RAYMOND JOHN MICKELBERG v THE QUEEN and PETER MICKELBERG v THE QUEEN BC8700685

Unreported Judgments WA · 134 Pages

SUPREME COURT OF WESTERN AUSTRALIA FULL COURT COURT OF CRIMINAL APPEAL

WALLACE, OLNEY & PIDGEON JJ

CCA No 187 of 1986 and CCA No 64 of 1987

24-31 August, 1-17 September, 18 November 1987, 18 November 1987

Headnotes

CRIMINAL LAW & PROCEDURE — evidence — appeal against conviction — appellant and another convicted of conspiracy to defraud, breaking, entering and stealing and obtaining gold under false pretences — third co-accused acquitted — alleged miscarriage of justice EVIDENCE — fresh and new evidence as ground of appeal, discussed — fingerprint evidence — whether fingerprint an 'unforgeable signature' — claim that fingerprint not available to police officers at time when print allegedly found on cheque — new evidence to contrary — claim that photofit not constructed by correct method — prior conviction revealed to jury CONSPIRACY — elements of — whether acquittal of any one of co-accused required acquittal of other co-accused on terms of charge PROCEDURE — role of Criminal Court of Appeal, discussed

Cases referred to in judgments:

Alexander v The Queen 145 CLR. 295.

Craig v The King (1933) 49 CLR. 429.

Gallagher v The Queen (1985-86) 160 CLR 392.

Lawless v R (1979) 26 ALR 161.

Mickelberg v The Queen [1984] WAR 191.

R v Cook [1987] 1 All ER 1049.

Ratten v The Queen (1974) 131 CLR. 510.

Reg. v McIntee (1985) 38 SASR 432.

The Queen v Darby 148 CLR. 668.

The Queen v Hoar 148 CLR. 32.

Cases also cited:

Alexander v R (1981) 55 ALJR 355.

Armanasco v R (1914) 16 WALR 174.

Aylett [1956] Tas SR 74.

Baker v Campbell 153 CLR 52.

Beamish, CCA No. 20 of 1964; unreported.

Bullivant v AG for Victoria [1901] AC 196.

Chamberlain (No. 2) 153 CLR 521.

Clyne v NSW Bar Association 104 CLR 186.

Conroy, Warn and Sisson v R [1976] WAR 91.

Cook (1987) 84 Cr App R 369.

Davies and Cody v R (1937) 57 CLR 170.

Driscoll v R (1977) 137 CLR 517; (1977) 51 ALJR 731.

Green, 61 CLR. 167.

Gunn (No. 1)(1942) 43 SR. (NSW.) 26.

Helmhout v R (1980) 42 FLR 53.

Jackman v R (1914) 16 WALR 8.

Leary v R [1975] WAR 133.

Maric v R (1978) 20 ALR 513.

Matthews & Ford [1973] VR 199.

McAulliffe v R (1922) 25 WALR 48.

Peacock v R (1911) 13 CLR 619.

R v Boardman [1969] VR 151.

R v Burchielli [1981] VR 611.

R v Clune [1982] VR 1.

R v Hayes 5 SASR. 278.

R v Lavery (2) (1979) 20 SASR 430.

R v Phil Maria [1957] St R Qd 512.

R v Shin, Mon, Yong (1975) 7 ALR 271.

R v Thompson (1851) 111 AELR. 1100.

Re Knowles [1984] VR 751.

Stirland v DPP. [1944] AC 315.

The Queen v Ireland (1971-1972) 126 CLR 321.

Wheeler v Cahill (1944) 61 WN. (NSW.) 1.

Whitehorn v R (1983) 49 ALR 448.

---------- ***BC8700685 at 4***

---------- ***BC8700685 at 1***

Wallace J

In my opinion, each of these appeals, that of Peter's being by way of petition, should be dismissed. I am satisfied that in each instance there has been no miscarriage of justice. I publish my reasons.

Olney J

I am of the same opinion and publish my reasons.

Pidgeon J

I agree, and publish my reasons.

---------- ***BC8700685 at 2***

Wallace J

The history behind these two appeals, CCA No. 64 by way of petition under s21(a) of the Criminal Code, is as follows. On the 4th March 1983 the appellants, to whom I shall refer as Raymond and Peter respectively together with their brother Brian, stood trial upon a District Court indictment bearing the following eight counts: "1. Between the first day of April 1982 and the 23rd of June 1982 at Perth RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG conspired together to defraud the DIRECTOR OF THE PERTH MINT by inducing him to part with a quantity of gold without receiving payment therefor. 2. AND FURTHER that on the 7th day of April, 1982 at North Perth RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG broke and entered the building of CONTI SHEFFIELD ESTATE AGENCY PTY. LTD. and therein stole a quantity of blank cheque forms the property the THE WEST AUSTRALIAN BUILDING SOCIETY. 3. AND FURTHER that on the date and at the place aforesaid RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG wilfully and unlawfully set fire to a building. 4. AND FURTHER that on the 13th day of May, 1982 at Bull Creek RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG broke and entered the building of one HAZEL LILY BRADBURY trading as HL. BRADBURY AND ASSOCIATES and therein stole a quantity of blank cheque forms the property of PERTH BUILDING SOCIETY. 5. AND FURTHER that on the 13th day of May, 1982 at Bull Creek RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG wilfully and unlawfully set fire to a building. 6. AND FURTHER that on the 22nd day of June, 1982 at Perth RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG by falsely pretending to an employee of the DIRECTOR OF THE PERTH MINT that a cheque numbered 811157 in the sum of ONE HUNDRED AND FOUR THOUSAND FOUR HUNDRED AND NINETY TWO DOLLARS AND FIFTY CENTS ($104,492.50) was a good and valid security for that amount obtained from the said DIRECTOR OF THE PERTH MINT a quantity of gold with intent thereby to defraud. 7. AND FURTHER that on the 22nd day of June, 1982 at Perth RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG by falsely pretending to an employee of the DIRECTOR OF THE PERTH MINT that a cheque numbered 551533 in the sum of TWO HUNDRED AND FORTY NINE THOUSAND NINE HUNDRED AND THIRTY TWO DOLLARDS AND SEVENTY FOUR CENTS ($249,932.74) was a good and valid security for that amount obtained from the said DIRECTOR OF THE PERTH MINT a quantity of gold with intent thereby to defraud. 8. AND FURTHER that on the 22nd day of June, 1983 at Perth RAYMOND JOHN MICKELBERG, BRIAN MICKELBERG and PETER MICKELBERG by falsely pretending to an employee of the DIRECTOR OF THE PERTH MINT that a cheque numbered 811161 in the sum of TWO HUNDRED AND NINETY EIGHT THOUSAND FIVE HUNDRED AND FIFTY DOLLARS ($298,550.00) was a good and valid security for that amount obtained from the said DIRECTOR OF THE PERTH MINT a quantity of gold with intent thereby to defraud." After a long trial lasting three and a half weeks verdicts of guilty were returned by the jury on all counts in respect of Raymond and Peter and on counts 1 and 6 to 8 inclusive in respect of Brian. All three then appealed to the Court of Criminal Appeal.

---------- ***BC8700685 at 5***

Brian's appeal against convictions was heard between the 12th and 14th September 1983 and on the 14th November 1983 allowed with the result that his convictions were quashed. Peter's first notice of appeal is dated the 25th May 1983 and was directed against counts 2 to 5 inclusive only. The grounds filed in support of that appeal challenged the weight of evidence adduced before the jury in that it was both unsafe and unsatisfactory to allow the convictions to stand and further, that the learned trial Judge erred in directing the jury that upon a finding that the appellant was a party to the conspiracy alleged and was so prior to the 7th April 1982, and upon finding that any or all of the offences listed in the indictment counts 2 to 5 were committed as a probable consequence of the prosecution of that purpose, namely the conspiracy charged in count 1, then it would be appropriate to find the

appellant guilty of each such offence. Peter's appeal was dismissed by the Court of Criminal Appeal on the 4th November 1983. In so doing the learned Chief Justice expressed the opinion: "In deciding this appeal it is important to appreciate that the appellant was convicted of the conspiracy as charged and of the commission of each of the offences which were the offences agreed by the conspiracy to be committed. There was ample evidence to support those convictions and they are not challenged on appeal. And it was, in the course of the argument addressed to us on the hearing of this appeal, conceded and in my opinion rightly conceded that there was evidence upon which the jury could conclude, and I think safely and beyond reasonable doubt conclude, that this appellant entered into the conspiracy prior to the 7th April 1982, and hence prior to the date of the first count of breaking and entering and the first count of arson."

---------- ***BC8700685 at 6***

On the 14th September 1983 Raymond filed a notice of application for extension of time in which to appeal against conviction and a notice of appeal against conviction based upon the ground that the learned Judge erred in law in directing the jury that it would be appropriate to return a verdict of guilty on counts 2 to 8 inclusive if they were satisfied beyond reasonable doubt that: (a) the appellant formed a common purpose with one or more persons to defraud the Director of the Mint; and (b) the offences in counts 2 to 8 inclusive were of such a nature that their commission was a probable consequence of the prosecution of that purpose. The appeal did not come on for hearing until the 4th February 1984 when counsel on behalf of Raymond appeared to argue portion of his appeal upon a new ground wherein it was claimed that the appellant's fingerprint upon the back of the WA. Building Society cheque presented to the Mint was a forgery. Alternatively it was argued, as it was at the trial, that the appellant handled the cheque on the 15th July in the course of the police inquiry and subsequent to the Mint having handed over the relevant gold bars. Counsel then retired from the argument before the Court of Criminal Appeal and Raymond, in person, argued that the police records of interview were fabricated and that he had new evidence to support that claim. Raymond further maintained, inter alia, that there was a tape recording of Donald Leslie Hancock and Detective Sergeant Hooft which, "when played, will demonstrate that, in fact, perjury was committed. That tape recording was not brought forward at trial but it is available." - and was available at the time of the trial. Pidgeon J. refused to extend time on the 7th November 1983. Raymond then referred the matter to the Court of Criminal Appeal pursuant to s702. On the 8th February 1984 extension of time was again refused.

---------- ***BC8700685 at 8***

Peter again appealed on the 27th December 1983 and appeared in person before the Court of Criminal Appeal on the 2nd April 1984 when he sought an extension of time in which to file his notice of appeal. On this occasion he appealed against all convictions contending that the trial Judge erred in allowing the prosecutor in final address to fabricate evidence which removed his right to a fair trial. The ground contended that there was new evidence available which disproved section of the Crown case. In the course of argument serious imputations upon prosecution counsel's handling of the trial were made. The Court of Criminal Appeal was of the opinion that there was no substance to the grounds claimed with the result that the leave sought was refused and the appeal dismissed.
On the 20th January 1987 Peter presented a petition to his Excellency the Governor wherein he sought the exercise of Her Majesty's mercy pursuant to the provisions of s21 of the Criminal Code on the grounds that since his last mentioned appeal Peter has discovered fresh evidence which has cogency and plausibility as well as relevancy. It is claimed that this fresh evidence has not been the subject of any previous appeal. The details thereof are set out in the grounds to follow. It is further argued that: "If the fresh evidence is considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. It is submitted that Peter Mickelberg should either have a verdict of not guilty recorded or should be granted a new trial." On the 22nd May 1987 the Hon. the Attorney General, acting pursuant to para.(a) of s21 of the Criminal Code, referred the whole case to the Court of Criminal Appeal. Under s21(a) the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted. On the 19th December 1986 Raymond sought leave to appeal against all his convictions. Leave has been granted and directions have been given that Peter's petition, now Appeal No. 64 of 1987, will be heard together with that of Raymond's, No. 187 of 1986.

---------- ***BC8700685 at 9***

S689(1) of the Criminal Code provides: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the grounds that it is unreasonable

or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal." In Brian's appeal the learned Chief Justice placed the following construction upon this provision: "That (above) provision certainly does not authorise this Court sitting as a Court of Criminal Appeal to overturn and to quash a jury's verdict simply because on the material before it it would not have found the facts as they were found by the jury. An appeal from a jury's verdict, controlled as it is by that subsection, is not a rehearing of the case before a jury of three judges. On the other hand, the jurisdiction to allow an appeal under that provision is not denied simply because on the material it can be said that there was evidence before the jury which was as an exercise in logic can be said to be capable of sustaining the verdict. Even if that be the case, the verdict may be, within the meaning of the subsection, 'unreasonable' or one which 'cannot be supported having regard to the evidence'. It has been held that even if the evidence led before the jury is capable of sustaining their verdict this court under the formula to be found in this subsection will interfere if in all the circumstances it is thought that it was dangerous to convict. Plomp v The Queen, (1963) 110 CLR 234, per Dixon CJ. at p. 244. In forming that opinion the court must, of course, act on that view of the facts which in its opinion the jury were entitled to take having seen and heard the witnesses, but having done that there is a responsibility in this Court to consider whether none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand. Hayes v The Queen (1973) 47 ALJR. 603, per Barwick CJ. at pp. 604-605. See, too, Conroy v The Queen [1976] WAR 91, and R v Smith [1979] 2 NSWLR 299 at p. 309 per Street CJ. In considering that question it seems to me to be important and very much to the point to remember that it is the verdict of guilty which is under consideration and it must be the case that it will be dangerous to allow that verdict to stand if this Court is of the opinion that although it is a verdict which can in a general way and in logic be supported by the evidence, it is a verdict which cannot by the same process be sustained to the necessary standard of persuasion. It goes without saying that 'occasions when a verdict can be set aside upon such considerations .... will no doubt be relevantly rare.' Barwick CJ. in Hayes case above at p. 605. 'Verdicts, of course, ought not to be and are not in practice set aside except upon very substantial grounds. But it is one thing to exercise powers with caution and discrimination and another to deny their existence.' Raspor v The Queen, (1958) 99 CLR 346, at p. 352 per Dixon CJ., Fullagar and Taylor JJ." See Burt CJ. in Brian Mickelberg v The Queen CCA Nos35 and 37 of 1983 delivered the 4th November 1983. (my emphasis)

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To the task mentioned above must be added the opinion that this Court forms of the new and fresh evidence adduced before this Court by both appellants and the Crown. It is now necessary to turn to the grounds of appeal. Raymond's first seven grounds of appeal are not the same as Peter's first seven grounds of appeal which are as follows but do cover the same area: " 1. The Trial Judge erred in law in directing the Jury in his final direction that: 'Perhaps the most direct evidence against him is the fingerprint on the West Australian Building Society cheque; one of the three cheques which was handed over on the 22 June in exchange for the bullion. .... He (Sgt. Henning) told you that there has been no documented evidence of two fingers leaving the same print; each finger leaves a different print. As his evidence in that regard was not challenged you may safely accept that a fingerprint is, in effect, an unforgeable signature.' 2. Fresh evidence has since become available which establishes that the fingerprint on the WABS. cheque ('the crime mark') is a forgery. This evidence is available in the form of affidavits and, if necessary, sworn testimony by four internationally recognised experts being REGINALD JOHN KING, MALCOLM WATSON THOMSON, GEORGE J. BONEBRAKE and ROBERT DALE OLSEN. (my emphasis) 3. The learned Trial Judge erred in law in directing the Jury that: 'There is no evidence that his fingerprint from that time was available to the police officers and you would have expected if it were that when Sgt. Henning found the fingerprint as he has told you, on the 24 June that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records.' 4. Fresh evidence has since become available which establishes that the police officers had access to the fingerprints of Raymond John Mickelberg prior to the 15 July 1982 and that the police officers could have compared those fingerprints with the fingerprint which was allegedly located on the Building Society cheque on the 24th June 1982 and not photographed until the 15th July 1982. The importance of this fresh evidence is emphasised by the fact that the Learned Crown Prosecutor in summing up to the Jury told them that: 'When you get items like these cheques which are obviously involved in the fraud you fingerprint them in order to find out if there are any fingerprints on them that happen to be on file.' Sgt. Henning swore: 'I was quite satisfied when I first saw it on the 24th that that print that I have demonstrated in that position was one that I would be able to make an identifiable comparison with.' The fresh evidence suggests that the crime mark was not present on the WABS. cheque on 24 June 1982 and did not appear on the WABS. cheque until 15 July 1982. 5. The Learned Trial Judge erred in law in directing the Jury that there was no evidence that his (Raymond John Mickelberg's fingerprint from that time was available to the police officers and when he directed the Jury that 'you would have expected if it were that when Sgt. Henning found the fingerprint, as he has told you on the 24 June, that it would have been

compared with Raymond John Mickelberg fingerprint if it were in the records.' 6. There now exists fresh evidence which had it existed at the time of the trial would have proved that Exhibit 21 at the trial, purported to be a photofit constructed by the Penry photofit method:- (a) was not a photofit constructed by the Penry photofit method, (b) does not contain a single feature of the Penry photofit facility, and (c) was constructed from a passport photograph of Peter Mickelberg. 7. The Learned Trial Judge erred in law in accepting Exhibit 21 into evidence as neither Mr nor Mrs Allen nor Mr Henry could identify Peter Mickelberg as the man they described for the purpose of the construction of Exhibit 21." Raymond's eighth and final ground of appeal is as follows: "In all the circumstances the verdict of the jury is unsafe and unsatisfactory if the fresh evidence referred to above is considered in combination with the evidence given at the trial. The verdict of guilty ought in the minds of reasonable men be affected as the fresh evidence at the least is sufficient to remove the certainty of the appellant's guilt which the evidence at the trial produced. The fresh evidence is evidence of great importance." Peter's further grounds of appeal are as follows: " 8. On the 7th day of December 1982 an indictment was presented against the three accused Raymond Mickelberg, Peter Mickelberg and Brian Mickelberg which said indictment alleged, inter alia, one count of conspiracy which said count was in the following terms: 'That between the First day of April in the year of Our Lord one thousand nine hundred and eighty two and the twenty third day of June 1982 at Perth Raymond John Mickelberg, Brian Mickelberg and Peter Mickelberg conspired together to defraud the Director of the Perth Mint by inducing him to part with quantity of gold without receiving payment therefore.' The said count of conspiracy, according to its terms, was dependent upon the three accused being found guilty of the alleged conspiracy and it was an essential element of the said count. It followed that the acquittal of any one of the said accused as a matter of law, required an acquittal of both the other accused. There was no alternative count nor was it alleged that Raymond John Mickelberg and Peter Mickelberg conspired together. Nor has any fresh indictment alleging a conspiracy between the said Raymond John Mickelberg and Peter Mickelberg been presented. In fact one of the three accused the said Brian Mickelberg was on the 4th day of November 1983 acquitted of the count of conspiracy as alleged in the same indictment and by reason of the acquittal of the said Brian Mickelberg and in accordance with the terms of the said indictment the record of conviction of the remaining two accused is inconsistent with the acquittal of the said Brian Mickelberg and as such the said Peter Mickelberg and Raymond John Mickelberg should be acquitted. 9. Further to Ground 8 above the overt acts which allegedly supported the conspiracy charge were in fact the substantive charges set out in the indictment. As such, the conspiracy charge must fail as in fact the substantive charges were adjudicated on the same indictment. As the Crown elected to present the conspiracy charge as the overt acts all charges on the said indictment should be dismissed and Peter Mickelberg should be acquitted of all charges. 10. There is new evidence which establishes that there has been a miscarriage of justice:- (a) An audio taped conversation between Peter Mickelberg and Raymond John Mickelberg and Det. Sgts. Hancock and Hooft which casts doubt on the alleged admissions made at Belmont Police Station on 26th July 1982 by the Petitioner. (b) Evidence that Mr. Cannon the Petitioner's instructing solicitor appeared for Arpad Security Agency Pty Ltd and Arpad Lazlo Bacskai on or about 20th July 1982 in the Court of Petty Sessions, Perth in relation to charges of exceeding the terms of their security licence in relation to the disappearance of $250,000.00 of gold from a TAA flight on 11th June 1982. (c) Evidence that Mr. Cannon was at the time of acting for Peter Mickelberg, acting for one of the police officers (Det. Sgt. Andrew Tovey) involved in the prosecution of the accused and, according to the instructions of the accused Peter Mickelberg, the said Det. Sgt. Tovey lied on his oath and concocted admissions by Peter Mickelberg. This evidence is in the form of an affidavit sworn by the petitioner. (d) Evidence of the Petitioner's occupancy of the flat at 7/112 Rupert Street, Subiaco in the form of affidavits sworn by Pauline Marie Lee, Wendy Sylvia Baker and Betty Jean Rebakis and filed in this Honourable Court in CCA176/177/83. (e) Evidence that Exhibit 20, commonly known as the 'Talbot Note' tendered through Mr. and Mrs. Allen purportedly as a document written by a person who allegedly bought a 1965 white Falcon for $400.00 on the 25th May 1982 could not be proved beyond reasonable doubt to have been written by Peter Mickelberg. This evidence is in the form of an affidavit sworn by Geoffrey W. Roberts on 19th August 1987. (f) Evidence of the Petitioner's alibis on:- (i) 25th May 1982 in the form of an affidavit sworn by Grant Edwin Carroll; and (ii) 22nd June 1982 in the form of affidavits sworn by Mr. and Mrs. Stacey. 11. The Learned Trial Judge erred in law in admitting into evidence Exhibit 23 and 78 when the best evidence in the form of eye witnesses called by the Crown were unable to identify the said Peter Mickelberg. 12. The Learned Trial Judge erred in law in not discharging the Jury when the Crown displayed to the Jury the prior conviction of Peter Mickelberg to wit possession of an unlicenced firearm in Exhibit 102. 13. Fresh evidence has since become available which establishes that police investigating officers investigating the Perth Mint Swindle fabricated evidence. This evidence is available in the affidavits sworn by ARTHUR JOHN WALSH sworn the 28th day of July 1987 and the 12th day of August 1987 and sworn testimony by MR. BILL BARRETT, Press Secretary to the Premier of Western Australia. 14. In all the circumstances the verdict of the Jury is unsafe and unsatisfactory if the fresh and new evidence referred to above is considered in combination with the evidence given at the trial. The verdict of guilty ought in the minds of reasonable men be affected as the fresh and new evidence at the least is sufficient to remove the Petitioner's guilt which the evidence at the trial purportedly produced. The fresh and new evidence is evidence of great importance."

BC8700685 at 15

A summary of the evidence led by the Crown at the trial is as follows. In 1980 and 1981 Raymond and Peter purchased gold bullion from the Perth Mint. Indeed on the 21st September 1981 Raymond purchased three 50 oz bars of gold in the name of Pacific Trading signing for it "B. Rogers". Thus it is to be inferred that they had knowledge of what was involved in such transactions and in particular that the Mint accepted building society cheques at face value. (AB pp. 48-50). On the night of Wednesday the 7th April 1982 the premises of Conti Sheffield Estate Agency were broken and entered and a bundle of blank West Australian Building Society cheque forms were stolen. The premises were then set on fire by the intruders. On the 15th April 1982 a man, who gave his name as Bob Fryer, telephoned the Mint and enquired about buying $250,000 worth of gold. One Blackwood made a similar enquiry for twenty 50 oz bars of gold. Later one York ordered seven 50 oz bars of gold. On the 27th or 28th April a man, who gave his name also as Bob Fryer, rented Suite 3, a suite of business offices at Barker House, Hay Street, Subiaco. He paid three months' rental in advance. On the 3rd May 1982 a man who gave his name as Frank Harrison rented Suite 15, in the same building. In each of these cases an inference could be drawn that the rental payments were made by Commonwealth Bank cheques (AB pp. 1961 and 1965) with money drawn from an ANZ. Access account operated by Raymond in the false name of Colin Wilson (AB p. 2023).

BC8700685 at 16

On the night of the 13th May the premises of HL. Bradbury & Associates, estate agents of Bull Creek were broken and entered and a bundle of blank Perth Building Society cheque forms were stolen. Again the premises were set on fire by the intruders. On the 20th May 1982 an application was made in the name of Frank Harrison for a telephone service in Suite 15 Barker House. There was evidence, if accepted by the jury, that on Tuesday 25th May, while wearing a wig and dark-rimmed glasses in an attempt to disguise himself, Peter bought a 1965 model white coloured Ford Falcon car from a Mr. and Mrs. Allen at Armadale. On Thursday the 27th May 1982 a cheque for $20.00 was issued by the Perth Building Society by means of withdrawal from the savings accounts of Peter Gulley. It was made payable to Mr. Wilson whom Raymond professed not to know. That cheque was never presented. The inference could be drawn that it may well have provided a model for forging the cheques which eventually were presented at the Mint. Expert handwriting evidence was given that the handwriting on the PBS. Gulley account forms was that of Raymond. Although initially denying that the account was his Raymond subsequently admitted that he had opened the Gulley account in 1976 for taxation avoidance reasons.

BC8700685 at 17

From the 15th June onwards arrangements were made by telephone for the hire of security guards from three different firms. Their instructions were to transport the bullion from the Mint to Suite 3 in Barker House. On the 18th June 1982 arrangements were made by Bob Fryer of Fryer Investments by telephone with an employment agency for a secretary to man the office on the 22nd June 1982. At 9.30 a.m. on the morning of the 22nd June 1982 the secretary was informed by telephone, by a caller who identified himself as Mr. Fryer that she was to be at the office in Barker House no earlier and no later than 11.00 a.m. on that day and that she was not to leave the office before 4.30 p.m. It was explained to the secretary that there were two tool boxes and an envelope on the desk in the office; that three couriers would call between 11.00 a.m. and 1.00 p.m. to collect the boxes and the envelope; and that the couriers would return later with the containers which would be taken by another courier to the airport.
There is evidence, if accepted by the jury, that on the morning of Tuesday the 22nd June Peter, again wearing a disguise, parked the white Ford Falcon car off a laneway near Barker House then, before the hired secretary arrived, placed three forged building society cheques in Suite 3. By then the man who called himself Fryer had ordered $250,000 of gold by telephoning the Mint. And shortly before that the Mint had received orders by telephone from Blackwood and York for two further large quantities of gold bullion.

BC8700685 at 18

Early on the afternoon of 22nd June 1982 the three couriers each from different security firms collected the cheques from Suite 3 together with boxes in which the bullion was to be placed. At the Mint, in three separate transactions, gold bullion then worth a total of more than $650,000 was handed over to the security men in exchange for those forged building society cheques. The bullion was delivered to Suite 3 where a representative of a fourth courier, whose attendance had been arranged again by telephone, received it and subsequently saw to its delivery to another carrier, again hired by telephone by Fryer, for the purpose of taking the bullion to Jandakot airport.

Instructions for this purpose were given to the courier by means of the use of a Citizen Band radio said to have been fitted to the white Falcon car.
There was evidence, if accepted by the jury, that the one typewriter had been used to type all three of the cheques presented to the Mint as well as the application form for the telephone service to Suite 15 in Barker House. All three cheques were forged. One cheque was drawn upon the West Australian Building Society and the remaining two were drawn upon the Perth Building Society. The West Australian Building Society cheque form had been issued to Conti Sheffield Estate Agency Pty. Ltd. and was one of 30 blank cheque forms missing after the premises of that company had been fired. The Perth Building Society cheque forms had been issued to HL. Bradbury & Associates at Bull Creek and were two of 13 blank cheques forms missing from that firm's premises after the breaking and entering and firing.

---------- ***BC8700685 at 19***

On the face of each of the Perth Building Society cheques the same account number was shown. Enquiries revealed that this number had been assigned to an account opened on the 10th March 1976 in the name of Peter Gulley his address being given as 144 Barker Road, Subiaco. As I have already said Raymond subsequently admitted that he used the name Peter Gulley and that he owned 144 Barker Road, Subiaco. In 1975 a boarding house had been conducted at that address by Mrs. P. Mickelberg, the mother of Raymond and Peter. It was the discovery of this address which led the police to the Mickelbergs. The white Ford Falcon car was found abandoned and burned on the 25th August 1982. Within its wreckage there appeared evidence that it had since its purchase been fitted with a Citizen Band radio.
It was part of the prosecution case that the back of the West Australian Building Society cheque bore a fingerprint identified as being that of Raymond's. It is now conceded by Raymond that the relevant print is identical with a print from his right index finger but that its existence is equally consistent with it having been fraudulently placed there by the police. Hence Raymond's grounds of appeal and the evidence said to be both new and fresh adduced in support thereof. Peter Mickelberg was implicated in the crime, it is said, by his purchase of the white Ford Falcon sedan from Mr. and Mrs. Allen to whom he gave a note whereon he printed his name as that of Robert Talbot with the address care of the Post Office Meekatharra. The transaction is said to have taken place on the 25th May 1982.

