shop the "A" frame was inside the shop.

BC9604360 at 11

A Mr Barry Whitford gave evidence that he received a telephone call from a woman who said that she was from Flora Metallica. They spoke about some salt and pepper shakers. His evidence was that this telephone call was made about 5.10pm. Mr Whitford confirmed the accuracy of the time of the call by checking with Telecom and checking the accuracy of his clock. The only person who could have made the call from the shop at that time was Mrs Lawrence. As the learned trial Judge pointed out to the jury, if the call came from Mrs Lawrence, then she was still alive at about 5.10pm or very close to that time.

In this state of the evidence the learned trial Judge told the jury that there were various questions they had to consider. As formulated by the learned trial Judge, these were: "I am just simply referring to these pieces of evidence to bring together perhaps some of the pieces of evidence which bear upon the question of the events that occurred immediately surrounding the killing of Mrs Lawrence. You would have to consider for yourselves what you thought the evidence carried you to as to a conclusion as to what happened to her. How did the person who killed her get into the shop? Was it through the back door? If so, how did that person get through the back door? Was it because the door had been left on the rag or had been left ajar, or was it because she had already come into the shop before the person who killed her did? Was the person who killed her already in the shop having got in through the back door by being able to push it open because it was not properly secured? Was that person then seen by Kate Barsden, ducked down and was in the front part of the shops being secret when Mrs Lawrence came in and disturbed that person by making a telephone call from the rear. There are a number of different ways you can look at that evidence and it may help you to make a conclusion about those matters or you may find that of no assistance whatsoever either to understand or to know how the killing occurred or perhaps more importantly to evaluate what you think of what the accused person

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BC9604360 at 12

said, if you find that he said these things, later to the police about what occurred.

They are matters which you could consider. Certainly you may have had some confidence that you know where in the shop she was killed, so how did she get there? Did she come forward having made the telephone call to commence the locking up process and did she there surprise and come upon the intruder? These are matters for you, you will see, but it would seem pretty clear, you may think - again it is a matter for you - that she was first struck down in front of that partition wall where the display board is and you have got the evidence firstly of Dr Cooke and also of Mr Bagdonavicius who also observed the scene about that and the nature of the blood spattering and the smearing in that area which indicates that blows were struck to her head low down at that point.

Then of course, you have got the evidence that she was dragged to the rear of the shop later and perhaps you may think, but it would be a matter for you, that the spattering in that area - the region of the back door and on the fridge

and on the sink cabinet may indicate that one or more further blows were struck there, perhaps not. The matter is entirely for you.
You would want to give careful consideration I would suggest to you to that aspect for the reasons that I have mentioned. You would look to the timing of that also. You may think you need to reconcile in some way the evidence given by Kate Barsden and by Mr Whitford about times. It may not concern you. It is a matter entirely for you."
Mr Lawrence gave evidence that he began to be concerned that his wife had not arrived home by 6.15pm. He telephoned the shop. There was no answer and the answering machine had not been switched on. He drove to the shop. The lights were still on. There was a pot outside with a eucalyptus tree in it. He opened the front door with his key and took the pot inside. The "open" sign was still above the front door. There was still a mat outside the door. The "A" frame was inside. Mr Lawrence noticed some blood on a partition and he heard a groan. He found his wife lying on the floor. She had

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blood in her mouth and was making gurgling sounds. He turned her onto her side and telephoned 000. The ambulance arrived shortly afterwards. He found the back door shut but unlocked. He found the door to the shed at the back open and the lights on. This was a work shed. There was a copper bath which was operating.
Mr Lawrence then went back into the shop. No jewellery was missing. No cash was missing from the cash box under the display counter. Mrs Lawrence's handbag was on the shelf behind the partition. A brown Oroton wallet was missing, as were her credit cards. She normally had $100 - $150 cash in her wallet. Mr Lawrence's evidence was that on the night of 23 May Mrs Lawrence was wearing jeans and a jumper.
Mr Lawrence said that Mrs Lawrence's policy was that, if anyone was confronted in the shop by another person or in danger, they should hand over whatever was required of them without dispute. He said there were various tools in the back shed such as adjustable spanners, screwdrivers, pliers and clippers. They were used in the business. Shortly after 23 May 1994 Mr Lawrence checked the tools to see if any of them were missing. He thought an expanding spanner was missing, but he was not sure. The spanner he thought was missing was a Sidchrome spanner "10 inches in length" with an adjustable head. He would also describe it as "a wrench".
A possible inference from Mr Lawrence's evidence was that Mrs Lawrence may have been in the shop, but had gone out to the shed at the back to do some work, leaving the shop unattended. The intruder may have entered the shop and been disturbed by Mrs Lawrence. Alternatively, Mrs Lawrence may have been waiting in the shop and had been disturbed by the intruder.
The calling of the ambulance was logged at 6.37pm. The ambulance arrived at 6.45pm. In the meantime, the police had arrived at 6.42pm.

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On this evidence, an important question for the jury was to determine where the appellant was between 5.00pm and about 6.20pm when Mr Lawrence arrived at the shop. There was evidence that the appellant was short of money, but the learned Judge warned the jury that this evidence did not carry the matter anywhere.
The appellant's evidence was that after he left the taxi, he went to Ms Michelle Engelhardt's flat at 3/10 Murray Avenue at about 5.30pm to change his clothes. On his account, he was there for about one minute. He said that after that he was walking around trying to score some marijuana. He was with a Mr Damien Kostezky. They visited a corner delicatessen between 6.00pm and 6.30pm to buy food. They then went to Ms Engelhardt's flat arriving there about 6.40pm. Mr Kostezky, however, gave evidence that he met the appellant at 7.00pm. Ms Engelhardt gave evidence that the appellant called at her flat at about 6.30pm and stayed until after 7.00pm. She recalled that it was after 7.00pm because he left while a television programme called Home and Away was on and this programme had commenced at 7.00pm.
Ms Engelhardt's evidence that the appellant left her flat after 7.00pm could not have been correct. There was irrefutable evidence that the appellant was on a train travelling between Mosman Park and Fremantle at 6.58pm. He would have boarded that train a Mosman Park a few minutes before. This means that he must have left the flat some time before 7.00pm. It also follows that Mr Kostezky's evidence that he met the appellant at 7.00pm could not have been correct.
There was a body of evidence from various witnesses at a number of flats in the area that they had been visited by the appellant on the previous night, Sunday 22 May, when the appellant was endeavouring to obtain drugs. The appellant's evidence regarding his pursuit of drugs placed these activities on the Monday night rather than the Sunday night. The learned Judge directed

BC9604360 at 15

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the jury that it was for them to consider where the truth lay, but that the evidence raised questions whether the appellant was confused or whether he was lying about these issues taking place on the night of Monday 23 May.
His Honour said that the acceptance or rejection of the appellant's evidence regarding his movements was significant, as it was the basis of his alibi. The jury were told they had to consider whether the evidence was deliberately untrue or simply mistaken in the context of the evidence given by other witnesses. If the alibi was rejected, the appellant was left in the situation where he was unable to account for his movements. The learned Judge commented that this could be taken no further than giving rise to an opportunity or a motive for being in the area of Flora Metallica, or in the shop itself, with an opportunity to commit the killing.
It was in this context that the learned Judge gave the following direction to the jury: "You need to have very clearly in your minds, in my view, the fact that there is this further step to be taken. What we are concerned with there is evidence of opportunity. By itself it would seem to me that would not carry you to the conclusion beyond a reasonable doubt that it was this accused person who killed. As to that, I would have thought that was a conclusion which you could not reach adverse to him unless you accepted the police evidence of the confessions he made. As to that there are some very clear questions for you to consider."
The principal grounds of appeal relied upon by the appellant were concerned with the confessional evidence.
GROUND 1: INTERVIEWS ON 10 AND 17 JUNE 1994
Ground 1 of the grounds of appeal was that: "The learned trial Judge erred in law and in fact in admitting into evidence non-videotaped interviews between the appellant and Detective Caporn and Detective Emmett on 10 June 1994 ('the

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BC9604360 at 16

first interview') and the appellant and Detective Brandham and Detective Carter on 17 June 1994 ('the second interview').
PARTICULARS
(a) The learned trial Judge erred in that his Honour, either as a matter of law, or in the exercise of his discretion, ought to have ruled that the first interview and the second interview, or parts thereof, should not have been admitted into evidence because they were interviews between the police and a suspect in police custody, when video equipment was readily available, there was no other mechanical corroboration of what the appellant was alleged to have said in the interviews and there was a serious and substantial dispute as to both what was said and the purpose intended to be conveyed by what was said. (b) The learned trial Judge erred in law in that he ought to have ruled that the first interview and second interview were inadmissible in that in both the first interview and the second interview the detectives offered the appellant inducements in that they said they told the appellant to 'tell the truth' in circumstances where it was clear that the police, on each occasion this was said, therefore wanted the appellant to tell them something different than what had hitherto been said. (c) The learned trial Judge erred in failing to exercise his discretion to exclude the first interview and second interview from being admitted into evidence as the interviews were in effect a cross-examination intended to break down the answers of the appellant to questions put by the detectives, to which they had received replies which they (the detectives) regarded as unfavourable."
THE VOIR DIRE
The admissibility of the evidence of these two non-videotaped interviews on 10 and 17 June 1994 was challenged at the trial and there was a voir dire. Objection was taken to the admissibility of the evidence on two

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BC9604360 at 17

grounds. First, it was said that the statements of a confessional character were not voluntary. Secondly, it was said that the evidence should be excluded in the exercise of discretion on the grounds of unfairness. The learned Judge approached the first ground on the basis that the Crown carried the onus of proving that the confession was voluntary on the balance of probabilities. As to the second ground, it was for the accused to satisfy the Court that it would be unfair to admit the evidence against him, because of the circumstances under which it was obtained, having regard to the overriding need for a fair trial: Webb (1994) 74 A Crim R 436 at 442-443 per Malcolm CJ.
The appellant made allegations of the use of violence by Detective Sergeant Caporn. After an appearance in the Central Law Courts where he was represented by counsel, the appellant accompanied the detectives to the CIB offices and was interviewed. This interview took place after a discussion with counsel who had represented him at the Central Law Courts that day. On that basis, the holding of the interview as such was said to be voluntary, although the appellant contended that he was induced to participate by the prospect that after asking him a few questions, his property would be returned to him.

The learned Judge found the evidence given by the two detectives clear and consistent. As his Honour put it: "Cross-examination of them produced no inconsistency or difficulty in the acceptance of their evidence so far as they were asked to deal with the specific allegations being made and effecting the voluntariness of the material."
As to the evidence of the appellant, the learned Judge said: "So far as the accused person's account of the matters which particularly concern the voluntariness of this evidence is concerned, I have already mentioned in my discussions with learned defence counsel some concerns that I had about that

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evidence and I think it is unnecessary for the purpose of these reasons to mention the detail and the particularity of that. It is sufficient to say that I detected clear shifts in the ground of the accused person during the course of the evidence that he gave in chief and then during his cross-examination which made it particularly difficult to understand upon what part of the process of interview it was contended, or might be contended, that the voluntariness of what was being said impacted by misconduct by both of the officers concerned. I make that observation without, as I say, in my view needing to go back to the detail of those shifts except to say that the final position reached by the accused person, following his cross-examination, seemed to me to lead to the conclusion that the violence and the two episodes which were concerned with that really came not at spaced intervals during the process, as had already been spoken of, but towards the end with little questioning between them and certainly with no confessional statements being made by the accused person relevantly to that violence employed upon him, as he contended it was, so as to leave no clear view in my mind as to what part of the interview was challenged in terms of its voluntariness. It is fair to say that I saw no reason in relation to that material to prefer that account to that given by the police officers, which did strike me as being an account given clearly, consistently and in believable terms, an account which I accept in preference to that given upon his oath by the accused. So far as the material in relation to the second interview of 17 June is concerned, and particularly so far as its voluntariness is concerned, of course the way in which that interview came about was quite different. The material seems to have, on both sides, followed a process of arrest which involved the exercise of some force and some handcuffing, and may well have been a process which produced, at least by the handcuffing, some degree of injury to the lower part of the accused person's right arm and possibly hand."
There was medical evidence given by the two doctors who saw the appellant at Royal Perth Hospital the following morning. This evidence was consistent with the observable evidence of injury to the appellant and

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inconsistent with the complaints of assault made by him in that there were no signs of any observable injury consistent with the complaints which he made.
In addition, the oral interview on 17 June was followed by a video-recorded interview. No complaint was made by the appellant about injury other than in respect of injuries which might have been inflicted when he was at a nightclub the previous night.
Again, the learned Judge regarded the evidence of the police officers as "persuasive and clear". His Honour was unable to find any "inconsistency or inherent difficulty in their accounts, or any aspect of their evidence which would lead one to be concerned as to whether it might be believed".
The evidence of the appellant was that, in what he described as the initial and rational stage of the interview, he was not describing what he himself had done as an intruder in the shop and how he had brought about the death of Mrs Lawrence, but that: "... he was merely discussing with Mr Brandham his theories as to what may have occurred for the purpose, as I understood his evidence, of assisting Brandham to a better understanding of the incident which he was in the process of investigating."
As to this the learned Judge said: "I find it difficult to describe my reaction to that evidence as being that it was other than nonsensical and my reaction to it was not assisted by the evidence given for the first time, I think, during the cross-examination of the accused person, that Brandham having obtained statements made by him which had the appearance of being confessional in character, presented to him a written document saying to the accused person that that would constitute a retraction of all that had previously been said and inviting his signature on that document."
This oral interview was followed by the video-recorded interview. During the course of that interview, when given the opportunity, the appellant

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made no relevant complaint about his treatment by the police. As the learned trial Judge said: "When asked why no complaint appears on that video of other than injuries which might have been received in a fracas which occurred at a nightclub on the previous night, in his evidence the accused person said that he was so intimidated by the police officers that he made a conscious decision, as I understood it, not to make any complaint or at least made no complaint at that time because of the terrible things that had been done to him and because of the fact, as he gave it in evidence, that he was a person easily intimidated and confused. Looking at his demeanour as recorded on that contemporaneous video recording I am left with a clear impression of an accused person showing no signs at all of speaking with persons who had very shortly before the pictures were taken behaved with such violence towards him as he described. He looks to me on the video to present a consistent demeanour of a person who is participating in the process in a free way and is in command of the situation in which he, at least in his mind - in which he then found himself to be involved. In short, this also is an allegation which depends upon my judgment as to the credibility of the evidence available on the issue of voluntariness and in relation to which I have said I would accept the evidence given by Brandham and Carter and the negation of any material as emerges from the accused's evidence in disagreement with the police officers which would prevent the conclusion that the confessional material was other than voluntarily provided. I am satisfied, on a balance of probabilities, that each interview is voluntary."
The evidence given at the trial concerning the interviews was to the same effect as the evidence given on the voir dire.
GROUND 1(A): FAILURE TO USE VIDEO EQUIPMENT
Ground 1(a) contends that either as a matter of law, or as a matter of discretion, evidence of the first and second interviews when the appellant was

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in police custody on 10 and 17 June 1994 ought to have been excluded on the ground that video equipment was available, but was not used, there was no independent corroboration of what the appellant was alleged to have said in the interviews, there was a substantial dispute about what was said and "the purpose intended to be conveyed by what was said". It was submitted that the time has now been reached when this Court ought to state as a matter of law or practice that Judges hearing serious criminal charges should exclude evidence of alleged conversations between a suspect and police officers in such circumstances. The need for such a rule of practice was said to arise because of what was submitted to be "the continued disregard by senior police officers of the guidelines of the Commissioner for Police for the videotaping of suspects". These guidelines were tendered in evidence on the voir dire.
In support of these submissions counsel for the appellant relied upon the comments of members of the High Court in McKinney v The Queen (1991) 171 CLR 468 at 474 per Mason CJ, Deane, Gaudron and McHugh JJ; at 479-480 per Brennan J; and at 494-495 per Toohey J. Reference was also made to R v Stewart [1993] 2 TasR 274 at 281-293 per Zeeman J, as well as a series of judgments in this Court, namely: Kelly v The Queen, unreported; CCA SCt of WA; Library No 940590; 27 October 1994; Sell v The Queen, unreported; CCA SCt of WA; Library No 950319; 22 June 1995; and Pelham v The Queen, unreported; CCA SCt of WA; Library No 950505; 25 September 1995. In these cases the Court has repeatedly stressed the desirability of the use of video equipment where it is available and has criticised the practice of using the video equipment as a means to obtain corroboration of a confession or admission previously made in an earlier unrecorded oral interview.
In Kelly v The Queen the Court (Rowland, Franklyn and Walsh JJ) delivered a joint judgment. At that time, and, as is still the case, the Acts

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Amendment (Jurisdiction and Criminal Procedure) Act 1992 had not been proclaimed. It is a matter of great regret which leaves the criminal justice system open to significant criticism and a substantial waste of police and court time and money that this legislation has not come into force. As a result police evidence continues to be open to challenges which would not be otherwise available. This state of affairs is manifestly against the public interest.
The legislation deals specifically with the statutory requirements in relation to the use of video recording facilities. In the meantime, the common law continues to apply. The relevant concerns were expressed by the Court at 13-19. In particular, concern was expressed that the police officer in that case did not understand the purpose of video recording. The Court warned of the possibility that the failure to use available video recording facilities to record the whole of an interview with a suspect may give rise to real questions of unfairness.
In R v Woodward, unreported; SCt of WA; Library No 950117; 22 March 1995, the question of admissibility of evidence of police interviews fell to be determined in the course of a criminal trial. In that case there had been an initial interview at the Child Abuse Unit without using the video facilities which were there available. Two video-

recorded interviews were then made. A number of admissions were made in the initial unrecorded interview and in the first video-recorded interview. A challenge was made to the admissibility of the evidence in relation to both of these interviews. As a result of the challenge, the Crown told the Court it would not lead evidence of the initial interview or the second video-recorded interview and would rely only on the first video-recorded interview.
In the result, the evidence was held admissible. Steytler J said at 8 that he was "troubled" by the delay of one and one half hours between the arrival of the accused at the Child Abuse Unit and the commencement of the first video-

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recorded interview. The delay was explained by a police officer by saying that he followed what he understood to be the standard police practice in respect of the use of video facilities, being that those facilities should only be used "once it was established that an offence had been committed". In my opinion, the justification for interviewing a suspect in any case is that he is a person who is suspected of committing an alleged offence. An additional reason advanced by the police officer was that because allegations had been made against the accused person in respect of two children, the two interviewing officers did not want to conduct one video-recorded interview in respect of both. As Steytler J said at 8: "... I would have thought that it would have been a relatively simple matter for the interviewing officers at once to have interviewed the accused person in regard to the one child and thereafter to have conducted a separately taped interview in regard to the second child."
His Honour also said that there is "much to be said for the view that, wherever practicable, the whole of an interview with a suspect should be recorded ...". In the result, however, it was concluded that the failure to use the video facilities during the course of the initial interview gave rise to no unfairness, either of itself or which would make it unfair to him to use the later video-recorded interview against him: cf Van Der Meer v The Queen (1988) 62 ALJR 656.
In Sell v The Queen it was argued in support of an appeal against conviction that evidence of an alleged confession made by the appellant should have been excluded on grounds of unfairness. The challenge was directed to evidence of admissions obtained in an initial interview prior to a video-recorded interview, as well as to the evidence of the video-recorded interview itself. The trial Judge had determined that the evidence was admissible in the course of a voir dire. It was held that no basis had been made out for the

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Court of Criminal Appeal to disturb any of the findings of fact made by the trial Judge. The question which arose, however, related to the fact that the appellant was questioned orally for about 20 minutes in a room in which videotaping facilities were available. It was submitted for the appellant that an important element of the unfairness to the appellant was the use by the police of "selective video recording" of the interview. As noted at 12-13 of my reasons: "The argument was that the police had the opportunity and the facilities to commence recording the interview immediately and that it was unfair to the appellant not to record the entire content of the interview and to admit into evidence 'only part of the true record of interview'."
After a review of the decision in Kelly v The Queen and the references in that case to McKinney v The Queen, I said in my judgment in Sell at 17-18: "In my opinion, it was clearly contemplated by the High Court that, as a matter of practice, where video recording facilities were available, the whole of the interview with a suspect would be recorded on video. In my opinion, such a practice is highly desirable."
It was also made clear in Sell at 18-19 that what the Court had said in Kelly at 17-18 was that public policy does not necessitate the adoption of a rule of practice or of law that requires that in every case where video facilities are available, the whole of the suspect's interview should be recorded on video. In Sell at 18-19 I said: "In my view, this does not detract from the view that, as a matter of practice, it is highly desirable that the police themselves adopt a rule to that effect, so as to avoid the necessity for trial Judges to determine whether to exercise the discretion to exclude confessional evidence on the ground of unfairness."
I also said at 19:

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"In the context of the present case, the first comment that I would make is that, had the whole of the interview at the Katanning Police Station been recorded on video, it may well be that the voir dire, the challenge to the police evidence before the jury and the very extensive directions required to be given by the trial Judge, could have been avoided. Furthermore, much room for argument and disputation may be avoided if a practice is adopted of giving a caution at the outset of an interview in every case where the police have sufficient evidence in their possession to justify a charge being laid, even though a decision has not been made to lay a charge, or in any case in which the

suspect has been the subject of a specific complaint and the purpose of the interview is to obtain an admission or admissions. In my view, there is an element of potential unfairness in waiting to administer a caution until one or more admissions have been made."
In this respect, the passage from the judgment of Mason CJ in Van Der Meer v The Queen, above, at 661 is relevant.
The judgments in Sell also make it clear that the purpose of the video recording of an interview is to corroborate the police evidence of the admissions made by the accused in the course of that interview. The purpose is not to obtain corroboration of admissions alleged to have been made in an earlier interview which was not video-recorded. The very dangers in relation to unrecorded interviews are those which have given rise to the rule of practice requiring the McKinney direction.
Both Kennedy and Ipp JJ expressed their agreement with my reasons in Sell Ipp J said: "I wish to record my specific agreement with the learned Chief Justice that it is highly desirable that the police adopt a rule of practice that in every case, where video facilities are available, the whole of the suspect's interview should be recorded on video. It is becoming more and more frequent for admissions to be called into question when they are made during video-recorded interviews that are held after unrecorded police interrogations. There is a serious risk that such admissions will be regarded as unfair ..."

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In Pelham v The Queen, above, one of the grounds of appeal contended that the trial Judge erred in law in that he declined to give a McKinney direction or any adequate direction in circumstances where an unrecorded and uncorroborated (other than by a police officer) record of interview was challenged by the accused. The appellant had been interviewed in a room which was set up as a video interview room, but the interview was not video-recorded. During the interview the appellant made certain admissions. Following this, there was a video-recorded interview in which the appellant denied matters previously admitted. The Court once again noted the "continuing misapprehension by police officers concerning the purpose of video-recorded interviews".
The Commissioner's Guidelines for Questioning Suspects as they stood at the relevant time in 1994 provided in para3-3.21 that: "Where possible a member should always attempt to record statements in the least disputable form. The record of interview, recording both questions and answers, interruptions, times etc., is an acceptable form of record. Video and tape recordings have received the court's approval in this respect."
The Commissioner also issued Guidelines for Video Tape Recording of Interviews with Suspects which took effect from 1 May 1993. These record a preference for "audio/visual recording, because of its convenience and inherent objectivity". Audio/visual recording was stated to be applicable to interviews with "all suspects where the offence is a major indictable one, namely offences that carry a term of imprisonment which exceed 14 years, and may include other matters nominated by the senior OIC of the Squad or sub-branch". The interview was required to be conducted in accordance with the Commissioner's Guidelines for Questioning Suspects. The Guidelines for Video Tape Recording specify that:

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"Should the interviewee decline or object to the interview being recorded, the interviewer should endeavour to have the interviewee explain his reasons for objection. Should it still be necessary to terminate the recording of this interview, the interviewer is to announce his intention of turning the recorder off. The interviewer should then proceed with the interview in the normal manner."
Thus, while the video-recorded interview was regarded as the preferred alternative and was intended to apply to all suspects in relation to major indictable offences carrying a penalty of in excess of imprisonment for 14 years, it was apparent that this was not applied in practice.
The legislation yet to be proclaimed provides, among other things, for amendments to be made to the Criminal Code. Among the provisions to be inserted is a new s570(D)(2) which provides that: "On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless: (a) the evidence is a videotape that records the admission; (b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a videotape recording of the admission; (c) the court is satisfied there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence."
S570(D)(3) provides that subs(2) does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence. Subs(1) defines "admission" to mean an admission made by a suspect to a member of the Police Service, whether the admission is by spoken words or by acts or otherwise. The term "serious offence" means an indictable offence of such a nature that, if a person over the age of 18 years is charged with it, it cannot be dealt with summarily

BC9604360 at 28

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and in the case of a person under the age of 18 years, it includes any indictable offence for which the person has been detained. Subs(4) provides that for the purposes of subs(2) "reasonable excuse" includes: (a) the admission was made when it was not practical to videotape it; (b) equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person; (c) the accused person did not consent to the interview being videotaped; (d) the equipment used to videotape the interview malfunctioned.

These provisions are not yet in force and the matter still requires to be determined in accordance with the common law. The Commissioner's Guidelines, however, reflect the desirability of using video equipment whenever it is available. In the cases to which I have referred, this Court has made it clear that a failure to use the equipment when it is available in a manner consistent with that contemplated by the High Court in McKinney may have the result that the evidence will be excluded on the grounds of unfairness. This Court has now clearly stated what the desirable practice should be, but it would be inappropriate to give that practice retrospective effect. It should be clearly understood, however, that the practice described in Sell as desirable will be given effect by the courts in respect of interviews conducted since the date of that decision on 22 June 1995. That decision cannot be applied to the present case.

In this case it was submitted to the learned trial Judge that the evidence of the first and second interviews should be excluded in the absence of corroboration by means of the use of a video, a signed record of interview or the adoption by the appellant of notes of the conversation. The learned Judge accepted that when the interview started it was clear that the police officers had no independent evidence upon which the appellant might be charged. The appellant had then already been interviewed on a number of occasions

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BC9604360 at 29

regarding his movements on 23 May 1994. The accounts which he had given had been checked by police and there were difficulties in the way of accepting them. In these circumstances, he was clearly a suspect. Given that he was once again being called to account for his movements and his previous explanations had not been accepted, I consider that it was desirable that he be cautioned and interviewed by means of the video recording equipment which was available. He had, however, been interviewed on a number of previous occasions and cautioned. The failure to caution on 10 June 1994 did not of itself result in any unfairness.

During the course of the first oral interview, he gave an account which differed from evidence which the police had obtained. These discrepancies resulted in various exhortations "to tell the truth". Again, in my opinion, it was highly desirable at that stage when this first began to occur, that the use of the video should have commenced. It was only after the interview had proceeded for some considerable time that the appellant began to speak in the third person in a way which indicated an apparent involvement in the killing of Mrs Lawrence. At that stage again, as Detective Caporn himself agreed, the interview should have been resumed on video. In the result, the interview was terminated altogether.

The learned Judge found that neither the first interview nor the second interview was in breach of the Commissioner's Guidelines or, to the extent that either of them was, the Guidelines were not departed from in any way which would give rise to the exercise of discretion. In reaching this conclusion, his Honour, having described the sequence of events, said that he found nothing to activate his exercise of discretion to exclude the material, taking full account of the Commissioner's Guidelines. As his Honour put it: "Each of these and particularly, as relied upon in this case, para3-3.21 in the relevant extract from the Police Manual, each of those statements of guidelines concerned, as I understand their

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BC9604360 at 30

operation, to provide to investigating police a capacity to understand what procedures ought to be employed in the recording of confessional statements made by persons ultimately charged. So in one sense they are guidelines to be operated by individuals in the course of the evidence gathering process, but whether they are satisfied and whether that process has been appropriately followed is only ultimately to be tested in relation to the making of a confessional statement by a person who is charged. So far as the Guidelines are concerned in their operation to either interview process, it seems to me that they were not breached or if not strictly followed were not departed from in any way which would give rise to the exercise of the discretion. So the remarks which I have just made in relation to that aspect of the matter are equally applicable, in my view, to the interview which occurred on 17 June which, however, was ultimately concluded by a videotaping of an interview process. It is quite a different question, of course, whether the way in which Brandham conducted [the interview] that is the sensible or best way to conduct

the use of the video-recording device or whether more effective means of obtaining and recording evidence of that character are available by more skilled use of the video process."
The latter question was not the question before the Court. In the result, the learned Judge concluded that there was nothing in either of the two interviews which were not recorded on video which required him to exclude either of them in the exercise of his discretion. In all the circumstances, notwithstanding the criticisms which I have made, I consider that having regard to the state of the authorities at the time the relevant interviews were conducted, it has not been demonstrated, either as a matter of law or in the exercise of his discretion, that the learned trial Judge was in error.
For these reasons, I consider that ground 1(a) fails. I am of the opinion, however, that police officers should in the future take note that where video facilities are available and use is not made of them, the evidence

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obtained in an oral interview is likely to be held inadmissible in the exercise of the Court's discretion.
GROUND 1(B): ALLEGED INDUCEMENTS TO "TELL THE TRUTH"
In support of ground 1(b) it was contended that the Detectives offered the appellant an inducement in both of the interviews not recorded on video when they told the appellant to "tell the truth". It was submitted that the police officers made it clear to the appellant that they wanted him to tell them something different from what had been said previously. This point does not seem to have been taken in relation to the voir dire.
On some 11 occasions during the first of the interviews not recorded on video on 10 June 1994, the appellant was told to tell the truth in various ways. These included such statements as, "All we want is honesty", "Will you tell me the truth?", "I would like you to give me a true account of what you did", "Why didn't you tell me the truth?", "Come on Andrew, you know that you have told me many lies", "We want to know the truth", "You're telling a story", "There is only one thing to do, tell the truth", "... I only want to know the truth", "All we want is the truth" and "Is that the truth?". All of this needs to be seen in a context where the appellant had on previous occasions given conflicting accounts of his movements which were clearly false in a number of instances. In the second interview on 17 June 1994 he was told on two occasions, "I also want you to be completely truthful with me" and "Tell me the truth, Andrew".
It has frequently been held that mere moral exhortations to tell the truth will not render a confession inadmissible. For example, statements such as "Be sure to tell the truth" (R v Court (1836) 7 C and P 486; 173 ER 216) and "Don't run your soul into more sin, but tell the truth" (R v Sleeman (1853) 7 Cox CC 245) have been held not to constitute an inducement. Even where the court has expressed its disapproval of the content of the exhortation, it has been held not

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to render a confession inadmissible: R v Wild (1835) 1 Mood CC 452; 168 ER 1341; and R v Gillham (1828) 1 Mood CC 186; 168 ER 1235.
In Beamish v R [1962] WAR 85 objection was taken to the admissibility of an alleged confession on the ground that it was involuntary having been obtained by an impermissible inducement. The words complained of were "We want truth. My boss wants truth. Will you tell us the truth because we have a clever staff". When this was said, the speaker pointed in the direction of the police station. This phrase was held to rank no higher than the statement "Be sure to tell the truth" referred to in R v Court, above, see per Jackson SPJ at 87. Virtue J at 99 considered that the words used meant "We want the truth, we have the means of finding out the truth whether you speak or not. Were you concerned in this crime". Virtue J considered that such an exhortation could not reasonably be construed as conveying any threat or promise calculated to interfere with the appellant's freedom of choice.
In my opinion, the statement "Come on Andrew, you know that you have told me many lies" was inappropriate. It is necessary, however, to put the statement in context. The appellant had given an account how he had been given a police badge and tie pin by someone who had stolen a chalice from the Flora Metallica a few days before Mrs Lawrence was killed. Detective Caporn demonstrated to the appellant that his account must have been untrue by reason of certain facts. The appellant then said, "Okay, you busted me on that one". After another interchange Detective Caporn said, "Why didn't you tell me the truth?". The appellant said, "That's the only bit of bullshit I've told all up". Detective Caporn said, "Come on Andrew, you know that you have told me many lies". The appellant said, "That's the only bullshit I have told you in all this". Detective Caporn said, "You don't want to tell us about any of the unlawful things that you have done, Andrew, but it has gone beyond that, mate. We want to know the truth". The appellant said, "Yeah, I lifted the badge and

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the tie pin". Detective Caporn then said, "We don't need to dwell on that, Andrew. I want to know what you did when you left the taxi". This was a reference to when he left the taxi that brought him to Mosman Park on the afternoon of 23 May 1994. In this particular case, the inappropriate comment was related to a matter which constituted a side issue and concerned a different transaction, although it involved an alleged incident at Flora Metallica a few days before Mrs Lawrence was killed.

As to the allegation that the detective improperly commented, "You're telling a story", as appears from the following context, the statement made by the detective was in fact, "You're telling the story". The appellant was being asked whether he knew Mrs Lawrence by name. As recorded in the transcript: "I said, 'Mistaken about what?' He said, 'About who I actually spoke to.' I said, 'Well, was it Pamela Lawrence?' He said, 'I don't know.' I said, 'Why did you tell us two different stories?' He said, 'Probably because I wasn't sure.' I said, 'I've gone on to ask you if you know her name and you said, "No." ' He said, 'I've got mixed up, that's all.' I said, 'You also said that it wasn't the woman that was in the news.' There was a pause before he said, 'There you go. It just goes to show you how unstable my mind was, doesn't it?' I said, 'You're telling the story.' He said, 'I don't know, mate. I thought it was the one I saw on television.' I said, 'We have actually spoken to the woman who you spoke to on the day you went in to sell jewellery.' He said, 'So it wasn't Pamela Lawrence.' I said, 'No. She says you did show her jewellery, that you took off a ring and handed it to her. Is that right?' He said, 'Yeah.' I said, 'Why didn't you tell us that?' He said, 'I don't know.' "

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In this particular case, the comment alleged was simply not made. In its context, the statement in fact made was entirely appropriate.