---------- ***BC8700685 at 20***

During the course of police inquiries Peter was requested to provide a sample of his handwriting. The jury heard evidence from a handwriting expert that the note left with Mr. and Mrs. Allen was in the handwriting of Peter. There was also further evidence that on the 5th March 1982 Peter had rented a flat in the Subiaco area in his own name and that when completing the application form therefor he gave the name of Otto Kleiger, another false name admitted to be used by Raymond.
Peter now contests the prosecution handwriting evidence with evidence said to be new and fresh in rebuttal of that evidence called before the jury. Finally Peter is said to have made damaging admissions in his interview with the police. The making of those admissions was at the trial denied by Peter and indeed his evidence was to the effect that he had been subjected to physical violence by the interviewing detectives who have combined together to fabricate what he is claimed to have said. The fabrication has extended well beyond the admissions alleged to have been made by Peter and covers the contention that a photofit reproduction of Peter's appearance was the subject of a tracing of his passport photograph.
In short the appeals are based upon the broad propositions that the investigating detectives forged Raymond's crime mark upon the back of the WABS. cheque, used to perfect the swindle, that the identification of Peter by means of the photofit reproduction is false and was in fact constructed from his passport photograph and thereby doubt is brought to bear upon the allegation that Peter was the author of the Talbot Note. Ground 10 raises areas of doubt and suspicion but above all is the very serious allegation that the police fabricated the case against the appellants.

---------- ***BC8700685 at 21***

The law relating to the reception of fresh evidence was considered in depth in Lawless v R (1979) 26 ALR 161, another reference of a petition for mercy under the relevant provision in the Crimes Act of Victoria. There Barwick CJ. and Mason J. were of the opinion that the proposed evidence sought to be introduced was not fresh evidence upon which a new trial might be ordered since the applicant could have discovered it through the exercise of reasonable diligence in the preparation of his case. Notwithstanding this opinion the court did give consideration to the so-called fresh evidence and decided that it could not be said that it was likely, had that evidence been before

the jury, that a verdict of guilty would not have been returned. Mason J. at pp. 174-5 had regard to Chief Justice Barwick's opinion expressed in Ratten v The Queen (1974) 131 CLR 510 at pp. 516-7: "There is lastly the situation where the miscarriage is that the jury did not have before it evidence not available to the appellant at the time of his trial which, if believed by the jury, was likely to lead to an acquittal, the jury not being satisfied beyond reasonable doubt of guilt. This may be regarded as an instance in which the accused has not had a fair trial. It will be observed that I have limited the last of these instances of miscarriage to the case of the production of evidence not available to the appellant at his trial. The rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law. But the underlying concepts of the adversary nature of a trial, be it civil or criminal, and of the desirable finality of its outcome are valid in relation to the trial of criminal offence. As Smith J. rightly said in expressing the reasons of the Full Court in this case, 'Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence' Re Ratten [1974] VR. 201, at p. 214. It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not. Consequently if the proceedings are not blemished by error on the part of the judge, whether it be on a matter of law or in the proper conduct of the proceedings, or by misconduct on the part of the jury, there has been a fair trial. It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. Great latitutde must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence. But he must bear the consequences of his own decision as to the calling and treatment of evidence at the trial. Thus, there will be no miscarriage simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted. The accused, nevertheless, will have had a fair trial. But if the new evidence does qualify as fresh evidence it can be said that the trial was not fair. Of course, if by reason of new evidence accepted by it though it may not be fresh evidence, the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the fact that the trial itself has been fair will not prevent the court upon that evidence quashing the conviction. I turn now to consider what a court of criminal appeal should do in relation to each of these situations in which there may be a miscarriage and in which new evidence is tendered for the court's consideration. In every situation the court must decide on the relevance of the new evidence, even in the case of a reference by the Attorney-General such as the present. It must decide its credibility, that is to say whether or not it is capable of belief, both as to veracity and competence in the case of oral evidence, and as to authenticity in the case of documentary evidence. But in some situations, as I shall point out, the court will decide whether it believes the evidence. In other situations it will be enough that, whatever its own view, the evidence is capable of belief, and likely to be believed, by reasonable men. Having considered relevance and credibility, the court will weigh the cogency of the evidence, having in mind always the evidence produced at the trial. That evidence will be taken in that sense in which, having regard to its verdict, the jury must have accepted it. For all these purposes the court may see and hear the witnesses of the new evidence, both Crown and appellant being entitled to examine and cross-examine as the case may be. Further, the court will be entitled to receive evidence which tends to support, contradict or weaken the new evidence or the inferences which might be drawn therefrom. It is now necessary to differentiate the use which the court may make of the new evidence according to which of the instances of miscarriage it is considering. If the court is considering whether the verdict of guilty should be set aside outright for the reason that innocence is shown, or the existence of an appropriate doubt established, the court will consider all the material itself, forming and acting upon its own belief in, or disbelief of, the evidence, and upon its own view of the facts of the case including the evidence at the trial, though, as I have said, taking the facts as proved at the trial in the sense which having regard to its verdict the jury must have taken them. Of course, if it is concluded that there was a miscarriage in the sense that the court itself is satisfied of innocence or entertains a reasonable doubt as to guilt, there will be no question of a new trial. The verdict of guilty will be quashed and the appellant discharged. Further, when the material before the court satisfies the court of a miscarriage of this kind, it will not matter that the new material or some part of it is not fresh evidence, in the sense that it was not or could not have been available at

the time of the trial. Thus, until the court decides that there is no miscarriage of this kind, it will not need to consider whether or not any part of the new evidence satisfied the criterion of fresh evidence. The court's acceptance that guilt beyond reasonable doubt is not established, means inevitably that to maintain the verdict of guilty would be a miscarriage of justice. Also, as I have already said, it will not matter in such a case that the trial was fair and without blemish. But if the material before the court of criminal appeal does not convince the court of such miscarriage, or if the appellant's claim is only for a new trial, the fact that the new material is not wholly fresh evidence in the sense I have described will be material. I have already pointed out that the non-production by the accused of evidence available to him at the trial - available actually or constructively in the sense I have mentioned - will not make the trial in any sense unfair. .... To sum up, if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will be found if that new material is not fresh evidence. But if there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage which has occurred because of the absence at the trial of the fresh evidence." (my emphasis)

---------- ***BC8700685 at 24***

In Gallagher v The Queen (1985-86) 160 CLR. 392 the High Court recently gave further consideration to the law applicable to appeals of this nature. Leaving aside any wrong decision on a question of law or other irregularity at trial, to which I shall return, it is clear that the Court of Criminal Appeal can allow an appeal only if it considers that miscarriage of justice has occurred by reason of the fact that fresh and new evidence now adduced was not called at the trial. An appellate court "will always receive fresh evidence if it can be clearly shown that failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand": see King CJ. in Reg. v McIntee [1985] 38 SASR. 432 at p.435. Gibbs CJ. in Gallagher's case referred with approval to the decision of Rich and Dixon JJ. in Craig v The King (1933) 49 CLR 429 at p. 439 as follows: "A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance." (my emphasis) As Gibbs CJ. viewed the position: "If the court concludes that the fresh evidence is apparently credible, or not incapable of belief, when considered in conjunction with the other evidence given in the case, the question then arises what influence it might have had upon the jury if it had been available at the trial. This question, which really subsumes the issue of credibility, has been stated in the authorities in different ways and with different degrees of emphasis. Sometimes it is said that the question is whether the evidence would probably have affected the verdict: .... sometimes it has been regarded as sufficient that the evidence might reasonably have led the jury to have a reasonable doubt: .... In Ratten v The Queen (1974) 131 CLR. 510 the test was said to be whether the fresh evidence, if believed, was likely to produce a different verdict: see per Barwick CJ. at 520 with whom McTiernan J., Stephen and Jacobs JJ. agreed. In Lawless v The Queen this test was again accepted as correct (1979) 142 CLR. at 665, 670-672, 677-686. By 'likely', Barwick CJ. in Ratten v The Queen meant 'probable'; he said at 520, that 'it is not enough that there is a reasonable possibility that a doubt be raised: there must be a likelihood of a different verdict'." See too the decision of Mason and Dean JJ. with which Gibbs CJ. agreed.

---------- ***BC8700685 at 26***

I turn to an examination of the new and fresh evidence adduced by the appellants in support of their grounds of appeal so that it may be considered in combination with the evidence already given upon their trial. Grounds 1 and 2

It is conceded by the appellants that the partial fingerprint (the crime mark) found on the back of the WABS. cheque presented to the Mint on the 22nd June 1982 is in fact a partial fingerprint of the top portion of Raymond's right index finger. What is now maintained is that there is fresh evidence to support the proposition that the crime mark is a forgery. However, that was not the way in which issues were joined in the appellants' trial. The manner in which the appellants' argument in support of these grounds was mounted arises out of Raymond's hobby of manufacturing metal and silicone casts of, inter alia, his hands. On the 15th July 1982 the investigating detectives made three visits to Raymond's house in order to execute search warrants taken out for the purpose of searching

the appellant's premises for gold and documents. In that process evidence was given before the learned trial Judge by members of the Mickelberg family that metal and rubber replica hands of Raymond were taken away by the police on that day. The trial transcript also bears the suggestion that one of the investigating detectives confirmed this evidence but the subject thereof was, I repeat, not in issue in the trial. Before us Detective Sergeant Tovey swore that no rubber hands were removed from Raymond's house at all. The only hands removed were made of metal and that was not until the 26th July.

---------- ***BC8700685 at 27***

The importance of these two dates arises out of the discovery of the crime mark by Detective Sergeant Henning on the 24th June 1982 when the three forged cheques were subjected to the chemical reaction of ninhydrin. Sergeant Henning's evidence was that he was satisfied that the poor and partial print was of sufficient quality to enable a match to be made but, of course, the need to eliminate all of those in the employ of the Mint who had handled the cheque then became necessary.
There was evidence adduced before us that the development of a fingerprint by the ninhydrin process has to be carefully controlled because of the likelihood of the developed print rapidly fading and hence the need to record its development by photographic process. Detective Sergeant Henning went on leave for nine days on the 25th June 1982 and upon his return on the 4th July 1982 overlooked the need to photograph the crime mark until the 15th July 1982 the day upon which the police visits to Raymond's house were made. On the 16th July 1982 the cheque was forwarded to Dr. Hilton John Kobus at the Australian National University where he was a research fellow involved in research into methods of fingerprint development and enhancement. The WABS. cheque was sent to Dr. Kobus because the crime mark was weak and required enhancement. Hence the scene was set for the now serious allegation that the police perfected a forgery of Raymond's right index finger upon the WABS. cheque because possessed, it is claimed, of a silicone rubber replica of Raymond's right hand, they clearly had the relevant opportunity.

---------- ***BC8700685 at 28***

In his evidence before the learned trial Judge Raymond swore that the police took castings of hands, moulds of hands cast, inter alia, in rubber from his premises on the afternoon of the 15th July 1982. The relevant portion of the evidence at AB p. 1062 reads as follows: "Had anything else been taken from you of a similar nature? - Numerous other things. Castings of hands, moulds of hands. My work is oriented around hands and this was of some interest to them. They took everything that was cast in brass, bronze, anything that was cast in rubber. There was numerous things taken. When you say 'rubber' what do you mean by rubber? - Hands. Would you look at this? Is this the sort of work that you were doing? - Yes, that is mine. Had this been taken? - All that sort of work had been taken. HEENAN J: What are you showing to the witness Mr Cannon? MR CANNON: I am showing what is called a latex casting, I presume. WITNESS: In fact, it is a silicone rubber casting. MR CANNON: A silicone rubber casting of your right hand? - Of my right hand. And I think Detective Sergeant Hancock mentioned that he found books on castings in your house? - He did. Is it a hobby of yours? - It is. I would ask that both of those items be admitted as an exhibit, Sir, Exhibits A2 brass hand, Exhibit A7 silicone rubber casting of right hand." Throughout almost three weeks of hearing before this Court it was at no stage revealed that Ex. A7 was in fact manufactured long after the appellants' arrest and indeed on Peter's evidence a week before the trial (T/s. pp. 1329-30). At no stage in the course of his trial did Raymond suggest that the crime mark had been forged. That was because he had explored the possibility of a plea of forgery when his solicitor and counsel Mr. Cannon secured the services of one Bardwell, a retired detective inspector formerly employed in the Queensland Police Scientific Bureau, to provide advice as to whether the crime mark contained sufficient points of identification to establish it as Raymond's fingerprint.

---------- ***BC8700685 at 29***

On the 11th and 12th January 1983 Bardwell conducted an experiment in Cannon's office with both the bronze casting and a moulded synthetic rubber finger of Raymond, not Ex. A7, for the purpose of ascertaining whether the appellant's fingerprint could be forged. The experiment was conducted in Raymond's presence and was unsatisfactory. Bardwell took the silicone rubber fingers supplied to him back to Queensland for further testing by O'Brien, a senior police technical officer, but again the experiment to achieve a replica print by the use of an ink medium was unsuccessful. So there was no submission before the learned trial Judge and jury that Raymond's fingerprint had been forged upon the WABS. cheque.

---------- ***BC8700685 at 30***

The ground then employed at trial was for Raymond to say that he had been tricked by the police into handling the cheque during their process of investigation, a most unlikely event and one denied by the investigating detectives. In the course of his cross-examination Raymond placed no significance upon the police removal of brass and rubber hands from his premises as the following reveals (AB p. 1202): "What is the brass and rubber hand all about? - Sir, they are the objects, amongst hundreds of others, that were seized from my house. Particular reference was made by Hancock on, I think, 23rd September, from memory, and by Tovey on the (I think) 15th as to what a crazy hobby I had. All right. WITNESS: What or why they wanted them, other than that they thought they were cast in gold, I wasn't sure. MR DAVIES: Do they have any more significance now? - As far as the police are concerned? As far as you are concerned? - They may well have. Such as? Such as? - Such as they are capable of doing anything. Go on? - And it worry me that Hancock made reference on that day to how good the fingerprints were. Go on? What other significance do they have? - None other than they had a normal interest in the fact that they were fine castings and that they took particular interest in the detail. Is that the other significance you are suggesting? - It has significance to me that they took particular interest. My question was: Do they have significance now? - None other than that they were seized, that they were drilled, and the fact that some of the same type of equipment, as is a lot of the other gear that I have, has not been returned. No other significance now? - No. None at all? - None at all. To you? - To me. Not making any suggestion that the police have used them in any way? - I am not in a position to make suggestions about things such as that. Do you think they did? - I don't think they did."

---------- ***BC8700685 at 31***

Finally, Raymond's argument was put to the jury by his counsel in the following terms: "The defence suggestion is this: Mickelberg's print was not on that cheque on the 22nd June 1982. It got there on the 15th July and on the 16th July it was circled and sent away to Dr Kobus. Where is there any proof at all of a photograph or anybody to say that that particular print was in existence between the day the police got it, namely the 23rd June, and the 15th July? Mickelberg states that he touched it on the 15th July. Mickelberg states 'They had my prints in 1975'. The expert has said, looking at the print originally, 'I couldn't find enough points of comparison to justify it in a court of law'. He is talking about the 15th July." Whilst the fingerprint developed by Henning was poor and partial he was satisfied that it was good enough to make a comparison with a print supplied by a suspect. The delay in photographically recording the crime mark and indeed the lack of detailed records relating thereto was severely criticised not only before this Court but at the trial. Had the ninhydrin treatment of the crime mark been photographed prior to the 15th July 1982 it would not have been possible for Raymond to argue in the manner set out above by his counsel. It remains, nevertheless, that the appellant's allegations of police mala fides and the opportunity to compromise Raymond were clearly before the jury and rejected.

It is against that factual background that the learned trial Judge's charge to the jury should be viewed. What his Honour said was based upon the facts, was in accord with the evidence and in no way could be suggested as an error of law.

By 1982, the year of the robbery, the scientific world had become aware of the possibility of fingerprints being forged by means of, inter alia, the use of a rubber replica moistened with a liquid containing inter alia amino-acid. This was well known to Sergeant Henning but of course he was not questioned thereon in the course of the trial. What happened subsequent to the appellants' trial, conviction and unsuccessful appeals was that their representatives toured the world armed with silicone rubber replicas of Raymond's right index finger. We have not been told as to when these rubber replicas were cast. The bespeaking of expert evidence from overseas upon the possibility of forgery was reinforced by compromising those interviewed with portions of the trial transcript wherein police access to a silicone rubber replica of Raymond's right hand and index finger was stressed. Unaware of the manner in which the trial had been conducted each of the appellants' experts disagreed with the learned trial Judge's statement that "a fingerprint is, in effect, an unforgeable signature". Clearly his Honour's remark was taken out of the context of the trial.

---------- ***BC8700685 at 32***

The appellants' expert evidence concentrated upon the comparatively recent discovery that a fingerprint could be forged by use of a replica rubber finger. It was only when the prosecution intervened to ensure that the appellants' experts were fully advised that each in turn recanted his original opinion to express the view that the crime mark was equally consistent with having been made by a silicone rubber cast and a genuine finger. Not one of the appellants' experts has expressed the opinion that the crime mark was a forgery and that set against the opinions of the respondent's experts that indeed the crime mark was not a forgery is sufficient to dispose of these grounds in favour of the respondent. Nevertheless I turn to have regard to the nature of the evidence adduced by the appellants' experts.

BC8700685 at 33

Reginald John King was one of the appellants' principal witnesses. He is a fingerprint consultant of Clevedon Avon, England with experience in the identification of persons by means of finger impressions for over 36 years. He was trained in that science at New Scotland Yard in 1948 and employed by the Bristol Constabulary Fingerprint Bureau until 1952. He retired from the force in 1975. He first criticised Sergeant Henning for the delay in photographing the fingerprint as totally unacceptable because of the risk of the print fading or disappearing. That of course was always a possibility, but there is now no suggestion that the print disappeared or that it does not contain sufficient identifiable marks.

King was told that on the 15th July (i.e., the same day that Sergeant Henning identified the print) the police raided Raymond's home and seized approximately 20 brass/bronze and rubber/silicone casts of Raymond's right hand and index finger. This knowledge weighed heavily with him as his mention of the fact on two occasions in his affidavit reveals. He carried out experiments with the silicone replicas supplied so as to conclude that the crime mark could be consistent with contact having been made by means of a silicone replica bearing perspiration. In an Addendum Report, King has revealed the extent to which he was involved in reading portion of the trial transcript supplied both by representatives of the appellants and the respondent. That Report and a subsequent letter to the Honourable the Attorney General does reveal, in my opinion, the witness's lack of objectivity in the opinion expressed. Importantly he was quite happy to agree that he could not say that the crime mark was forged. He was unable to tell.

BC8700685 at 34

Malcolm Watson Thompson, a fingerprint expert from Scotland, agreed unreservedly with King's opinion as expressed in his affidavit. In my opinion Thompson suffers from the same lack of objectivity as clearly is the position with King. Harold George Tuthill was of the opinion that had the cheque come to him without knowledge of the possible use of a rubber finger the only thing that would have led him to be suspicious was the position of the crime mark on the back of the cheque. This he found to be an unnatural position as indeed did King. The position of the crime mark cannot be the subject of expert evidence. To me the relevant position could not be said to be unnatural as indeed is the opinion of Brian James Norton, former officer in charge of the Victorian Fingerprint Bureau - indeed it could be said to be a perfectly natural position for the removal of the cheque from the typewriter used for the purpose of typing the relevant details thereon. And that view is reinforced by the opinion given by the respondent's expert, Frank Edwin Warboys of New Scotland Yard that there is faint evidence of fingerprint ridge detail on the front of the cheque opposite to the position of the crime mark on the rear thereof and consistent with the document having been gripped by the tip of the index finger on the rear of the cheque in the position of the crime mark and with the thumb of the same hand on the front and opposite portion of the document.

BC8700685 at 35

George Jacob Bonebrake, fingerprint expert formerly of the FBI. originally expressed the opinion that "the latent fingerprint on the check is consistent with a latent fingerprint made using a silicone finger and is not consistent with the fingerprint made by Raymond John Mickelberg on the fingerprint card, which appears as part of the charted enlargements, or with the series of inked fingerprints furnished by Mr. Boase" (AB. p. 2267). The material provided for the purpose of forming this opinion was however of inferior quality. When shown clearer photographs Bonebrake's opinion altered to "on a review of the material made available to me it cannot be determined with any degree of accuracy whether the latent fingerprint on the check was made by the actual finger or a silicone finger" (AB. p. 2277). In his evidence Bonebrake said there never was a time that he was prepared to swear that the crime mark was a forgery. I do not accept the view that Bonebrake's original opinion was not influenced by the information provided by the appellants' supporters e.g. Ex. 217.

The determining feature, in my opinion, is the failure of the appellants' experts to approach their examination of the document devoid of such extraneous knowledge as the police's alleged possession of silicone rubber replicas. The case of Robert Dale Olsen is an express example of an expert's opinion having been swayed in the first place by inadequate material conveyed to him by the appellants' representatives. At least Olsen was honest and courageous enough to finally express the opinion that he was unable to tell whether the crime mark was a forgery and therefore it should be viewed as genuine. In my opinion each of the appellants' expert fingerprint witnesses initially suffered from the same lack of objectivity as the witness King whose knowledge of the police opportunity to have forged the crime mark was basic to the formulation of his opinion. Peter's ground of appeal pleads that fresh evidence establishes the crime mark as a forgery. Knowledge that a fingerprint could be forged by the use of human sweat as a medium may constitute fresh evidence. However that cannot be said to establish the crime mark as a forgery.

BC8700685 at 36

The respondent's expert evidence was led by Frank Edwin Warboys, senior chief fingerprint officer of New Scotland Yard, London who has had 33 years of fingerprint identification experience. Importantly he is knowledgeable in the area of fingerprint forgeries. He took into account nine factors of genuineness in expressing the opinion that there was no doubt whatever that the crime mark on the WABS. cheque was placed thereon by the natural finger of Raymond. Each of those factors are set out in his affidavit sworn the 5th June 1987. The expertise of a forger would inter alia involve knowledge of the ninhydrin reaction to the amino-acid in human perspiration and the manner in which transference of such an invisible medium could successfully be perfected. In Warboys' opinion "even if all the steps detailed .... were followed, the alleged forger could still not be sure that a ninhydrin reaction to the amimo-acid would develop. Only approximately 12 per cent of cheques treated in the United Kingdom could produce legible marks. The witness's description of the concatenation of print ridge detail was clearly revealed in the photographic exhibits to the affidavit of Peter Malcolm Swann also of the United Kingdom who has had 27 years prior experience in operational fingerprint work. It is the inability of a silicone rubber cast to replicate the pore ducts in ridged detail which, in that witness's opinion, is of considerable relevance. Impressive too was the evidence of Thomas Bertrand Thompson of the Federal Bureau of Investigation, a serving officer in that organisation who demonstrated the lack of flexibility in a silicone cast as opposed to the surface of a natural finger. "Microscopic examinations and comparisons between the inked and ninhydrin developed latent prints made by natural and replica fingers reveal that much detail of sweat pores and edges of ridges is lost when a replica finger is printed. Loss of detail occurs at every generation of reproduction. In contrast, this detail is present on the print of a natural finger and is present on the questioned print. Of course a great deal would depend upon the expertise exercised in the production of a replica nor would the fingers said to have been used for that purpose by the police ever identified. But certainly the rubber replicas including Exhibt A7 in no way approached the flexible surface of the human finger. That is a clear observable fact not requiring professional expertise for its determination." Further expert evidence from Norton, to whom I have referred and who had members of the Victorian Fingerprint Bureau conduct experiments to produce a natural looking fingerprint by the use of a rubberised finger, support Warboys' opinion. "Most of the latent prints made by my experts using the rubberised finger referred to in King's affidavit showed obvious signs of forgery. A latent fingerprint is invisible until developed with ninhydrin. Therefore the experts .... worked 'blind'. They had no idea whether they were leaving a print or how good it would be until it was developed": (AB p. 2517)

BC8700685 at 38

In short I have not found the appellants' technical evidence credible. Nor can that evidence be viewed in isolation when it is known that the rubber fingers supplied to Bardwell and by him to Queensland fingerprint expert O'Brien, failed to provide a satisfactory ink impression when experimented with for that purpose. That was the endeavour prior to trial and which occasioned the abandonment of any forgery argument. I reject the appellants' grounds 1 and 2. I turn to grounds 3, 4 and 5.

It is the respondent's evidence at the trial that when Raymond's fingerprint was detected on the 24th June 1982 the police force did not have a set of fingerprints to compare therewith. However, Raymond told the jury that his fingerprints had been taken by the police in the year 1976 when he was charged with a Commonwealth offence under the Crimes Act. In fact the date upon which Raymond was dealt with for that offence was the 9th June 1976 and at his request his fingerprints were destroyed on the 11th June 1976 as is evidenced by the entry on Docket No. 163264 Ex. 171 and the signature of Sergeant Henning. But Raymond's fingerprints were taken at Commonwealth Police Headquarters and not the lock-up of the Western Australian Police Force in Perth. The Commonwealth police then provided the State police with a set of Raymond's fingerprints and those prints were the subject of the destruction entry in Ex. 171.

It transpires that the Commonwealth police did not destroy their copy of Raymond's prints which were sent to Western Police Complex Canberra ACT. on the 15th June 1976. On the 22nd June 1976 the Commonwealth police sent a copy of Raymond's fingerprints to the Central Fingerprint Bureau in Sydney. Because of these facts readily available to Raymond prior to trial it is argued that the investigating police had access to Raymond's fingerprints notwithstanding their contention that they were unaware of the existence of such prints both in Canberra and in Sydney. It is clear that had request therefore been made copies of the prints would have been forwarded to them within a few days.

BC8700685 at 39

Such an argument presupposes knowledge in the Western Australian Police Force that Raymond's fingerprints existed in Canberra and in the Central Fingerprint Bureau. Local records disclose the destruction of such

fingerprints. Nor would it have been possible on the evidence before this Court for a search to have been conducted in the Central Fingerprint Bureau simply by production of a partial print of Raymond's right index finger without his name. Suffice it to say that there is no evidence of any request having been made by the State police of either the Commonwealth police in Canberra or of the Central Fingerprint Bureau for copies of Raymond's fingerprints to be forwarded to Western Australia.
It is so easy to be wise after the event. Such an argument is out of context with the evidence of the progress being made by the investigating detectives. The existence of the Mickelberg family was unknown until the 7th/8th July 1982 when investigation of the Perth Building Society cheque numbers revealed the account with that society in the name of Peter Gulley alias Raymond. An inquiry conducted at the address revealed in the society's records resulted ultimately in an interview of Peter which disclosed that Raymond was then in Penang. Whilst the investigating detectives were aware of the existence of a poor partial print having been obtained they were unaware of the name of its owner or of the fact that he should become a suspect until about the 12th July 1982 when they obtained Raymond's application for a passport from the Passport Office for the purpose of obtaining documentary evidence of his handwriting. If the existence of Raymond's fingerprints with the Commonwealth police in Canberra and in the Central Fingerprint Bureau in Sydney may be regarded as fresh evidence I am not satisfied that the investigating detectives had access to those fingerprints in the sense that they had such knowledge.