For these reasons, in the circumstances of this particular case, I do not consider that the statements made by the police to the effect that the appellant should "tell the truth" had the result that the confessional evidence in the first and second oral interviews which were not recorded on videotape should have been excluded as involuntary or excluded by the learned trial Judge in the exercise of his discretion.

GROUND 1(C): IMPERMISSIBLE CROSS-EXAMINATION IN INTERVIEWS

As to ground 1(c), it was accepted by counsel for the appellant that this ground was, at least in part, related to ground 1(b). It was submitted that the process of questioning in the first and second interviews was impermissible in that it involved, in effect, a cross-examination intended to break down the previous answers by the appellant to questions put to him earlier. This was not a point taken on the voir dire at the trial. In my view, however, the police were entitled to put to the appellant his prior inconsistent statements and ask him to explain them. In my opinion, given this overall context and the particular circumstances of this case, the approach adopted by the police officers in the conduct of the interviews did not infringe the principle stated by Mason CJ in Van Der Meer v The Queen, above, at 661. In my opinion, ground 1(c) fails.

GROUND 2: FAILURE TO GIVE MCKINNEY DIRECTION

Ground 2 was as follows: "The learned trial Judge erred in law in failing to properly or adequately warn the jury of the dangers of convicting the appellant on the basis of:

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(1) the first interview; and/or (2) the second interview; and/or (3) the videotaped interview with Detective Brandham and Detective Carter on 17 June 1994 ('the videotaped interview'), in all the circumstances of the case."

A number of particulars were given in support of this ground. Ground 2(a) consisted of an acknowledgement that the learned trial Judge correctly indicated to the jury that they should not find that the appellant killed Mrs Lawrence unless they accepted the police evidence of the confessions allegedly made.

Counsel submitted that there was a broad legal and factual gulf between a person being suspected of committing an offence and his conviction of it. It was contended that this gulf could only be bridged by a fair trial according to law: McKinney at 478 per Brennan J. The submission made by counsel for the appellant was that the appellant had been denied a fair trial for three reasons. First, it was contended that the police did not follow the Commissioner's Guidelines or the directions of the High Court or this Court in relation to the videotaping of interviews with the appellant. Secondly, it was submitted that the Crown put up a case that was internally contradictory and fatally flawed. Instead of frankly pointing this out to the Court or the jury, counsel for the Crown endeavoured to reconcile the irreconcilable and in conducting the case made misstatements of fact to the jury and put a matter to the accused which he should have at least known was not accurate. Thirdly, it was submitted that the trial Judge failed to properly or adequately warn the jury about the dangers of convicting in this case in accordance with what was required by the High Court in McKinney. The first of these reasons was the subject of ground 1 of the appeal. The second was the subject of ground 3. It is the third which was relevant to ground 2.

BC9604360 at 36

As a consequence of these submissions, it was acknowledged by counsel for the appellant that, to a large degree, the outcome of the appeal turned on the question of the failure to record on videotape the first two oral interviews on 10 and 17 June 1994. That question has been dealt with in relation to ground 1(a).

GROUND 2(B)(II): ABSENCE OF CORROBORATION OF ORAL INTERVIEWS

Counsel for the appellant directed his submissions in support of ground 2 first to ground 2(b)(ii) which contended that the learned trial Judge erred in: "Failing to warn the jury of the dangers in convicting the appellant of wilful murder on the basis of the contents of either the first interview and/or the second interview, when neither was reliably, simultaneously and independently recorded by mechanical means nor adopted by the appellant in the first person in a mechanically recorded interview."

It was submitted that this case required a strong McKinney warning. It was stressed that this was a case in which the learned trial Judge had directed the jury (AB1362) that they could not be satisfied beyond a reasonable doubt that the appellant killed Mrs Lawrence unless they accepted the police evidence of the confessions he made.

The joint judgment of Mason CJ, Dawson, Gaudron and McHugh JJ in McKinney at 472 held that there should be a rule of practice that: "... where the only or the only substantial evidence against an accused person consists of disputed and uncorroborated confessional statements allegedly made in an unsigned police record of interview while the accused was held in police custody without access to a lawyer, the trial Judge must warn the jury that it may be dangerous to act upon it." Their Honours also said at 476 that the jury ought to be instructed:

BC9604360 at 37

"... that they should give careful consideration as to the dangers involved in convicting an accused person in circumstances where the only (or substantially the only) basis for finding guilt has been established beyond reasonable doubt is a confessional statement allegedly made whilst in police custody, the making of which is not reliably corroborated."

In the course of his summing up the learned Judge said: "Certainly, if you conclude that the police evidence about these two occasions, 10 and 17 June, is a matter of direct confession, then it is evidence which directly is evidence of the guilt of the accused person as being the person who killed Mrs Lawrence. It is the only such evidence. There is no other evidence of that character in the case. Other evidence can take you so far as opportunity. Only this evidence, if you accept it, will take you to the point of a conclusion, it would seem to me, that the accused person was indeed the killer. You should, I think, be under no misapprehension about the significance of this material. The other aspect of this is that it does not stand entirely on its own. Within its content, counsel for the Crown suggests you will find such evidence of clear and close involvement that, if you accept that the material is honestly given by the police officers, you will be satisfied that only the killer could be confessing in these terms. That is a matter for your consideration. On the other hand, so far as defence counsel is concerned, he invites you to consider for the accused such matters as how does this material fit in with other independently known facts, as he would have it; the lack of blood on the clothing, the lack of money after the event as he puts it? He invites you to consider that there was a lack of opportunity to dispose of any weapon, to get rid of, by washing blood on the clothing. These would be matters for you to consider whether that was so or not."

It may be accepted that it is the lack of reliable corroboration of the confession, by such means as a video recording, which attracts the relevant warning: McKinney at 475. The basis upon which the warning is required is the vulnerability of an accused to fabrication when he is involuntarily held in custody and questioned: McKinney at 478. In my opinion, however, the

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BC9604360 at 38

alleged admissions made by the appellant in the two oral interviews on 10 and 17 June 1994 were very substantially corroborated by the contents of the subsequent video-recorded interview on 17 June 1994.

The learned Judge commenced the relevant part of his summing up to the jury by saying that if they were not prepared to accept the police evidence, that was the end of the matter. If the jury did accept the police evidence as accurate and truthful, the jury were instructed to ask themselves whether the statements made by the appellant were statements of a confessional nature professing to do what he did, even though there were statements made in the third person, or were they explicable in some other way, such as the discussion by the appellant of a theory regarding how Mrs Lawrence was killed.

The jury were invited to weigh the evidence of what the accused said regarding the alleged injuries which resulted from his time in police custody on 17 June against the evidence of his visit to Royal Perth Hospital in the early hours of the morning of 18 June 1994 and his examination by medical practitioners there. The attention of the jury was

drawn to the evidence of the appellant regarding the injuries which he said resulted from his time in police custody on 17 June. They were directed to ask themselves whether those injuries were injuries which the doctors who examined the appellant did or should have discovered, if they had been present. In this respect, there was a question whether the hand injury was explicable as a result of something which happened at a nightclub or something which happened when he was handcuffed when arrested early in the morning of 17 June outside a cafe in Fremantle.

In relation to the first interview by Detectives Caporn and Emmett, the learned Judge directed the jury that they should be satisfied that the police officers were witnesses of truth, first in relation to their evidence that notes of the conversation were made contemporaneously and accurately and, secondly,

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that the evidence which they gave was likewise truthful. The learned Judge then went on to say: "Of course the accused is at a disadvantage in that regard, is he not, as has been made clear during the course of this. These persons are expert and practised witnesses. They have the mutual support of each other's testimony to advance here in the Court and the accused person has no such benefit and no benefit of making an independent contemporaneous note of his own. So is it against that background that you look at and consider the evidence which these officers have given but the first step is to consider what was said. That process of interview and questioning noted in that way may or may not produce admissions. Caporn and Emmett said that it did on 10 June albeit with the accused even then, they would say as I have understood the proposition, attempting to mentally, at least distance himself from his personal involvement as the killer by speaking in the third person. That was a process which, as I have understood it, they invite you to conclude was then going on. Then there was a break, upon their evidence, and immediately thereafter a retraction of the confession in circumstances which led to the assault ... You will want to draw a conclusion about how indeed that process ended up. If it ended up in that way it is perhaps not surprising that there was no more formal record made of the content of what was then said." The reference to the assault was a reference to the appellant biting Detective Caporn on the leg.

As to the second interview on 17 June 1994, the evidence of how that was conducted was given by Detective Sergeant Brandham and Detective Carter. As to that the learned trial Judge directed the jury that: "Again, it is an ordinary process, one properly carried out if you accept their evidence and one which would produce at the end, as it is said it did, confessional statements made by the accused person. Quite important and significant confessional statements made by him in a state of some distress but on this occasion in the first person. There it is.

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What then happens? You would expect that thereafter that process, once some material confession or admission is made, it would then be put in a recorded form so that there is independently created record for what was said. Again, according to their evidence, the accused person retracted the confession. So you have this odd process, by which Brandham has attempted, it would seem on the video, to have the accused person confirm that he did earlier make the admissions and not to attempt to have him make them again by further independent questioning. You will see, when you look at that process what words were used and I invite your attention to that. Ask yourselves the question is it simply as the accused suggests to you? Is that the process which is going on? In the course of that process are there questions when both parties, both Brandham in asking the question and the accused in answering it, slip into the first person of a direct account of what the accused did at the time of the killing? What was his direct involvement with Mrs Lawrence? Look to see whether you think that is what is occurring or alternatively is it the case, as the accused said, that there was at the end of this long process of interview and mistreatment by Brandham and Carter, a record of interview in the video engaged in which he thought would involve more than occurred. It only, he says, involved a discussion of the theory, yet again, and you will ask yourselves whether the mode of expression is consistent with that view of what was occurring or not and he says that he expected to be able to give an independent account to clear himself of any suggestion that he might have been the person involved and that didn't happen. Was he denied any such opportunity?

Is it the case, at the end, that it supports any view of any impropriety appearing at the time by revealing, as the accused suggests to you it does, the fact that he was very tired, that he was in distress, that he was terrified, was the word he used in giving evidence, and completely exhausted? You will see the demeanour of the persons involved and the process recorded on the video and it may be of some assistance to you in that area as well. Those sorts of considerations are raised on the respective sides for your consideration about that material."

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There is no doubt that, so far as the first two oral interviews which were not video-recorded are concerned, they involve evidence of confessional statements made by the appellant while in police custody that were, at least in significant part, disputed. However, the oral interviews were not the only or the only substantial basis for finding that guilt had been established beyond reasonable doubt. The making of the confessional statements was reliably corroborated in the video record of interview and by reference by the accused to certain aspects of the crime and surrounding facts. These were as follows: (1) In the course of both the oral interview and the video recorded interview on 17 June 1994 the appellant made statements which showed that he knew of the three areas of injury sustained to Mrs Lawrence's head. He accurately showed them on his own head during the video recorded interview. What he then said was consistent with the evidence of the forensic pathologist Dr Cooke and his post-mortem report. The only information made public in the media was that Mrs Lawrence had been struck on the head with a blunt instrument. (2) In the oral interview the appellant first said that he struck Mrs Lawrence at least six times, possibly 12 times. Later in the oral interview he said he hit her about 12 times. In the video recorded interview he said he hit her six to 12 times at the maximum. The post-mortem examination determined that Mrs Lawrence sustained at least 12 wounds to the head. There was reference in the media to numerous blows having been inflicted to Mrs Lawrence's head. The only reference to any particular number was at least 10 or more than 10. (3) The appellant said that he did not hit Mrs Lawrence anywhere else.
This statement was made in the oral interview on 17 June 1994. The forensic evidence was that there were only injuries to her head and not to any part of her body. There was no reference in the media to Mrs

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Lawrence being struck with a blunt instrument to any part of her body other than her head. There were no references in the media to whether or not there were any injuries to any part of her body apart from her head. (4) The appellant said that he dragged Mrs Lawrence from the front of the shop to the rear of the shop. This statement was made in the oral interview of 10 June 1994 and described by the appellant in sketches which he made at the time. Similar statements were made in the oral interview on 17 June 1994 and repeated by reference to a sketch of the shop. In the video recorded interview on 17 June 1994 similar admissions were made. There were drag marks in the blood on the floor from the front of the shop to the rear as interpreted by the forensic pathologist, Dr Cooke and the forensic biologist, Mr Bagdonavicius. The appellant's description of what he did was consistent with their evidence. There had been no report in the media of this aspect of the case. (5) The appellant said that Mrs Lawrence was wearing dark slacks and a jumper. This statement was made in the oral interview on 17 June 1994. There was independent evidence that Mrs Lawrence was in fact wearing blue jeans and a jumper. There was no report in the media of her clothing. (6) The appellant had accurately described the configuration of the shed in relation to the rear of the shop, the steps to the back landing, the flyscreen door, the main rear door and the small sign on the main door, none of which were visible from the rear laneway or the back yard. This was done both in the oral interview on 17 June 1994 and in the subsequent video recorded interview on the same day. The appellant produced a sketch showing the shop and the shed.

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(7) The appellant said that while he was in the Flora Metallica shop he was seen by a girl in her early teens who was sitting in the front passenger seat of a car parked back from the traffic lights in Glyde Street. At one stage he described the vehicle as being pale green in colour. At another stage he also mentioned that the vehicle was white. This was done in the oral interview on 17 June 1994 and the presence of the vehicle was confirmed in a sketch of the shop. He also identified the car as a Corolla in the oral interview on 10 June 1994, although later he referred to a white sedan, probably an old Ford Cortina. (8) Similar evidence was given in the video recorded interview. There was an extraordinary coincidence between the evidence of Miss Barsden and the statement made by the appellant to police officers that the two of them "locked eyes" and that the person seen by Miss Barsden then "ducked" or "bobbed" down behind the counter. The appellant himself said that once he realised he had been seen by the girl he "ducked" or "bobbed" down behind the counter. This was first stated by him in the oral interview on 10 June 1994 and repeated in the oral interview on 17 June 1994. There was a reference to bobbing down in the media, but in relation to the girl in the car the only thing reported in the media was that a witness had seen a man with a bandanna with a gold braid and blue and green colouring in the shop at 5.00pm. There was no reference to the witness being a girl or the age of the girl, being in her early teens, or to the girl being in the front seat of a car or to any description of a car by colour or make, or of the car being back from the traffic lights in Glyde Street. Significantly, there was no reference in media reports to the person seen in the shop "locking eyes" with the witness.

BC9604360 at 44

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(9) The appellant said that Mrs Lawrence's purse came from her handbag. This was said both in the oral interview on 17 June 1994 and the subsequent video recorded interview on 17 June 1994. Mr Lawrence confirmed that Mrs Lawrence kept her purse in her handbag. This was not reported in the media. (10) The appellant said that Mrs Lawrence's handbag was black. This statement was made in the oral interview on 17 June 1994. The handbag was in fact dark blue. There was no report of the colour of the handbag in the media. (11) The appellant described Mrs Lawrence after the attack as making "gurgling noises". This was said in both of the oral interviews on 10 June and 17 June 1994. Mr Lawrence said that on finding his wife she was "moaning and making gurgling sounds". She had blood in her mouth. These facts had not been reported in the media. (12) The appellant said he saw Mrs Lawrence's car parked at Flora Metallica when he was loitering in Glyde Street prior to entering the premises. This was stated in his oral interview on 17 June 1994. Mrs Lawrence's car was still parked in its usual position when the crime was discovered. This was in fact reported in the media. (13) The appellant said that Mrs Lawrence said to him, "Take what you want and go". This statement was made in the oral interview on 17 June 1994. There was evidence from three witnesses that Mrs Lawrence's policy was that if any of the staff were confronted by anyone in the shop they were to hand over whatever was requested. This fact had not been reported in the media.
(14) The appellant said that he had taken money from the purse, but that no jewellery was taken. This statement was made in the oral interview on 17 June 1994 and repeated in the video interview on 17 June 1994. In

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BC9604360 at 45

fact, only money that was in Mrs Lawrence's purse was taken. No jewellery was missing. This fact was reported in the media. (15) Finally, the appellant said he took a wrench from the shed at the back of the shop to use as a jemmy on the back door, but when he got to the back door it just pushed open. This statement was made in both oral interviews on 10 and 17 June 1994. The media had reported "no sign of forced entry". The appellant produced a sketch of the murder weapon which depicted a "Sidchrome" extendible spanner. Mr Lawrence gave evidence that he thought such a spanner was missing from the shed.
It can be seen that seven of these statements were made in one or other of the oral interviews and corroborated by the video record of interview. A number were statements of a kind which could only have been made by a person who was present at the time of the killing. In my opinion, when this body of evidence is taken in conjunction with an assessment of the demeanour of the appellant as depicted by the video-recorded interview on 17 June 1994, the evidence against the appellant became compelling and provided substantial corroboration of the earlier statements alleged to have been made by him in the two oral interviews on 10 and 17 June 1994 which were not video-recorded.
It was submitted on behalf of the appellant that, although in the videotaped interview the appellant admitted that he had told the Detectives certain things in the earlier oral interview, the videotaped interview did not corroborate the earlier alleged confessional statements as the appellant often talked about what somebody else would or may have done rather than what he did and the Detectives and the appellant were often at cross-purposes, the Detectives talking in the first person and the appellant in the third person. These were matters which were clearly left with the jury by the learned trial Judge. There was a significant issue whether the statements made by the

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BC9604360 at 46

appellant in the third person were intended to convey what he himself did. In my opinion, looking at all of the evidence relating to the interviews, the jury were entitled to infer that the appellant was clearly referring to himself when he spoke in the third person. There were times when I gained the distinct impression that some of the things said by the appellant in the third person in the video interview were a deliberate attempt to cloud the issue or simply an attempt to be clever.
It was also submitted on behalf of the appellant that, even if the videotaped interview corroborated various statements made earlier that day to the detectives in the oral interview, it did not corroborate the confessional nature of such statements. This was said to be so because there remained a dispute whether what the appellant said was confessional in nature or merely the provision of a theory by the appellant as to what the appellant would have done if he was indeed the killer or other conjecture on the appellant's part. This issue was also clearly left to the jury by the learned Judge. In my opinion, there was a substantial basis upon which it was clearly open to the jury to conclude that when the appellant was speaking in the third person he was in fact referring to himself. This was a question of fact for the jury to determine. Once they determined that issue against the appellant, the significance of the video-recorded interview as corroboration of confessional statements made in the earlier oral interviews would have become much greater.

In my opinion, given the particular circumstances of this case, the warnings given to the jury were sufficient. For these reasons ground 2(b)(ii) fails.

GROUND 2(B)(I) AND (III): RELIABILITY OF ALLEGED CONFESSION

Ground 2(b)(i) contended that the trial Judge erred in:

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"Failing to instruct the jury either at all or alternatively in an even handed way, that if they accepted that the Detectives' evidence was factually correct, they also had to consider whether what was said to the Detectives, in the particular and peculiar circumstances of this case, was reliable and proved beyond reasonable doubt that the appellant was the killer."

In my opinion, the directions given by the learned trial Judge, to which I have already referred, were even handed. It was made clear to the jury that they had first to accept the truth of the police evidence regarding what the appellant said in the course of the interviews. Secondly, it was made clear to the jury that they had to be satisfied that what the appellant said amounted to "a direct confession". The issue whether the appellant was referring to himself when speaking in the third person, or whether he was merely expressing a theory about what the killer might have done, or whether the statements in the third person had some other explanation inconsistent with guilt, was clearly left to the jury by the Judge. Contrary to the contention in ground 2(b)(i), the learned Judge expressly told the jury that "... the first step is to consider what was said".

In my opinion, ground 2(b)(i) fails.

GROUND 2(B)(III) CONTENDED THAT THE TRIAL JUDGE ERRED IN:

"Failing to instruct the jury that there were particular factors which effected whether the alleged confessions were made, and if so, the reliability of what the Detectives alleged the appellant said to them in the first interview, second interview and videotaped interview, including the appellant's specific denial of involvement in the murder as recorded in the videotaped interview, the fact that the alleged confessions in the first interview were in the third person, the fact that the alleged confession in the second interview was specifically retracted, the length of time the appellant was in police custody and interviewed in the first interview, the second interview and videotaped interview, the fact that some of the things allegedly confessed to by the appellant in the first interview, the second interview and the videotaped interview did not match some of the objective facts of the offence committed

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and the surrounding circumstances, and that after the first interview and then the second interview and videotaped interview, the police released the appellant on bail when, on the Detectives' evidence, he had confessed to murder."

In my opinion, ground 2(b)(iii) does not take the matter significantly further than ground 2(b)(i) and the other grounds already dealt with. The directions given by the learned Judge to which I have already referred sufficiently canvassed each of the matters to which reference is made in ground 2(b)(iii) save for the last point. As to the point that some of the things said in the interviews did not match some of the existing facts, specific reference was made by the learned trial Judge to them. In addition to referring to the Crown's contention that only the killer could have known some of the things mentioned in the alleged confession, the learned Judge also referred to the contention of counsel for the defence, that the alleged confessional evidence did not fit with other independently known facts. These were the lack of blood on the appellant's clothing; the appellant's lack of money after the event; and his lack of opportunity to dispose of the murder weapon or get rid of any blood on his clothing by washing the clothing. In my opinion, the fact that the appellant was released on bail after the interviews on 10 and 17 June 1994 was not a matter which required any specific direction by the trial Judge.

For these reasons ground 2(b)(iii) fails.

GROUND 2(B)(IV): DANGERS IN RELYING ON VIDEOTAPED INTERVIEW

Ground 2(b)(iv) contended that the trial Judge erred in: "Failing to specifically instruct the jury of the dangers in relying on the videotaped interview in convicting the appellant, including the frequent references by the appellant to some other person being the perpetrator of the offence, the failure of Detective Brandham to allow the appellant to speak, at the end of the interview, about matters other than what the appellant had 'told him earlier', despite having given assurances to the appellant

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during the videotaped interview that this would occur, the leading nature of the questioning by Detective Brandham and the way in which Detective Brandham controlled the interview, the potentially misleading use of the first person by Detective Brandham when answers and information were given by the appellant using the third person and the

fact that some of the things said by the appellant in the interview were statements of fact which did not match the true facts of the offence as committed."

For the reasons already stated, I consider that the question of the significance of the frequent use by the appellant of the third person in relation to the commission of the offence was sufficiently identified and left to the jury by the trial Judge.

At the outset of the videotaped interview, it was made clear to the appellant that he did not have to participate in the interview unless he wanted to. He was appropriately cautioned. The appellant said that he understood this and that he was "very happy" to continue. The appellant also said that he wanted "to be video-recorded so that I can be cleared".

Reference was then made to the conversation earlier on 17 June 1994 in the oral interview. Detective Sergeant Brandham made it clear that he wished to put to the appellant various things that he had told the Detectives in the earlier interview. The appellant said that after he had left the taxi he "shot through" and did not pay the taxi driver. He then went up to Stirling Highway and cut back to the rear of Flora Metallica. He needed money. He went in through the rear of the shop of Flora Metallica. He went out to the front and saw that the front door was shut. He thought the shop was closed so that it was safe to do a break. He was then on Glyde Street near the telephone boxes. He thought he saw Mrs Lawrence in the shop when he was in Glyde Street although he said the "other girl that worked there looked very similar to her". He thought she was closing up. He went into the shed at the rear having found the door was not locked. He described the contents of the shed and said he

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had got a wrench from a toolbox. He then left the shed and went to the rear of the shop where there were steps leading up to the back door. He said there were about five steps, no more than eight. He went up to the steps where there was a security screen door which opened towards him. Inside that door there was another door with a grip handle. He went in through the back door. He saw nothing but heard something.

He was then asked what he said happened from then on. At this point the transcript of the interview showed that the appellant changed to the third person as follows: "MR MALLARD: Well, initially I entered into the room, or this person entered the room - - DET SGT BRANDON (sic Brandham): Yeah. MR MALLARD: - - thinking that he was on his own. DET SGT BRANDON: Yeah. MR MALLARD: But then he heard the sound of someone rustling in the front, and that would have been Pamela bending over the counter, putting on her jewellery because she's closing the store down. DET SGT BRANDON: Okay. Right. We'll go on just a bit further from that. You said that you approached her from the rear of the shop and she asked you 'What are you doing here?'. MR MALLARD: Yeah. DET SGT BRANDON: Is that right? MR MALLARD: That's right. DET SGT BRANDON: Okay. And that you said to her that you were going to rob her. This is what you told us. Okay? MR MALLARD: This is what I imagine this person would say.

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DET SGT BRANDON: Okay. What I'm saying is, this is what you told us. MR MALLARD: It's what I told you. DET SGT BRANDON: Right. Okay. You said that you were going to rob her? MR MALLARD: Yeah. DET SGT BRANDON: Okay. And that you said that you wanted jewellery and money? MR MALLARD: Yeah. DET SGT BRANDON: Okay. Now, is the case that she said to you that she knew you? MR MALLARD: Yes. DET SGT BRANDON: No. What I'm saying is - - MR MALLARD: Yes. DET SGT BRANDON: - - you said to us - - MR MALLARD: She knew me.

DET SGT BRANDON: - - she said she knew you, and she knew you because - - MR MALLARD: She would have been talking to her worker, who told her about me when I come in about the jewellery. DET SGT BRANDON: Right. No problems. Okay. Did you tell her - - did you tell us, rather, that you wanted money and jewellery? MR MALLARD: Yes. DET SGT BRANDON: Okay. And that she offered you money and jewellery? MR MALLARD: I would imagine so. DET SGT BRANDON: Okay. What I'm saying is - -

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MR MALLARD: I would say she would have done, because she would not have wanted to be - - she would have given the guy everything. DET SGT BRANDON: Okay. All right. No worries. And that you told us that she became hysterical, that she started screaming? This is what you said - - MR MALLARD: I would say a woman - - DET SGT BRANDON: No. I'm asking you if that's what you told us? MR MALLARD: That's what I said."

The appellant then confirmed that he had told the Detectives that Mrs Lawrence became hysterical and started screaming. He said he did not mean to cause her any further injury but he panicked. He only meant "to knock her

out". The interview then proceeded as follows: DET SGT BRANDON (sic Brandham): Okay. And you said to us that you hit her how many times? MR MALLARD: I would say six to 12 at the max. DET SGT BRANDON: Six to 12 times. MR MALLARD: Judging by the damage that was shown to me in photographs, from the top of the - - DET SGT BRANDON: Just on that, in relation to that, she said - - you said to us that she put her hands up in the air. MR MALLARD: I think so. DET SGT BRANDON: All right. Now, did you hit her on the hand? Sorry, you told us - - MR MALLARD: I think that she would have done this. DET SGT BRANDON: You told us that you didn't hit her on the hands, though.

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MR MALLARD: That's right, because she would have gone like this and then gone like this. DET SGT BRANDON: Okay. Okay. MR MALLARD: Collapsed. DET SGT BRANDON: Yeah. And that she - - you indicated to us where this person that hit her on the head - - can you indicate to us where you said you hit her on the head? MR MALLARD: I think the initial blow would have been to here, around the forehead. DET SGT BRANDON: Yeah. MR MALLARD: And as she went down, on the cranium. DET SGT BRANDON: Yeah. MR MALLARD: As she went down, on the temple, and just mashed the fuck out of her till there was just blood and hair and brains. DET SGT BRANDON: All right, mate. Okay. After the first hit, she fell on the ground, you told us? MR MALLARD: That's right. DET SGT BRANDON: Okay. And that you continued to hit her in that location. MR MALLARD: That's right."
The appellant confirmed that he had told the Detectives that he then dragged Mrs Lawrence to a rear section of the shop so that she would not be seen. He agreed that in the early discussion they had gone through that aspect of the matter several times.
The appellant confirmed that he had told the Detectives that Mrs Lawrence gave him cash from "a stash which was in her handbag". He also confirmed that she gave him a purse. He confirmed that initially he had told the Detectives that he thought she was wearing a jumper and black slacks.

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In the videotaped interview he speculated that she was wearing a skirt of some sort, saying that "being a woman of taste and sophistication, she would have had to be - - not a skirt like this but one that joins up". When it was put to him that he initially told the Detectives that he thought she was wearing a jumper and black slacks, he said, "That would have been her co- worker".
He was questioned about a map which he had earlier drawn showing the premises on which he had marked with an X where he told the Detectives he first hit Mrs Lawrence. There was a line to a second X which marked the point to which he had dragged Mrs Lawrence. He said the handbag was in that vicinity. The map also showed a dotted line the significance of which he explained as: "That is where the eye witness saw the perpetrator either clearing the rest of the jewellery before he fucked off, left ... or before he dragged the body to the next scene, or before he put his hand into the rest of the purse."
He also confirmed that he had drawn a diagram of the weapon that he said he had obtained from the shed. He confirmed that he had a cap on, which was a peaked cap with the peak in reverse. The cap had a gold braid band around it.
He told the police officer that he had stolen the cap, picked up a black leather jacket and a bicycle together with a pair of gloves.
He then recounted how he had seen a car stopped a few cars back from the traffic lights on Stirling Highway in Glyde Street. There was a young girl looking at him. He confirmed that he "locked eyes" with her as she was seated on the passenger side.
He confirmed that after leaving the shop he disposed of the purse, the handbag and the weapon by throwing them off the Stirling Bridge, broke various ID cards, put them in the sand and washed his hands. He said that he either ran there from the scene, had a pushbike or caught a train.

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Detective Sergeant Brandham then asked the appellant to confirm that after telling the Detectives all of the above "a couple of times", he then said that it was "all lies" and that he had made it all up. The appellant agreed. It was then put to the appellant that there were certain things about what he had told the Detectives that only the offender would know. He was asked to explain that. His explanation was: "Um, my association in Mosman Park, going to the deli on the corner, walking past the jewellery store, being inside at the front counter of the jewellery store, not knowing what is behind the back wall, but also seeing the jewellery store or the jewellery store and adjoining shops

from the cycle centre in Stirling Highway, and then just coupling that with information on the television, um, identikit photograph, which is probably nothing like the person."
He then went on to say that what he had told the Detectives was "my version, my conjecture, of the scene of the crime".
There is no indication from the record of interview that Detective Brandham failed to give the appellant any opportunity to speak about matters other than what the appellant had "told him earlier". There was no assurance to the appellant during the videotaped interview that this would occur.
After the appellant had been cautioned and indicated that he was happy to continue with the interview, Detective Sergeant Brandham asked the appellant what had happened at the nightclub which the appellant had visited the previous night when he said that he had been assaulted. After this matter had been discussed for some time the appellant was then asked a series of questions regarding what he had told the Detectives during the oral interview earlier on the morning of 17 June 1994. The various things that the appellant told the Detectives were then put to him. The passage relied upon by counsel for the appellant for the alleged assurance that the appellant would be given an

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opportunity to speak about other matters at the end of the interview appeared in the following context: "DET SGT BRANDON (sic Brandham): Okay. No worries. Okay. You said that you needed money. MR MALLARD: I did. DET SGT BRANDON: Okay. And you told us that you went in the rear - - went in through the rear of the shop of Flora Metallica. Is that what you told us? MR MALLARD: I told you that. DET SGT BRANDON: Okay. Okay. I'm just going to go through that now, okay - what you told us? MR MALLARD: All right. DET SGT BRANDON: We'll sort the rest out later. Okay? I'm just going through what you told us. Okay. I think you also told us on another occasion that you went out the front first, onto Glyde Street? MR MALLARD: Yes. DET SGT BRANDON: You told us that you went out front on Glyde Street and that you were looking back and you saw that the Flora Metallica - - the door was shut? MR MALLARD: Yes. DET SGT BRANDON: And that you thought it was closed, so it was safe to do a break. Is that what you told us? MR MALLARD: That's correct."
In my opinion, the remark, "We'll sort the rest out later" did not constitute an assurance of the kind alleged. No significant attempt appears to have been made at any time to speak about other matters.
Given that the purpose of the interview was to obtain confirmation in the context of the videotaped interview of what the appellant had told the

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Detectives in the oral interview earlier, it was natural for Detective Sergeant Brandham to put to the appellant what he had been recorded as having said in the oral interview. Although this resulted in a number of questions being of a leading nature, the appellant clearly volunteered a considerable amount of information. In my opinion, when taken in the context, the use of the first person by Detective Sergeant Brandham was not misleading. The point that some of the things said by the appellant in the interview did not match known facts has already been dealt with and was specifically referred to by the learned trial Judge in his directions to the jury.
A number of additional points were raised by counsel for the appellant which were said to be inconsistencies between what the appellant said in the video-recorded interview and known or proved facts. These were: (1) The appellant said that there were five, no more than eight, steps to the rear door of the shop. It was submitted that there were in fact only five steps and this number was suggested by Detective Brandham during the interview. The relevant passage in the interview is as follows: "DET SGT BRANDON (sic Brandham): Okay. You said about some steps? MR MALLARD: Steps. I think - - I couldn't remember the name of - - the number, the number of steps, but I would imagine - - DET SGT BRANDON: You said about five, I think. MR MALLARD: Five, no more than - - no more than eight." Detective Sergeant Brandham did no more than remind the appellant of what he had said in the earlier interview. In my opinion, there is nothing in this point. (2) The appellant said that the back door was "a door with a grip handle, no turn, no bolt". There was in fact no grip handle on the back door. In my opinion, this inconsistency was immaterial in the context.