---------- ***BC8700685 at 40***

Inspection of Docket 163264, Ex. 171, revealed the destruction of the 1976 prints. Whilst the police possessed a fragmented fingerprint of a suspect they did not have Raymond's prints when he was charged with using the false name of Peter Gulley until the 15th July 1982. Nor for that matter would the Central Fingerprint Bureau have been able to assist them merely by production of the partial print. I accept the evidence of Assistant Commissioner Billing that on the evening of the 15th July 1982 he was working in the documents section checking the large number of documents brought in by the detectives who searched Raymond's home when Senior Constable Muhleisen brought to him the set of Raymond's fingerprints collected from the lock-up where Raymond had been charged with using the false name of Gulley. The comparison of the partial print on the WABS. cheque was then made for the first time and but six or seven points of identification only could be made. The decision was then made to send the cheque to Canberra for enhancement (T/s. pp. 693-4). It cannot therefore be said that the trial Judge erred in law in directing the jury as claimed in ground 3 nor can it be said that his Honour was in error in directing the jury as set out in ground 5. The three grounds should be dismissed. I turn to deal with ground 6.

---------- ***BC8700685 at 41***

We pass from the appellants' allegation of the police having fabricated evidence against Raymond to the contention that the police artist's portrayal of Peter was not as a result of information given to him by Mr. and Mrs. Allen from whom he purchased the white Falcon motor car and from the observations of one Henry who claims to have seen Peter on the day the conspiracy was completed. To understand this ground it is necessary to go to the evidence of the police artist at the trial. Sergeant Kenneth Albert Pierce gave evidence that he was in charge of the modus operandi section of the police force and also a police artist. He is a member of the International Association for Identification and for the four years prior to February 1983 had been involved in facial depiction in an official capacity. On the evening of the 25th June 1982 he spoke with a Mr. and Mrs. Allen whose prior ownership of the white Falcon sedan seen at Subiaco on the day of the robbery had been traced. The Allens, however, were not very precise in the description they gave of the young man who purchased their vehicle. Apart from a description of hair, said to be a wig and glasses, Sergeant Pierce's sketch progressed no further.

---------- ***BC8700685 at 42***

It was not until Sergeant Pierce sat with Mr. Henry who had observed the young man in question at and in the relevant motor vehicle in the car park at the rear of his business premises in Subiaco that Sergeant Pierce was able to complete his sketch. He did this by means of placing the hair and glasses described by the Allens on an overlay of the face described by Henry so as to produce a composite sketch admitted into evidence as Ex. 21 Identikit Sketch. It is that sketch which became the subject of newspaper publicity in the Sunday Times on the 27th June 1982. It is Sergeant Pierce's evidence that Ex. 21 was prepared with the assistance of photofit equipment consisting of plastic strips of sections of the human face in order to assist identification of the suspect.
A problem arises out of the fact that in their evidence before the jury both Allens identified the facial portion of Ex. 21 as having been prepared at their direction. Such could not have been the case according to Francis John Domingo (AB. p. 2188) called by the appellants. Sergeant Pierce confirmed that the Allens were simply mistaken.

The appellants called a number of so-called experts in order to prove police duplicity in that the sketch said to have been drawn by Sergeant Pierce could not have been the subject of photofit use, but was the subject of the copying of a passport photograph of Peter.
For that purpose the appellants called one Donald Gideon Cherry, a retired police officer, who is said to have qualified as an expert in the field of police composite sketches in a number of courts in the United States of America and who swore an affidavit that it was his considered opinion that Ex. 21 was influenced directly by a passport photograph of Peter Mickelberg. He did not consider that the use of a photofit had been involved at all even though he had no experience of the use of that system. He was drawn to this conclusion because of the consistencies between the photograph and the sketch which could not be the subject of mere chance. His final affidavit conclusion is that based on his experience he concluded that parts of the passport photograph of Peter Mickelberg were incorporated into the finished drawing.

---------- ***BC8700685 at 43***

The fact is, however, that the information provided to Cherry as to Henry's observation of the young man was not accurate nor did it of course take into account the rather precise nature of Henry's evidence before this Court. Henry is obviously an observant person who had reason to record with some accuracy the facial features of the young man whose car park imposition had irritated him on the morning of the 22nd June 1982. Further affidavit evidence was read to the court of one Ryan, the inventor of the photofit system, who expressed the opinion that his system had not been used as claimed by Pierce and corroborated by Henry. That evidence was supported by another expert by the name of Proven.
Proven has had no experience of sketching himself and therefore has no relevant qualification. He clearly relied upon what he was told by journalist Lovell and in giving his opinion relied upon the advice that the passport photograph was in the possession of the police when Ex. 21 was drawn. His credibility was completely destroyed when the comparisons between his affidavit and that of Mr. Ryan were read to the court. The evidence of the appellants' fourth artist witness Domingo did not support the appellants' argument - rather did it confirm the method by which Pierce arrived at his composite sketch.

---------- ***BC8700685 at 44***

In the end this Court is able to determine itself whether or not the relevant sketch bears a likeness to Peter and in my opinion that is not the case. In any event Peter Mickelberg was never identified by means of the sketch. This aspect of the trial was not in issue as will be seen. The real purpose of the argument is to demonstrate the alleged mala fides of the police in their linking of Peter to the crimes committed. This is done by pointing to the discrepancy between the evidence of the Allens and that of Pierce as to the origin of the instructions given to the police artist to prepare his drawings. To me Pierce was an impressive witness of the truth who is obviously a sensitive artist. I am quite unable to accept the evidence of the appellants' witnesses all of whom suffered from a lack of objectivity by virtue of having accepted compromising instructions not supported by the entire evidence given at trial.
The subject of identification was very carefully adverted to by both prosecuting counsel and the learned trial Judge. Conscious of the fact that both the Allens and Henry had been shown a photograph of Peter Mickelberg learned counsel warned the jury that they could not use their recollection of the appearance of the young man in question as a means of identification of Peter Mickelberg (AB p. 1792). The learned trial Judge added to that warning in the following manner: "There are two main groups of evidence put before you which you may think tend to implicate the accused Peter Mickelberg with the car. The first group is the description of the eye-witnesses, Mr and Mrs Allen and Mr Henry - at least, mainly those people - and the second, the handwriting on the Talbot note, the note which was written out at Mr and Mrs Allen's home on the 25th May. As to the first group of evidence, if I might call it that, that is the identification by the eye-witnesses, it is important that I first give you a warning in relation to identification evidence and then go on to explain to you why in this case that evidence simply cannot be relied upon as connecting Peter Mickelberg with the car. I must warn you of the special need for caution when considering the evidence of Mr and Mrs Allen and Mr Henry as to the visual identification of the young man seen with the car. What I have to say now, of course, does not relate to the handwriting comparison made by Sergeant Billing. The warning as to the visual identification is necessary because it is very easy to make a mistake in identification. When miscarriages of justice have occurred and, of course, they do occur sometimes, identification of the accused has been a major source of error. There have been a number of instances where responsible persons, honest persons - their honesty, in fact, is not in question and that, of course, is so here, as I understand the evidence at least - have made positive identifications on a parade or otherwise and those identifications have proved to be erroneous. Lawyers, because of their training and because of the reading of law reports that they are required to do, know that these mistakes have occurred but probably most jurors do not. One of the main problems in relation to identification evidence, members of the jury, is that a mistaken witness can still be very, very convincing especially when he is

transparently honest and there is another trap, and it really is a trap because it is not something that you may expect. The trap is this: Mistakes can occur when two or more and sometimes a large number of people make the identification - all can be mistaken about the same person. That is one of the peculiar features of identification evidence. In this case, as the Crown prosecutor acknowledged to you in the course of his address the Crown does not rely upon the evidence of Mr and Mrs Allen and Mr Henry as positive identification of the accused; in fact, there has not been identification of the accused by those witnesses. You could not, by any stretch of the imagination, accept their evidence as identifying Peter Mickelberg as the young man who purchased the car or the young man who was seen with the car on the morning of the 22nd of June. In each case the evidence of the eye-witnesses fell far short of positive identification. I could, I suppose, point to various aspects of that identification which render it unacceptable but counsel have already mentioned them and I think it is sufficient if I say their evidence is not identification of the accused Peter Mickelberg and it cannot be accepted by you as identification. In the end the most that can be made of their evidence, I suppose, is that you may think they were saying the accused man Peter Mickelberg could have been the young man involved with the car. There is a lurking danger, as one of the judges has described it, that you might be tempted to use their separate evidence, the evidence of Mr Allen, Mrs Allen and Mr Henry, in the same way as you might use circumstantial evidence; in other words, there is a lurking danger that you might treat the evidence of each as not being sufficient by itself but when put together as amounting to convincing evidence. That cannot apply in relation to identification evidence. You cannot use the separate pieces of evidence of the Allens, of Mr Henry, to support one another. You cannot use it by adding possibility to possibility and making probability or something even higher than that out of their evidence. So I direct you in the end that the evidence of Mr and Mrs Allen and Mr Henry and Mr Hondros and Mr McCracken cannot be accepted as identification of Peter Mickelberg as the young man in question. The evidence relating to the identikit, the evidence of the efforts made by the police to get descriptions from them, of course, is part of the story. What they did, you may think, is what you would expect policemen trying to find an offender would do. At that stage, of course, the police were investigating the matter. They were trying to find the culprit and what they did was acceptable and probably necessary. However, we are now at a different stage of the criminal process. We are at the stage of the trial and the result of that investigation simply cannot be accepted as evidence tying in the accused Mickelberg with the young man." (AB p. 1904) For these reasons I am of the opinion that there is no substance to ground 6. Grounds 7 and 11

---------- ***BC8700685 at 47***

Each of these grounds relate to the sketch the subject of Ex. 21 mentioned above, a touched up photograph of Peter Mickelberg the back of which was signed by Henry in identification of the appellant and Ex. 78, upon which are set out three further photographs of Peter Mickelberg. The extent to which each of those photographs and the sketch could have played a part in the trial process is best adverted to in his Honour's charge which I have set out above. The law on the subject is set out in the recent case of Alexander v The Queen 145 CLR. 295. In light of both prosecuting counsel's strong warning to the jury that they should not use the evidence of the Allens and Henry for the purpose of Peter's identification and his Honour's charge it cannot be said that the admission into evidence of these exhibits operated unfairly against Peter Mickelberg. I turn to deal with grounds 8 and 9.
The Court of Criminal Appeal heard the appeals of Brian Mickelberg Nos35 and 37 of the 1983 and the appellant Peter Mickelberg Nos36 and 65 of 1983 together. When judgment was delivered on the 4th November 1983 the convictions recorded against Brian Mickelberg were quashed. At the same time the appellant Peter Mickelberg's appeals were dismissed. The court was well aware of the law involved in expressing the opinion that Peter Mickelberg was properly convicted of conspiracy. In The Queen v Darby 148 CLR. 668 the High Court was of the opinion that the conviction of a conspirator, whether tried together with an alleged co-conspirator or separately, may stand notwithstanding that the latter is acquitted or his conviction is quashed on appeal unless in all the circumstances the conviction is inconsistent with the acquittal of the other person. That is not the instant case. Nor in my opinion does the decision in The Queen v Hoar 148 CLR. 32 support ground 9. I turn to Peter's ground 10(a). Ground 10(a)

---------- ***BC8700685 at 48***

The first thing that can be said about this ground is that the alleged evidence is not new. The tape in question was played to Peter's instructing solicitor who doubted its authenticity. Its contents were also made known to Peter's counsel. Because of their opinion of the tape neither Raymond's nor Peter's counsel tendered it in evidence in the conspiracy trial though they did cross-examine on portions of it. Importantly to the extent that it was authentic it was not recorded until December of 1982, long after Peter's arrest. It was recorded in connection with the "Yellow Rose of Texas" trial when the police had reason to take Raymond's wife into the police station for questioning and that incident is mentioned in the tape. The miscarriage of justice alleged is said to arise out of the conversation recorded

evidencing the commission of violence against Peter so as to make inadmissible admissions of guilt said to have been made by him at Belmont Police Station on the 26th July 1982. However Peter in his trial denied having made the admissions later set out herein. The factual issue thus arising was well and truly before the jury from which it may be taken that Peter's denial was rejected. Ground 10(b)
This ground has troubled me greatly. Not because of its express terms which would appear to infer a breach of professional conduct on the part of Mr. Cannon subsequently withdrawn by Peter, but because of the manner it is linked to Mr. Searle's opening remarks which have not been withdrawn. Therein it is recorded at p. 10/11 of the transcript as follows: "Now, these matters here, going on to (b) is that (b) (ground 10(b)) simply pleads as fact that the petitioner's instructing solicitor appeared for Arpad Security and Arpad Lazlo Bacskai on or about the 20th July 1982 in the Court of Petty Sessions in relation to charges of exceeding the terms of their security licence. In other words, there is a clear conflict of duty and interest if one can establish the hypothesis - and this is an hypothesis I would submit can be established in this case - that Arpad is in fact a very likely suspect, an alternative suspect, in relation to the Perth Mint swindle. One of the reasonable hypotheses consistent with innocence that I will put to your Honours in relation to the petitioner is that there is another party, to wit Arpad, which had the care and conduct at all times of that gold, in respect to which there is much more direct evidence of their involvement than there is of the petitioner. In my submission, that fact put Mr Cannon in a conflict of duty and interest of the most extraordinary degree and the relevant dates can be gone through. In fact, in terms of chronology perhaps I could take you through to original dates and places." Bacskai was subpoenaed to give evidence and did so. What he had to say evidenced the fact that he and his staff were interrogated by the investigating detectives and cleared. That evidence was corroborated by the investigating detectives. As can be well imagined counsel's opening remarks were reported in the press and as a result the witness and his company may well have suffered in the eyes of the community. There has not been one iota of evidence to support counsel's allegation and yet the inference sought to be made remains and has not been withdrawn. In my opinion the attack made on Mr. Bacskai is without foundation and scandalous. There is no evidence of any conflict of interest on Cannon's part. Ground 10(c)

---------- ***BC8700685 at 50***

Whilst Mr. Cannon was acting as Peter's instructing solicitor separate counsel in the form of Singleton represented him in the trial. It is clear that there was no conflict of duty involved insofar as the professional work involving Detective Sergeant Andrew Tovey is concerned. The contest between Peter and Tovey adverted to in the ground was the subject of evidence adduced in the trial and represented one of the issues to be resolved by the jury obviously not in favour of Peter. In his evidence before us Peter further withdrew any allegation of unprofessional conduct on the part of Mr. Cannon. There is nothing new in this plea. Ground 10(d)
The subject of this ground is not new evidence. It was adverted to in Peter's appeal before the Court of Criminal Appeal in 1984 and disposed of for that reason. The ground is regarded as very important in that it is said to provide a rebuttal of the argument sought to be inferred by the prosecution that the flat in question was used as a headquarters for the robbery. This I do not understand for the use of a flat as a dwelling does not exclude its use for the robbery purpose. Nor can it be said that the police did not question the neighbours of Unit 7 as Detective Sergeant Round's evidence before us reveals (T/s. p. 1471). Ground 10(e)
Herein lies the most compelling evidence as to the identification of Peter. In his trial Detective Sergeant Billing, as he was then, gave evidence before the jury of his examination of the Talbot Note (Ex. 20) and his comparison of the handwriting thereon appearing with known samples of Peter's handwriting. He concluded that the Talbot Note was written by Peter. Prior to the appellants' trial Peter's solicitor requested John Douglas Gregory, then Officer in Charge of the document examination section of the West Australian Police Department, to examine Ex. 20 and compare it with the material the subject of Detective Sergeant Billing's opinion. As a result Gregory carried out such an examination using stereo microscope photographic equipment and lighting sources in the Crown Law Department for some five or six hours. He concluded that the author of the top portion of Ex. 20 was Peter. He was not therefore called at the trial.

---------- ***BC8700685 at 51***

Gregory, however, appeared before us in his present position as the Director of the fraud section of the Department of Immigration. He is a member of the Australian Society of Forensic Document Examiners. In my opinion he was a most credible witness and that view is supported by the notes he made in his 1983 study which were tendered in evidence by Mr. Searle. Those notes clearly identify Peter as the author of the Talbot Note.
Gregory's evidence was supported by the evidence of international expert David Morris Ellen, a licentiate of the Royal Society of Chemistry and an employee of the Metropolitan Police Forensic Science Laboratory in London since 1953. Between 1968 and 1986 he worked in the document section becoming head thereof in 1974. He is

presently on leave of absence from the Metropolitan Police Office and works at the Forensic Science Centre in Adelaide, South Australia. In short he confirmed the opinions previously expressed by Billing and Gregory.

---------- ***BC8700685 at 52***

In an endeavour to cast doubt upon these opinions the appellant sought the advice of one Geoffrey William Roberts who claims to be capable of delivering expert opinions in many areas of forensic science. His report ignores the similarities so glaringly obvious in the writing on Ex. 20 and known samples of Peter's handwriting but concentrates on the need to identify such samples as in fact the handwriting of Peter and certain claimed differences between that writing and that which appears on Ex. 20. Even so he readily conceded the many similarities when his attention was drawn thereto. In my opinion Roberts lacked objectivity and because of that his evidence was not helpful. Finally the opinion expressed by Gregory to Peter's solicitor prior to the trial makes it clear that the evidence sought to be adduced under this ground is far from fresh. Ground 10(f)
Neither the affidavit of Grant Edwin Carroll nor that of the Stacey's achieves the alibi sought to be established by Peter. In the first place Carroll was unable to say at what time the tiles in question were purchased when in fact the white Ford Falon vehicle was purchased on the same day from Mr. and Mrs. Allen. A similar comment applies in respect of Mrs. Stacey who was unable to assist this Court with evidence other than the fence involved was not finished on a week-end. She did not corroborate Peter's evidence that he was with Raymond and Brian all day on the 22nd June 1982. Ground 12

---------- ***BC8700685 at 53***

The best test of the weight of this ground is the attitude adopted by defence counsel at the trial itself. It was conceded that the conviction in question was of minor importance and that is the way it was obviously viewed by his Honour. It is insufficient in itself to occasion interference with the jury's verdict. The whole weight of this appeal is based upon the allegation of police fabrication. The importance of that allegation should not be lost. It carries through into ground 13 which is dependent, if at all, upon the evidence of a man whose word could not possibly be accepted. Firstly, it is to be rejected because of the need of the necessary inference to be drawn from the word "stitch" said to have been used by Lewandowski and then it is met by Lewandowski's denial. If it was necessary to decide between the credibility of each of the men in question I have no difficulty in concluding that I would prefer Lewandowski's word to that of Walsh. Walsh's evidence could not under any circumstances be regarded as plausible, cogent or credible. The Trial
In the need to have regard to the evidence adduced at trial I turn to what transpired. On the 16th July Detective Sergeant Hooft, together with Detective Henley, asked Peter where he was on the 22nd June 1982. Peter told him that he, together with his brothers Brian and Ray, had spent the whole day building a fence at his parents' home at Mullaloo. And he was positive about that. The following conversation ensued: "I (Detective Sergeant Hooft) said, 'I would like you to accompany us to Subiaco when we finish so a bloke can have a look at you'. He said, 'What for?' I said, 'On the 22nd June a young bloke was seen in a Falcon sedan at the rear of 49 Hay Street Subiaco. We believe this person was involved in the offence. A man from a neighbouring business spoke to the young bloke and he can identify him. I would like him to have a look at you'." At about 8.00 a.m. on the 16th July 1982 Peter was conveyed to the rear of the premises at 31-33 Hay Street, Subiaco where the witness Terence Henry was invited to have a look at Peter: "Was the accused in the car or outside the car? - He was in the car and then I asked him to step from the car so Mr Henry could have a better look at him. That was done, I take it? - Yes, it was. What happened then? - Mr Henry walked back to the building and I accompanied him and the accused got back into the vehicle with Detective Henley."

---------- ***BC8700685 at 54***

Detective Henley's evidence of what then transpired when Peter Mickelberg got back into the car is as follows: "What happened then? - That is when Peter started to cry and put his head between his hands. I said to him 'What are you upset about?' He said, 'I think he recognised me'. I said, 'I think he did, too, because it was you in the white Falcon. Is that not right?' He said, 'Christ, if he recognises me I'm gone. Shit why this'. That was when Sergeant Hofft returned to the vehicle. What happened when Sergeant Hooft returned to the vehicle? - Sergeant Hooft said to him, 'What's wrong with you?' Detective Henley said, 'He's worried that he was recognised'. Peter said, 'Did he recognise me Henry?' Hooft said, 'Calm down Peter what are you worried about?' He said, 'What's happening to this family. Ray will kill me for this. Can I see Ray first. I've got to see Ray'. Hooft said, 'What's the matter?' He said, 'He said did he recognise me?' Hooft said, 'He may have. It was you in the car parked here on the morning of the 22nd June wasn't it?' He said, 'If I see Ray first I'll tell you what you want to know. If Ray says it's all right I'll tell you.

I'll tell you everything'. Hooft said, 'Can you tell us where the vehicle is now?' He said, 'I've got to see Ray. I can't say anything until I see Ray. He'll kill me if I tell you'. Hooft then said, 'All right. We'll leave that for the moment. Just calm down. You had a flat in Rupert Street Subiaco is that right?' He said, 'Yes'. Hooft said, 'I'd like you to come with us while we search those premises is that all right with you?' He said, 'As long as I'm in Cannon's office by 9.00 o'clock'. During this conversation Peter was crying. He had tears in his eyes and they were running down his face." (AB p. 699)

---------- ***BC8700685 at 55***

Peter was then taken by Detective Tovey, with Sergeants Hooft and Henley to Unit 7, 112 Rupert Street, Subiaco where Tovey questioned Peter as follows: "I asked him how much the rent was a week and the accused said, '$95.00'. I said, 'That's pretty high'. The accused said 'It wasn't too bad I share with my mate'. I said, 'Who was your mate?' He said, 'He's gone now he went to his girlfriend not long after we moved in and left me with the rent'. I said, 'What's he's name?' He said, 'Otto'. I said, 'Is that his first name or what?' He said, 'That's he's first name'. I said, 'What's his full name?' He said 'Otto Kleiger but he has gone up north'. I said, 'Whereabouts?' The accused said, 'I don't know'. I said, 'So you are paying for a unit you are not living in'. The accused said 'Yeah, they take the rent out of the money I paid in advance until they get new tenants and I get what's left'. I said, 'Why did you move out?' The accused said, 'I went home because Dad's sick'."
At the Belmont Police Station on the 26th July 1982 Detective Sergeant Hancock interviewed Peter when the following conversation was noted: "I then said to him, 'First of all, Peter, on the 25th May this year a young man purchased a 1965 Ford Falcon sedan with Wanneroo plates' - and I quoted the plate No. WN 14077, I think it was - 'from a couple in Armadale for $400.00. I have reason to suspect that that young man was you'. He said, 'I don't want to answer that'. I said, 'Why don't you want to answer it?' and he said 'Mr Cannon told me not to say anything'. I said, 'Do you deny that you bought that car?'. He said 'I don't want to answer that'. I then showed him a photograph of himself and I said, 'Is that a photograph of you' and he said 'Yes, where did you get that?' (The photograph was on the left-hand side of Exhibit 78. It is a photograph of Peter unadorned by a hair wig and glasses as the middle photograph on Exhibit 78 demonstrates). .... He looked at it and didn't say anything and I said, 'What do you say about that?' He said, 'It still doesn't prove that it was me'. I then showed him a photostat copy of a note which had the name Robert Talbot on it. Look at Exhibit 20, please, Sergeant? - Yes, that's the original note. I showed him a photostat of that note. After you had shown that to him what was said? - I said, 'The young man who bought the car wrote this note and gave it to the couple in Armadale and police handwriting experts say that it is your handwriting'. He said, 'So what if I bought the car?' I said, 'Did you buy the car?' He said 'I can't say'. I said, 'Why. It was obviously you?' He said 'I know but we made an agreement that we wouldn't say anything'. .... I then said to him, 'On the morning that the gold was obtained from the Mint, that car was parked at the back of Barker House from about quarter past eight till about half past ten. A man from a nearby business actually spoke to the driver as he was leaving and I have reason to suspect that that driver was you'. He said, 'I know him. You took me up there last time. Did he recognise me or not?' I said, 'When he saw your photo with the wig on he recognised you'. He said, 'I thought so'." (my emphasis) Peter clearly recognised Henry (AB p. 1800). To continue the evidence: "I said, 'We believe that the person who was driving that car put the three cheques for the gold in Suite 3 of Barker House'. He said, 'I've been told not to say anything about that'. I said, 'We also believe that at least one of the cheques couldn't have been put there until after 10 o'clock that morning. That's why the car was parked there till half past ten'. He just didn't reply to that. I said to him there was a CB radio fitted to the car when it was seen that morning. He said, 'I don't want to say anything about that'. I said, 'Peter we would like to know where that vehicle is now?' He said, 'I would tell you but I promised not to say anything about it. If Ray says it's all right I'll tell you where it is'. I said, 'We've searched everywhere for it even up to Kalbarri. Is it up there somewhere?' He said, 'No it's not up there it's not far away really'. I said, 'Is it hidden in a garage somewhere?' He said, 'No it's been dumped. You will find it eventually but you mightn't recognise it'. I said, 'Has it been burned, has it?' (The burnt Falcon was found on the 25th August 1982 and was identified by its chassis number). He didn't answer me. I said, 'Where has it been dumped Peter?' He said, 'I can't tell you until I talk to Ray if he says it's all right I will show you'. I then said to him 'I've been told that you leased a unit in Rupert Street Subiaco in March on the 6th March'. He said, 'That's right I told Detective Tovey all about that'. I said, 'Did you have a telephone put on there?' He said, 'Yes'. I said, 'I have been told that you were never seen at the unit and that none of your personal effects where ever there'. He said, 'Who told you that?' I said, 'We have spoken to the estate agents and we have made enquiries amongst neighbours and other tenants'. He said, 'So I wasn't there very much'. Did you put anything further to him about the leasing of that unit? - Yes I said to him 'When you made the application for the lease of that unit you gave the name of Otto Kleiger as a referee. Who is Otto Kleiger?' He did not answer me. I said, 'Who is Otto Kleiger Peter?' He said, 'I can't say anything about that'. I said, 'You told Detective Tovey that Otto Kleiger was your flat mate and he had gone up north'. He did not answer me. I said, 'Otto Kleiger is Ray isn't he?' He said, 'How do you know that?' I said, 'Never mind that, why did you use one of Ray's false identifies when you leased the unit?' He said, 'That was Ray's

idea'. I said, 'We suspected that that unit was leased purely as a headquarters for the job on the mint'. He said, 'That was Ray's idea too'. I said, 'Is that where the phone calls were made to the mint and where the cheques were typed out?' He said, 'I can't say anything about that or words to that effect'. Did you show him at any stage a blue folder of papers that had been brought in by Detective Cvijic and given to the Scientific bureau? - Yes I did. What did you say to him about that? - The folder had numerous papers in it and I said 'Do these papers belong to you' and he said 'Yes, they took them from our place in Mullaloo'. I showed him several of the pieces of paper which had handwritten notes on them and I said to him 'Is this your writing'. He said 'Yes'." Later on the 26th July 1982 Peter was interviewed by Detective Sergeant Round in the presence of Detective Gillespie. He was asked: "What have you told Sergeant Hancock? - I hadn't told him where the gold is but I have certainly told him a lot more than I intended to. Peter (sic Ray) won't be very happy about it. (AB p. 559). Why don't you tell us where the gold is, Peter, and help us clear this up? - Look, I can't. I have to talk to Ray. If Ray says it's all right, I'll tell you. You know what's like being brothers and that. I can't say anything. I said, 'Did you tell them where the car is?' He said, 'Not exactly, I told them it had been burned and dumped but I did not tell them where'. I said, 'Where is it'. He said, 'I can't say anything. I can't tell you. Let me talk to Ray first I will see what he says'. 'Why did you tell me the other day you didn't know the name Peter Gulley?' He said, 'That's obvious now isn't it? I knew you were looking for Ray and I knew it was Ray and I knew why you were looking for him'. I said, 'You told Detective Tovey that Otto Kleiger was your flat mate'. He said, 'Yes, that was a bit silly, wasn't it? That was the only name I could think of at the time. You know that's just a tax dodge'. I said, 'Did you ever live at the unit with anybody?' He said, 'No'. I said, 'The neighbour said you were hardly ever there but the lights used to be on at the place'. He said, 'Yes. Ray gave me one of those time switches that put the lights on and off so it would look like someone was living there'. I said, 'Don't you think you should tell us the full story Peter and help us to get the gold back?' He said, 'I just can't tell you, you know what's it's like, I will talk to Ray and if he says yes I'll tell you everything'.