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(3) It was suggested that the appellant said that Mrs Lawrence had left the key in the back door, but the evidence of both Mr Lawrence and Mrs Barsden was that there was no key left in the back door. Mr Lawrence described the back door as having a bolt lock on the left hand side three or four feet from the ground which was fitted with a padlock. This door was open when he arrived after Mrs Lawrence had been killed. Mrs Barsden described the back

door and the locking mechanism on the back door as follows: "There was a security wire door there and there was also another door with a barrel in it that you also could use a key and a little button that you could switch up and down. On the door handle there was a piece of fabric. On that particular day, the wire I had left open and I had gone to shut the door but if I had shut the door, Pam could not have got in and what happened when I shut it was, the fabric got over the latch, so when I shut the door, the fabric was in the latch preventing it from actually closing.
That was the position she had left it in when she left earlier that day. If it was pushed from the outside it would open. In the course of the video interview, the appellant said that he had opened the back door "inwards, with the key". Asked whether there was a key in the door he replied, "No. I don't know. I didn't see a key". Detective Sergeant Brandham was about to ask him what happened next when the appellant asked if he could say something else. The following passage then appears in the transcript of the interview: "MR MALLARD: If Pamela Lawrence was locking the store up, maybe she came through the back way; the front door was already locked. Maybe - - DET SGT BRANDON (sic Brandham): Okay. MR MALLARD: And she left the key in the back door, and that's why he had easy access, and that's why she didn't hear him until he was marching down the store.

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DET SGT BRANDON: We'll go on with what you told us earlier, okay, before we go into anything else. Are you happy with that? MR MALLARD: I'm very happy with that."
In my opinion, the appellant appears to have been somewhat confused about whether there was a key in the back door or not. The significant point was that he found the back door unlocked and was able to push it open. I do not consider there is any substance in this alleged inconsistency. (4) After the appellant described how he had entered the shop and confronted Mrs Lawrence, it was put to him by Detective Sergeant Brandham that, "You told us that she became hysterical and started screaming". The appellant replied, "That's right. That's what I said". It was submitted that this was inconsistent with Mrs Lawrence's "policy" which was just to give any intruder what they wanted. At that stage, however, according to the appellant's own account Mrs Lawrence had already offered him money and jewellery. She had in fact given him cash and her purse. The effect of the appellant's statement was that because Mrs Lawrence became hysterical and started screaming, he panicked and tried to knock her out. In my opinion, there was no inconsistency with the policy because it had already been implemented.
(5) It was submitted that the appellant had asserted that he was on "speed" which was inconsistent with the absence of any evidence that the appellant took "speed" at the time. The reference to "speed" was a passing reference made in the context of the appellant panicking when Mrs Lawrence began to scream. What he said was, "I panicked and at the time I thought I was on speed or drugs, but maybe not". There is no substance in this point.

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(6) It was submitted that the statement by the appellant that he hit Mrs Lawrence six to 12 times "at the max" was inconsistent with the forensic evidence that at least 12 blows had been struck. I reject this submission. As I have already indicated, the appellant's description of the number of blows combined with his account of where on Mrs Lawrence's head the blows were struck was remarkably similar to the forensic evidence.
(7) It was submitted that the appellant's statement that Mrs Lawrence had given him cash from "a stash which was in her handbag" was inconsistent with the Crown case which was that the money taken by the offender was in Mrs Lawrence's purse, which was also allegedly missing. During the interview the appellant was asked, "Do you agree that you said she gave you cash?". The transcript then records: "MR MALLARD: That's right. DET SGT BRANDON (sic Brandham): Do you agree that you told us that she gave you cash from a stash? MR MALLARD: From a stash which was in her handbag. DET SGT BRANDON: Okay. All right. Now, you also said that she gave you a purse? MR MALLARD: A purse."
In my opinion, taken in context, the reference to the purse provides a basis for consistency with the known facts rather than an inconsistency.
(8) It was submitted that a reference by the appellant to a "matching" purse was inconsistent with the known facts, which were that the purse was an Oroton purse and did not match the dark blue handbag. What the accused volunteered in the interview was: "I would say it would have to be a matching purse. Being a woman of taste, she would have had a matching handbag and a

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matching purse. At a last resort, I would have gone for a Glomesh bag." This appears to have been a piece of speculation or an attempt to confuse the issue rather than a statement of fact.

(9) It was submitted that the reference to the "Glomesh bag" in the above passage was inconsistent with the known fact that the dark blue handbag was not a Glomesh bag. The appellant himself had earlier described the handbag as a black bag. In my opinion, this discrepancy arose as a result of another piece of speculation or attempted confusion on the part of the appellant.
(10) In answer to the question, "You told us that she was dressed in what?", the appellant said: "A skirt of some sort. Again, being a woman of taste and sophistication, she would have had to be - - worn a nice skirt like this, but one that joins up." It was submitted that the implication from the text used and the visual image seen on the videotape was that the appellant was indicating a matching skirt and jacket or blouse. There was some uncertainty about whether the phrase was, "worn a nice skirt like this" or "not a nice skirt like this". In my opinion, the difference is immaterial. It was submitted that this was inconsistent with the known fact that Mrs Lawrence was wearing a dark blue jumper with a red pattern and blue jeans with some tears around the knees. Following upon the answer to which I have referred, Detective Sergeant Brandham put it to the appellant that initially he had told them he thought Mrs Lawrence was wearing a jumper. The appellant responded, "A jumper and black slacks". The answer which is said to be inconsistent appears to be a further piece of speculation or attempted confusion by the appellant. What he had originally said was more accurate.

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(11) It was submitted that the appellant's agreement that he had initially said he thought Mrs Lawrence was wearing a jumper and black slacks was inconsistent with the known fact that she was wearing blue jeans. In my opinion, this inconsistency was not of great significance in the context of the case as a whole where it was clear that the appellant knew other things that only the offender could have known. (12) It was submitted that the appellant's statement that the handbag was on the floor was inconsistent with the known fact that the bag was on a shelf three shelves up from the floor. Asked where the handbag was situated, the appellant responded: "The handbag, I would imagine - being her locking up - would be in the back section against the wall, to the right of - - in the corner of the room." To this point this was consistent with the known facts. Detective Sergeant Brandham then said, "On the floor, or - -" and Mr Mallard interposed, "On the floor". The matter was not further pursued. In my opinion, the alleged discrepancy was not material.
(13) When asked a second time about the set of steps at the rear of the store, it was said that the appellant's statement that there were six to eight steps was inconsistent with the known fact that there were five steps. When they were discussing the appellant's sketch plan, Detective Sergeant Brandham pointed to a position on the plan and asked, "A set of steps there?". The appellant's response was, "Six to eight". In the earlier oral interview he had nominated five steps. At an earlier stage in the video-recorded interview he had said, "Five, no more than - - no more than eight". There is nothing in this point.
(14) It was submitted that by implication the appellant said that the offender had a cap or red bandanna. It was contended that this was inconsistent with Katherine Barsden's evidence that she saw a person in the shop

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with what she thought was a scarf which had an orange border and a slight pattern of blue and green and folded in a triangle. The appellant said that he was wearing a peaked cap which when turned around looked like a bandanna. It was suggested to him that it had an orange band around it, but he said that it was of gold braid. He acknowledged that the cap was worn back to front. In my opinion, given the brief opportunity which Katherine Barsden had to register what the person she saw was wearing, the coincidence was quite strong. Her evidence was that the person she saw had what she "assumed to be a scarf on his head". I note that at an earlier stage in the interview the appellant referred to "Either a cap ... or a red bandanna".
(15) It was submitted that the appellant's statement, in which he indicated the place where the eyewitness saw "the perpetrator" "clearing the rest of the jewellery before he fucked off", was inconsistent with the statement that no jewellery was taken or disturbed. The relevant passage in the transcript reads as follows: "MR MALLARD: That is where the eyewitness saw the perpetrator either clearing the rest of the jewellery before he fucked off, left - - DET SGT BRANDON (sic Brandham): Yeah. MR MALLARD: Or before he dragged the body to the next scene, or before he put his hand into the rest of the purse." In the context, the reference to clearing the rest of the jewellery was equivocal and not necessarily inconsistent. It was one of three possibilities, the second of which was strikingly consistent with the known facts and the third was not inconsistent with them. In any event, the inconsistency was not substantive, having regard to the context.

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(16) It was submitted that the appellant's statement in the video-recorded interview with reference to the car with Miss Barsden in it was inconsistent with the known description of Mrs Wood's pale green 1990 Toyota Seca Corolla. In the video-recorded interview the appellant was asked, "You told us you were seen by a girl in a car?". His answer was, "Yes. Now, I figured at first the car would have been a white sedan, probably an old Ford Cortina". Detective Sergeant Brandham interposed, "Right" and the appellant continued, "Or it was a station wagon, white in colour. Don't ask me why I say white". When asked about the car in the oral interview on 17 June 1994 the appellant said, "I think it was a small green, pale green sedan or station wagon. It may have been white; I'm not certain". In the earlier oral interview on 10 June 1994 he was asked, "What type of car was it?". The appellant replied, "A green one, not new". Asked what make it was he replied, "I don't know; a Corolla". In my opinion, the alleged inconsistency is more apparent than real, having regard to the earlier answers.
(17) It was submitted that the reference to the car referred to above as alternatively, "A station wagon, white in colour" was inconsistent with the identity of Mrs Wood's car. Again, the discrepancy is more apparent than real having regard to what the appellant said in the earlier interviews.
(18) It was submitted that the appellant's statement, "I reckon the driver must have been young" was inconsistent with the known fact that Mrs Wood was aged 71 on the day of the murder. When examined in context, this was not a reference to the driver but to the passenger. The reference to the driver was clearly an error which was later corrected when the appellant said that she was seated on the "Driver's - -

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passenger side", "because he is on the left side where the shop is". There is nothing in this point.
(19) It was submitted that the appellant said the driver was a male when the known fact was that the driver was Mrs Wood. This is incorrect. No such statement was made by the appellant. When the appellant said, "Because he is on the left side where the shop is", he was in fact referring to the fact that he had been seen by a girl in a car. The reference to "he" was clearly intended to be a reference to the girl who had seen him. There is no substance in this point. (20) It was submitted that the statement by the appellant that he disposed of the handbag was inconsistent with the known fact that the handbag remained in the shop. This is an obvious inconsistency, but weighed in the balance, I do not consider that it was of any particular significance. (21) It was submitted that the appellant's statement that the purse and weapon (ie, the wrench) were disposed of "off the Stirling Bridge" in deep water was inconsistent with the fact that the police diving team did not find the weapon. Senior Constable Tattersall, the Supervisor of the Police Water Branch had given evidence that, "If any of the items had been in the area searched, we would have been able to locate them". The appellant's statement was not necessarily true as the appellant had given other accounts about how he disposed of the purse and the weapon. There is no substance in this point. In my opinion, ground 2(b)(iv) fails.
GROUND 3: VERDICT UNSAFE AND DANGEROUS
Ground 3 was as follows: "The conviction of the appellant was unsafe and dangerous in that:

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(1) a properly instructed jury ought to, or must have had a reasonable doubt about the guilt of the appellant; and/or (2) the conduct of the prosecutor was such as to make it unsafe and dangerous to allow the verdict of the jury to stand."
This ground was supported by a number of particulars. Particulars (1) and (2) related to ground 3(1) and particular (3) related to ground 3(2).
The principles to be applied by a Court of Criminal Appeal in considering a contention that the verdict of the jury was unsafe and dangerous or unsatisfactory were restated by a majority of the High Court in M v R (1994) 181 CLR 487 at 492-493 in terms which substantially repeated the approach taken in Morris v The Queen (1987) 163 CLR 454 at 463-464; and 470-471. The question is one of fact which the Court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there may be evidence upon which a jury might convict, nonetheless it would be dangerous in all of the circumstances to allow the verdict of guilty to stand.
WHETHER JURY MUST HAVE HAD A REASONABLE DOUBT
Particular (1) was as follows: "(a) The verdict of guilt was dependent upon the first interview, the second interview and the videotaped interview being accepted as constituting reliable confessions of guilt. (b) The lack of appropriate warnings as set out in appeal ground 2 above, deprived the appellant of the benefit of a properly instructed jury determining the case. (c) A properly instructed jury ought to, or must have, had a reasonable doubt about whether the interviews constituted reliable confessions of wilful murder, given the circumstances of the making of these alleged confessions,

BC9604360 at 67

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as particularised in (b)(ii), (iii) and (iv), to ground 2 above."
In my opinion, notwithstanding the legitimate criticisms which may be advanced concerning the procedures followed by the police officers in relation to the various interviews and the generally poor standing of interviewing techniques revealed in them, it is clear that the members of the jury must have been satisfied that the evidence of the police officers concerning the two oral interviews was truthful. In my view, again notwithstanding the criticisms of the manner in which the videotaped interview was conducted, it provided reliable corroboration of the oral interview earlier on 17 June 1994 and in turn provided reliable corroboration of the interview on 10 June 1994. As I have already indicated, when all the interviews are taken together, particularly when one has regard to the demeanour and responsiveness of the appellant to the questions put to him in the videotaped interview, the confessional evidence was not only reliable but compelling. The verdict of the jury indicates that they must have been satisfied beyond a reasonable doubt regarding the reliability of the confessions. In such a case there is no scope for the verdict being unreasonable or against the weight of the evidence. For the reasons already expressed, ground 2 of the grounds of appeal was not made out.
In my opinion, having made an independent assessment of the evidence, I am quite satisfied that there is no basis for a contention in this case that a properly instructed jury ought to or must have had a reasonable doubt about the guilt of the appellant. On the contrary, I consider that the verdict of guilty returned by the jury was fully justified in the light of the evidence. It follows that this was not a case in which the only evidence which could prove that the appellant was the killer was disputed uncorroborated confessional evidence of the kind referred to in Chidiac v The Queen (1991) 171 CLR 432 at 444-445 per Mason CJ.

BC9604360 at 68

APPELLANT'S MOVEMENTS SHOWED HE WAS NOT THE OFFENDER
Particular (2)(a) was that in any event: "The evidence of the times of the appellant's movements relied upon by the Crown did not prove beyond reasonable doubt that the appellant was the offender, and to the contrary proved that the appellant could not have been the offender."
It was submitted that the Crown case as opened and closed was that the appellant's murder of Mrs Lawrence was a robbery gone wrong. As previously indicated, the Crown alleged that the murder weapon was a wrench which the appellant took from the shed behind the Flora Metallica shop immediately prior to the murder. It was alleged the appellant hit Mrs Lawrence over the head with the wrench 12 times.
The Crown alleged that the appellant was in the vicinity of Flora Metallica from shortly before 5.00pm or just after based upon the evidence of the taxi driver. The Crown also alleged, based on the evidence of Mrs Raine that the appellant went into a lift of a block of flats nearby to Flora Metallica between 5.10pm and 5.20pm and was observed with an iron bar in his hand. It was also said to be part of the Crown case, based upon the alleged confessions of the appellant, that after the murder the appellant ran to Stirling Bridge near Fremantle to get rid of the murder weapon and wash his clothes in salt water to remove blood stains. At the same time it was said that the Crown case was that after the disposal of the weapon off Stirling Bridge, the appellant made his way back to Ms Engelhardt's flat in Mosman Park. It was alleged that the appellant returned to the flat at about 6.30pm when he was drenched. There was undisputed evidence that the appellant caught a train in Mosman Park to Fremantle and was pictured on a Westrail video on the train at 6.58pm according to the video clock. It followed, therefore, that the Crown alleged that in the two hours between 5.00pm and 7.00pm the appellant had committed the murder, disposed of the weapon and washed his clothes.

BC9604360 at 69

Evidence was given of the attempts by the Police Diving Unit to find the murder weapon which the Crown alleged had been discarded from Stirling Bridge. The Crown prosecutor said in his closing address that: "It is true he set off to Stirling Bridge. The police divers could not find the weapon off the Stirling Bridge. They expected to be able to find it. Well, the weapon could have been disposed of anywhere and it would be like a needle in a haystack trying to find the weapon ... It's a simple fact that it has not turned up and it would be like trying to find a needle in a haystack trying to find it."
It was submitted that this was not the Crown case and that the Crown case was that the murder weapon was disposed of from Stirling Bridge.
It is true that the Crown case was opened on this basis because it was relying upon the appellant's statement that he had disposed of the murder weapon and Mrs Lawrence's purse off Stirling Bridge. Evidence was given by the supervisor of the Water Police Branch that underwater searches were conducted in the foreshore area off North

Fremantle and Stirling Bridge. The search area was based on what was described as "a feasible or conceivable throwing distance for what we believe the weapon may have been". The supervisor said: "If any of the items had been in the area searched, we would have been able to locate them with the visibility and the bottom of the search area." Nothing was found. It was noted that the appellant had also said that the murder weapon may have been disposed of in the sea at North Fremantle.
Ms Engelhardt said that a few minutes after 6.30pm on 23 May 1994 the appellant arrived at Ms Engelhardt's flat in Murray Avenue by bicycle wearing a leather jacket, black leather gloves and black pants. He was drenched from the rain. He was also wearing a tartan red shirt. He said, "Don't hassle me because I have had a really hard day". He went to the

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bathroom. A Michael Buhagiar was present and shortly afterwards Damien Kostezky arrived as he and Ms Engelhardt were about to watch the television programme Home and Away which commenced at 7.00 o'clock. According to her recollection Mr Buhagiar and the appellant left her flat about 7.10pm. As previously noted, this evidence of time is inconsistent with the irrefutable evidence that the appellant was on the train to Fremantle at 6.58pm. The appellant returned at about 9.30pm.
The appellant said that when he got out of the taxi he was wearing torn jeans with various colours splashed over them. Underneath those jeans he had on dark blue dress trousers. He had on a green silk shirt and underneath that a T-shirt which was striped but predominantly yellow with maroons, yellows and greens and "sort of striped". According to Ms Engelhardt the appellant was in the habit of wearing various sets of clothing and often wore more than one pair of pants. He was in the habit of frequently changing his clothing. The taxi driver recalled that his trousers were green and red and had a hole in them near the knee. He did not think they were jeans. The person seen by Mrs Raine was observed to be wearing navy blue tracksuit pants with brown shoes and what was a scarf or bandanna on his head which was darkish blue and dirty white.
It was submitted on behalf of the appellant that the Crown case was contradictory and fundamentally flawed in a number of respects. First, it was submitted that there was a clear contradiction between the proposition that the appellant murdered Mrs Lawrence and then ran the four kilometres to Stirling Bridge to dispose of the weapon and wash his clothes and the evidence of Mrs Raine whom the jury were invited to accept saw the appellant between 5.10 and 5.20pm when he had no blood on his clothes. The forensic evidence was that it was likely that the killer's clothes would have been heavily soiled.