---------- ***BC8700685 at 58***

Finally on Thursday the 23rd September, in company with Detective Sergeant Allen, Detective Tovey again spoke to Peter at the Warwick CIB. Office. The conversation went as follows: "I said to the accused, 'Peter, you have been charged with the offences relating to the Perth Mint. I want to tell you that you are not obliged to say anything and anything you do say may be given in evidence'. He said he understood that. I then said to the accused, 'I want to talk to you about the gold from the Perth Mint'. He said, 'I've already spoken to Sergeant Hancock and Sergeant Lewandowski'. I said, 'Things have changed now though and we still want to get the gold back'. The accused said, 'Do you mind if I call you Andrew?' I said, 'No. You can if you want to'. The accused said, 'Andrew, you don't really expect me to tell you where it is, do you?' I said, 'Do you realise that it would be better for everyone concerned if the gold from the mint can be recovered'. The accused said, 'Andrew if I tell you where it is, Ray will kill me'. I said, 'Why are you so scared of Ray?' The accused said, 'You don't know what he's like'. I said, 'What are you going to do. Sit on the gold forever?' The accused said, 'We're prepared to get twenty years'. I said, 'Who told you that?' The accused said, 'Cannon'. .... I said, 'Well, Peter, are you going to tell us where the gold is?' The accused said, 'No Andrew, I can't. Ray would kill me. I won't waste any more of your time'. I said, 'Just tell me one thing. Is the gold overseas?' The accused said, 'No it's not'. I said, 'Are you sure you won't tell me where it is?' The accused said, 'Nothing personal Andrew but I can't'."

---------- ***BC8700685 at 59***

This evidence against Peter if accepted, supported by the Talbot Note is very strong.
Apart from the identification of Raymond's right index fingerprint upon the rear of the WABS. cheque, the use of the Peter Gulley PBS. account number upon the two PBS. cheques presented to the Mint and the use of the Wilson ANZ. Access account to pay the rent for Suites 3 and 15 Barker House, there was also evidence of Raymond's interview by the investigating detectives. Initially Raymond told Detective Sergeant Round that he had never heard of Peter Gulley (T/s. p. 519): "I said, 'Have you ever used that name yourself? He said, 'No definitely not'. I said, 'Do you have an account with the Perth Building Society at Subiaco in the name of Peter Gulley?' He said, 'No, why should I do that?' I said, 'Two of the cheques used to get the gold from the Perth Mint were drawn on the account of Peter Gulley and issued by the Perth Building Society'. He said, 'Peter said you were looking for this Peter Gulley but I don't know anything about it'. I said, 'I don't think you are being completely truthful with me. I've got reason to suspect that you are the person who had the account at Perth Building Society in the name of Peter Gulley would that be right?' He said, 'No way, look around. You won't find any gold here. I've got nothing to hide'. .... I said, 'I'll tell you this, Raymond, the handwriting on the application forms to join the Perth Building Society account have been definitely identified as yours. What do you say about that?' He didn't answer. I said, 'It can be proved, Ray, that you have been operating that account since 1976'. He said, 'All right it's my account'. I said, 'Where is the passbook now. Have you still got it or has it been destroyed?' He said, 'It hasn't been destroyed. I'll make a phone call and

see if I can get it back'. .... I said, 'Why have you got an account in a different name?' He said, 'That's just for tax purposes'. I said, 'Why didn't you tell me that in the first place. Why tell my lies?' He said, 'Well I have told you now haven't I'. I said, 'You only told me when you realised we could prove it. Do you have any bank accounts?' He said, 'No'." Later Detective Sergeant Hancock questioned Raymond in the presence of Detective Sergeant Round: "Sergeant Hancock said, 'I am told that you told Sergeant Round that the account in the name of Peter Gulley with the Perth Building Society is, in fact, your account and that Peter Gulley doesn't exist. Is that right?' He said, 'Yes'. Sergeant Hancock said, 'Where is the passbook now?' He said, 'I lost it'. Sergeant Hancock said, 'I am told that at your house this morning you told the enquiry officers that you could get it back'. He said, 'No. I lost it three or four months ago'. Round said to the accused, 'You did not say that. You said you could get it back, it hadn't been destroyed and you tried to make a phone call and the phone was out of order'. He said, 'No. You misunderstood me. I said I lost it three or four months ago'. Round said, 'You did not say that. Why else did you make the phone call. You said you could get it back from someone'. He said, 'I'm mixed up'. Sergeant Hancock said, 'Where did you lose the passbook?' He said, 'In Karrinyup somewhere'. Sergeant Hancock said, 'And that was three or four months ago'. The accused said, 'Yes'." Raymond was then questioned as to the manner in which the passbook had been lost and then Sergeant Hancock said: "On the 27th May at the Whitfords agency of the Perth Building Society you withdrew $20.00 from that account by cheque made payable to a Mr. Wilson'. He did not answer. Sergeant Hancock said, 'The handwriting on that withdrawal slip has been identified as yours'. He said, 'It must have been about then that I lost the folder - I lost the passbook and the folder he is referring to'. Sergeant Hancock said, 'That's not three or four months ago is it?' He said, 'I thought it was about then'. Sergeant Hancock said, 'Do you remember operating the account at Whitfords on the 27th May?' He said, 'Yes'. Sergeant Hancock said, 'Why did you get a cheque made payable to Wilson for?' He said, 'I honestly cannot remember'. Sergeant Hancock said, 'You have been operating that account since 1979. You have only operated that account twice since 1979. That was on the 22nd April 1982 when you withdrew $20.00 cash and on the 27th May when you had the cheque made payable to Mr. Wilson and you cannot remember what the cheque was for'. He said, 'I honestly cannot remember what it was for'. .... Sergeant Hancock said, 'On the 5th May this year a man giving the name of Raymond Wilson of 49 Hay Street, Subiaco rang Armaguard and made enquiries about the transporting of a large quantity of gold'. He said, 'I can't say anything about that'. Sergeant Hancock said, 'Why?' He said, 'I can't that's all'. Sergeant Hancock said, 'Why did you open the account with the Perth Building Society in the name of Peter Gulley in 1976?' He said, 'That was just to avoid taxation'. Sergeant Hancock said, 'You never had enough money in the account for it to be a tax dodge'. He said, 'You never know when you might need it, do you?' Sergeant Hancock said, 'There were two Perth Building Society cheques presented to the Perth Mint on the 22nd June for the amounts of $298,000.00 and $104,000.00. Both of those cheques had the Peter Gulley account number on them. How do you explain that?' He said, 'Someone could have found the book and used my number'. Sergeant Hancock said, 'You used the book on the 27th May and now you say you lost it about then. The offenders would have to be pretty slick to find your book and then use your account number on the Mint job on the 22nd June'. He said, 'It could have happened'. Sergeant Hancock further said, 'Where were you on Thursday the 13th May'. He said, 'I can't remember'. Sergeant Hancock said, 'And what about Wednesday the 7th April?' He said, 'Look you won't find anything to tie us in with those fires'. Sergeant Hancock said, 'You know about the Perth Building Society agency at Bull Creek and the WA. Building Society agency at North Perth that were broken into and burned?' He said, 'I read about them'. .... Sergeant Hancock said, 'Did you burn the Peter Gulley passbook?' He said, 'That's an interesting question'. Sergeant Hancock said, 'Well did you?' He said, 'Let's say it's gone'. Sergeant Hancock said, 'Gone where?' He said, 'I lost it didn't I?' .... Sergeant Hancock said, 'Are you worried about involving other people?' He said, 'There's more involved than you realise'. Sergeant Hancock said, 'Who is involved?' He said, 'I can't say anything'. Sergeant Hancock said, 'Can the gold be recovered?' He said, 'Look I can't say anything'. Sergeant Hancock said, 'Why can't you tell me?' He said, 'I'm a soldier'. Sergeant Hancock said, 'Ray I suspect you were involved in the breaks on those building society agencies that were burned down and getting the gold from the Mint by using those dud cheques'. He said, 'You'll have to charge me then won't you, but you'll be battling to tie me in with those fires'."

---------- ***BC8700685 at 62***

Raymond was later interviewed at the Belmont CIB. office when Detective Sergeant Round said to him: "I told you the other day Ray that we would make as many enquiries to prove you weren't involved in this Mint thing as we would to prove you were. Now things don't look too good for you'. He said, 'I know everything does look bad but like I said the other day, last time, I can't say anything. There's too much involved'." Still later when what had transpired between Peter and Detective Sergeant Hancock was outlined to Raymond he was asked if he knew where the white Falcon car was and he answered, "Of course". Detective Sergeant Hancock then said, "Your fingerprint has been identified on one of the cheques that was presented to the Mint in payment for the gold'. He just looked at me and did not say anything'. Hancock said, 'What do you say about that?' He said, 'I didn't touch the cheques'. I said, 'You must have that's the only way your prints could get there'. He then said, 'You blokes aren't putting me on. My

fingerprints were found on one of the cheques?' I said, 'Yes they were'. He said, 'Which cheque?' I said, 'One of the West Australian Building Society ones that were stolen from Conti Sheffields in North Perth. It's the one for $249,000.00'. He said, 'That's a bit of a blow isn't it?' He then said, 'You would have been rapt when you found that'. I said, 'Ray can we get the gold back?' He said, 'I can't say'. I said, 'Can it be recovered. It is possible to recover it?' He shook his head. I said, 'Where is it'. He said, 'You already know where it is'. I said, 'What do you mean'. He said, 'You already know'. I said, 'What do you mean we already know?' He said, 'Someone opened their big mouth this morning'. I said to him, 'I don't know what you are talking about'. He said, 'Don't worry about it then'. I said, 'Ray if we can get that gold back half the problems are over'. He said, 'I can't say anything'. I said, 'Why can't you tell us' and he said, 'There's too much involved'. .... I then said to him, 'I believe that you and Brian both transferred your homes into your wives' names the day before the Mint job. Was that also in case something went wrong?' He said, 'Something like that'. I said to him, 'Right at the beginning of this enquiry I said that it had the feel of a military operation'. He said, 'You can't get away from your training. It becomes part of you'. I said, 'Even down to arranging alibis?' He said, 'That's part of it'. I then said to him, 'Ray you obviously realise that the game is up. Are you prepared to to tell us the full story and help us get the gold back to the Mint?' He said, 'I can't Don. Look you blokes have been pretty good about the whole deal but I can't tell you there's too much involved'."

---------- ***BC8700685 at 63***

Raymond was then asked to read the notes which had been taken by Sergeant Lewandowski and he did so, commenting: "It's a bit hard to decipher in places but it looks pretty right. I've put us in a bit more than I thought I had". Those notes were tendered in evidence before us. Raymond did not sign them.
All of the evidence relating to the police interview of each appellant was before the jury and although denied by each appellant was capable of and must have been accepted beyond reasonable doubt. The appellants' argument that Raymond's fingerprint on the back of the WABS. cheque presented to the Mint on the 22nd June 1982 is a forgery is based upon the opportunity afforded to the investigating detectives to have perfected such a fraud. The possibility of such a defence was considered by Raymond prior to the trial. To support that view the appellants adduced evidence before us that rubber fingers - Ex. A7 - and metal hands were taken by the police on their third visit to Raymond's house on the 15th July 1982. That evidence is said to have been supported by the evidence of Detective Tovey at AB. p. 715, but a fair reading of the relevant passage does not bear out such an inference. Furthermore Tovey has now sworn before us that no hands were taken from Raymond's house on the 15th July 1982 (AB. p. 2529).

---------- ***BC8700685 at 64***

The forgery argument is further supported it is claimed by the failure of the police to photograph the ninhydrin development of the crime mark until the 15th July 1982 upon which day Raymond was arrested and fingerprinted on the false name charge. This enabled Detective Sergeant Henning to make a comparison. But say the appellants the police had access to Raymond's fingerprints taken in 1976. Finally suspicion is complete for when the enhanced photographed crime mark was forwarded from ANU. to Perth on the 26th July 1982 the ninhydrin developed crime mark could no longer be seen on the back of the WABS. cheque. This of course does happen particularly when the ninhydrin developed print is exposed to light as was the case in the photographing which took place at ANU. All of this evidence may be said to be relevant but in my opinion, for reasons expressed already, it is neither credible, cogent nor compelling. The appellants argued before the jury that they had been framed by the police and that argument has continued. The evidence of their experts stops short of supporting the forgery and it must be remembered that each expert changed his final opinion when provided with more adequate material. On the other hand independent experts called by the respondent have denied the possibility of a forgery.
The argument that the police had access to Raymond's fingerprints prior to the 15th July 1982 is not supported by the evidence and is not relevant when it is appreciated that Raymond did not become a suspect until about the 12th July 1982. Nor is the failure of the police to photograph the ninhydrin developed crime mark prior to the 15th July 1982 relevant. Of particular importance is the manner in which Ex. A7 was put into evidence in the trial and used before this Court as if it had been taken from Raymond's house on the 15th July 1982. It was not until Mr. Cannon was called to give evidence that we were informed that Ex. A7 was manufactured shortly before the appellants were tried.

---------- ***BC8700685 at 65***

Nor have we had produced to us the latent rubber replica finger alleged to have been used to have perfected the forgery. The very nature of the crime mark itself and its position upon the cheque militates in my opinion against the

suggestion of forgery. In weighing the appellants' evidence and argument on this ground against the background of the trial evidence I am unable to find that a miscarriage of justice has occurred. On the contrary I am firmly of the opinion that the jury's verdict of guilty as against Raymond has been confirmed.
I have already rejected Peter's grounds of appeal relating to the allegation that the sketch made by Detective Sergeant Pierce was copied from a passport or other photograph of Peter. Peter was never identified thereby though there was clearly evidence before the jury that he identified himself when confronted by Henry. On the other hand the Talbot Note is very strong evidence against Peter supported as it is by the witnesses Gregory and Ellen. Nothing said by Roberts is sufficiently credible or cogent to enable the suggestion that Peter's trial was in any way unfair to be made. Both appellants allege serious misconduct against the police in the course of the trial and this fact was again pointed out to the jury by the learned trial Judge.

---------- ***BC8700685 at 66***

Alibi evidence was also before the jury as indeed was the argument that the failure of the police to photograph the crime mark before the 15th July 1982 supported the allegation that Raymond's print did not exist thereon prior to that date. So too was the claim that Raymond's fingerprint was available to the police from 1976. In essence the appellants' pleas are that the whole of the police evidence against them was fabricated. Such a serious charge has in no way been substantiated. In the course of this exercise the appellants have cast their net wide and, in my opinion, have implicated innocent parties without justification. I am far from persuaded that any miscarriage of justice has occurred in respect of Peter. For these reasons I am of the opinion that each of these appeals should be dismissed.

---------- ***BC8700685 at 1***

Olney Jbackground

TO APPEALS On 7th February 1983 the appellants (hereafter referred to respectively simply as Raymond and Peter) and their brother Brian Mickelberg were arraigned in the District Court at Perth upon an indictment charging the following eight counts: (1) That between 1st April 1982 and 23rd June, 1982 at Perth they conspired together to defraud the Director of the Perth Mint by inducing him to part with a quantity of gold without receiving payment therefor. (2) That on 7th April, 1982 at North Perth they broke and entered the building of Conti Sheffield Estate Agency Pty. Ltd. and therein stole a quantity of blank cheque forms the property of The West Australian Building Society. (3) That on the date and at the place aforesaid they wilfully and unlawfully set fire to a building. (4) That on 13th May, 1982 at Bull Creek they broke and entered the building of one Hazel Lily Bradbury trading as HL. Bradbury and Associates and therein stole a quantity of blank cheque forms the property of Perth Building Society. (5) That on 13th May, 1982 at Bull Creek they wilfully and unlawfully set fire to a building. (6) That on 22nd June, 1982 at Perth by falsely pretending to an employee of the Director of the Perth Mint that a cheque numbered 811157 in the sum of $104,492.50 was a good and valid security for that amount, they obtained from the Director of the Perth Mint a quantity of gold with intent thereby to defraud. (7) That on 22nd June, 1982 at Perth they, by falsely pretending to an employee of the Director of the Perth Mint that a cheque numbered 551533 in the sum of $249,932.74 was a good and valid security for that amount, they obtained from the Director of the Perth Mint a quantity of gold with intent thereby to defraud. (8) That on 22nd June, 1982 at Perth they, by falsely pretending to an employee of the Director of the Perth Mint that a cheque numbered 811161 in the sum of $298,550.00 was a good and valid security for that amount, they obtained from the Director of the Perth Mint a quantity of gold with intent thereby to defraud. Each pleaded not guilty to each count. On 4th March 1983 the jury returned guilty verdicts against Raymond and Peter in respect of all counts and on counts 1, 6, 7 and 8 against Brian Mickelberg. Substantial sentences of imprisonment were imposed. All three subsequently appealed to the Court of Criminal Appeal. On 14th November 1983 Brian Mickelberg's appeal against conviction was allowed and the convictions quashed. It is unnecessary to detail the course of various appeals instituted by Peter except to say that apart from a minor variation to the sentence, they were unsuccessful. On 14th September 1983 Raymond filed an application for an extension of time within which to seek leave to appeal against his convictions and on 8th February 1984 that application was refused. In December 1986 Raymond again made application for an extension of time within which to appeal against all 8 convictions and in due course that application was granted. On 20th January 1987 Peter presented a petition to the Governor pursuant to s21 of the Criminal Code seeking the exercise of the Royal prerogative of mercy and on 22nd May 1987 the Attorney General referred the whole case to the Court of Criminal Appeal. Pursuant to s21(a) of the Criminal Code the case is required to be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a convicted person. The Court directed that the reference of Peter's

petition (now designated as Appeal No. 64 of 1987 and hereafter referred to as an appeal) be heard with Raymond's appeal (Appeal No. 187 of 1986).

---------- ***BC8700685 at 3***

GROUNDS OF APPEAL The grounds relied upon in support of Raymond's appeal, although substantially similar in terms to the first seven grounds in Peter's appeal, are not identical therewith and accordingly same are set out hereunder in full. 1. The learned trial judge had told the Jury in his final direction that: "Perhaps the most direct evidence against him (Raymond Mickelberg) is the fingerprint on the West Australian Building Society cheque; one of the three cheques which was handed over on the 22nd June in exchange for the bullion. ... He (Sgt. Henning) told you that there has been no documented evidence of two fingers leaving the same print; each finger leaves a different print. As his evidence in that regard was not challenged you may safely accept that a fingerprint is, in effect, an unforgeable signature." 2. Fresh evidence has since become available which establishes that fingerprint is not an unforgeable signature, and that the 'crime mark' on the WABS. cheque is consistent with being implanted there by a rubber silicone replica of the Applicant's right index finger; further that the crime mark cannot be scientifically proven to be a genuine fingerprint. This evidence is available in the form of affidavits and, if necessary, sworn testimony by four internationally recognised experts being REGINALD JOHN KING, MALCOLM WATSON THOMSON, GEORGE J. BONEBRAKE and ROBERT DALE OLSEN. 3. The learned trial judge further told the jury that: "There is no evidence that his (Raymond's) fingerprint from that time was available to the police officers and you would have expected if it were that when Sgt. Henning found the fingerprint as he has told you, on the 24th June that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records." 4. Fresh evidence has since become available which establishes that the police officers had access to the fingerprints of Raymond John Mickelberg prior to the 15th July 1982 through the Central Fingerprint Bureau for the whole of Australia in New South Wales and that the police officers could have compared those fingerprints with the fingerprint which was allegedly located on the Building Society cheque on 24th June 1982. 5. The importance of this evidence is emphasised by the fact that the learned Crown Prosecutor in summing up to the jury told them that: "When you get items like these cheques which are obviously involved in the fraud you fingerprint them in order to find out if there are any fingerprints on these that happen to be on file." Sgt. Henning says: "I was quite satisfied when I first saw it on the 24th that that print that I have demonstrated in that position was one that I would be able to make an identifiable comparison with". There was further emphasis placed on this subject by the learned Crown Prosecutor in his summing up. 6. The learned trial judge also told the jury that there was no evidence that his fingerprint from that time was available to the police officers and "you would have expected if it were that when Sgt. Henning found the fingerprint, as he told you on the 24th June, that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records". 7. There now exists fresh evidence which had it existed at the time of the trial would have wholly changed the significance of Exhibit 21 at the trial. That evidence is contained in the affidavits of WILFRED RYAN, JAMES PROVEN, JEAN SHEPHERD, GRAHAM DAVIES and JOHN DOMINGO which are filed with this Notice of Application for Leave to Appeal. 8. In all the circumstances the verdict of the jury is unsafe and unsatisfactory if the fresh evidence referred to above is considered in combination with the evidence given at the trial. The verdict of guilty ought in the minds of reasonable men be affected as the fresh evidence at the least is sufficient to remove the certainty of the Applicant's guilt which the evidence at the trial produced. The fresh evidence is evidence of great importance.-

---------- ***BC8700685 at 5***

The grounds relied upon by Peter as finally amended at the commencement of the hearing of the appeal are: 1. The trial judge erred in law in directing the Jury in his final direction that: "Perhaps the most direct evidence against him is the fingerprint on the West Australian Building Society cheque; one of the three cheques which was handed over on the 22 June in exchange for the bullion...He (Sgt. Henning) told you that there has been no documented evidence of two fingers leaving the same print; each finger leaves a different print. As his evidence in that regard was not challenged you may safely accept that a fingerprint is, in effect, an unforgeable signature." 2. Fresh evidence has since become available which establishes that the fingerprint on the WABS. cheque ("the crime mark") is a forgery. This evidence is available in the form of affidavits and if necessary, sworn testimony by four internationally recognised experts being REGINALD JOHN KING, MALCOLM WATSON THOMSON, GEORGE J. BONEBRAKE and ROBERT DALE OLSEN. 3. The learned trial judge erred in law in directing the Jury that: "There is no evidence that his fingerprint from that time was available to the police officers and you would have expected if it were that when Sgt. Henning found the fingerprint as he has told you, on the 24 June that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records. 4. Fresh evidence has since become available which establishes that the police officers had access to the fingerprints of Raymond John Mickelberg prior to the 15 July 1982 and that the police officers could have compared those fingerprints with the

fingerprint which was allegedly located on the Building Society cheque on the 24th June 1982 and not photographed until the 15th July 1982. The importance of this fresh evidence is emphasised by the fact that the learned Crown Prosecutor in summing up to the jury told them that: "When you get items like these cheques which are obviously involved in the fraud you fingerprint them in order to find out if there are any fingerprints on them that happen to be on file." Sgt. Henning swore: "I was quite satisfied when I first saw it on the 24th that that print that I have demonstrated in that position was one that I would be able to make an identifiable comparison with." The fresh evidence suggests that the crime mark was not present on the WABS. cheque on 24 June 1982 and did not appear on the WABS. cheque until 15 July 1982. 5. The learned trial judge erred in law in directing the jury that there was no evidence that his (Raymond John Mickelberg's) fingerprint from that time was available to the police officers and when he directed the jury that "you would have expected if it were that when Sgt. Henning found the fingerprint, as he has told you on the 24 June, that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records." 6. There now exists fresh evidence which had it existed at the time of the trial would have proved that Exhibit 21 at the trial, purported to be a photofit constructed by the Penry photofit method:- (a) was not a photofit constructed by the Penry photofit method, (b) does not contain a single feature of the Penry photofit facility, and (c) was constructed from a passport photograph of Peter Mickelberg. 7. The learned trial judge erred in law in accepting Exhibit 21 into evidence as neither Mr. nor Mrs. Allen nor Mr. Henry could identify Peter Mickelberg as the man they described for the purpose of the construction of Exhibit 21. 8. On 7th December 1982 an indictment was presented against the three accused Raymond Mickelberg, Peter Mickelberg and Brian Mickelberg which said indictment alleged, inter alia, one count of conspiracy which said count was in the following terms: "That between the First day of April in the year of Our Lord one thousand nine hundred and eighty two and the twenty third day of June 1982 at Perth Raymond John Mickelberg, Brian Mickelberg and Peter Mickelberg conspired together to defraud the Director of the Perth Mint by inducing him to part with a quantity of gold without receiving payment therefor." The said count of conspiracy, according to its terms, was dependent upon the three accused being found guilty of the alleged conspiracy and it was an essential element of the said count. It followed that the acquittal of any one of the said accused as a matter of law, required an acquittal of both the other accused. There was no alternative count nor was it alleged that Raymond John Mickelberg and Peter Mickelberg conspired together. Nor has any fresh indictment alleging a conspiracy between the said Raymond John Mickelberg and Peter Mickelberg been presented. In fact one of the three accused the said Brian Mickelberg was on the 4th day of November 1983 acquitted of the count of conspiracy as alleged in the said indictment and by reason of the acquittal of the said Brian Mickelberg and in accordance with the terms of the said indictment the record of conviction of the remaining two accused is inconsistent with the acquittal of the said Brian Mickelberg and as such the said Peter Mickelberg and Raymond John Mickelberg should be acquitted. 9. Further to Ground 8 above the overt acts which allegedly supported the conspiracy charge were in fact the substantive charges set out in the indictment. As such, the conspiracy charge must fail as in fact the substantive charges were adjudicated on in the same indictment. As the Crown elected to present the conspiracy charge as the overt acts all charges on the said indictment should be dismissed and Peter Mickelberg should be acquitted of all charges. 10. There is new evidence which establishes that there has been a miscarriage of justice:- (a) An audio taped conversation between Peter Mickelberg and Raymond John Mickelberg and Det. Sgts. Hancock and Hooft which casts doubt on the alleged admissions made at Belmont Police station on 26 July 1982 by the Petitioner. (b) Evidence that Mr. Cannon the Petitioner's instructing solicitor appeared for the Arpad Security Agency Pty Ltd and Arpad Lazlo Bacskai on or about 20 July 1982 in the Court of Petty Sessions, Perth in relation to charges of exceeding the terms of their security licence in relation to the disappearance of $250,000 of gold from a TAA flight on 11 June 1982. (c) Evidence that Mr. Cannon was at the time of acting for Peter Mickelberg, acting for one of the police officers (Det Sgt. Andrew Tovey) involved in the prosecution of the accused and, according to the instructions of the accused Peter Mickelberg, the said Det Sgt Andrew Tovey lied on his oath and concocted admissions by Peter Mickelberg. This evidence is in the form of an affidavit sworn by the Petitioner. (d) Evidence of the Petitioner's occupancy of the flat at 7/112 Rupert St, Subiaco in the form of affidavits sworn by Pauline Marie Lee, Wendy Sylvia Baker and Betty Jean Rebakis and filed in this Honourable Court in CCA 176/177/83. (e) Evidence that Exhibit 20, commonly known as the "Talbot Note" tendered through Mr. and Mrs. Allen purportedly as a document written by a person who allegedly bought a 1965 white Falcon for $400.00 on the 25 May 1982 could not be proved beyond reasonable doubt to have been written by Peter Mickelberg. This evidence is in the form of an affidavit sworn by Geoffrey W. Roberts on 19 August 1987. (f) Evidence of the Petitioner's alibis on:- (i) 25 May 1982 in the form of an affidavit sworn by Grant Edwin Carroll and (ii) 22 June 1982 in the form of affidavits sworn by Mr. and Mrs. Stacey. 11. The learned trial judge erred in law in admitting into evidence Exhibit 23 and 78 when the best evidence in the form of eye witnesses called by the Crown were unable to identify the said Peter Mickelberg. 12. The learned trial judge erred in law in not discharging the jury when the Crown displayed to the jury the prior conviction of Peter Mickelberg to wit possession of an unlicenced firearm in Exhibit 102. 13. Fresh evidence has since become available which establishes that police investigating officers investigating the Perth Mint Swindle fabricated evidence. This evidence is available in the affidavits sworn by Arthur John Walsh sworn 28th July 1987 and 12th August 1987 and sworn testimony by Mr. Bill Barrett, Press

Secretary to the Premier of Western Australia. 14. In all the circumstances the verdict of the Jury is unsafe and unsatisfactory if the fresh and new evidence referred to above is considered in combination with the evidence given at the trial. The verdict of guilty ought in the minds of reasonable men be affected as the fresh and new evidence at the least is sufficient to remove the Petitioner's guilt which the evidence at the trial purportedly produced. The fresh and new evidence is evidence of great importance. THE CROWN CASE AT THE TRIAL

---------- ***BC8700685 at 10***

Whilst it is unnecessary to detail every aspect of the evidence led against the appellants at the trial it is appropriate to give a broad outline of the Crown case. More detailed reference will be made to particular portions of the evidence where necessary in dealing with the individual grounds of appeal.
On 22nd June 1982 in three separate transactions the Perth Mint supplied gold bullion in exchange for what purported to be building society cheques for various sums, each sum being the amount appropriate to the value of the bullion supplied. These are the transactions referred to in counts 6, 7 and 8. The cheques referred to in counts 6 and 8 appeared to be cheques drawn by the Perth Building Society (PBS.) on its bank and the cheque referred to in count 7 appeared to be a cheque drawn by the West Australian Building Society (WABS.) on its bank. Each cheque proved to be a forgery.

---------- ***BC8700685 at 11***

Blank PBS cheque forms 811157 (count 6) and 811161 (count 8) had been supplied by PBS. to HL. Bradbury and Associates a firm of estate agents at Bullcreek which also conducted an agency of the PBS. Blank WABS. cheque form 551533 (count 7) had been supplied to Conti Sheffield Estate Agency Pty Ltd of North Perth which conducted an agency of WABS. On the night of 7th April 1982 the premises of Conti Sheffield Estate Agency were broken into and same were set fire to. A quantity of blank WABS. cheque forms, including form 551533, was missing after the fire. On the night of 13th May 1982 the premises of HL. Bradbury and Associates were broken into and set fire to. A quantity of blank PBS. cheque forms, including forms 811157 and 811161, was missing after the fire.
Each of the cheques referred to in counts 6 and 8 referred to the same PBS. account number which was traced to an account in the name of one Peter Gulley. Initially Raymond denied any knowledge of Peter Gulley but subsequently admitted, and in evidence at the trial repeated his admission, that he had opened the account in the name of Peter Gulley some years before and that he had on occasions operated on that account. A fingerprint said to be identical with the fingerprint of Raymond's right index finger was found on the reverse side of WABS. cheque 551533.
Late in April 1982 a man who gave his name as Bob Fryer arranged by telephone to rent suite 3 in office premises at Barker House 49 Hay Street Subiaco for a term of 2 months. He later arranged, again by telephone, for the name Fryer Investments to be exhibited on the directory board of the building. Payment of the tenant's bond and rent was made by bank cheque forwarded by post and the key to the premises was forwarded by post at the request of the tenant to an address in Mount Magnet. Early in May 1982 a man giving his name as Frank Harrison arranged to rent suite 15 in the same building. All arrangements were made by telephone and the bond and rent money were paid by bank cheque forwarded by post. The manageress of the building who had the conduct of the letting arrangements had no personal contact with either tenant except by telephone or through the mail. On 20th May 1982 an application was made for the connection of a telephone service to suite 15 in the name of Frank Harrison. The application was typewritten.

---------- ***BC8700685 at 12***

There was evidence at the trial given by a police scientific branch expert that each of the three cheques referred to in counts 6, 7 and 8 and the telephone application form in respect of suite 15 was typed on the same typewriter.
On 25th May 1982 a person who it was said appeared to be wearing a wig and dark rimmed glasses purchased from a Mr. Allen of Armadale a 1965 model white coloured Ford Falcon car. The purchaser gave his name as Robert Talbot and wrote that name and an address on a piece of paper (the Talbot note) which he gave to Mr. Allen. A police handwriting expert gave evidence at the trial identifying the writing on the Talbot note as being the writing of Peter. On the morning of 22nd June 1982 the white Ford Falcon car which had been purchased from Mr. Allen was seen to be parked in a laneway near the rear of Barker House. A young man was seen in the car on two occasions. The car then had fitted in it a CB. radio. On 25th August 1982 the same car was found abandoned and burnt out.

---------- ***BC8700685 at 13***

In the week preceding 22nd June 1982 various arrangements were made in each case by telephone with two separate security firms for the picking up from suite 3 of a tool box and a cheque. Similar arrangements were also made with a third security firm to pick up a cheque from suite 3. In each case the security firms had instructions to go to the Perth Mint and in exchange for the cheque obtain a quantity of gold bullion previously ordered and further to transport the bullion once obtained from the Mint to suite 3. Other arrangements were made with a fourth courier for the transportation of three boxes containing the gold bullion from suite 3 to Jandakot airport. Instructions with respect to the latter activity were given to the courier by means of messages conveyed by CB. radio. There was further evidence from which the Crown invited the jury to draw inferences first, that in 1980 and 1981 both appellants having purchased gold bullion from the Perth Mint had knowledge of what was involved in such transactions and that the Mint accepted building society cheques at their face value, and second, that a cheque for $20 having been issued by PBS. on 27th May 1982 by way of withdrawal from the Peter Gulley account, Raymond was in possession of a model for forging the cheques used to acquire the gold on 22nd June 1982.
At the trial police officers gave evidence of conversations with both Raymond and Peter. Neither of the accused signed any statement or record of interview and neither directly admitted participation in any of the offences charged. However, the conversations deposed to by the several police witnesses, if accepted by the jury, would nevertheless amount to a tacit admission of the involvement of the accused. THE DEFENCE CASE AT THE TRIAL

---------- ***BC8700685 at 14***

Each appellant gave evidence at the trial and denied any involvement. There was some alibi evidence in respect of the two nights when the Conti and Bradbury estate agencies were set fire to and in respect of the 22nd June 1982. Peter denied having purchased the white Ford Falcon car from Mr. Allen and denied that the Talbot note was written by him. He denied being the person seen in the white Ford Falcon car at the rear of Barker House on the morning of 22nd June 1982. Raymond gave evidence that he had handled WABS. cheque 551533 on the 15th July 1982 and that he had been tricked into doing so by the police thereby providing the fingerprint later identified as his. Raymond and Peter each denied making the statements asserted by the police to have been made by him in various conversations during the course of the enquiry and asserted that the police had fabricated this evidence. Peter claimed to have been physically assaulted by the police in the course of the enquiry. THE TRIAL JUDGE'S CHARGE TO THE JURY
The trial judge addressed the jury at considerable length and as exception is taken only to two particular aspects of his Honour's charge it will be convenient to deal with those passages in the context of the relevant ground of appeal.
THE ROLE OF THE COURT OF CRIMINAL APPEAL S689(1) of the Criminal Code provides that on an appeal against conviction the Court shall allow the appeal if it considers the verdict of the jury should be set aside on the grounds either that it is unreasonable, cannot be supported having regard to the evidence or that the judgment of the court below should be set aside on the ground of a wrong decision on any question of law or that there was a miscarriage of justice. This provision was considered in detail in Mickelberg v The Queen [1984] WAR 191 in which Burt CJ. said at p.194: "That provision certainly does not authorise this Court sitting as a Court of Criminal Appeal to overturn and to quash a jury's verdict simply because on the material before it it would not have found the facts as they were found by the jury. An appeal from a jury's verdict, controlled as it is by that subsection, is not a rehearing of the case before a jury of three judges. On the other hand, the jurisdiction to allow an appeal under that provision is not denied simply because on the material it can be said that there was evidence before the jury which as an exercise in logic can be said to be capable of sustaining the verdict. Even if that be the case, the verdict may be, within the meaning of the subsection, 'unreasonable' or one which 'cannot be supported having regard to the evidence'. It has been held that even if the evidence led before the jury is capable of sustaining their verdict this court under the formula to be found in this subsection will interfere if in all the circumstances it is thought that it was dangerous to convict. Plomp v The Queen, (1963) 110 CLR. 234, per Dixon CJ. at p.244. In forming that opinion the court must, of course, act on that view of the facts which in its opinion the jury were entitled to take having seen and heard the witnesses, but having done that there is a responsibility in this Court to consider whether none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand. Hayes v The Queen (1973) 47 ALJR 603, per Barwick CJ. at pp. 604-605. See, too, Conroy v The Queen [1976] WAR 91, and R v Smith [1979] 2 NSWLR 299 at p.309 per Street CJ. In considering that question it seems to me to be important and very much to the point to remember that it is the verdict of guilty which is under consideration and it must be the case that it will be dangerous to allow that verdict to stand if this Court is of the opinion that although it is a verdict which can in a general way and in logic be supported by the evidence, it is a verdict which cannot by the same process be sustained to the necessary standard of persuasion. It goes without saying that 'occasions when a verdict can be set aside upon such considerations ... will no doubt be relevantly rare.' Barwick CJ. in Hayes case above at p.605. 'Verdicts, of course, ought not to be and are not in practice set aside except upon very substantial grounds. But it is

one thing to exercise powers with caution and discrimination and another to deny their existence.' Raspor v The Queen, (1958) 99 CLR. 346, at p.352 per Dixon CJ., Fullagar and Taylor JJ." The foregoing passage accurately explains the present state of the law relating to the exercise of the appellant jurisdiction of the Court of Criminal Appeal.

---------- ***BC8700685 at 16***

FRESH AND NEW EVIDENCE AS A GROUND OF APPEAL In Ratten v The Queen 131 CLR 510 Barwick CJ. described three instances in which a Court of Appeal will find a miscarriage of justice has occurred. Relevant to the present proceedings is the third category of cases as to which he said at p.516: "There is lastly the situation where the miscarriage is that the jury did not have before it evidence not available to the appellant at the time of his trial which, if believed by the jury, was likely to lead to an acquittal, the jury not being satisfied beyond reasonable doubt of guilt. This may be regarded as an instance in which the accused has not had a fair trial. It will be observed that I have limited the last of these instances of miscarriage to the case of the production of evidence not available to the appellant at his trial. The rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law. But the underlying concepts of the adversary nature of a trial, be it civil or criminal, and of the desirable finality of its outcome are valid in relation to the trial of criminal offence." His Honour then went on to describe the nature of a criminal trial as a trial, not an inquisition, in which the protagonists are the Crown on the one hand and the accused on the other. He continued at p.517: "Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not. Consequently if the proceedings are not blemished by error on the part of the judge, whether it be on a matter of law or in the proper conduct of the proceedings, or by misconduct on the part of the jury, there has been a fair trial. It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence. But he must bear the consequences of his own decision as to the calling and treatment of evidence at the trial. Thus, there will be no miscarriage simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted. The accused, nevertheless, will have had a fair trial. But if the new evidence does qualify as fresh evidence it can be said that the trial was not fair. Of course, if by reason of new evidence accepted by it though it may not be fresh evidence, the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the fact that the trial itself has been fair will not prevent the court upon that evidence quashing the conviction."

---------- ***BC8700685 at 18***

More recently the High Court has considered the circumstances in which an appellate court will conclude that there has been a miscarriage of justice on the basis of fresh or new evidence. In Gallagher v The Queen 160 CLR. 392 the Court had occasion to deal with a case in which there was no doubt that if the fresh evidence had been before the jury and had been believed the jury, if it had acted reasonably, would undoubtedly have returned a different verdict. The critical question in that case had to do with the credibility of the evidence. After analysing a number of authorities Gibbs CJ. said at p.399: "It seems to me, with all respect, that where the trial was by jury, the accused was entitled to have the question of his guilt determined by the verdict of the jury, and that the Court of Criminal Appeal in considering the effect of the fresh evidence, should consider what effect it might have had upon reasonable jury. It is not enough that there is a bare possibility that a jury might have been influenced by the evidence to return a verdict of not guilty. On the other hand it is too severe, and indeed speculative, a test, to require that the Court should grant a new trial only if it concludes that the fresh evidence was likely to have produced a different result, in the sense that it would probably have done so. I have had the advantage of reading the reasons for judgment prepared by Mason and Deane JJ. who suggest that the Court of Criminal Appeal will

conclude that the unavailability of the fresh evidence at the time of the trial will have involved a miscarriage of justice if the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence had been before it at the trial. I am in substantial agreement with this statement. However, I would emphasize that no form of words should be regarded as an incantation that will resolve the difficulties of every case. No test can detract from the force of the fundamental principle that the appeal must be allowed if a miscarrige of justice is shown to have occurred. It is only a practical guide to the application of that principle to say that the court will grant a new trial if, having approached the matter with the caution that is always demanded when fresh evidence is produced in a criminal case, and having weighed the credibility of the fresh evidence and considered its cogency in the light of the evidence given at the trial, it considers that a jury might reasonably have reached a different verdict if the evidence had been available at the trial." In the same case Brennan J. observed (at p.410) that: "The miscarriage of justice consists in a conviction which it is likely would not have occurred if the fresh evidence had been given. It is enough that the fresh evidence, if given, would have been likely 'to remove the certainty of the prisoner's guilt'." His Honour went on to say that the likelihood of acquittal is a sufficiently clear criterion and to describe the likelihood as "a significant possibility" introduces a further conception which has a nuance of meaning different from the meaning of likelihood. Dawson J. expressed what appears to be essentially the same concept at p.420 in these terms: "The function of a court of criminal appeal does not extend beyond determining whether the evidence is reasonably capable of sustaining a particular verdict. For this reason, I do not think that it can now be accepted that a miscarriage of justice can only be shown to arise from the discovery of fresh evidence if it can be established to the satisfaction of an appeal court that the fresh evidence is likely to produce a different verdict. It will be sufficient if, upon the whole of the evidence consisting of the evidence at the previous trial together with the fresh evidence, a court of criminal appeal reaches the conclusion that a jury might entertain a reasonable doubt about the guilt of the appellant. A court will not, of course, reach such a conclusion lightly and will bear in mind that the evidence led at the previous trial was sufficient in the opinion of the jury to establish the guilt of the appellant beyond reasonable doubt. For this reason a verdict will not be disturbed unless the fresh evidence is relevant, cogent and plausible. In the end, however, the question remains whether on the whole of the evidence, including the fresh evidence, a jury might reasonably acquit, not whether it is likely to do so. In making these observations I have had the advantage of reading the reasons for judgment of Mason and Deane JJ. They express the view that an appellate court will only conclude that the unavailability of new evidence at the time of a trial involves a miscarriage of justice if it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the applicant of the charge had the new evidence been before it in the trial. With respect, I do not think that the use of the expression 'significant possibility' lays down a standard which is different from that which I have endeavoured to express in what I have already said. In particular, the use of that phrase involves the rejection of any test based upon likelihood of acquittal. I have thought it preferable to express myself as I have because it seems to me that if there is any real possibility of acquittal by a reasonable jury, it must always be significant when considering miscarriage of justice. For that reason it seems to me to be better to avoid any attempt to reformulate the accepted tests, such as that used by Fullagar J. in Mraz (1955) 93 CLR. 493 at p.514, which have been found to be of practical assistance. But I do not understand Mason and Deane JJ., in speaking of a significant possibility of acquittal, to be laying down any new or different test for ascertaining whether there has been a miscarriage of justice in fresh evidence cases. Rather I think that they are emphasizing that those cases are of a special nature because an appellate court must consider the probative value of the fresh evidence and must do so against evidence which has already been accepted by a jury as establishing guilt. In that context, the fresh evidence must be of real significance for the court to conclude that there is a possibility that a jury might reasonably acquit. But if it does so conclude, then to my mind it must also conclude that there is a miscarriage of justice."

---------- ***BC8700685 at 20***

In the present appeals there is no issue between the parties as to the appropriate principles to apply and it is upon the basis of the High Court judgments in Gallagher v The Queen that the issues raised in these appeals should be determined.

THE CONDUCT OF THE APPEAL Upon the hearing of the appeal each appellant was separately represented by counsel. The Court had before it the entire transcript of the trial proceedings and copies of the documentary exhibits adduced at trial. In addition the other physical exhibits were available. The appeal papers included affidavits sworn by various witnesses whose evidence was said by the appellants to be either fresh or new and further affidavits of witnesses sought to be called by the Crown in reply. Each appellant called such witnesses as he desired and with some minor exceptions the evidence in chief of those witnesses was contained in the filed affidavits. Witnesses were cross-examined and re-examined in the ordinary manner of evidence given at trial and numerous further exhibits were tendered. The Crown then called its witnesses who were dealt with in the conventional manner. Counsel for the appellants and the Crown then addressed the Court and the appellants' counsel were each given the opportunity to make a reply.

BC8700685 at 21

THE FINGERPRINT EVIDENCE At the trial Sergeant Kenneth George Henning testified as to his qualifications as a fingerprint expert and no issue was raised as to his standing in that respect. He described a fingerprint as a reproduction of the ridges that appear on the skin that covers the hands. He said the fingerprint is a rubber stamp effect that is caused by depositing perspiration which exudes from the pores of the skin onto another object. Any smooth object is suitable for having a fingerprint imprinted on it and prints can be left on paper. The paper acts like blotting paper absorbing the perspiration and when chemically treated with a ninhydrin reagent the otherwise invisible fingerprints appear. There has been no documented evidence to say that two fingerprints have ever been found to be the same except from the same finger. None of the foregoing was challenged either at the trial or on the appeal.

BC8700685 at 22

Henning first became involved in this case on 24th June 1982 when he received from the second in charge of the police scientific branch, the cheques referred to in counts 6, 7 and 8. He treated them with a ninhydrin reagent which developed some fingerprints that were identifiable as such and some smudge marks that were not identifiable as fingerprints. On the WABS. cheque there were two identifiable fingerprints. On one PBS. cheque there was one and on the other there was none.

On 25th June 1982 Henning attended at the Perth Mint to obtain fingerprints from Mint staff for the purpose of eliminating persons who had a lawful cause to have handled the cheques. After completing the elimination process there was one fingerprint on the back of the WABS. cheque not accounted for. He described this remaining print as clear enough for him to be satisfied that he would be able to make an identification from it.

On 15th July 1982 Henning was handed a set of fingerprints in the name of Raymond John Mickelberg. He formed an opinion with regard to the identification of the unaccounted for fingerprint on the WABS. cheque in relation to the fingerprints received on the 15th July but because of the lack of a sufficient number of points of identification he said that that opinion would not have been accepted by the Court.

The WABS. cheque was photographed on 15th July 1982. In the period from when the cheque came into Henning's custody on 25th June 1982 until it was photographed it had been kept in a locked reinforced cabinet in the handwriting exhibit room. Henning and other authorised persons would have had access to it. On 16th July 1982 the WABS. cheque was sent to Canberra for the purpose of ascertaining whether Dr. Hilton John Kobus, a researcher at the Australian National University, could treat it in a way that may enhance the print and thus provide a better basis for comparison. The cheque was returned from Canberra on 26th July 1982 with a number of photographic negatives of the fingerprint. One of these, which Henning considered to be the best and clearest, was enlarged and upon comparison of the enlargement with the fingerprints obtained from Mickelberg on 15th July 1987 he formed the opinion that the print on the cheque was indeed identical with the fingerprint of Mickelberg's right forefinger.

BC8700685 at 23

No issue was taken at the trial concerning the identification of the print on the cheque with Mickelberg's right forefinger nor indeed is it now said other than that the print on the cheque is identical with a fingerprint made by that finger.

Detective Sergeant Donald Leslie Hancock interviewed Raymond on 26th July 1982 (the day on which the photographs of the enhanced fingerprint were received back from Canberra) and testified to having told Raymond on that occasion that his fingerprint had been identified on one of the cheques. Raymond's response was that he had not touched the cheques. In the course of cross-examination by Raymond's counsel it was put to Hancock and he denied that on 15th July 1982 in an interview with Raymond he had shaken the WABS. cheque from a plastic bag for the purpose of showing Raymond the signatures on it and that Raymond had handled the cheque on this occasion. Not only did Hancock deny that Raymond had been shown the WABS. cheque but he also asserted that he had not seen it himself. In his own evidence Raymond asserted that on 15th July 1982 Hancock had shaken something out of a plastic bag and told him to look at it. He says he picked it up by holding it in the corner or possibly by both corners. He identified the document in question as a WABS. cheque.

BC8700685 at 24

A photograph of the cheque taken on 15th July 1982 indicated that the fingerprint in question was on the reverse side near the top of the cheque about one inch in from the corner.

The case put to the jury on Raymond's behalf was that Hancock had induced Raymond to handle the cheque on 15th July 1982 and thereby implant his fingerprint on it. Comment was made on the failure to photograph the cheque until 15th July 1982 notwithstanding that according to Henning the fingerprint had first been developed on 24th June 1982.

Ground 1 in each appeal asserts an error of law by the trial judge in his direction to the jury with respect to the fingerprint evidence. The notices of appeal contain a selective extract from the judge's direction and it is appropriate that the portion quoted should be put into its full context. Having dealt with a number of general matters of law and then specifically with the evidence relating to first Brian Mickelberg and then Peter his Honour continued: "I turn now, members of the jury, to consider the evidence relating to the accused Raymond John Mickelberg. Perhaps the most direct evidence against him is the fingerprint on the West Australian Building Society cheque; one of the three cheques which was handed over on 22nd June in exchange for the bullion. Sgt. Henning, who gave evidence on the fourth day of the trial, told you of his long experience in classifying and identifying fingerprints. He told you that there has been no documented evidence of two fingers leaving the same print; each finger leaves a different print. As his evidence in that regard was not challenged you may safely accept that a fingerprint is, in effect, an unforgeable signature. Sgt. Henning went on to tell you of his getting the three cheques on 24th June last, I think, of examining them and of his noticing one fingerprint on the cheque in question that he could not identify. He went on to tell you then after 15th July he sent the cheque to Canberra where it was treated by Dr. Kobus and that after the cheque and photographs made by Dr. Kobus had been returned he concluded that the cheque in question bore the fingerprint made by the right index finger of the accused Raymond John Mickelberg. Sgt. Henning demonstrated to you, as you have been reminded, the position of the finger when it made the print. If you find, and there is no dispute about it it would seem, that the cheque does bear Raymond John Mickelberg's fingerprint then you will need to ask yourselves: How did the print get there? If it was put there before the cheque was handed over at the Mint it would seem, and of course this is a matter of inference entirely for you, that the accused Raymond John Mickelberg was definitely involved in the swindle. If he was not involved how else could his print come to be on the cheque? The accused has told you that he handled the cheque in the course of an interview with Det-Sgt. Hancock on 15th July. He said that Sgt. Hancock showed him a cheque, shook it out of a plastic bag, and told him that his handwriting was on it and referred him to the 't's', some of the 't's', appearing in the handwriting. The accused said that he handled that cheque. In evidence he said that he handled the cheque by picking it up at the corners. Sgt. Hancock told you, when it was put to him in cross-examination, that nothing like that happened. He said that the accused did not handle the cheque in the course of the police investigations. On behalf of the accused it is said that there is no independent evidence to show that the print was there before 15th July. Mr. Cannon put to you that there was no photograph taken of the print before then. Mr. Davies has commented on that and reminded you of Sgt. Henning's testimony as to finding the print on the cheque on 24th June. If you accept Sgt. Henning's evidence you would find, it would seem, that the print was there well before the accused Raymond John Mickelberg was interviewed by the police. On his behalf it is put to you also that if the fingerprint was there before 15th July it should have been identified before then, before Raymond Mickelberg was interviewed at all, because he has told you his fingerprints had been taken in 1975 or 1976 and therefore were on file and available to the police officers. As Mr. Davies took pains to point out to you, the only evidence to that effect is his. No-one else has said that his fingerprints were taken in 1975 or 1976. There is no evidence that his fingerprint from that time was available to the police officers and you would have expected, if it were, that when Sgt. Henning found the fingerprint, as he has told you, on 24th June that it would have been compared with Raymond John Mickelberg's fingerprint if it were in the records."

---------- ***BC8700685 at 26***

The final paragraph of the foregoing extract relates to issues raised in grounds 3, 4, 5 and 6 of Raymond's appeal and grounds 3, 4 and 5 in Peter's. Consideration thereof can be deferred for the moment.

The comment to which the appellants take exception in ground 1 is no more than an observation based upon the undisputed evidence given at the trial. Viewed in its full context it cannot be construed as an assertion that it is impossible to forge a fingerprint in the sense of implanting a fingerprint on an object otherwise than by means of the actual touching of the object by the finger in question. His Honour has simply repeated the evidence which neither then nor now is disputed, namely that there has been no documented evidence of two fingerprints leaving the same print. He went on to canvass the evidence as to how the fingerprint came to be on the cheque. The matter was left to the jury in accordance with the evidence.

---------- ***BC8700685 at 27***

In Peter's notice of appeal ground 2 asserts that since the trial fresh evidence has become available which establishes that the fingerprint on the WABS. cheque is a forgery. Despite what may have been deposed to in the

affidavits of the four persons named in the notice of appeal, the sworn testimony of those persons when given at the appeal did not support the assertion of forgery.
Ground 2 in Raymond's notice of appeal raises a similar but significantly different issue in that it is there asserted that fresh evidence has become available which establishes that the fingerprint in question is consistent with having been implanted on the WABS. cheque by a rubber silicon replica of Raymond's right index finger. And further it is said that it cannot be scientifically proven to be a genuine fingerprint.
There was ample evidence given at the appeal and it was not contested that for many years it has been known by law enforcement authorities throughout the world (including Henning) that it is possible to make a silicone rubber replica of a finger which when coated with perspiration, ink or other suitable substance will leave a mark on an object onto which the replica is then placed similar to a fingerprint that could be identified as the fingerprint of the person from whom the replica was made. To that extent therefore a fingerprint can be forged and this fact has been well known for a considerable time. It cannot therefore be said that the evidence which the appellants seek to lead with respect to the capacity to forge a fingerprint is fresh evidence. Indeed the evidence discloses that prior to the trial those advising the appellants had consulted an expert from Queensland who came to Perth inter alia for the purpose of attempting to establish whether a forged fingerprint could be obtained from certain silicone finger casts that had been made of Raymond's right index finger. The expert was unsuccessful in achieving a recognisable print with the casts that were supplied to him at that time and his evidence was not used at the trial.

---------- ***BC8700685 at 28***

As to whether the fingerprint on the WABS. cheque can be scientifically proven to be a genuine fingerprint i.e. the mark left by the touching of the cheque by Raymond's natural right index finger, there is a difference of opinion amongst experts. Despite their earlier assertions made on affidavit that the fingerprint on the WABS. cheque was a forgery, none of the appellants' witnesses was prepared to say more than that it is not possible to say one way or the other. Several of very eminent and experienced witnesses called by the Crown were however prepared to assert not only that it is possible to scientifically establish whether a particular "fingerprint" has been made by a natural finger or a replica finger but they went on to express their separate opinions that the fingerprint in question was indeed made by a natural finger and not a replica.
If for present purposes the evidence is accepted at its most favourable to the appellants, that is that it is not possible to tell whether the fingerprint in question was made by Raymond's natural finger or by a silicone replica thereof it is necessary to consider the new evidence in combination with the evidence at the trial to determine the cogency of the new evidence and whether had the jury been in possession of the new evidence, there is a possibility that it might reasonably have acquitted the appellants.