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In my opinion, the Crown were obliged to lead the evidence of Mrs Raine. The jury may have concluded that the person she saw was not the appellant. If so, they could have put her evidence to one side. Alternatively, the jury may have been satisfied that the person she saw was the appellant. It is known that Mrs Lawrence was still alive and at the shop at 5.10pm when she made a telephone call to a customer. The murder must have occurred very shortly after that. Mrs Raine's evidence concerning the time was not necessarily precise. If she did see the appellant and he still had the murder weapon, then she saw him before he had disposed of it. He was next seen arriving by bicycle at Ms Engelhardt's flat at approximately 6.30pm. Consequently, between when he was seen by Mrs Raine and 6.30pm, he had time to ride the bicycle the four kilometres to Stirling Bridge and back again. In these circumstances, the remaining discrepancy relates to the failure of Mrs Raine to observe blood on the appellant's clothes. One possible explanation for that was that the appellant had removed an outer layer of clothing or changed his clothes by the time he was seen by Mrs Raine. The appellant himself said that he had changed his clothes at Ms Engelhardt's flat at about 5.30pm.
It was submitted that the Crown case that the appellant disposed of the murder weapon off Stirling Bridge was disproved by the police evidence which the Crown did not seek, by evidence, to qualify or contradict. That is not altogether true, having regard to the fact that the appellant also said that the murder weapon could have been disposed of in the sea at North Fremantle. This was the same distance from Mosman Park as the Stirling Bridge and could have been reached by the appellant by bicycle in the time frame to which I have referred. The jury may well have concluded that the appellant had deliberately given conflicting accounts of where he disposed of the murder weapon in order to confuse the issue.

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It was also submitted on behalf of the appellant that the Crown prosecutor's suggestion to the jury in closing that trying to find the murder weapon was "like trying to find a needle in a haystack" was neither the Crown case, nor

supportable by any evidence that the Crown had led or relied on. In my opinion, having regard to the whole of the evidence in the trial, there was nothing improper in this comment by the Crown prosecutor in his closing address.
As I have said, the appellant himself said that he changed his clothes at Ms Engelhardt's flat at 5.30pm. His evidence of time was no more precise in this respect than that of Mrs Raine. If Mrs Raine did see him, it may have been that the appellant changed his clothes earlier than he said and had already changed when he was seen by Mrs Raine.
There is no doubt that the appellant caught a train in Mosman Park towards Fremantle shortly before 7.00pm. There is a photograph of him taken from the security video at 6.58pm wearing the jeans which he had described he was wearing in the taxi. These have a substantial tear in the left knee area. He appears to be wearing a dark blue item of clothing underneath the jeans. He was also wearing a black or dark brown jacket and gloves and appeared to be holding something in the crook of his left arm and shoulder. The jury would have been entitled to accept the accuracy of this time. If they did, it follows that Ms Engelhardt's evidence of the time when the appellant left her flat as being just after 7.00pm could not have been correct. He must have left before 7.00pm. It also follows that the evidence of Mr Kostezky who said he met the appellant at 7.00pm in Mosman Park could not have been correct. The appellant must have left Ms Engelhardt's flat shortly before 7.00pm. If he arrived there at 6.30 as Ms Engelhardt said, he would have had time to change and leave again in order to catch the train.

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In my opinion, the submission that the time line of events on 23 May 1994 showed that the appellant could not have been the offender cannot be accepted.
LACK OF FORENSIC EVIDENCE
Particular (2)(b) contended that: "There was a lack of any forensic evidence connecting the appellant with the commission of the offence when this would have been expected if the appellant was the perpetrator of the crime that was committed."
It was submitted that, in the circumstances of this case, forensic evidence connecting the appellant with the commission of the offence would have been expected. It was submitted that evidence to this general effect was given by Dr Cooke and Mr Bagdonavicius and an inference to this effect could have been drawn from the evidence of the ambulance officer. Although the Crown case was that the appellant had washed the blood from his clothes by wading into salt water by Stirling Bridge, there was no evidence that the clothes had traces of salt on them. The black shoes which he was said to have been wearing at the time did not display any evidence of having been submerged in salt water.
It is the fact that there was no blood staining on the clothes of the appellant that were seized that was of the group of Mrs Lawrence. In his evidence in chief Dr Cooke said that as a result of the blows to the head there "may well" have been a splattering of blood. Asked whether the splattering would have occurred immediately, Dr Cooke said: "No, with each individual blow there may not be necessarily a lot of splattering of blood. Certainly once the injury is suffered the blood would well up and flow very quickly but at the moment of impact there may or may not be much splattering."

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So far as the absence of blood is concerned, the evidence of Dr Cooke was to the effect that the first two blows to Mrs Lawrence's head would have knocked her down. This in itself could explain the absence of blood on the appellant's clothes.
Mr Bagdonavicius gave evidence that that depending on the amount of blood on a person's clothing any blood could have been washed out of their clothing within one and a half hours to two hours afterwards either by immersion in salt water or simply by being out in heavy rain. The lower the temperature the more likely this would be. Asked whether he could say from his observations anything about the likelihood of the offender in this case getting blood on him or her, he replied: "On the spray pattern, if there was any blood on the clothing it would be only around the lower legs and there doesn't appear to be a very large amount there anyway."
The appellant's description of what happened in the video record of interview was remarkably consistent with the evidence of Dr Cooke. It is apparent that estimates of the likelihood and extent of the perpetrator having blood on his clothes were largely a matter of conjecture, but, in all the circumstances, it would not necessarily be inconsistent with the Crown case for the appellant not have had blood on his clothes. If the appellant was riding a bicycle and was drenched by the rain between about 5.30 and 6.30 pm this could well have explained why this was so.
It is significant that when pictured on the train at 6.58pm the appellant is wearing what might be described as "paint run" faded jeans with green and red paint splashes on them and a large hole in the left knee. The jeans and the jacket are strikingly similar to the clothing described by the taxi driver, Mr Peverall, including the hole in the

trousers. They also match the description of the clothes being worn by the appellant as described by Ms Engelhardt when she saw him drenched at 6.30pm when he arrived at her flat on a bike. The

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appellant said that when he was in the taxi he was wearing navy blue dress trousers underneath his jeans and there is a reference to navy blue tracksuit pants by Mrs Raine. It is a reasonable inference that the appellant took off the jeans and put them back on again. He said that he had spent about one minute changing his clothes at Ms Engelhard's flat at about 5.30 pm.
PRUSSIAN BLUE PAINT
Particular 2(c) contended that: "The presence of 'Prussian Blue' paint in the wounds of the deceased did not fit the crime which was allegedly confessed to by the appellant."
A Mr Lynch gave evidence that Mrs Lawrence's wounds had flakes of Prussian Blue paint in them. This was also the evidence of Dr Cooke.
Mr Lynch said that the weapon may have had this colour of paint on it and had been a steel object which may have rusted as well, because of the presence of iron oxide particles in the blue smears found.
It was submitted that the appellant's description of the weapon used in the killing made no reference to its colour. It was also pointed out that Mrs Raine's evidence was to the effect that the person she saw was carrying an iron bar. No reference was made to the fact that it was coloured blue. Mr Lawrence gave evidence that a wrench which was possibly "an expanding spanner" could have been missing. There was no evidence that the spanner was blue. The appellant himself drew a sketch of a Sidchrome expanding spanner. No reference was made to it being blue.
On the state of the evidence, there was simply no evidence one way or the other regarding the colour of the murder weapon. The inference from the forensic evidence was that the murder weapon had blue paint on it and was rusted. No evidence was given by any witness which was specifically inconsistent with the forensic evidence.

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LACK OF EVIDENCE OF OPPORTUNITY
Particular 2(d) contended that: "There was no eye witness evidence which placed either the appellant, or a person matching his description, including the clothing the appellant was said by the prosecution to have worn at the time of the offence, at the scene of the crime - inside the shop named Flora Metallica - at the time when the prosecution alleged the offence was committed; and (i) the witness Miss Katherine Barsden said in evidence that the person she saw in Flora Metallica had an orange bandanna; and (ii) the defence witness Ms Anabella De Florenca said that she saw a person glancing at Flora Metallica wearing an orange bandanna at the relevant time, when there was no evidence that the appellant ever owned or wore such an item of clothing or one that would match such a description."
As already noted, Miss Barsden's evidence was that she saw a person in the shop wearing what she assumed was a scarf which had an orange border and a slight pattern of blue and green and folded in a triangle. The appellant said he was wearing a peaked cap which, when worn back to front, looked like a bandanna. It was suggested to him that it had an orange band around it, but he said that it was of gold braid. I have already referred to the striking similarity between the descriptions given by the appellant and Miss Barsden of the incident when Mrs Wood's car stopped at the traffic lights in Glyde Street shortly after 5.00pm. In my opinion, this was quite compelling evidence which, in conjunction with other evidence, entitled the jury to infer that the appellant was in the shop at the relevant time. The evidence of Ms De Florenca could not be regarded as inconsistent as what the appellant

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described as gold braid may well have appeared orange to her, as it appeared to be to Miss Barsden. In my opinion, there is no substance in this point.
It follows that ground 3(2) fails.
CONDUCT OF THE CROWN PROSECUTOR
Counsel for the appellant made a number of criticisms of the conduct of the Crown prosecutor at the trial, on the basis of which it was submitted was that it was unsafe and dangerous to allow the verdict of the jury to stand. It is necessary to deal with each of these in turn.
HEIGHT OF THE APPELLANT
Particular 3(a) contended that the Crown prosecutor: "Put to the appellant in cross-examination that his height was 6 feet 8 inches, and that this fitted the evidence of Ms Lilly Raine in that the person she saw enter the lift at the Bel Air flats had to duck to get into the lift (which had a height of 6 feet 8 inches) when the prosecution had no evidence

of the appellant's height being 6 feet 8 inches and indeed the police had possession of the appellant's photograph taken at East Perth Lockup on 23 May 1994 which stated that the appellant's height was 199 cms (6 feet 6.35 inches) and not 6 feet 8 inches, which equates to 203.20 cms."
There was a photograph produced at the trial which was to be exhibit 84, namely a photograph of the appellant against a height scale which clearly suggested that his height was as put to the appellant in cross-examination. This photograph was ruled inadmissible at the trial in the exercise of discretion. This photograph was in the possession of the Crown prosecutor at the time he put his question and fully justified it. This photograph was marked exhibit 1 on the appeal and was tendered by counsel for the respondent, who asked counsel for the appellant to withdraw the submission of impropriety the subject of this particular. Counsel for the appellant made the withdrawal in his reply, while drawing attention to the fact

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that there was also the Lockup photograph taken on 23 May 1994 showing the appellant's height as 199 cms which counsel for the appellant had also tendered and which was exhibit 2 on the appeal. On the evidence before us, while there was a basis for the question put in cross-examination, it is not possible to determine whether the particular question was fair, but this point alone was not capable of leading to a miscarriage of justice.
MISS BARSDEN'S EVIDENCE
Particular 3(b) contended that the Crown prosecutor: "told the jury in his closing address that the witness Miss Katherine Barsden said she saw a man wearing a bandanna with a gold border ... and this matched a cap of the appellant with a gold braid when worn backwards, when Miss Barsden said in evidence that the person she saw in Flora Metallica wore an orange bandanna."
The evidence given by Miss Barsden was as appears from the following passage in the transcript: "...You look in that right window as you look into the shop. Just take us through from go to whoa what you see in your own words?---I saw a man. I estimated him to be about 30 to 35 years old, medium build. He had a slight beard and it was orange, sort of strawberry blond in colour. He had what I assumed to be a scarf on his head. Right. Just describe that as best you can?---It was, sort of a rustic orange colour. It had also, like, a slight pattern of blue and green in it. And the orange-which part of it was orange?---The border."
It is not quite correct that Miss Barsden identified the person she saw as wearing an orange bandanna. Her evidence has been referred to previously as well as the evidence of what the appellant told the police officers regarding the blue peaked cap that he was wearing which had a gold braid border which looked like a bandanna when worn back to front. The relevant comment made

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by the Crown prosecution (volume 5 at 1413) was not accurate but was not one which prompted counsel for the defence or anyone else at the trial to seek a correction. In the context of this case, this point alone was not capable of leading to a miscarriage of justice.
IRON BAR SEEN BY MRS RAINE INCONSISTENT WITH CROWN CASE Particular 3(c) contended that the Crown prosecutor: "Told the jury in his closing address that the witness Ms Lilly Raine identified the appellant carrying an iron bar in the Bel Air flats, after the appellant, on the prosecution case had committed the offence and indicated to the jury that this supported the prosecution case ... when it did not as: (i) the prosecution case, on the basis of the alleged confessions, was that the murder weapon was a Sidchrome wrench, which must have been painted 'Prussian Blue' to explain the presence of paint of this colour in the deceased wounds, and (ii) on the prosecution case on the basis of the alleged confessions, the appellant, immediately after committing the offence, disposed of the murder weapon by throwing it off Stirling Bridge in Fremantle, before the appellant went to the Bel Air flat."
This point has already been dealt with earlier in these reasons. For the reasons which I have already expressed, I do not consider that there is any substance in it.
WHAT THE CROWN SAID ONLY THE KILLER WOULD KNOW
Particular 3(e) contended that the Crown prosecutor: "told the jury in his closing address that there were 15 things which the appellant said in his interviews with the police that only the killer would know, including that: (i) the deceased was wearing dark slacks and a jumper, when this was misleading as in the videotaped interview, the appellant said that the deceased 'would have ... worn a

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nice [matching] skirt' and that the deceased's [co-worker] ... would have ... worn a jumper and black slacks; (ii) the vehicle in which Miss Katherine Barsden was travelling when she looked into Flora Metallica and saw someone was said by the appellant to be a pale green Corolla (which matched the car in which Miss Barsden had travelled) when this was potentially misleading as in the videotaped interview the appellant said that he 'figured at first the car could have been a white sedan, probably an old Ford Cortina ... or it was a station wagon, white in colour'."

Both of these points have been dealt with earlier. While particular 3(e)(i) rightly points out what the appellant said in the videotaped interview, he had in an earlier interview described Mrs Lawrence as wearing dark slacks and a jumper. What the appellant said in the videotaped interview may well have been calculated to confuse the issue.

Similarly, in relation to particular 3(e)(ii), the appellant had in an earlier interview described the vehicle as a pale green Corolla although he did say it might have been white. The vehicle was in fact a pale green Corolla. The inference was also open that in the videotaped interview the appellant was again attempting to confuse the issue.

No exception was taken at the trial to either of these statements by counsel for the prosecution.

In my opinion, none of these matters either alone or taken in combination could be said to have led to a miscarriage of justice in this case. It follows that particular 3(e) has not been made out. It follows for all of these reasons that ground 3(2) fails.

GROUND 4: EVIDENCE OF BAD CHARACTER

Ground 4 of the grounds of appeal was that:

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"The learned trial Judge erred in law in directing the jury that they could take into account evidence of the appellant's bad character in assessing the credibility of the appellant as a witness."

In the course of his summing up, the learned trial Judge said: "Let me go then to this question of what is the evidence as to the identification of the accused person as the person who committed the crime. In the first place let me say that there has been a body of evidence which has necessarily, I think, in the circumstances been laid before you which would tend to show the accused person to be a person of perhaps bad character. It happens with respect to other witnesses as well - a person who would steal or lie or cheat, smoke cannabis and live that sort of lifestyle. That sort of evidence has been led not to inflame your minds against the accused person but as a necessary or essential part of the narrative, the motivation for his movements in a particular way at the time. The question of its relevance to his alibi has been discussed and the way in which it is led to explain the accused's conduct is clear enough to you I am sure. What I want to caution you about is not to take that evidence so far as it shows him to have elements of bad character and draw the conclusion from that, from your conclusions about that, that he is a person who did or was more likely to have committed the offence charged in the indictment. It is not led for that purpose and it would be improper for you to use it in that way. Of course it has not only relevance to the narrative and the factual events that occurred and which were relevant to the period of time, but of course it is proper that you should have regard to it in relation to your assessment of credibility of the accused person as a witness and any other person who is a witness in the case. That is perfectly proper and it is right that you should have regard to the evidence in that context, for the accused as well as for any other witness because of course it is correct to say, in line with where the burden of proof lies, that the accused person is not obliged ever to go into the witness box and give evidence to establish his innocence but when he does so he becomes a witness in the case whose testimony is available for all purposes just as any other witness in the case and so he subjects himself to your

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assessment of his credibility and his creditworthiness in just the same way as any other witness does."