---------- ***BC8700685 at 29***

At the trial there was evidence that Raymond engaged in a hobby which inter alia involved him in making both silicone and metal casts of hands and further that when his residence at 1 Leach Street Marmion was searched by police officers both rubber and metal hands were seized. The date of seizure is disputed. Defence witnesses said it was on 15th July 1982 whereas the police placed it at 26th July 1982. Police witnesses denied that anything other than metal hands were seized but defence witnesses asserted the contrary. They said that rubber and metal hands were taken. It has already been mentioned that prior to the trial the appellants' experts had endeavoured to produce a recognisable fingerprint with replica fingers provided by Raymond but had not succeeded in doing so. The metal replica hands were not capable of producing a good imitation print. The seizure of the replica hands was raised at the trial in evidence by Raymond and indeed he identified and produced a red replica which he said he had made of his own right hand. But he made no further assertion concerning the hand in his evidence in chief. Counsel for the Crown did however raise the issue in cross-examination when the following exchange took place between him and Raymond: "What is the brass and the rubber hand all about? - Sir, they are the objects, amongst hundreds of others, that were seized from my house. Particular reference was made by Hancock on, I think, 23rd September, from memory, and by Tovey on the (I think) 15th as to what a crazy hobby I had. All right. WITNESS: What or why they wanted them, other than that they thought they were cast in gold, I wasn't sure. MR. DAVIES: Do they have any more significance now? - As far as the police are concerned? As far as you are concerned? - They may well have. Such as? Such as? - Such as they are capable of doing anything. Go on? - And it worried me that Hancock made reference on that day to how good the fingerprints were. Go on? What other significance do they have? - None other than they had an abnormal interest in the fact that they were fine castings and that they took particular interest in the detail. Is that the other significance you are suggesting? - It was significant to me that they took particular interest - My question was: Do they have significance now? - None other than that they were seized, that they were drilled, and the fact that some of the same type of equipment, as is a lot of the other gear that I have, has not been returned No other significance now? - No. None at all? - None at all. To you? - To me. Not making any

suggestion that the police have used them in any way? - I am not in a position to make suggestions about things such as that. Do you think they did? - I don't think they did."

---------- ***BC8700685 at 30***

There can be no dispute that since the trial numerous silicone castings of Raymond Mickelberg's right index finger have been made which are capable of producing a good representation of his fingerprint. At no time either at the trial or at the appeal has it been asserted or even suggested that there existed at 15th July 1982 any cast or other replica of Raymond's right index finger capable of producing a representation of his fingerprint. Indeed the only evidence that has been heard concerning the time when any replica was made is that the red hand tendered at the trial was made long after the appellants were arrested. This was conceded at the appeal by Peter's counsel. There is therefore no new evidence that would point to even a possibility that the fingerprint in question was other than a mark made by Raymond's natural finger.

---------- ***BC8700685 at 31***

The appellants place a great deal of store on the fingerprint issue in this case mainly it would seem because of the trial judge's opening comment that "perhaps the most direct evidence against (Raymond) is the fingerprint on the West Australian Building Society cheque". That comment was of course true but it is one thing to say that a particular piece of evidence is the most direct evidence against an accused and it is another thing to say that it is the only evidence against the accused. In this case there was a substantial amount of circumstantial evidence implicating Raymond not to mention the evidence of his conversations with the investigating detectives which, if accepted as having occurred as the police witnesses said, were tantamount to an admission of his involvement in the conspiracy and the other offences charged. The Crown case was not in any way dependent upon the fingerprint on the WABS. cheque. It was one of many pieces of evidence which tended to link Raymond with the fraud committed on the Mint.
The second significance attached to the claim that the fingerprint on the WABS. cheque was forged by the police is that it is said that the forgery is but one of several pieces of evidence fabricated by the police which had they been disclosed to the jury would have cast doubt upon the credibility of the police officers who testified as to the conversations said to have taken place with Raymond and Peter. This latter argument is of course dependent upon the appellants making good the fabrications and so far as the assertion that the police forged the fingerprint is concerned there is no evidence either new or old that supports the proposition that the fingerprint in question is a forgery nor that the police had the capacity to create the forgery at the time it is said to have been made.

---------- ***BC8700685 at 32***

It follows that there is no substance in either of the first two grounds in each appeal.
Grounds 3, 4, 5, and 6 in Raymond's appeal and grounds 3, 4 and 5 in Peter's are part of the case mounted by the appellants suggesting the fabrication of the fingerprint evidence. In view of the conclusion already reached it is unnecessary to consider the same but because of the serious imputations made against the investigating police officers it is appropriate that some reference be made to the relevant evidence.
The appellants' assertion is that Raymond's fingerprint was available to the investigating police officers prior to 15th July 1982 and that therefore had the fingerprint in question been developed on the WABS. cheque on 24th June 1982 it would have been possible for the police to identify it as being that of Raymond from the very outset. Furthermore a sinister implication is sought to be drawn from the fact that the cheque with the developed print was first photographed on 15th July 1982 rather than on some date prior thereto on or after the 24th June 1982.

---------- ***BC8700685 at 33***

The evidence given at the appeal indicates that at the time that Raymond gave to the police a full set of his fingerprints on 15th July 1982 (he appears to have done so on two occasions on that day, once voluntarily and once after being charged with an offence concerning the use of the false name Peter Gulley) the police were aware that there was already within the records of the department a file or docket in the name of Raymond John Mickelberg whose date of birth corresponded with that of the appellant and from whom fingerprints had been obtained upon his apprehension by the Federal police on a minor charge on 9th June 1976. That docket records that on 11th June 1976 the fingerprints were destroyed at Raymond's request. Other evidence indicates that the practice of the Federal police in 1976 was to take three sets of fingerprints from persons who were charged with offences. One set was ultimately sent to the Federal police office in Canberra, one to the National Fingerprint Bureau maintained on a

co-operative basis by the States and the Commonwealth in Sydney and another to the local State police. The latter set of prints only were destroyed in 1976. No request was ever made to either the Federal police in Canberra or the National Bureau in Sydney for the destruction of the other prints. As at the 24th June 1982 when, according to the police evidence, the fingerprint in question was first developed, there was no reason to suspect Raymond as being involved in these offences and accordingly it is understandable that no enquiry was made concerning the availability of Raymond's fingerprints. Furthermore, the fingerprint as first developed by Henning was of poor quality, hence his wish to have it "enhanced" by Dr. Kobus. It is misleading simply to quote his evidence that he was satisfied on 24th June 1982 that he would be able to make an identifiable comparison with the print and to suggest that he should then have been able to identify it as Raymond's.

---------- ***BC8700685 at 34***

Raymond had first become a serious suspect on 12th July 1982 when the police were able to obtain from the Department of Foreign Affairs a passport application that he had signed some time earlier and from which they were able to reach a tentative conclusion that the application in respect of the opening of the Peter Gulley account was written by him. He was not interviewed by the police until 15th July 1982 and it was on that day that he finally, after an initial denial, admitted to being the person who operated the Peter Gulley account and on that day he gave the police a full set of his fingerprints. It is true that between the 12th and 15th July 1982 it would have been open to the investigating officers to check whether his fingerprints were on record locally and had they done so they may well have been led to think that despite the destruction of the local copy of the prints in 1976 other copies could be available elsewhere in Australia. That no such enquiry was made is beyond dispute. The appellants attach a sinister implication to the failure to make the enquiry suggesting that it indicates that indeed there was no fingerprint on the cheque until 15th July 1982. As part of the appellants' argument attention is drawn to the failure to photograph the cheque until 15th July 1982.

---------- ***BC8700685 at 35***

Whilst there is no doubt that had the cheque been photographed with the fingerprint on it on the 24th June 1982 or some day prior to the 15th July 1982 the question presently under consideration could not have arisen, the explanations given by the police for adopting the course of conduct that was followed has about it the ring of truth and there is no competing evidence. Henning says he developed the fingerprint on the cheque on 24th June 1982 by a ninhydrin process. It is agreed that this process of development is a continuing one and the ultimate development may not occur for some days or even a week. There is evidence also that if exposed to bright light the developed fingerprint may tend to fade although there seems to be no certainty about the extent of fading. It is nevertheless prudent practice once a fingerprint has been developed by the ninhydrin process to photograph it to guard against the possibility of fading. Henning went on leave for nine days after the 25th June 1982, returning to duty on 4th July 1982. He made no arrangements for the photographing of the cheque before going on leave and in his absence no thought was given to that matter by any other officer. Upon returning from leave he overlooked the need to photograph the cheque until 15th July 1982 when enquiries made concerning the process of enhancement adopted by Dr. Kobus revealed that there was a strong prospect of the existing print disappearing as a result of the further treatment to be administered to the cheque. Thus it was that the fingerprint on the WABS. cheque was first photographically recorded on 15th July 1982 prior to the cheque being sent to Dr. Kobus for enhancement. At that stage fingerprints had been taken from Raymond in the ordinary course of the investigation and Henning had reached the conclusion that the print was indeed from Raymond's right index finger although without further enhancement the identification was inadequate for the purpose of proof in court.

---------- ***BC8700685 at 36***

With respect, it is possible to be critical of the comments made by the trial judge in the final paragraph of the portion quoted above from his charge to the jury. The fact that Raymond was the only person who had said that he had previously been fingerprinted was not something that in the ordinary course of events one would expect required corroboration but nothing turns on the point. The assertion was not made until 15th July 1982 by which time Raymond's fingerprints were available to the police. Any enquiry made to the National Fingerprint Bureau would have taken a little time to be responded to and at the best could not have been made before 12th July 1982. There does not appear to be any reasonable ground to think that had the jury been aware that Raymond's fingerprints were on record in Sydney and in Canberra that it would have had any bearing upon the outcome of the trial. It certainly does not lead to the conclusion that the police manufactured the fingerprint evidence.

For the reasons already expressed grounds 1, 2, 3, 4, 5 and 6 of Raymond's appeal and grounds 1, 2, 3, 4 and 5 of Peter's should be dismissed.
THE TALBOT NOTE Peter's ground 10(e) asserts that there is new evidence which establishes that there has been a miscarriage of justice in that the Talbot note cannot be proved beyond reasonable doubt to have been written by Peter.

---------- ***BC8700685 at 37***

At the trial Mr. Raymond John Allen of Armadale testified to having advertised for sale a 1956 Ford Falcon sedan in May 1982 and in response to that advertisement the car was purchased for $400 paid in cash. Mr. Allen did not have a licence transfer or disposal notice available and suggested that he would go to the local traffic office to attend to the transfer of the car but the purchaser said he was in a hurry and suggested it be posted to him. To this Mr. Allen responded that the purchaser should leave his address and gave him a pad and pencil on which the purchaser wrote in block letters: ROBERT TALBOT C/O MEEKATHARRA POST OFFICE MEEKATHARRA
The only handwriting evidence called at the trial was the prosecution witness Sergeant Edward John Billing then second in charge of the police scientific bureau in Perth. Billing compared the writing written by the purchaser of the Ford Falcon sedan with the handwriting of each of the three accused and formed the opinion that it was written by Peter. His evidence took the form usual in this type of matter whereby the questioned writing is compared letter by letter with samples from a known source and in so doing called in aid the use of photographic enlargements to demonstrate the basis of the opinion that he formed.
In his charge to the jury the trial judge dealt with the Talbot note in the context of the comments he made in relation to the evidence implicating Peter. His Honour said: "I turn now, members of the jury, to consider the evidence relating to Peter Mickelberg. The most significant physical evidence, if I can call it that, which tends to implicate him is the white Ford Falcon motor car. The evidence that the motor car was involved in the swindle again is circumstantial but there are a number of circumstances which point to its involvement: First, its presence in the parking area about 100 metres from the rear of Barker House on the morning of 22nd June is a circumstance, particularly if you conclude that it was there at the time when the cheques were delivered to suite 3; secondly, the circumstance you may take into account is the strange behaviour of the young driver seen by Mr. Henry; the third circumstance which you might take into account is the fact that the car had a CB radio in it that morning though not when it was seen on the previous Saturday and that Mr. Duvnjak's last instructions came over a CB radio; the fourth circumstance is that it was burnt and abandoned some time after the commission of the offences; finally, the circumstances in which it was purchased are strange. It was purchased by a young man, it seems, who was wearing thick rimmed glasses and who Mrs. Allen, at least (it seems ladies notice these things more than men) thought was wearing a wig. Then, of course, the registration of the car, apparently, was never transferred to the purchaser. So they are the circumstances, or some of them at least, which you may think point clearly, inevitably perhaps, to the involvement of the car in the Mint swindle. There are two main groups of evidence put before you which you may think tend to implicate the accused Peter Mickelberg with the car. The first group is the description of the eye witnesses, Mr. and Mrs. Allen and Mr. Henry - at least, mainly those people - and the second, the handwriting on the Talbot note, the note which was written out at Mr. and Mrs. Allen's home on 25th May." After dealing with the evidence relating to visual identification his Honour then went on to say: "The main evidence of identification, the main evidence connecting the accused Peter Mickelberg with the car, is that of the handwriting on the note, the second part of the evidence to which I referred. In relation to that, when you retire I suggest that you look again at exhibit 87, the card which Mr. Davies showed you yesterday and I think even the day before and which he discussed with you in considerable detail and which has been the subject of comment, in particular by Mr. Singleton. I have suggested that you look at the card but remember, that is merely an illustration. You should look beyond the card, look at its author or rather, its editor, Sgt. Billing. Consider the impression that Sgt. Billing made upon you when he was giving evidence. He was a fellow human being. What did you think of him as a human being? Did he impress you as being honest? Did he impress you as being reliable? Did he impress you as being thorough? Did he impress you as being competent? Ask yourself about all of those aspects and try to decide, if you can, whether he gave you confidence in accepting his evidence. Then you go on to consider the way in which he went about his comparison of handwriting. Did he go about it in a fair way, in an objective way, in a way that was calculated to produce the correct result? Was he selective in picking out bits of handwriting from various documents and comparing them with the handwriting on the note? Or did he, as he told you, look at the overall picture and produce exhibit 87 merely as an illustration of what he had done, not putting to you the whole picture in exhibit 87 but providing you with a clear example of some of the more obvious consistencies between the various groups of handwriting? You will find it helpful, I should think, when you retire, to look at exhibit 87 as a key to the other pieces of handwriting which were used by Sgt. Billing in forming his conclusion. The Crown Prosecutor has demonstrated to you how you can go to those documents yourself. You do not have to rely upon Sgt. Billing at all. In fact, in comparison of handwriting there is a call by you to examine the original evidence. Have a look at it yourself. See

whether, in fact, you need the guidance or assistance of anyone else in reaching a conclusion. If you feel you need that guidance or assistance, consider whether you can accept it from Sgt. Billing. Having approached the evidence in that way then ask yourselves, I suggest, in the end are you satisfied that Sgt. Billing's conclusion is the correct one. If you accept his conclusion, and probably at this stage at least you would need to consider whether you are satisfied of that beyond reasonable doubt - I say that in relation to this piece of circumstantial evidence because it tends to stand out on its own and it is so important - if you are satisfied beyond reasonable doubt that his conclusion is correct then it would seem quite clear that the accused Peter Mickelberg was the young man who bought the car at Armadale on 25th May. If he bought the car you may well conclude that he was involved in the Mint swindle."

---------- ***BC8700685 at 40***

No exception is taken to the judge's direction concerning the handwriting evidence.
On the appeal the appellant called Mr. Geoffrey William Roberts who describes himself as a consulting chemist and examiner of questioned documents. The witness holds the degree of Bachelor of Science from the University of Melbourne and said he had been involved in the examination and study of handwriting for in excess of 25 years. He has given evidence in courts in Victoria, in the Federal Court of Australia in both Victoria and Western Australia and in the Family Court.
The thrust of Roberts' evidence was to identify differences that he could detect between the questioned writing and the samples of Peter's writing that had been used by Billing and he also criticised some of the techniques used by Billing in the presentation of his evidence to the trial court. The witness agreed that there are many similarities in the construction of letters and the linking of letters between the writing on the Talbot note and the writing attributed to Peter but in his opinion there are also a number of significant differences that cannot be accounted for by the hypothesis that the writing on the Talbot note is by the same person who wrote the writing attributed to Peter.
Roberts' testimony at the appeal left considerable doubt as to his competence and objectivity. At a very early stage in his evidence he said: "The next point that I noted was in relation to the letters 'ber' in 'Robert'; that group of letters in the middle of the name. In the Talbot note, the first observation is that the top loop of the 'b' has been contracted until it is virtually in line without a loop. That degree of contraction I did not find anywhere in the writing attributed to Peter Mickelberg, although the general formation of the letter 'b' is similar to the style that Mickelberg uses. The distinction is that the proportions of the top loop are never contracted in the samples that we have of his writing to the extent that they are in the Talbot note." Shortly thereafter in response to a question from the Bench, and after having had two particular examples pointed out to him, the witness agreed that there were indeed examples of the characteristic in the sample writing which he had initially said could not be found. And as the evidence proceeded several other similar examples were identified. By concentrating on the claimed differences between the questioned writing and the known samples of Peter's writing to the exclusion of the many similarities the witness failed to offer any explanation for those similarities.

---------- ***BC8700685 at 41***

Roberts' evidence was unconvincing, lacked objectivity and was devoid of any probative value. Nothing he said could reasonably be regarded as likely to have any effect upon the conclusion reached by the jury. But quite apart from that, evidence called at the appeal by the Crown from Mr. John Douglas Gregory, an expert in document examination, established that prior to the trial he had been engaged by the appellants' solicitors to examine the Talbot note, which he did, and to express an opinion concerning it, which he did. As a result of his opinion he was asked not to write a report and he was not called at the trial. It is patent from Gregory's evidence, and in particular from the working papers he prepared at the time of his examination of the Talbot note, that not only was his opinion that Peter had written it, but also that such opinion is supported by an overwhelming amount of detailed evidence. The Crown also called Mr. David Maurice Ellen the head of the document section of the Metropolitan Police Forensic Science Laboratory in London. Ellen testified to having examined the Talbot note and having concluded that it was written by Peter. His evidence was cogent and compelling. There can be no question that the claimed new evidence advanced on behalf of the appellant could not give rise to the possibility that the jury, acting reasonably, would have acquitted the appellant had that evidence been given at trial.

---------- ***BC8700685 at 42***

THE EVIDENCE OF IDENTIFICATION It is convenient to deal under this heading with Raymond's ground 6 and Peter's grounds 6, 7 and 11.
At the outset a brief description of what is referred to as the Penry photofit method is called for.

In an affidavit read to the Court Wilfred Edward Ryan of the United Kingdom deposed to being the inventor of the Penry Facial Identification Technique which is conveniently referred to simply as photofit or the Penry photofit facility. This is a method of preparing composite facial images of persons suspected of criminal acts by means of sets of photographic facial features arranged in five principle categories namely hair and forehead, eyes, nose, mouth, and chin and jawline. There are 576 photographs of facial features in the male caucasian section of the photofit kit and no more than one single feature has been used from any one photograph of a person for use in the kit. It is clear that the various features available in the Penry photofit facility can give rise to a large number of combinations of facial features and one witness indicated that this was in excess of 10,000,000,000 combinations.

---------- ***BC8700685 at 43***

In his final address, counsel for Peter was forced to concede that the fundamental proposition upon which ground 6 is based, namely that the document which is exhibit 21 at the trial "purported to be a photofit construction by the Penry photofit method" was flawed in that at no time during the trial nor indeed in evidence at the appeal did the artist who prepared ex. 21 or anyone else claim it to have been "constructed by the Penry photofit method". This being so the bulk of the expert evidence called to support the ground became irrelevant and there is no need to canvass it in detail except to say that the testimony of the witnesses Cherry, and Proven was unconvincing and lacked objectivity. In each case it was based upon incomplete and largely incorrect information as to the extent that the person in question had been observed by the persons who assisted in the preparation of the sketch and the availability to the artist of a passport photograph of Peter. Having started on a false premise it was inevitable that their evidence would lack cogency. The appellants' case was thus reduced to an assertion that there now exists fresh evidence which had it existed at the time of the trial would have proved that exhibit 21 was constructed from a passport photograph of Peter.
Exhibit 21 was prepared by Sergeant Kenneth Albert Pierce the officer in charge of the modus operandi section of the WA Police Force. At the trial Pierce testified that on the evening of 25th June 1982 he spoke with Mr. and Mrs. Allen (the man from whom the white Ford Falcon car had been purchased and his wife) and prepared a drawing of hair and spectacles on drafting film. He had spent some time with Mr. Terrence Henry (who had seen a young man in the white Ford Falcon car near Barker House on 22nd June 1982) and prepared a facial drawing in his presence and under his direction. On 28th June 1982 Pierce cut a portion of the drafting film from the drawing that had been prepared in the presence of the Allens and this was used as an overlay on the drawing that was completed in the presence of Henry. The two drawings were subsequently put together in such a way that the hair and spectacles could be folded over the facial drawing and thus give the appearance of being the hair and spectacles of the face drawn under Henry's direction. In his evidence at the trial Allen was asked in cross-examination whether the police artist had shown him a series of drawings such as hairstyles, nose shapes, chin shapes, ears, jaws and he agreed that to be so. Henry said that he had spent some time with the police artist endeavouring to put together an "identikit" picture and identified the lower part of ex. 21 "as the description I gave to the police officers at that time". In cross-examination he was asked about an occasion some time later when the police came to his business premises and asked him to look at a person sitting in a car in the street. He was asked whether he had looked at any other photographs or anything of that nature prior to that particular day when he looked at the man and his response was "no, only the identikit". The evidence at the trial certainly indicated that ex. 21 had been prepared without the assistance of any photograph other than the photographic sections used in the Penry photofit facility.

---------- ***BC8700685 at 45***

In evidence at the appeal Pierce described in detail the method used in preparing ex. 21. He said that Mr. and Mrs. Allen tried to select different sections of the face from the Penry photofit facility but were unable to relate to the resultant attempt at a facial drawing. He found Mrs. Allen a better witness than Mr. Allen and his recollection was that Mrs. Allen found the depiction of the hair and the spectacles acceptable. At the end of the session with the Allens he had only achieved a depiction of the hair and the spectacles. On the 26th June 1982 Henry had attended at police headquarters and directed him in the preparation of a facial drawing which became the underlay to ex. 21. In obtaining the facial depiction he recalled using the Penry photofit facility. His recollection is that Henry selected pictures of portions of the face from the kit which he found to be generally consistent with his recollection and then the witness sketched each feature onto drafting film. He then made adjustments to the features at Henry's direction until the drawing was acceptable to Henry. Pierce said that in his experience the Penry photofit facility alone produces an unacceptable facial depiction because it appears dead and flat and there is insufficient flexibility. He has overcome this by using a translucent sheet of drafting film placed over the Penry photofit features. He then traces the features onto drafting film and adjusts those features and adds detail at the direction of the witness. In drawing each of the facial features the Penry photofit facility is used as a starting indication but the final drawing of individual features may become considerably different as a result of adjustments directed by the witness. He denied

that a photograph of Peter was supplied to or used by him in the preparation of the drawings which were completed on 25th and 26th June 1982. He said that at that time he had not heard of the name Mickelberg and did not see a photograph of Peter until some time in July 1982.

---------- ***BC8700685 at 46***

Henry also gave evidence at the appeal. He said that on Saturday 26th June 1982 he attended at police headquarters in Perth and was asked to work with the police artist to make an "identikit" drawing of a young man he had seen in the car park near Barker House a few days earlier. Before starting with the police artist he looked at two "mug books" for about half an hour but did not see any person that looked anything like the man that he had seen in the car park. Those were the only photographs that he looked at on that day. He described the procedure followed in this way: "A white sheet of paper was set out on the desk in front of us and the police artist had many small drawings of plastic eyes, noses, lips, eyebrows and such facial features in a kit he had. The artist and I began by looking for a facial outline. He had various shapes of faces, some with a square jaw, others with rounded jaw, others with receding chins. All of these face shapes were on pieces of plastic. When I had chosen a facial outline he traced that outline by sketching in pencil onto white tracing paper placed over the facial outline. Then I considered the eyes, eyebrows, noses, lips and hairlines. When I had selected the appropriate eyes the artist sketched those eyes onto the tracing paper using the eye strip to trace from. All of the other features were sketched in a similar manner until they came together in a face that related to the young man I had seen in the car park the Tuesday before. I watched the police artist do all the sketching. Initially there was what I would call a rough up which was prepared first on the tracing paper. That rough up was just the outline of the features. The artist then completed a drawing by putting in shading and reconstructing the features at my direction so that it looked like the young man's face. As I recall there was not a lot of change from the rough up to the final sketch except for all the shading and sketching that made the final sketch lifelike. During the time I worked with the police artist I never saw any photograph. I never saw the police artist referring to any photograph during the preparation of the sketch. All the sketching was done at my direction with changes being made when I wasn't satisfied that a feature was like that of the young man that I had seen on the Tuesday morning. The police artist never took the final sketch from the room while we were working on it. At no time did the police artist and myself ever leave the room in which we were working."

---------- ***BC8700685 at 47***

It is common cause that the sketch which is the underlay of ex. 21 was published in the Sunday Times newspaper on Sunday 27th June 1982.
At the trial Detective Ljibjana Cvijic gave evidence that on the morning of 16th July 1982 at the house of the appellants' parents at 81 Mullaloo Drive Mullaloo various papers including a coloured passport type photograph of Peter were seized. The photograph was later given to Constable Webb of the photographic section. The latter testified to having received same from Cvijic on 16th July 1982.
The only new evidence of the police having possession of a passport photograph of Peter is that on 7th August 1985 a passport application made by Peter on 10th July 1980 to which was attached the usual passport photograph was retrieved by the Foreign Affairs Department from the Australian Archives and made available to the police. The application had remained in the custody of the Australian Archives continuously since the 5th March 1981 when it had been deposited by the Department of Foreign Affairs. None of this evidence was challenged.
Both Pierce and Henry were impressive witnesses whose testimony was in no way shaken on cross-examination. Furthermore their testimony at the appeal was entirely consistent with that given at the trial. There is no reason to believe that a jury would do other than accept the evidence of Pierce and Henry as being factual. There is no evidence that the police had or even may have had a passport photograph or any other photograph of Peter at the time ex. 21 was prepared.

---------- ***BC8700685 at 48***

Ground 6 in each appeal cannot be sustained and should be dismissed.
Peter's ground 7 asserts an error of law on the part of the trial judge in accepting ex. 21 into evidence by reason of the inability of either Mr. or Mrs. Allen or Henry to identify Peter as the man they described for the purpose of constructing ex. 21.
At the trial Mr. and Mrs. Allen were both unable to identify Peter as the person to whom the white Ford Falcon sedan had been sold. Prior to the trial, and again at the trial, Henry was unable to identify Peter as the person he had seen in the car on the 22nd June 1982. The three witnesses had nevertheless endeavoured to assist the police

artist to prepare a facial likeness of the respective persons that they had seen and the sketch prepared under Henry's direction had been used in a newspaper article within a few days of the 22nd June 1982 in an endeavour to obtain public co-operation in the solving of the crime.
Although it is a matter of personal judgment and without in any way reflecting on the artist's ability it is fair to comment that the sketch produced under Henry's direction cannot be said to resemble Peter nor to bear a likeness to him.

---------- ***BC8700685 at 49***

Counsel for Peter has questioned the forensic purpose for which ex. 21 was admitted into evidence. There do appear to be sound reasons for ex. 21 being admitted as an exhibit. The identification of the person who purchased the car from Allen was obviously an important issue in the case. This identification was sought to be achieved in two ways. First by the handwriting on the Talbot note and second by the visual identification of Mr. and Mrs. Allen. Whilst the handwriting evidence pointed to Peter the descriptions given by the Allens both at the time of their first interview with the police and through their attempt to produce, with the police artist's assistance, a sketch of the man in question failed in any way to identify Peter. There was nothing about what they said the purchaser of the car looked like nor about that part of ex. 21 which they are said to have assisted in producing which in any way implicated Peter. Likewise with Henry. He was unable to provide any evidence which pointed to Peter as being the person he had seen on 22nd June 1982. Exhibit 21 therefore did not tend to advance the prosecution case and in a positive sense was probably favourable to Peter's case.
The complaint now made is that as the Allens in their evidence at the trial identified the underlay of ex. 21 as being the result of their work with Pierce (as to which they were mistaken if the evidence of Pierce and Henry is accepted), the effect of the exhibit was to link the person seen in connection with the vehicle on 22nd June 1982 with the person who purchased the vehicle on 25th May 1982. Therefore, if the evidence of the handwriting is found to identify the purchaser of the car as Peter through this exhibit he is identified as being the person seen by Henry on 22nd June 1982.