After the jury had retired counsel for the Crown referred to this part of the summing up and said: "Your Honour very early in the charge mentioned, having regard to his lying, cheating and stealing, - having regard to that in relation to his credibility. I just had a concern there. That evidence was led purely to show his movements, his whereabouts, also to a very lesser extent, as your Honour commented on, on motive but it was really introduced for that purpose. It is normally evidence that would not be there. I just had a concern about whether it should be expressed in those ways. Normally the ladies and gentlemen of the jury would not hear about any other of these matters but it is already interwoven into his whereabouts and his movements and it is relevant to motive although your Honour suggested that would not take the jury very far."

The learned trial Judge made it clear that the view which he had taken is that once the evidence came in, it was evidence in the trial and it could all be considered.

Although counsel for the appellant did not address any submissions to the Court in relation to this matter, the outline of submissions contained a submission that the direction to the jury was in error on the basis that once evidence of bad character was led, not for the purpose of rebutting a defence of good character, but for some other purpose, the jury should only consider the evidence of bad character for its relevant purpose, and not for assessing

the credibility of the accused as a witness. Counsel for the appellant relied upon the proposition in Cross on Evidence, Australian Looseleaf Edition, para19,145 which states the proposition in the following terms: "Where evidence which incidentally reflects adversely on the accused' s character is admissible for some other reason, the jury may use the evidence for that reason only."

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This was said to be consistent with the exceptional nature of evidence being given which shows the bad character of the accused: Attwood v The Queen (1960) 102 CLR 353.
S8(1)(d) and s8(1)(e) of the Evidence Act 1902 provide that: "(d) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination, notwithstanding that it would tend to incriminate him as to the offence charged; (e) a person charged and called as a witness in pursuance of this section may be asked, and if asked shall be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless- (i) the proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence."
This case was unusual because the evidence of the appellant's bad character was led as part of his own case and in support of his defence of alibi. This evidence was led by the appellant or brought out in cross- examination of Crown witnesses which tended to show that the appellant was a person who smoked cannabis and who was prepared to lie, cheat or steal to feed his habit, as were a number of the persons with whom he associated. It followed, in my opinion, that the prosecution was entitled to cross-examine the appellant about these matters to rebut his defence of alibi and thereby incriminate him in the

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offence charged under s8(1)(d), notwithstanding that this might also tend to show that he was of bad character. In Attwood at 360 per Dixon CJ, McTiernan, Fullagar, Taylor and Menzies JJ their Honours referred to the equivalent provisions in the Crimes Act 1958 (Vic) and said: "In practice the words have always been applied as limiting what may be asked in cross-examination to credit but not as affecting cross-examination to strictly relevant facts and this seems to be in accordance with the natural reading of the provision. The words 'bad character' although possessing no technical meaning are apt to describe a head of exclusion already known and understood. At common law no motives of policy or humanity or fairness excluded the proof of facts and circumstances forming the parts and details of the transaction and the incidents or matters tending to explain, identify or lead up to the occurrences forming the subject of the issue, in short what we commonly embrace under the term 'relevant facts'; it did not exclude such evidence notwithstanding that it might disclose acts or conduct on the part of an accused person which would be considered inconsistent with good character. The exclusory words in s399(e) do not naturally relate to a fact, matter or circumstance which is in itself directly relevant to the proof of the issues although its occurrence or existence incidentally tells against the possession by the accused of a good character or may be the ground of attributing to him a bad character. This view was expressed by Angas Parsons J in the Supreme Court of South Australia speaking for the Full Court. His Honour said of the cross-examination there objected to: 'Such questions are not directed as to the accused's bad character, but to prove his guilty knowledge, which was one of the issues in the case, and, that being the position, they were not rendered inadmissible by reason of the fact that they might also tend to show that he was of bad character': R v Baxter (1927) SASR 321 at 327. In Reg v Lambert (1957) SASR 341 Piper AJ speaking for the Full Court adopted this statement and also said, 'notwithstanding that it appears that the provisoes' (to the provision) 'were enacted in order to protect accused persons from such prejudicial effects as might arise from the consequences of enacting that accused persons may give evidence in their own

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defence, questions which tend to show that he is of bad character may be asked of an accused person if they are relevant to the question whether he did or did not commit the offence charged' (1957) SASR at 345, 346. His Honour added: 'or to test the veracity of his evidence in chief' (1957) SASR at 346, but it is safer to omit this alternative as capable of a construction or application which would carry it beyond relevance into cross-examination

to credit. Otherwise the passage expresses the interpretation of the provision which seems best to accord with the probable legislative intention."
The qualification in relation to testing the veracity of the evidence in chief of the accused appears to have been intended to distinguish between cross-examination which tends to incriminate the accused and a cross-examination which goes merely to credit. As Cross on Evidence, above, para23,195 puts it in the context of Attwood: "... the statute does not protect the witness accused from questioning about bad character where this goes to a relevant fact and not solely to credit. In such a case the question does not offend against the prohibition notwithstanding that, incidentally, it may tell against a person's credit."
In my opinion, this is a correct statement of the position under the Western Australian legislation.
On this basis, the decision in Attwood means that s8(1)(d) will permit questions which tend to incriminate the accused directly or indirectly, in respect of the offence charged. In cases to which none of the exceptions apply, the prohibition in s8(1)(e) relates to questions which go solely to credit. This was the approach adopted in R v Chitson [1909] 2 KB 945; and R v Kurasch [1915] 2 KB 749.
In Jones v Director of Public Prosecutions [1962] AC 635, the accused, who was charged with the murder of a Girl Guide, relied on as his defence an uncorroborated alibi that he was with a prostitute. It was necessary for him to explain why he had earlier endeavoured to set up another alibi which

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would have been corroborated. His explanation in his evidence in chief was that he had previously been in trouble with the police and was afraid they would not accept an uncorroborated alibi. When cross- examined, it was put to him that the uncorroborated alibi was strikingly similar to that he had previously relied upon. The accused had in fact relied upon such an alibi at an earlier trial at which he had been charged and convicted with the rape of another Girl Guide. While the cross-examination did not actually show that he had committed another offence, the House of Lords held that it tended to show that he was a person of bad character, who had been suspected of, if not charged with, another serious crime. Lords Simonds, Reid and Morris held that the cross-examination was permissible as relevant to the guilt of the accused because it tended to disprove his alibi. Their Lordships, however, would not have permitted the questions if the accused had not himself referred to his previous trouble, thereby himself "tending to show" he was of bad character by making known that fact to the jury: cf R v Sraek [1982] VR 971 at 979; and R v Couper (1985) 18 A Crim R 1.
In my opinion, the circumstances of this case were similar to those in Jones in that the appellant himself showed himself to be a person of bad character by the very nature of his defence of alibi which, in any event, was liable to be tested by cross-examination. In addition, the appellant himself gave evidence which tended to show that he was a person of bad character. The cross-examination in relation to these matters was relevant to the issue of guilt and was permissible under s8(1)(d), notwithstanding that it also went to the credit of the accused: cf Donnini v The Queen (1972) 128 CLR at 130-133 per Menzies J.
The appellant gave evidence that he stole, told lies and cheated to obtain money for various purposes, including to get marijuana. He specifically gave evidence that on the night of Sunday 22 May 1994 he had broken into a

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flat occupied by one Mr Brett Dell and stolen clothing, including a black leather jacket, as well as a guitar, amplifier and a racing bicycle. He then went to various places trying to obtain marijuana.
The appellant also gave evidence that he was arrested by police on the morning of Monday 23 May 1994 at Ms Engelhardt's flat. This was as a result of a complaint made by Brett Dell. He was taken to Cottesloe Police Station and from there to the East Perth Lockup. He recounted how he had duped the taxi driver who took him to Mosman Park that afternoon into waiting for him in the belief that he was going to change his clothes and continue the journey to Fremantle. This was how he avoided paying his taxi fare.
He then gave evidence of his alibi, in which he said that he visited various flats, including ones visited the previous night, to see if he could "score some marijuana". At about 5.30pm he checked that the taxi was gone and went back to Ms Engelhardt's flat, arriving at about 6.00pm. He put on his torn jeans over his dark blue trousers and also put on Mr Brett Dell's leather jacket over the latter's red tartan shirt, together with his gloves. He then went off again "to try and score some marijuana". He went to various places including some of those visited the previous night. He went across Stirling Highway from Glyde Street and back again. On the way up and on the way back he noticed a police van outside Flora Metallica and all the lights on in the shop. He thought there must have been a break-in. It then started to rain and he ran to Ms Engelhardt's flat, arriving there, as he put it: "I estimate it to be around either - 7.00 at the outmost, but say 10 to 7 - 10 to 7, 7 o'clock."

He then got changed and dried himself off. He had on the red tartan shirt and dark blue trousers. Mr Damien Kostezky arrived. Ms Engelhardt asked him to get her some chocolate. The appellant said he went with Mr Kostezky in the latter's car to the corner deli to buy chocolate. They then

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returned to the flat. He and Mr Michael Buhagiar, who had already been at the flat, then agreed to leave together. The appellant put back on his torn jeans over his dark blue trousers, the leather jacket, a black scarf and the leather gloves. By the time he had changed, Mr Buhagiar was gone. The appellant then walked up to the Mosman Park Railway Station and caught the train to Fremantle. He met Mr Buhagiar on the train. The appellant was filmed by a security camera apparently alone on the train at 6.58pm wearing the clothes which he described. It was put to him in cross-examination that he had lied about his movements that night and that the facts were as outlined in the Crown case.

The appellant also gave evidence that the next morning, 24 May 1994, he went to the Iona Convent and pretended to be a police officer enquiring about a chalice. He had in fact stolen the chalice from the Convent some days before. His explanation was that he was trying to find a way to get the chalice back to the Convent. He then went on to St Hilda's Girls School where he stole a wallet from a school bag outside a classroom. He telephoned police communications and made a false report to the police to divert them and went to Ms Engelhardt's flat. She told him the police had been looking for him. Shortly after that the police arrived at the flat. He was taken to the Cottesloe Police Station and then to the East Perth Lockup.

It is also relevant that the appellant claimed that he had been, in effect, browbeaten and confused by Detective Sergeant Caporn in the oral interview on 10 June 1994. He specifically alleged that he had been beaten on two occasions. On the first he said: "... he slapped me, punched me in the stomach, tried to kick me in the groin but missed and hit me on the inside leg - inner thigh, right thigh."

He then went to the toilet. When he returned he said he was innocent. Detective Sergeant Caporn then grabbed hold of his right wrist and twisted it

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up behind his back. He grabbed the appellant by the hair and pulled it down. The appellant then bit the Detective on the leg. Detective Emmett then got hold of his arm and twisted it. Detective Sergeant Caporn said, "Let him go" and the appellant was pushed to the floor. He was then kicked in the stomach by Detective Sergeant Caporn who screamed at him, "You killed her. You killed her didn't you? You're a dog. You did it." These allegations were denied by the police officers.

The appellant said he was picked up by Detective Sergeant Brandham and another police officer on 17 June 1994 and put in a car. He was handcuffed. Detective Sergeant Brandham shoved a pistol in his face and said, "We're going to kill you. We're going to shoot you and bury you at Gnangarra Plantation." He was later butted in the side with a torch and one of the police officers grabbed hold of the handcuff on his right wrist and twisted it so that it cut him saying, "Is that what she said is it? Is that what she said?"

It was put to the appellant in cross-examination that he had lied to numerous people in the week before the murder in attempts to obtain money or property, that he had lied about his movements on the night in question and that he had lied about the conduct of police officers. In my opinion, the questions which he was asked in cross-examination went directly to the issue of his guilt of the offence charged. The cross-examination also went to the issue of his alibi and to the question whether his alleged confession was voluntary, both of which went at least indirectly to his guilt of the offence charged. These were relevant issues which fully justified the cross- examination, notwithstanding that it was inevitable that it would also go to his credit.

In my opinion, the directions given by the learned trial Judge were correct. If I am wrong in this view, I am of the opinion that no miscarriage of justice resulted, having regard to the compelling nature of the admissions and

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other evidence of the appellant's knowledge of aspects of the offence that only the perpetrator would know.

GROUND 5: MISDIRECTION ON LIES

Ground 5 was as follows: "There was a miscarriage of justice because the directions of the learned trial Judge about the use that the jury could make of any lies they found to have been told by the appellant, either in or out of court, were inadequate, confusing and incomplete."

It was submitted that part of the Crown case was that the appellant had lied on a number of occasions, both in and out of court, about his movements and whereabouts between 5.00pm and 7.00pm on 23 May 1994 and contended

that the reason the appellant told these lies was his consciousness of guilt. It was submitted that in these circumstances it was necessary for the trial Judge to give a careful, balanced and accurate direction to the jury regarding the use they could make of any lies they found to have been told by the appellant.
Unfortunately, the trial Judge did not direct the jury on the question of lies during his summing up. The matter was touched upon during the course of the summing up in the context of the evidence given by the appellant that on the Monday night as well as on the Sunday night he had visited a number of places knocking on doors seeking to obtain marijuana. In this context, the learned Judge said to the jury in the course of his summing up: "Well, it is a matter for you to evaluate that but in any event the question that you might ask yourself is, is the evidence given as a result of confusion? Was it truthful that these places were again visited on the following night, on this occasion as distinct from the Sunday without any success to knock up any people who were at home at the time, or are both those statements given at different times in different ways by the accused but in advancement generally of an account of an innocent character to make good his time during the relevant period - are those simply wrong or are

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they deliberate untruths? Are they lies? That is a matter to which you may have regard. Of course if you conclude that the evidence is unacceptable, then the first thing that happens is that that account given by the accused to explain where he was and what he was doing consistently with his innocence of this offence during the relevant period simply falls away and that would not be then evidence to which you would have regard in a positive way as bearing upon the issue of whether or not he was the person who carried out the killing. It has another significance if you conclude that they are lies, to which I shall return later."
This did not occur and his Honour's attention was drawn to that fact after the jury had retired. His Honour then indicated that he proposed to give a direction in accordance with Edwards v The Queen (1993) 178 CLR 193 at 210-211 per Deane, Dawson and Gaudron JJ. The jury were then asked to return. The trial Judge then directed them as follows: "There are two things that should have been said to you that I overlooked one of which - the first one I mentioned I said I was going to say to you and then I forgot at the end. It is in relation to this question of the statements made out of court by the accused person and also in evidence to you about his movements during the course of a relevant period. You may recall that when that was discussed, I mentioned to you that if you concluded that you did not accept that evidence, then that material simply fell away and became an account or an explanation for what he was doing during the period to which you would have no regard as affirmative evidence of that character. I said that you may also conclude that all or some parts of that material were as a result of the telling of deliberate untruths by the accused person - that they were in fact lies told by him at that time. That was discussed from the bar table as well as on both sides and I needed to say to you that what counsel said to you about that is right, about how you might use that material. It is important that you should know this from me as a direction of law because if it was your conclusion that the accused person in relation to his movements - to account for his movements in an

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innocent way during the course of the relevant period had told lies first to the police officers and also in the course of his evidence in the court, then you may ask yourselves a number of questions. The first thing that you need to be satisfied with, of course, is that they are deliberate untruths known to be false, lies. There is no cavilling about that. You need to be satisfied about that. Then you would need to ask yourselves what is the explanation for the telling of that lie? Is it clearly about a matter of particular importance in the case? Clearly in this case it would be so because it is concerned to explain in a way consistent with innocence the movements of the accused person. If you were satisfied that it was a matter of central and direct importance like that, you would just simply then ask yourselves the question: what explanation is there for the telling of such lies if that was your conclusion. If your answer to that question was that you can discern no explanation other than that the accused person was conscious that to tell the truth would implicate him in the killing of Mrs Lawrence and reveal his guilt of an offence in connection with her death, then you might use that conclusion positively as evidence to corroborate or support the truth of the confessional statements that he made. You see, ordinarily, if a person says something that is untrue or incorrect, it is simply a piece of non-evidence and it falls away and that certainly remains so in a case such as we are now discussing, but there is a different element that occurs. Because it is a statement against the interest of that person, because it is an important matter and because it is a deliberate lie told in your view only because the person was conscious of his guilt and wishes to conceal that, then that is a matter which you may take into account in support of the truth of the confession of his guilt and your conclusion that he did truthfully confess his guilt to the police officers in accordance with their evidence. It becomes then an independent piece of evidence which may bear upon issues - did he say those things to the police officers? Are they accurately recounted to the court? Were they said because he was conscious that he was the guilty person?