---------- ***BC8700685 at 50***

The trial judge was alert to the difficulties associated with the evidence of identification and let the jury know in detailed and unequivocal terms his view of the evidence and their responsibilities with respect to it. His Honour's direction with regard to this part of the case is set out in full: "As to the first group of evidence, if I might call it that, that is the identification by the eye witnesses, it is important that I first give you a warning in relation to identification evidence and then go on to explain to you why in this case that evidence simply cannot be relied upon as connecting Peter Mickelberg with the car. I must warn you of the special need for caution when considering the evidence of Mr. and Mrs. Allen and Henry as to the visual identification of the young man seen with the car. What I have to say now, of course, does not relate to the handwriting comparison made by Sgt. Billing. The warning as to the visual identification is necessary because it is very easy to make a mistake in identification. When miscarriages of justice have occurred and, of course, they do occur sometimes, identification of the accused has been a major source of error. There have been a number of instances where responsible persons, honest persons - their honesty, in fact, is not in question and that, of course, is so here, as I understand the evidence at least - have made positive identifications on a parade or otherwise and those identifications have proved to be erroneous. Lawyers, because of their training and because of the reading of law reports that they are required to do, know that these mistakes have occurred but probably most jurors do not. One of the main problems in relation to identification evidence, members of the jury, is that a mistaken witness can still be very, very convincing especially when he is transparently honest and there is another trap, and it really is a trap because it is is not something that you may expect. The trap is this: Mistakes can occur when two or more and sometimes a large number of people make the identification - all can be mistaken about the same person. That is one of the peculiar features of identification evidence. In this case, as the Crown Prosecutor acknowledged to you in the course of his address, the Crown does not rely upon the evidence of Mr. and Mrs. Allen and Henry as positive identification of the accused; in fact, there has not been identification of the accused by those witnesses. You could not, by any stretch of the imagination, accept their evidence as identifying Peter Mickelberg as the young man who purchased the car or the young man who was seen with the car on the morning of 22nd June. In each case the evidence of the eye witnesses fell far short of positive identification. I could, I suppose, point to various aspects of that identification which render it unacceptable but counsel have already mentioned them and I think it is sufficient if I say their evidence is not identification of the accused Peter Mickelberg and it cannot be accepted by you as identification. In the end the most that can be made of their evidence, I suppose, is that you may think they were saying the accused Peter Mickelberg could have been the young man involved with the car. There is a lurking danger, as one of the judges has described it, that you might be tempted to use their separate evidence, the evidence of Mr. Allen, Mrs. Allen

and Mr. Henry, in the same way as you might use circumstantial evidence; in other words, there is a lurking danger that you might treat the evidence of each as not being sufficient by itself but when put together as amounting to convincing evidence. That cannot apply in relation to identification evidence. You cannot use the separate pieces of evidence of the Allens, of Mr. Henry, to support one another. You cannot use it by adding possibility to possibility and making probability or something even higher than that out of their evidence. So I direct you in the end that the evidence of Mr. and Mrs. Allen and Henry and Mr. Hondros and Mr. McCrackan cannot be accepted as identification of Peter Mickelberg as the young man in question. The evidence relating to the identikit, the evidence of the efforts made by the police to get descriptions from them, of course, is part of the story. What they did, you may think, is what you would expect policemen trying to find an offender would do. At that stage, of course, the police were investigating the matter. They were trying to find the culprit and what they did was acceptable and probably necessary. However, we are now at a different stage of the criminal process. We are at the stage of the trial and the result of that investigation simply cannot be accepted as evidence tying in the accused Mickelberg with the young man."

---------- ***BC8700685 at 51***

No exception was taken to the admission of ex. 21 at the trial. The document was clearly relevant to the issues to be tried and was admissible even though it did not advance the Crown case. In the circumstances it could not be used as evidence to identify Peter as the person who bought the car from Allen nor as the person seen by Henry on the 22nd June 1982 and the jury were properly directed in that respect. The direction was more than adequate to dispel any suggestion that the exhibit had the effect of establishing that the person Henry saw on the 22nd June 1982 was the person who bought Allen's car. In the circumstances no error in law has been demonstrated with respect to the admission of ex. 21 and there is no substance in Peter's ground 7.

---------- ***BC8700685 at 52***

Ground 11 raises a similar issue as to the admissibility of evidence touching upon identification.
As mentioned earlier Detective Cvijic seized a coloured passport type photograph of Peter on 16th July 1982. On the same day she handed it to Constable Victor Webb, an officer attached to the photographic section of the police scientific bureau, who prepared black and white copies of it. On 18th July 1982 Pierce went to the Allens' home and spoke with Mrs. Allen. With her assistance he prepared a sketch of the hair and spectacles worn by the person who had purchased the Ford Falcon on 15th May 1982. The sketch was used as an overlay over a copy of the black and while print made by Webb. Subsequently, on 20th July 1982 at the request of Detective August, Pierce prepared another overlay similar to that prepared on 18th July 1982 but from which the spectacles were removed and on which the texture of the hair was altered. Exhibit 78 was prepared by Pierce. It consists of a board on which are mounted three photographs being (from left to right) a copy of the black and white print made by Webb on 16th July 1982, another copy of the same print on which is superimposed the overlay of hair and spectacles prepared by Pierce on 18th July 1982, and a third copy of the print on which is superimposed the altered overlay prepared by Pierce on 20th July 1982. The exhibit was tendered in evidence through Pierce and was not objected to. Exhibit 23 is a photograph of the third picture on ex. 78. It was tendered in evidence through Henry in these circumstances. After having testified in his evidence in chief concerning the preparation of what he described as the "identikit" picture the following exchange occurred between him and the Crown prosecutor. "Were you afterwards shown any photographs by the police with some drawings or alterations made to them? - Yes, I was. How many photographs were you shown, Mr. Henry? - I was shown two. Were you able to recognise the person depicted in - ? - Yes, I was. As being? - As being the fellow that I saw that morning. Having recognised that, did you put any identifying mark on the photograph that you were shown then? - I think I signed the back of it. I wonder if you would look at this photograph for me, please? - Yes; that is the photograph that I signed. Who is that a photograph of, in your assessment? - It was the fellow that I saw in the car park. That is tendered, if your Honour please. " The trial Judge immediately asked Peter's counsel if he had any objection to the exhibit being admitted and counsel replied: "I do not think I can validly object. I think, really, it is maybe question of weight." The photograph was then duly marked as an exhibit.

---------- ***BC8700685 at 54***

It emerged from the cross-examination of Henry that at some stage during the enquiry, the exact date of which was not established, police officers took Peter in a car to Henry's business premises and asked him whether Peter was the person that he had seen in the lane behind Barker House on the morning of the 22nd June 1982. Henry was unable to make any such identification and indeed when confronted by Peter in Court was again unable to say that

he was the person seen on 22nd June 1982. It was subsequent to the attempted identification at Henry's business premises that the police produced the photograph which became ex. 23 and which Henry recognised as being the person he had seen on 22nd June 1982.
The argument against the admissibility of exs23 and 78 is substantially the same as was advanced in respect of the admissibility of ex. 21. The failure of the Allens and Henry to provide visual identification of Peter in the case of the Allens as the person who purchased the white Ford Falcon and in the case of Henry as the person who was seen in the car on the 22nd June 1982 was a weakness in the prosecution case which may possibly have been explained by the use of a disguise. Mrs. Allen certainly thought that the person to whom the car was sold on 25th May 1982 was wearing a wig but, be that as it may, the evidence of identification through the Allens and Henry was unsatisfactory even with the aid of exs23 and 78. In the result the trial judge felt constrained to direct the jury in very positive terms in relation to the evidence of identification. The appropriate passage from the charge has already been quoted and need not be repeated. The observations previously made in relation to ex. 21 apply with equal force to exs23 and 78. Peter's counsel realised at the time that ex. 23 was tendered that the question in relation to it was really one of weight and that is how the case was fought. The force of the trial Judge's direction on the identification issue is such as to have overcome any prospect that the prejudicial effect of exs23 and 78 outweighed their probative value. The trial judge did not err in admitting the exhibits and there is no substance in ground 11.

---------- ***BC8700685 at 55***

Grounds 8 and 9 The proposition advanced by Peter's ground 8 whilst having some support historically is inconsistent with the current view of the High Court of Australia as expressed by Gibbs CJ, Aickin, Wilson and Brennan JJ in The Queen v Darby 148 CLR. 668 at p.678 where their Honours said: "In the light of the wealth of both academic and judicial consideration that has been devoted to this topic in recent years, we have no doubt that this Court should now redirect the common law of Australia on to its true course. It should determine that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person. In our opinion such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject."
R v Darby was a case involving the conviction of two persons accused of conspiracy who were tried jointly and both convicted. One of the accused appealed successfully and had the conviction quashed. The other accused then appealed on the ground that the co-accused's acquittal necessitated his own acquittal and the Court of Criminal Appeal in Victoria allowed the appeal and quashed the conviction. The Crown then applied to the High Court for special leave to appeal. Leave was granted, the appeal allowed and the conviction and sentence of the County Court be affirmed. There appears to be no reason why the principle enunciated in Darby's case should be confined to a case where there are two conspirators rather than three or more. There is no substance in the issue raised in Peter's ground 8.

---------- ***BC8700685 at 56***

Counsel for Peter attempted to support ground 9 by calling in aid the decision of the High Court in The Queen v Hoar 148 CLR. 32. In the end counsel did not assert that The Queen v Hoar contained any proposition that as a matter of law would justify the result sought. It is true that the members of the High Court expressed their views as to the undesirability of proceeding with a charge of conspiracy when a substantive offence has been committed and there is sufficient and effective evidence of that charge. The facts in Hoar's case were indeed in no way similar to the present case. Hoar had been charged, tried and convicted of conspiring with others to commit an offence against the Fisheries Act of the Northern Territory. He was given a suspended sentence and in addition the trial judge directed that certain plant then thought to be the property of Hoar which had been seized under the Fisheries Act be forfeited to the Crown. The power to order forfeiture arose upon a conviction under the Fisheries Act in respect of the offence that Hoar had been convicted of conspiring to commit. He was never prosecuted for that offence. The question before the High Court was whether forfeiture could be ordered upon the conviction for conspiracy. The High Court held that it could not.

---------- ***BC8700685 at 57***

There is no legal basis to support Peter's ground 9.
GROUND 10 Ground 10 in Peter's notice of appeal asserts that new evidence exists which establishes that there has been a miscarriage of justice and identifies six separate matters in respect of which this is said to be so.

Paragraph (e) which relates to the Talbot note has already been dealt with. It will be convenient to deal with the remaining paragraphs in order.
Ground 10(a) The appellant says that an audio taped conversation between Peter, Raymond and Sergeants Hancock and Hooft casts doubt upon the alleged admissions made by the appellant on 26th July 1982.
The tape existed at the time of the trial and some questions were asked of Hancock based upon the conversation in question. The tape was not played at the trial and this was as the result of a deliberate decision of the appellants' then legal advisers at least one of whom doubted its authenticity. This Court has heard that part of the tape that is said to cast doubt on the appellant's alleged admissions and has before it what is said to be a transcript of the whole tape. The recorded conversation or such part thereof as was played to this Court is disjointed and hard to follow. Even assuming that the transcript is a reasonably accurate record of the spoken words it is difficult to discern anything that appears therein as in any way impeaching the evidence given at the trial concerning the conversation that took place on 26th July 1982. No miscarriage of justice can have occurred by reason of the failure of the tape recording to have been used at the trial.

---------- ***BC8700685 at 58***

Ground 10(b) Mr. RW. Cannon, a practitioner of this Court, was instructed to act as solicitor for each of Brian, Raymond and Peter Mickelberg. At the trial Cannon appeared as counsel for Raymond. Brian was represented by his partner Mr. M. Bowden and Peter was represented by Mr. BJ Singleton of counsel.
Arpad Security Agency Pty Ltd carries on business as a security firm and holds a security licence under the relevant legislation. Mr. Arpad Lazlo Bacskai is the managing director of Arpad Security Agency Pty Ltd.
At the trial evidence was given by Mrs. Jo Anne Louise Armstrong that she was engaged through an employment agency by a person to whom she spoke on the telephone and who identified himself as Mr. Fryer. She was told to be in attendance at Suite 3, 49 Hay Street Subiaco on 22nd June 1982 between 11 a.m and 4.30 p.m. She was told that there would be 2 tool boxes and an envelope on the desk in the office and that between 11 a.m. and 1 p.m. 3 couriers would call to collect the boxes and the envelope and that each would later return with containers which would later be taken to the airport by another courier. The boxes and cheque were duly collected. Consistent with further instructions that she had received, an employee of Arpad came to the office at 1.10 p.m. and remained at the office with her. During this time each of the three security firms delivered the boxes containing gold bullion from the Mint. About ten minutes after the third box had been delivered another person by the name of Peter Duvnjak appeared. Mrs. Armstrong had previously been told by Fryer that Duvnjak was his personal courier and would be calling at the office for the purpose of taking delivery of the boxes. Fryer had also said that Arpad would be in attendance to wait with her pending Duvnjak's arrival and would assist Duvnjak carry the containers to his car. As soon as Duvnjak arrived the Arpad employee sprang to his feet and the two exchanged identification cards. The Arpad employee then instructed Duvnjak as to what to do. Each box was removed from the room and about ten minutes later the Arpad employee returned to ask Mrs. Armstrong to sign a slip, which she did.

---------- ***BC8700685 at 59***

At the commencement of the appeal, in support of an application for leave to amend the grounds of appeal to include inter alia ground 10(b), counsel for Peter sought to justify the ground on the basis that the facts asserted in para. (b) indicated a clear conflict of duty and interest on Cannon's part. He went on to say: "One of the reasonable hypotheses consistent with innocence that I will put to your Honours in relation to the petitioner is that there is another party, to wit Arpad, which had the care and conduct at all times of that gold, in respect to which there is much more direct evidence of their involvement than there is of the petitioner. In my submission, that fact put Mr. Cannon in a conflict of duty and interest of the most extraordinary degree...."
In the event, counsel called Bacskai who testified to the circumstances under which he and his firm had been prosecuted for a breach of the Security Agents Act 1976 for having conveyed to the Perth Airport a consignment of gold of value in excess of $30,000 without using an armoured vehicle. The offence was committed on 10th June 1982 and the complaint taken out on 12th July 1982. The summons was returnable on 21st July 1982. On the return day a plea of guilty was entered. Cannon appeared as counsel and made submissions in mitigation of penalty. He had been instructed by Bacskai's normal solicitors. All of this occurred before the Mickelbergs were arrested on 26th July 1982. No attempt was made to make good the very serious allegation against Arpad Security Pty Ltd and Bacskai made in counsel's submissions.

---------- ***BC8700685 at 60***

Cannon was called to give evidence by the Crown. When the particulars of Ground 10(b) were put to him he said that he had no independent recollection of the dates but accepted that it is quite true that he had acted for Arpad and also, he thought, Bacskai. He said that he would not know Bacskai if he ever saw him again and had never acted for him since that time.
The evidence does not disclose any conflict of interest and duty on Cannon's part and the ground is entirely without merit.
Ground 10(c) A further accusation of conflict of interest is levelled against Cannon by the assertion that whilst acting for Peter he was also acting for Detective Sergeant Tovey, one of the police officers involved in the enquiry and later a witness at the trial.
The ground was supported by evidence given at the appeal by Peter who said that on an occasion after he had been arrested when either going to or leaving Cannon's office he ran into Tovey who was then leaving Cannon's office. He did not speak to him.

---------- ***BC8700685 at 61***

Tovey's evidence was that at some time before the Mickelberg case arose he had been served with a civil summons concerning an alleged assault by a person whom he had charged with assault. The matter had come up for mention and nothing more had happened for approximately twelve months. He decided that it would be appropriate to have the summons struck out because no action had been taken and had consulted Cannon for this purpose.
Cannon's evidence was that in 1979 Tovey was the subject of a private complaint. The person who laid the complaint had disappeared and early in 1980 Tovey had asked him (Cannon) to write to the court to have the complaint struck out. When he received the hand up brief in connection with this matter he told the Mickelbergs that he had once acted for Tovey. He went on to say that Tovey had frequently delivered documents to his office and it could well have been that he had done so on an occasion when Peter was present.
There is clearly no evidence to support any assertion of conflict of interest with regard to the matter referred to in Ground 10(c).
Ground 10(d) The evidence at the trial indicated that early in March 1982 Peter had entered into a tenancy agreement with the owner of Unit 7, 122 Rupert Street Subiaco for a term of six months commencing on 6th March 1982. The rent was $190 per fortnight and on 8th March 1982 by a bank cheque payable in favour of the owner's agent he paid rent in advance amounting to $2,279.96. There was further evidence at the trial that indicated that just prior to Peter moving out of the unit in July 1982 an inspection revealed that the unit had the appearance of having been used and of someone living in it.

---------- ***BC8700685 at 62***

The ground of appeal has its genesis in evidence given by Hancock in relation to his conversation with Peter on 26th July 1982. The relevant parts of Hancock's evidence are as follows: "I then said to him, 'I have been told that you leased a unit in Rupert Street, Subiaco, in March, on 6th March.' He said, 'That's right. I told Det. Tovey all about that.' I said, 'Did you have a telephone put on there?' He said, 'Yes.' I said, 'I have been told that you were never seen at the unit and that none of your personal effects were ever there.' He said, 'Who told you that?' I said, 'We have spoken to the estate agents and we have made inquiries amongst neighbours and other tenants.' He said, 'So I wasn't there very much.' " In cross-examination by Peter's counsel at the trial there was the further exchange: "Then you go on to the leasing of the flat. Right? - -Yes. You ask him if he had the phone put on there and he told you 'Yes'. 'I am told that you were never seen at the flat; that none of your personal effects were ever there'? - Yes, I said that to him. He said, 'Who told you that?' You said, 'We've spoken to the estate agents and have made inquiries amongst other tenants and neighbours.' Right? - Yes. Let us deal with this. 'I am told that you were never seen at the flat'? - That's what I said to him. Where did you get that information from; that he was never seen at the flat? - Probably some of the inquiry officers, but I didn't mean in. exact words that he'd never been seen there. What I was inferring was that he wasn't there very much. 'None of your personal effects were ever there.' Where did you get that information from? - That had been told to me by one of the inquiry team. That his personal effects were never there? 'That none of your personal effects were ever there'; the same as saying that they were never there? - That's what I was led to believe, yes. Who told you that? - I'm not sure. One of the inquiry officers who had been inquiring into the lease of the unit. Was it not one of the inquiry officers who went there on 16th July and went to the flat and said 'There's nothing there. It's just a furnished flat and there's none of his personal effects there at all?' - No, no. they had interviewed several people around the place there. Who were the people they interviewed? Do you know?- - No, I can't tell you. What you believed and what you had been told was that he really was not living in the flat at all? - I was led to believe it appeared as though he had never lived there; that nobody lived in the flat. It was never lived in. It was just a rented place that would be used from time to time but it was not

his place of abode? - That's what I was led to believe. This was by your inquiring officers? - Yes. We have spoken to the estate agents and have made inquiries amongst other tenants and neighbours. What did the estate agents advise, do you know? You say, 'We have spoken to the estate agents' and other neighbours? - Yes, but I wasn't referring to myself, of course. No. What did the enquiries of the estate agents disclose? - that he did not live there but rented the place? - Yes. That's what I was led to believe; yes. You were led to believe that the estate agents informed that he had never lived there but was simply renting the premises - wasn't. living there, I should say? - I don't know whether it was the estate agent. I don't think it was the estate agent who said he wasn't living in the place. That is what you say, is it not? - 'We have spoken to the estate agents and we have made inquiries amongst other tenants and neighbours.' 'Who told you that?' 'That' being, 'You were never seen at the flat and none of your personal effects were ever there.' 'Who told you that?' 'We have spoken to the estate agents. We have made inquiries amongst other tenants and neighbours'? - That's right. So he went on to say, according to you, 'So, I wasn't there very much'? - That's what he said. You took that as an acceptance that he was not living there? - Yes. That's the way he said it to me. He said, 'So, I wasn't there very much' as though to say, 'So what?' As if to say, 'So what?' - Yes, that's right."

---------- ***BC8700685 at 64***

Detective Sergeant William Round gave evidence at the trial that on 26th July 1982 he had had a conversation with Peter. This was after Peter had been interviewed by Hancock. In the course of this conversation the following exchange took place: I said, 'Did you ever live at the unit with anybody?' He said, 'No'. I said, 'The neighbours said you were hardly ever there but the lights used to be on at the place.' He said, 'Yes. Ray gave me one of those time switches that put the lights on and off so it would look like someone was living there.'
The new evidence adduced on hearing of the appeal was from a neighbour who testified as to seeing Peter at the unit on a daily basis at least Monday to Friday and an employee of the estate agent who had inspected the premises on a couple of occasions and observed evidence of the occupation and use of the unit. Her last inspection had been on 22nd June 1982 probably at about 11.30 a.m. Peter was not present at the time of the inspection.

---------- ***BC8700685 at 65***

It was not part of the Crown case that the unit in Rupert Street Subiaco had been used as a headquarters for the execution of the fraud committed on the Perth Mint. Certainly that suggestion was put to Peter but it was his response to the suggestion which was of significance. The new evidence in no way detracts from the signficance of the answers given by Peter in the course of the enquiry. Even if it be assumed that more diligent enquiry made at the time would have revealed that Peter had occupied the unit more frequently than was suggested to him by Hancock the answers given to Round are not affected particularly as they involve the volunteering by Peter of the information concerning the use of an automatic device to turn the lights on and off. Whether or not Peter made those responses to Round was an issue before the jury and the new evidence can have no bearing upon the jury's assessment of that evidence.
No miscarriage of justice could have occurred by reason of the failure to call the evidence adverted to in ground 10(d).
Ground 10(f) The witness Allen testified at the trial that the transaction involving the sale of his white Ford Falcon car on 25th May 1982 took place at "about mid morning - 10.30. Somewhere around there." In cross-examination he said that the purchaser was present with him for about a quarter to half an hour. It was also put to him in cross-examination. "...You say it was about 10.00?" To which he replied "Ten, half .past ten". In her evidence at the trial Mrs. Allen when asked what time of day the purchaser had arrived, said "About 10.00-10.30 in the morning". When cross-examined she said it was "About 10.00 - between 10.00 and 11.00" - and "It was probably just after 11.00 when he left." At the trial the appellants' mother Mrs. Peggy Lorraine Mickelberg testified to having on the 25th May 1982 gone with Peter and her four year old grandson to business premises in Oxford Street Leederville where they purchased a quantity of ceramic tiles. When asked if she had any idea of the time when this was done her response was "Well, we got back home about 11.30, because we'd been to Alco as well." Her home was in Mullaloo. She produced a docket from Interceramic Centre 409-411 Oxford Street, Mount Hawthorn dated 25th May 1982 ..(exhibit C2) made out simply to "cash" which relates to the purchase of 40 pieces of tiling.

---------- ***BC8700685 at 66***

The new evidence which is referred to in ground 10(f)(i) is an affidavit of one Grant Edwin Carroll who presently lives in Queensland and who was not called as a witness but whose affidavit was read. Carroll has deposed that in May 1982 he was employed as a storeman at Interceramics at 409-11 Oxford Street Leederville and recognised ex.

C2 as a cash sale receipt for the sale of ceramic tiles on the 25th May 1982. He says he was the storeman who supplied the tiles. He remembers the transaction because he spoke to a young man, who he says he now knows to be Peter Mickelberg, about his car which was a black Porsche. He recalls the state of the weather, namely cold, overcast and drizzling but is not able to say whether it was in the morning or afternoon. He further says that he was never approached by either the police or the lawyers for the Mickelbergs at any time prior to their conviction but when he saw Peter's picture on television he recognised him as the person he had dealings with at Interceramics. He does not say whether this was before or after the trial. He then telephoned the police and told them about the incident. Although he was told that someone else would be in touch with him he was not contacted until about mid 1985 when a detective from Perth visited him in Sydney.

---------- ***BC8700685 at 67***

Peter's evidence at the appeal does not entirely accord with Carroll's affidavit in that he agreed in cross-examination that Carroll was one of the people he had contacted as a potential witness prior to the trial. It may be that Carroll's affidavit is technically accurate in that he does not specifically depose to not having been contacted by the appellant prior to the trial. In the absence of any cross examination of the witness and particularly in view of his uncertainty as to whether the tiles were sold in the morning or the afternoon of the 25th May 1982 little weight can be attached to the evidence contained in the affidavit.
Counsel for Peter invites the Court to draw an inference from the fact that the book from which ex. C2 originated suggests that the sale was but the third recorded on the 25th May 1982. This he suggests indicates that it must have been made early in the morning and presumably at a time when it would have been impossible for Peter to have been at Armadale purchasing the white Ford Falcon car. No other evidence was called from Interceramics Centre and it is not known how many cash sale books were used nor indeed what time of day the premises are open for business. No relevant conclusions can be drawn from Carroll's evidence nor indeed from the production of the Interceramics Centre book. In particular the new evidence does not provide Peter with an alibi for the time on 25th May 1982 when Allen sold his Ford Falcon sedan.

---------- ***BC8700685 at 68***

The second sub-para. of ground 10(f) has to do with Peter's claim at the trial that on 22nd June 1982 he was working at his parent's house in Mullaloo erecting a fence.
The only evidence tendered at the appeal was that of Mrs. Dorothy Stacey of 92 Mullaloo Drive Mullaloo who presumably lives relatively close to Peter's parents at 81 Mullaloo Drive. In her first affidavit Mrs. Stacey said that on a Saturday morning late in June 1982 she observed Mr. Malcolm Mickelberg and two of his sons unloading fencing materials at 81 Mullaloo Drive and thereafter the three of them proceeded to erect a small section of fence. The fence was not completed on that day but was completed during the following week and she is certain that it was completed no later than the Wednesday. In her second affidavit she says that she recalls seeing the Mickelberg sons working on the fence as she and her husband left home to go to the bowling club on the Tuesday at about 12 - 12.30 p.m. The fence had been started on the weekend immediately preceding the Tuesday. (The 22nd June 1982 was a Tuesday).
Mrs. Stacey was unable to provide any assistance as to dates and made no attempt to identify any of the sons to whom she referred. Her evidence is of no value in these proceedings.

---------- ***BC8700685 at 69***

Nothing in the new evidence led in support of the several parts of ground 10 supports the assertion that a miscarriage of justice occurred.
Ground 12 The basis for this ground of appeal does not readily appear from the transcript of the trial but rather is found in the soundtrack of a videotape that was played at the trial and which was tendered as an exhibit. The tape was not played at the hearing of the appeal.
It appears from the trial transcript that the videotape was taken of Peter at the Perth lockup on the evening of 26th July 1982 after he had been arrested and charged. The forensic purpose of the video appears to have been to contradict Peter's assertions as to the manner in which he had been treated by the investigating police officers earlier that day and in particular to demonstrate the absence of any physical injury.
Upon the videotape being tendered the trial judge enquired of the Crown Prosecutor whether he had been aware that there was a soundtrack to which the prosecutor replied in the affirmative. He also agreed that he knew what was going to be said. Precisely what words were used has not been revealed to this Court but it is common cause that in the course of the conversation which is recorded on the videotape some reference was made to Peter having

had a prior conviction for an offence in respect of an unlicensed firearm. The trial judge expressed the view that counsel should have alerted him to the matter in advance and obtained permission before disclosing to the jury the fact of a previous conviction.