BC9604360 at 93

I should have given you that direction earlier and I do so now that you simply may understand the limitation of the use of that material. You only use it in that way in the particular circumstances that I have described: if you are satisfied that they were deliberate untruths told consciously knowing where the truth was; that it was a matter of importance central to the case; and there was no other explanation for it then the fact that the accused person was conscious of his guilt of the commission of an offence.

It is still of course necessary to go on and consider quite separately what offence and what your conclusion might be and to arrive at a conclusion upon the whole of the evidence, including that piece of evidence, that you are satisfied beyond a reasonable doubt that he did in fact kill, but it has a bearing in that way upon your consideration of those issues."

His Honour then gave a short direction to the jury reminding them that the appellant was presumed to be of sound mind unless evidence established to the contrary. This direction was given in the light of the fact there was some evidence that the appellant had spent some time as a patient in Graylands Hospital. It was pointed out that this had no bearing on the case as there was no evidence before the jury to suggest that the appellant was other than of sound mind. That having been done, the Crown prosecutor drew his Honour's attention to the fact that while mention had been made of the possibility of an innocent explanation for the lies, the jury might also be told that: "There may be reasons for telling the lie apart from a realisation of guilt and the lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence."

In relation to that suggestion, the learned Judge said: "There you are, counsel is reading from the leading cases upon this subject and when he reads you that material and of course it is right, there might be all sorts of explanations I suppose, but the question is: are you positively satisfied that there is no other explanation than that the accused person told the lies, if you are satisfied that that is what they were, because he was conscious

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BC9604360 at 94

that he was the guilty person and desired to conceal that by the telling of a lie? That is what it really amounts to. You may consider all sorts of other explanations but it will be for you to understand what the evidence is about that and give that the consideration which the evidence bears. I will leave it to you there upon that basis."

Ground 5 was supported by a number of particulars as follows: "(a) The process by which the jury were directed on the use they could make of lies was inadequate and confusing ... (b) The learned trial Judge erred in failing to specify to the jury the lies allegedly told by the appellant out of court or in court, which were relied on by the prosecution as allegedly showing a consciousness of guilt. (c) The learned trial Judge erred in failing to direct the jury that any lies they found to have been told by the appellant could not per se ground a conviction. (d) The learned trial Judge erred in law in directing the jury that, in effect, they could take into account lies found told by the appellant in determining his guilt, if the lies were told from a consciousness by the appellant of his guilt ..., when this would involve the jury in an entirely circular process of reasoning."

In my opinion, although it was unfortunate that the trial Judge omitted to come back to the question of lies later as he intended to, the process was neither inadequate nor confusing. If anything, the fact that the jury were brought back specifically for a specific direction on the matter would have tended to highlight the direction.

So far as the need to specify the lies was concerned, the appellant had given a notice of alibi pursuant to s636A of the Criminal Code but which was tendered as an exhibit and was in the following terms: "I stepped out of the taxi. I entered through the front foyer of what I now know to be the Bel Air flats.

BC9604360 at 95

From what I now know to be Bel Air flats, I went to the ground floor corridor of what I now know to be Dover Court. I went into the lift. I pushed the top button. I stepped out of the elevator, immediately noticing muted red caged wire door of steel step leading up to the roof. I climbed around right side of wire caged door and went to the top of the steel stairs. I stopped at front of another wire caged door which also was padlocked. I returned to the bottom of the steel stairs. I stayed there looking out of the open stairwell. I then went to the top floor fire exit door. I walked down red painted concrete steps to the mezzanine level. I defecated. I went back to the top floor. I looked out of the open stairwell. I remained there 20 minutes. Then visited flats 114/72/82? But no one answered their doors. I then returned to top floor to see if weather had cleared. I then took the elevator to the ground floor. I left what I now know to be Dover Court. I diagonally crossed the rear carpark (Bel-Air). I crossed over what I now know to be Ecclesbourne Street. I went up alleyway and turned left into what I now know to be the rear carpark of 10 Murray Avenue. I went to Michelle's unit. I entered. Michelle and Michael were there. I estimate the time to be 6.00 p.m. I remained there around 10 minutes. During the time I was there, Michelle spoke to me and I spoke to her. I left

Michelle's unit. I went to Bel Air flats. I went to what I believe was Flat 133. I knocked. No answer. I went to Dover Court. I went to what I believe to be Flat 72 and what I believe to be Flat 82 and Flat 114. Knocked on them. No answer.
I left Dover Court. I went back to Ecclesbourne Street. I went along Ecclesbourne Street. I went into a block of flats, down a driveway with a grassed area at the front. I went to Flat 13, then Flat 12. I spoke to a young woman at Flat 12.

---------- ***BC9604360 at 96***

I left the flats. I went back on to Ecclesbourne Street. I turned left into what I now know to be Glyde Street. I went up Glyde Street. I noticed police van. I walked on the road around the police van. I continued on to Graham's flat. A block of flats I now know to be in Stirling Highway. I now know it to be Flat 17. Knocked. No answer. I walked back from Graham's flat down what I now know to be Glyde Street again. I went along Ecclesbourne Street and into Murray Avenue. I went to Michelle's unit. I went inside. The time was around 10 to 7.7 o'clock at the outmost."
Evidence of these events was given by the appellant at the trial. He made the point that he was only making estimates of time. This evidence was dealt with by the learned Judge as follows: "Of course it is the case that the accused person when he spoke to you about the final version of these events given in the notice of alibi - which is an exhibit now, exhibit 62, available for you and amplified and elaborated upon in his evidence - said and made the point that he was only making estimates of time. You will have for yourself the evidence given by Mr Brandham, I think, who spoke of the walks that he did around the area and the times in terms of minutes generally that it took him to walk not necessarily at a totally leisurely pace but nonetheless to walk between various points in the area. So you will have the account which is given by the accused and the times that were estimated that they would take. Certainly all those events, if they occurred and bore anything like the estimates of time that the accused mentioned, took well in excess of an hour, indeed up to two hours to perform those walks. So there is that evidence available for your consideration and your evaluation, that you would bear in mind, as I have mentioned, that the accused emphasised that he had no clear idea of times and that these were simply estimates that he was giving in answer to the questions asked of him in cross-examination.

---------- ***BC9604360 at 97***

You will have before you also the evidence given by the various witnesses who were nominated as being persons visited in the accounts given to the police who say that the night in question was Sunday - that really seems to be accepted now, not Monday, 23 May, so you have in the end you may think - it is a matter for you - a body of evidence which shows a series of visits to a number of nominated flats where people were found and home for the purpose of obtaining or pursuing the obtaining of drugs on the Sunday night. You have the accused's evidence of a series of similar visits to the same places on the Monday without any success at all, so you consider a number of these issues. What is the purpose and what is the explanation for the evidence in that form, if that is the conclusion you draw about it? Does it simply represent confusion in the mind of the accused as he describes as a result of the interview processes that were going on and statements that were made to him? For example, he said, as I recall his evidence, that he was thrown out by on one occasion being told that he was supposed to have arrived back in the area at 3.00pm. Did the police officers say that to him? It would seem perhaps an odd thing to say if they knew that he was, as one of the police officers protested at the time under cross-examination, in the Lockup at that time. Well, it is a matter for you to evaluate that but in any event the question what you might ask yourself is, is the evidence given as a result of confusion?"
It was at that point that the learned Judge went on to leave with the jury the question whether the appellant was telling the truth when he said those places were again visited on the Monday night or whether that evidence was simply wrong as a result of confusion or was his description of his movements on the Monday night a series of deliberate untruths or lies?
In my opinion, given the context, there was a sufficient specification of the lies relied upon as a consciousness of guilt for the purpose of the application of the law as stated in Edwards.
While the jury were not in terms told that any lies they found to have been told by the appellant could not of themselves ground a conviction, they

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were told that they could make use of the lies as corroboration only if there was no other explanation for them than a consciousness of the guilt of the appellant of the commission of an offence. The jury were told that they could take them into account in support of the truth of the confession of his guilt in concluding that he did truthfully

confess his guilt to the police officers in accordance with their evidence. The jury were specifically told that once they were satisfied that the lies were told out of a consciousness of guilt, it was still necessary to go on and consider "quite separately" what the relevant offence was and to arrive at a conclusion upon the whole of the evidence, including the lies, that they were satisfied beyond a reasonable doubt that the appellant did in fact kill Mrs Lawrence. In my opinion, this direction was adequate. It did not require the jury to involve themselves in an entirely circular process of reasoning.
In any event, I am firmly of the view that any difficulty or lack of clarity in the directions which were given about what the jury should do if they were satisfied that the appellant had lied about his movements on the night in question did not lead to any miscarriage of justice in this case.
CONCLUSION
For all of these reasons, while there were some unsatisfactory aspects of this case, I am quite satisfied that none of them individually or all of them taken together had the effect that there was any miscarriage of justice. For all of these reasons, I am of the opinion that the appeal should be dismissed.

Ipp J

---------- ***BC9604360 at 2***

I have had the benefit of reading the draft reasons to be published by Malcolm CJ. I agree entirely with those reasons and the conclusions arrived at by his Honour.
I wish only to make a short comment concerning the proposition, advanced on the appellant's behalf, that the reliability of the third and video-recorded interview of 17 June 1994 ("the third interview") was tainted by what had occurred and by what had been said at the earlier two interviews.
Malcolm CJ (at 41 to 45) sets out several statements made by the appellant in the third interview which constitute corroboration of the reliability of the confessional material recorded therein. In my opinion, the aggregate effect of these statements is fatal to the submissions advanced on the appellant's behalf. As his Honour points out, the nature and detail of several of the circumstances relating to and surrounding the murder disclosed by the appellant during the third interview were such that they could not have been derived from any source other than the personal knowledge of the appellant himself.
Of all the matters to which Malcolm CJ refers, none was more compelling and dramatic than the statement made by the appellant that he and Ms Barsden had "locked eyes" when she was passing by in the light green Toyota Corolla Seca sedan at about 5.00pm on the afternoon in question. As his Honour observes, "There was an extraordinary coincidence between the evidence of Ms Barsden and that statement made by the appellant". The appellant's statement that he and Ms Barsden had "locked eyes" must be coupled with his statement that the person seen by Ms Barsden "ducked" or "bobbed" down behind the counter in the shop once they had "locked eyes". Only the person in the shop at the time in question could have been able to describe the encounter with Ms Barsden. The appellant's description of this

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episode alone, in my view, is powerful evidence that he was guilty, beyond reasonable doubt, of the wilful murder of Mrs Lawrence.
In an attempt to refute the inevitable inference to be drawn from the recounting by the appellant of facts that would have been known only to the person who killed Mrs Lawrence, counsel for the appellant argued that those facts were communicated to the appellant by the police in the first two interviews. It was submitted that the appellant "picked up" this information in this way and regurgitated it at the third interview. For that reason, it was said, those facts could not be relied upon to corroborate the third interview. In my opinion, however, there is no substance in this submission. The manner in which the appellant responded to the questions from the police during the third interview, and the words used by him, were strongly indicative of spontaneous answers based on facts within his personal knowledge. Moreover, although the police officers concerned were cross-examined as to the accuracy of the transcripts of the first and second interviews, and it was put to them that parts of the transcript were false, it was not suggested to them that the material relating to the critical corroborative factors was derived from information given to the appellant by them during those earlier interviews. An example of this is the cross-examination of the police officers as to what the appellant told them concerning his visual encounter with Ms Barsden. Take the cross-examination of Detective Sergeant Caporn. He was questioned about the transcript of the interview of 2 June 1994, as follows: "And that in particular, that conversation on page 87, where you put to him, you say, 'We have a witness who saw someone in the shop around 5 o'clock. Did you get seen whilst you were in the shop?' He said, 'Yes'. 'By

who?' 'By a girl in a car'. 'Where was the car?' 'Here'?---Yes. That sort of - those things weren't said?---This was the first time that he spoke about actually going into the shop for a purpose other than selling jewellery. Yes, they were said.

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On page 88, the whole of that page, he didn't say any of that and you didn't ask those questions. Is that right?---He certainly did say that and I certainly did ask those questions.' In particular some of the things at the top of page 88, 'How do you know she saw you?' 'We locked eyes and I bobbed down like this and ran out.' That wasn't said, was it? It was so said. Again a description of a car on that page. 'What type of car was it?' 'A green one, not new.' 'What make?' 'I don't know, a Corolla maybe.' That wasn't said?---It was." (AB 729-730)

As this passage from the evidence demonstrates, the cross-examination proceeded on the basis that, during the earlier interview, nothing was asked of the appellant, and nothing was said by him, concerning Ms Barsden.

In cross-examination, it was put to the appellant that he had seen "in the media" that "there had been a witness who saw a man in the shop about 5 o'clock with a bandanna on and the man bobbed down" and he replied that he could not recall that. Later, he denied that he was aware of a report in the media to that effect. The following exchange is pertinent: "And you were able to tell the police about the girl in her teens in the car locking eyes with you and you bobbing down and you having the hat on backwards because that was you that the girl in the car saw?---It was not. And you were able to tell the police that there was no jewellery missing, but only a purse from her handbag and that Mrs Lawrence had given you the purse from the handbag because you were the robber?---I was not. On the girl in the car - let me suggest to you you were asked this question by the police at about 541, 542 or you gave these answers - that you were, 'Seen by a girl in a car through the front window, in her early teens, sitting in the front passenger seat, eyes locked with me. I bobbed down behind the counter. The car was stopped. It was a small pale green or white sedan or station wagon.' That is what you told Detectives Carter and Brandham in the oral interview, wasn't it?---It was not.

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In the video interview, you were asked these questions at 628; you talked about - Brandham said, 'And you in fact locked eyes with her. Is that the case?' and you said, 'That's the case.' That is what Brandham asked you and that is what you said, isn't it?---In what? It's on the video - this question and answer, 'And you in fact locked eyes with her - - -'?---I was referring to - he insisted an eyewitness had seen me and that was part of how I thought this eyewitness may have seen me. He has now got me to say that I have walked behind the counter and he has got all these things in my head and that particularly (sic) statement was referring to how I thought an eyewitness may have seen me because they insisted an eyewitness had seen me. They insisted they had shirt fibres. Right, but it is on the video and it reads like this at 628, 'And in fact you locked eyes with her. Is that the case?' This is Brandham and you said, 'That's the case.' You were agreeing with Brandham that you locked eyes with her because that is what you had told Brandham before?---No, I did not."

The appellant's explanation for his knowledge of the locking of the eyes episode was accordingly that that was how he "thought an eyewitness may have seen me". In my opinion the suggestion that he imagined the locking of the eyes, so strikingly described by Ms Barsden, is beyond belief; it is inherently incredible. The appellant's failure to give an appropriate explanation for his statement in the third interview, concerning a locking of eyes between Ms Barsden and the man in the shop, is damning indeed. It, alone, in my view, is strongly corroborative of the third interview.

During the cross-examination of the appellant he attempted to explain the fact that he had been able to draw the sketches referred to by Malcolm CJ, his knowledge of the interior of the shop, that he knew that the person in the shop had been seen by an "eyewitness", that he knew Ms Barsden was a passenger in the car, and that the body had been dragged to the rear of the shop, by stating that the relevant information had been given to him by the police. I gained the impression that this evidence, in each instance, was an

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afterthought. Whether the explanations so given were sufficient to create a reasonable doubt was left to the jury, and they decided against the appellant.

Apart from the episode relating to the locking of eyes, the appellant failed to advance any cogent explanation for his knowledge of the number of blows to the head, that the only injuries were to the head, the clothes Mrs Lawrence was wearing, the details of the vehicle in which Ms Barsden was a passenger, that Mrs Lawrence's purse came from her handbag, the colour of her handbag, the gurgling noises made by Mrs Lawrence after the attack, the

whereabouts of Mrs Lawrence's car, and the details of the Sidchrome wrench. The lack of any such explanation as to how the appellant knew of these matters also provides powerful corroborative force to the third interview.
In the circumstances, for the reasons expressed by Malcolm CJ, I would dismiss the appeal.

Wallwork J

---------- ***BC9604360 at 2***

I agree with the reasons for judgment of the Chief Justice who has made an extensive analysis of the facts in this case.
From the analysis it can be seen that the members of the jury not only had what was arguably a confession from the appellant, but they also had a considerable body of circumstantial evidence which was consistent with the allegation that the appellant was the person who attacked Mrs Lawrence on 23 May 1994.
The weight of the alleged admissions of the appellant was added to by the evidence concerning the appellant's movements on the night in question and his obvious knowledge of some of the circumstances of the attack which had not been published. Those matters are discussed in detail by the Chief Justice.
In my opinion, having regard to all the evidence the verdict in this case was truly open to the jury and I have no reason to conclude that the conviction is unsafe or dangerous, or that in any way there has been a miscarriage of justice.
I would dismiss the appeal.

Order

Appeal dismissed.

Representation:

Counsel for the appellant: Mr MT Ritter

Solicitor for the appellant: Dwyer Durack

Counsel for the respondent: Mr JR McKechnie QC and Mr KP Bates

Solicitor for the respondent: State Director of Public Prosecutions

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