---------- ***BC8700685 at 70***

Peter's counsel appears to have expressed some concern during the showing of the videotape and later explained his reaction to the judge as being the result of not having been told in advance that the videotape was to have a soundtrack. Counsel then went on to express the view that it was a minor matter and no application was made in respect thereof. The judge agreed that the matter was minor and said that he thought that probably enough had been said. He nevertheless maintained his objection to the manner in which the matter had been approached.
The Crown concedes that the trial judge's permission should have been obtained before the videotape was shown whilst counsel for the appellant concedes that this is not a major ground and clearly taken in isolation would not amount to a miscarriage of justice sufficient to warrant this Court's intervention.
Ground 13 - The Ogilvie's Tavern Incident The Crown conceded during the appellants' opening that the evidence in relation to this matter was fresh as the incident occurred a considerable time after the trial and indeed but a short time prior to the appeal.
Arthur John Walsh testified that on the evening of Thursday 16th July 1987 he went to Ogilvie's Tavern in Applecross and arrived there at about 6.20 in the company of Mr. Maurice Hitchcock. The two met a mutual friend Mr. Ray King who introduced them to Sgt. Anthony Lewandowski. Walsh, Hitchcock and King sat at a table drinking beer and discussing business. After about 15 20 minutes King brought Lewandowski to the table and he joined the group sitting on a chair next to and to the left of Walsh. Walsh said that he had been a member of the Victorian Police Force for 15 years and in 1965 was dismissed for having made false travelling claims. Lewandowski was introduced to him as a police officer. Walsh says that the two of them had some conversation concerning police work and in particular reference was made to a notorious former Sydney policeman one Rogerson. There was also other conversation. According to Walsh, Lewandowski made favourable remarks concerning Rogerson and said words to the effect that "the only bloke that comes near him is Don Hancock my partner in the Mickelberg business". To this Walsh says he responded to the effect "Oh, were you concerned in that case". He says that he then asked whether Lewandowski put Hancock in the same category as Rogerson to which Lewandowski is said to have replied "Mate, we did a mighty job on those cunts. We stitched them up properly. When he fixes a brief it stays fixed." Walsh says that Lewandowski was obviously talking about the Mickelbergs. He, Walsh, then said to Lewandowski "Who dropped the brick in the fingerprint evidence" meaning "Who fabricated the fingerprint evidence in the Mickelberg trial." Walsh's evidence is that Lewandowski laughed at that remark. Subsequently, Walsh says that there was some aggravation between himself and Lewandowski whereupon the latter stood up, put his fingers under the edge of the table and tipped the table over causing beer to be spilt in Hitchcock's lap. King and Walsh left the tavern at about 8.00 p.m. and Walsh arrived home 5-10 minutes later. He thereupon telephoned police headquarters and reported what he says occurred at the tavern that night. Subsequently a police superintendent telephone him from the CIB. and after the details had been repeated the superintendent said that the complaint would have to be transferred to the Internal Affairs Department. This all occurred on the night of Thursday 16th July 1987. Walsh says that the next he heard about the matter was at 1.50 a.m. on the following Sunday the 19th July 1987 when he received a telephone call. He had interviews with the police Internal Affairs Department on the Monday morning and later an officer of the Crown Law Department. Although two other witnesses were called in an attempt to corroborate Walsh's evidence neither was able to say anything concerning Lewandowski's alleged statement that "We stitched them up properly. When he (Hancock) fixes a brief it stays fixed".

---------- ***BC8700685 at 72***

In the witness box Walsh did not impress as a witness of truth. His background is questionable and his answers in cross-examination were evasive. Apart from having been dismissed from the Victorian Police Force for dishonesty he has convictions in 1970 for false pretences and 1971 for resisting arrest. Arising out of the latter matter he had charged a police constable with assault. In 1975 he unsuccessfully took action for defamation against another police officer and although costs were awarded against him the same have never been paid. Shortly after the defamation case he became bankrupt. In addition he admitted after some urging from Crown counsel that he uses a false name in connection with some of his business activities for the purpose of "minimising" his income tax. In his evidence in chief he asserted that he knew little about the Mickelberg case except that there was some suggestion of there having been a false fingerprint but that he said was the extent of his knowledge. In cross-examination however he admitted to having read the book "The Mickelberg Stitch" and some newspaper reports concerning the case but he denied knowing even the offence with which the Mickelbergs had been charged. This is a surprising claim from one who had read the book mentioned. He denied that he was a man who dislikes police.

BC8700685 at 73

Taken in isolation Walsh's evidence lacks credibility. In any event the statements that Walsh attributes to Lewandowski go no further than to suggest that the police in general and Hancock in particular had done a thorough job in preparing the brief for the prosecution of the Mickelbergs.
In fairness to Lewandowski it is appropriate to make a brief reference to his evidence in response to Walsh's claims. Lewandowski is presently a sergeant of police in charge of the Perth Children's Court Detention Centre and in 1982 was a detective with the CIB. and one of the officers involved in investigating the Perth Mint fraud. At about 5.30 p.m. on the evening of Thursday 16th July 1987 he visited Ogilvie's Tavern at Canning Bridge for the purpose of speaking to an estate agent with regard to the sale of his house. The agent, who was with Mr. Ray King, left at about 6.00 p.m. King invited him to join him and a friend at a nearby table and although at first he declined King persisted and accordingly Lewandowski joined them. King introduced him to Walsh and Hitchcock. When King introduced him to Walsh he mentioned that Walsh was an ex-policeman from Victoria and the two had a general conversation to do with police work particularly the places at which they had worked and whether they both .knew certain people. Lewandowski told Walsh that he had worked in New South Wales and had found New South Wales detectives to be "a good bunch of guys" but Walsh said that they were a pretty corrupt lot. The name of Rogerson was mentioned. Lewandowski denies ever having expressed any admiration for Rogerson. He said he had mentioned that his present post at the Children's Court Detention Centre was very different from the CIB. and that it was good to be free of the pressures associated with that type of work. When he commented that his only remaining problem from the CIB. was the Mickelberg appeal, Walsh replied to the effect that "They got a pretty hard time" to which Lewandowski says his reply was "You've got to be joking". He said he told Walsh that it was probably the most thorough enquiry carried out in this State. and that Hancock had done a great job. Walsh then said something like "Who gave them the fingerprint then". Lewandowski says that he then became upset because he took the comment to mean that the enquiry officers had forged the fingerprint. He stood up and started to leave. This was between about 6.30 and 6.45 p.m. In connection with the book "The Mickelberg Stitch" he said that he has taken action for defamation against various people concerning the contents of that publication.

BC8700685 at 74

Lewandowski was extensively cross examined but did not resile from his evidence in chief with respect to the incident at Ogilvie's Tavern on 16th July 1987.
Although Walsh's evidence is admittedly fresh the witness lacks credibility and the evidence lacks cogency. In any event, taken at its highest, it does not in any way have the effect attributed to it, namely establish that the police investigating the case fabricated evidence.

BC8700685 at 75

CONCLUSION (Raymond's Ground 8, Peter's ground 14) The appellants have each failed to demonstrate that the verdict of the jury is unsafe and unsatisfactory. The claimed fresh and new evidence tendered at the appeal lacks any significance and when considered in combination with the evidence given at the trial is incapable of providing any basis upon which the minds of jurors, acting reasonably, could be affected.
Both appeals should be dismissed.

BC8700685 at 2

Pidgeon J

On the 20th January 1987 Peter Mickelberg addressed a petition to His Excellency the Governor for the exercise of the prerogative of mercy in respect of a number of convictions for which the petitioner is at present serving sentences. The petition set out the fact that the petitioner had discovered subsequent to his conviction fresh evidence and claimed that this evidence considered in combination with the evidence already given would have affected the verdict. It was submitted that there should now be a verdict of not guilty recorded or a new trial. The petition set out details of this fresh evidence.
On the 6th February 1987 the Honourable the Attorney General wrote to the solicitors for the petitioner advising that the petition had been forwarded to His Excellency and the letter requested grounds of appeal. As a result the petitioner on the 12th February 1987 forwarded to the Honourable the Attorney General a notice of appeal addressed to the Registrar of the Court of Criminal Appeal. This set out the new evidence and it set out what were

claimed to be misdirections by the trial Judge resulting from the new evidence. There were further grounds to which reference will later be made. The Honourable the Attorney General acting in pursuance of s21(a) of the Criminal Code referred the whole case to this Court. The Code provides that in this event the case shall then be heard and determined as in a case of an appeal by a person convicted and this is what has occurred. The grounds of appeal given to the Attorney pursuant to his request have been included in the case referred and these have been treated by the parties as the petitioner's grounds of appeal. They were amended on motion of counsel for the petitioner at the commencement of the hearing of the appeal.

---------- ***BC8700685 at 3***

Raymond John Mickelberg one of the co-accused who was also convicted has obtained an extension of time for leave to appeal against his conviction. This extension of time and leave were each granted and this appeal was heard together with the appeal arising from the Attorney General's reference.
The fundamental basis of the administration of this part of the criminal law is that it must be a decision of the jury before there can be a conviction of offences of this nature. If it became known at a later stage that there was evidence of an appropriate standard that could bring the convictions into question then the convicted persons on the face of it are entitled to have the matter evaluated by the jury in a new trial. It would not be the function of this Court to make judgments on that evidence so as to displace the right to a jury trial when the evidence had reached the appropriate standard. The new evidence may be so compelling that it becomes clear to the court that the convicted persons are not the offenders and the true circumstances of the offence become known. In that event the proper course for this Court would be to order an acquittal and not put the offenders on trial again. It could not be suggested that the evidence before us comes within this category. The strength of the evidence may be such that it becomes apparent that a jury may have a reasonable doubt and that may indicate there ought to be a retrial irrespective of whether that evidence was fresh or available at the time. If a retrial is some years after the original trial and an even greater time from when the offence is committed then it becomes difficult for the witnesses to testify and the prosecution is placed at a disadvantage to discharge its onus. That would indicate a need to be wary of the situation of an accused person withholding some of the evidence at the trial with a view to having a second trial at a later date under more favourable conditions.

---------- ***BC8700685 at 4***

These concepts and the question as to what standard the evidence should reach have been considered by the courts in many cases and principles have been evolved. They have recently been referred to and summarised by the High Court in Gallagher v The Queen (1985-86) 160 CLR 392. Gibbs CJ. referred to the fact that when there is no wrong decision on any question of law or other irregularity in the trial, the Court of Criminal Appeal can allow the appeal only if it considers that a miscarriage of justice has occurred by reason of the fact that the evidence now adduced was not called at the trial. His Honour emphasised that it is important to remember that the fundamental question is whether a miscarriage of justice has occurred and that the principles that may be extracted from the authorities "should not .... be regarded as absolute or hard and fast rules". His Honour stated that the circumstances of cases may vary widely and that it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. His Honour went on to say at p. 395: "The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by the accused at the trial, is satisfied in the present case, and need not be discussed, although it should be noted that this is not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial. Two other matters that should be taken into consideration are whether the evidence is apparently credible (or at least capable of belief) and whether, if believed, the evidence might reasonably have led the jury to return a different verdict."

---------- ***BC8700685 at 5***

Mason and Deane JJ. said it was settled that an appellate court dealing with an application of this kind has some responsibility to examine the probative value of the fresh evidence and their Honours quoted from the judgments of Rich and Dixon JJ. in Craig v The King (1933) 49 CLR. 429, at p. 401: "A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the

result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance." It is within the concept of this passage that some of the grounds of appeal have been drafted.
I will, for convenience, refer to both the appeal and the reference as an appeal. The Code requires the reference to be treated as in the case of an appeal. The main grounds are that there is fresh evidence and this evidence was placed before this Court by affidavit with a number of the deponents being cross-examined. The law to which I have referred shows that this Court would not make factual findings on the evidence but is required to examine its probative value to see if it has cogency, plausibility and relevance and in the end to see if it is of such a character that if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected and to see if the court considers a miscarriage of justice has occurred. Photofit and Identification Evidence

---------- ***BC8700685 at 6***

I propose firstly to refer at length to grounds 6 and 7 of Peter Mickelberg's appeal which as amended reads: "6. There now exists fresh evidence which had it existed at the time of the trial would have proved that Exhibit 21 at the trial, purported to be a photofit constructed by the Penry photofit method: (a) was not a photofit constructed by the Penry photofit method, (b) does not contain a single feature of the Penry photofit facility, and (c) was constructed from a photograph of Peter Mickelberg. 7. The Learned Trial Judge erred in law in accepting Exhibit 21 into evidence as neither Mr nor Mrs Allen nor Mr Henry could identify Peter Mickelberg as the man they described for the purpose of the construction of Exhibit 21." Exhibit 21 consisted of two sheets of white cardboard attached so that one could be placed on top of the other. The upper sheet was of approximately quarto size and was called the overlay. The bottom sheet was of foolscap size and was called the underlay. On the bottom sheet there was pasted a pencil sketch of a face including hair and neck but with no spectacles. On the top sheet there was pasted a sketch of hair of a different style and spectacles but with the rest of the face including the area of the neck cut out. If this was placed over the underlay the face drawn on the underlay could be seen but with the hair-style and spectacles as depicted on the overlay. Each were sketches prepared by Sergeant Pierce, a police artist. The sketches were prepared on translucent drafting film and this film was pasted to the cardboard that comprised the exhibit. Work on the underlay sketch commenced on the 26th June 1982 four days after the offence in the presence of a civilian witness Mr. Henry who occupied premises near the scene of the offence. On the day of the offence, 22nd June 1982, Mr. Henry spoke to a young man in a Ford Falcon WN 14077, which car was at that time seen to have a CB Radio. The Crown case was that at the time the sketch was done the offenders were not then known and that Mr. Henry described the man he saw to the police artist to enable a sketch to be published in a newspaper to see if any person could identify the person he had seen. The completed drawing appeared in the Sunday Times on the 27th June 1982.

---------- ***BC8700685 at 7***

The overlay sketch was prepared in the following circumstances. The car in question had previously been owned by Mr. and Mrs. Allen and in the month before the offence they sold the car to a stranger who gave them a false name and whom Mrs. Allen considered was wearing a wig and he was also wearing spectacles. Mr. and Mrs. Allen attended before Sergeant Pierce on Friday 25th June, the day before Mr. Henry attended. Sergeant Pierce was not able to draw on the drafting film a face that satisfied the Allens, but he was able to draw hair and spectacles that satisfied Mrs. Allen. In his affidavit Sergeant Pierce deposes that to the best of his knowledge he erased the facial features from the drafting film at the conclusion of the interview with the Allens. He said that his normal practice was to erase any feature which was not acceptable to a witness. He said that only the hair and spectacles, as best he could recall, remained on the drafting film at the completion of the interview. He said that on the 28th June 1982 as a result of a conversation with Detective Gillespie he cut the drafting film in such a manner as to leave only the hair and spectacles on that piece of drafting film. He said he then handed that to Detective Gillespie together with the drawing done on drafting film in Mr. Henry's presence. He said the drawing and overlay became Ex. 21.

---------- ***BC8700685 at 8***

At the trial Sergeant Pierce gave very short evidence as to how he interviewed both the Allens and Mr. Henry and Ex. 21 being the composite of the underlay sketch and overlay was tendered and received as Ex. 21. It was labelled in the transcript as an "Identikit sketch" although the Sergeant had not described it as such. I shall later be referring to the fact that it was prepared by a newer technique known as "Photofit". Counsel for the Crown at the trial referred

to it as an identikit sketch and counsel for the defence followed suit, but this is of no significance. It was not suggested at the trial that a photofit picture as such was not admissible nor is this submitted at the appeal. In R v Cook [1987] 1 All ER. 1049 the Court of Appeal held that a photofit picture of a defendant is admissible at his trial as part of a witness's evidence and does not constitute a breach of the hearsay rule nor the rule against the admission of earlier consistent statements. I would also refer to Alexander v The Queen 145 CLR. 395 where photographs used in identification were admissible. Ground 7 before us alleges that the exhibit ought not to have been admitted into evidence as neither Mr. and Mrs. Allen could indentify the appellant Peter Mickelberg as the man they described. It will be convenient to deal with this ground before dealing with the allegation in the preceding ground that the exhibit was constructed from an actual photograph in possession of the artist. In R. v Cook the complainant did ultimately identify her attacker and the trial Judge admitted the photofit on the basis that it was part of the circumstances of the identification of the defendant. I would consider the reasons of the Court of Appeal would show that in appropriate circumstances it would be admissible even if the person describing the suspect cannot later identify him. Watkins LJ. said at p. 1084: "The true position is in our view that the photograph, the sketch and the photofit are in a class of evidence of their own to which neither the rule against hearsay nor the rule against the admission of an earlier consistent statement applies." Counsel for the appellant Peter Mickelberg is not arguing to the contrary. The basis of the argument is that it has now been ascertained that there was a mistake by the Allens in their identifying Ex. 21 and this mistake could have led to a miscarriage of justice. The mistake, which it is claimed the Allens made, is that at the trial they gave evidence where it would be interpreted that they said they gave the information to complete the underlay sketch as distinct from the overlay which meant that their views on the similarity of the underlay coincided with the view of Mr. Henry when this was not so. It would be very difficult to see any resemblance between the underlay and the appellant Peter Mickelberg and if the matter stopped there the mistake would be of no consequence. However, the matter did go further by reason of Exs23 and 78 which I will shortly describe. It would also be convenient to consider this ground in conjunction with ground 11 which reads: "11. The Learned Trial Judge erred in law in admitting into evidence Exhibit 23 and 78 when the best evidence in the form of eye witnesses called by the Crown were unable to identify the said Peter Mickelberg."

---------- ***BC8700685 at 10***

The Crown was endeavouring to show that the appellant Peter Mickelberg purchased the Ford Falcon from the Allens in May and was the person seen in that vehicle by Mr. Henry on the day of the offence. The first area of Crown evidence was that at the date of purchase the purchaser wrote the false name of Talbot on the "Talbot Note" and this handwriting was the same as that of Peter Mickelberg. This evidence is the subject of other grounds of appeal. When the Allens attempted to give a description to Sergeant Pierce on the 25th June 1982 they did not know the appellant and could not give a sufficient description for a sketch other than the hair and glasses. The evidence of the investigating detectives in the appeal is that the appellant Peter Mickelberg did not become a suspect until the 15th July 1982. His brother became a suspect earlier in July but after the publication of the photofit photograph in the Sunday Times on the 27th June. This was not as a result of this publication but was a result of inquiries into bank accounts.

---------- ***BC8700685 at 11***

The evidence of Sergeant Tovey in the appeal was that the investigating officers did not know Peter Mickelberg existed until the 7th July 1982 when they were inquiring into the Peter Gulley accounts. The decision was then made to obtain a photograph of him and this was done on the 15th July 1982 when the investigating officers went to the appellant Raymond Mickelberg's house and Peter Mickelberg was present. When they realised it was he who was at the house his name was called, he turned around and a photograph was taken. This the Crown say was the first photograph taken. On the following day a team of officers went to the appellant Peter Mickelberg's house and a number of documents were seized including a small coloured passport type photograph of Peter Mickelberg. Detective Cvijic gave evidence of this at the trial. (Trial T/s. p. 758). This photograph was handed to a police photographer on the same day, namely the 16th July, and he made some black and white copies of it (T/s. p. 436). One of these black and white photographs was the first of three photographs pasted on a board that became Ex. 78. Two copies of that photograph were given to Sergeant Pierce and on the 18th July 1982 he called on Mrs. Allen at her home with one of these photographs and using drafting film made an overlay of hair and spectacles at the direction of Mrs. Allen. This overlay was pasted on the photograph and it became the second photograph on the board that was Ex. 78. Sergeant Pierce then took the other copy of the photograph he had and drew on it hair in a slighty different style and the photograph thus adapted became the third photograph on the board, Ex. 78. This photograph had no spectacles. A copy of this photograph was one of two photographs shown to Mr. Henry by detectives on the 20th July. Mr. Henry recognised the person depicted in that photograph as being the person he saw in the car lot on the 22nd June 1982 and he signed the back of the photograph. He made a similar identification

of the photograph at the trial and this photograph was then admitted as Ex. 23. It is the photograph without glasses. Counsel for Peter Mickelberg stated that he did not think that he could object to it and it was a matter of weight. A few days before Mr. Henry identified the photograph the appellant Peter Mickelberg was taken to his office and Mr. Henry stated he could not identify him. Exhibit 78 was also identified and tendered. These were the circumstances in which Exs21, 23 and 78 were admitted into the trial. It would be open to the jury on this evidence to make the inference that the appellant was disguised by wearing a wig when seen by Mr. Henry and when Mr. Henry was shown a photograph with a wig as described by the Allens he could make the identification. On this basis it would appear to me that the exhibits were relevant and properly admitted at the trial for the purpose outlined but it would be necessary for the trial Judge to give a direction as to the dangers of this type of identification evidence. His Honour did give such a direction. In these circumstances there could be no merit in ground 11 as drafted. It is hard to understand the reference to best evidence. The Crown were endeavouring to show the appellant was different to his normal appearance and if a particular disguise was worn he was recognised. It was also a ground that could have been dealt with at the earlier appeal. As drawn I would see no merit in the ground, but this was not as it was argued. The basis of the argument is that it has now been ascertained that the Allens had made the mistake referred to and when this mistake is considered in conjunction with the fact that Exs23 and 78 were before the jury a miscarriage of justice has occurred. It may be difficult to spell this argument out from the grounds themselves, but that is of no consequence as the proposition which I have outlined was fully argued and I consider must be examined to see if it resulted in a miscarriage.

---------- ***BC8700685 at 13***

The confusion appears to have arisen because Mr. Allen at the trial was shown Ex. 21 and asked if he recognised it. The evidence led by the Crown would indicate that what Mr. Allen had previously seen was a sketch on translucent drafting film that did not satisfy him and most of which had been erased after he left. What he was shown in court was white cardboard consisting of only portion of the sketch done in his presence on top of a sketch drawn in the presence of someone else. This would inevitably lead to confusion of a witness. It is perhaps significant that he did not answer the question directly. When handed Ex. 21 these were the questions and answers: "Would you look at this for me, please? Taking it in stages, Mr Allen, are you able to recognise that as something which you had previously seen? - I think we might have improved on that a bit. Whether or not you improved on it, what can you tell us about that one? - The glasses look pretty well right. The hair is a bit out. What is wrong with the hair? - It's hard to explain, really. It is probably straight down the front more. It was straight down on the front more. What about the facial features? - It's pretty close. With the description from the witness left at that, the composite identikit photograph is marked for identification. MF121 .... Identikit sketch." It can be said that Mr. Allen has not directly stated that Ex. 21 itself was what was produced in his presence. In cross-examination the matter was taken further (T/s. p. 225): "HEENAN J: The witness has the bottom part of the item marked for identification 21. Mr Singleton, is that right? MR SINGLETON: Yes, sir."

---------- ***BC8700685 at 14***

I would interpose to repeat again that the bottom one was Mr. Henry's sketch and not the Allens. " TO WITNESS: Is that the one you agreed on? - Not really. As we left we said the hair was still not right. We could never get the hair right. MR SINGLETON: But what about the facial features? - Yes; we thought that was as close as we were going to get at that stage. We had had enough. When you say you thought the hair was not right, was that you or your wife's view of the hair? - No. I agreed but I was trying to get through to the artist at the time. Anyway, you later saw the top part, the overlay? - Mm. Were you about when that was prepared or was that shown to you? - No. We was there when that was drawn up. .... That top bit there with the glasses on, the overlay - was that done the same night when the bottom picture was drawn or was that done later? Did he come back, with another overlay with a slightly different hair style? HEENAN J: There are a couple of questions there, Mr Singleton. MR SINGLETON: Yes, sir. TO WITNESS: You said you told the police on the night when the identikit picture, the bottom one, was prepared, one of the first things you told them was that there were square lensed, thick black framed glasses? - Mm. You told us that he prepared the picture? - Mm. And that when you left after a couple of hours, you and your wife were satisfied as to the features of the person he had drawn, but you were still a bit concerned about the hair style? - Mm. When you left that Friday night, to the best of your recollection, was there a picture with an overlay and square framed glasses? Something like that? - I can't remember whether we drew the glasses on that night or - - Yes, he did draw it on while I was there. I was only there the once; yes. You said you were unhappy with the hair, and then you remember him coming out a second time? - I wasn't home when he came out home. You were not home? - No. Did your wife tell you that he brought another picture? - Yes. He brought out another photo and they got a closer description that time. But you did not see that? - No. You did say in your evidence, I thought, that when a picture was prepared by the police artist with you and your wife assisting him and when it was completed you and your wife

were as happy as you could be with the features of the face? - After we'd been through it, it was the closest we got. Right; and the nose, the chin, the mouth. You were not quite happy with the hair style, you said? - No. We spent a lot of time on that and couldn't get it right." It would appear that it was being assumed that the witness was saying that Ex. 21 was prepared in his presence. This may be the effect of the evidence, but the witness has not expressly referred to the medium in which the drawing was made and I would consider that the evidence is consistent with some uncertainty in his mind. Mrs. Allen's evidence was a little more positive (T/s. p. 236): "Did you spend some time with the police artist trying to reproduce your memory of this fellow? - Yes. Ultimately did you see, with the police artist, a composite picture of some sort? - What do you mean by that? That is with two bits; one that lies on top of the other? - Yes." This answer of itself would not be wrong as Sergeant Pierce's evidence was that he had the transparent drafting film over pieces selected from the photofit. However counsel for the Crown's next questions were: "Just look at the composite picture marked for identification No.21? Tell us first of all if you have seen it before? - Yes; the hair and the glasses, yes, and the face. You have seen that thing before? - Mm. Just tell us as best you can how that total thing relates to the person you saw that morning? - It seems we just couldn't explain the glasses and the hair to him and the policeman just couldn't get it right. We still weren't happy with it, you know, but its - - the jawline is too fine and that, but I think we had just had it by the time we had finished the - - How is the hair? - Well, roughly, but it had a part down on the - - well, this side of his head." I would consider this question in the circumstances could well have confused the witness and are to a degree equivocal. She was asked if she had seen that "thing" before and she saw a copy of part of the overlay prepared in her presence and in that sense she had seen an image before but had not seen the actual pasted cardboard before. Sergeant Pierce's evidence at the trial did clearly set out how the underlay was prepared in the presence of Mr. Henry and how the overlay was prepared after the conference with the Allens. If it could be said that the Allens positively identified the sketch on the underlay then their evidence was wrong. I would say that it would to an extent be equivocal whether or not they did make such identification. However the possibility must be examined that the jury or a juror may think they did make such an identification.

---------- ***BC8700685 at 17***

The fact that they may have been mistaken is claimed to be new evidence on the following basis. Affidavits have been filed by a number of witnesses having experience in identification procedures who referred to the fact that it would be impossible in the circumstances for a witness in the position of the Allens and one in the position of Mr. Henry both to have produced a picture similar to the underlay. Sergeant Pierce's affidavit in reply was that if the Allens gave evidence that they either drew or contributed to the underlay then they would be mistaken. His evidence before this Court was that he was not aware up to that stage of the Allens' evidence as he was out of court when they gave evidence at the trial. The appellants state that, as a result of this affidavit, they then realised that the mistake had been made. The prejudice submitted by Mr. Searle is outlined at p. 2206 of the appeal transcript: "The prejudice, in my submission, can be articulated in this way - and I like the way that Mr Domingo referred to it in his first affidavit, that through two separate sightings and two separate drawings ending up being a drawing of one person the man who bought the car on 25th May was effectively deemed to be the same person as the man who was at some hundred yards or somewhere from Barker House on 22nd June. The word 'deemed to be the person' is a very loose expression but, in my submission, the production of exhibit 21 from two very very separate sightings could only leave the jury with one possible inference to draw and that is that the same man the Allens saw was the man Mr Henry saw. In the absence of the drawing there was not sufficient evidence to decide that at all. There certainly was not sufficient evidence to determine that the man who bought the motor vehicle from the Allens on 25th May was the same man who parked his vehicle at City Business Brokers on 22nd June, not in the least, but the jury had one sketch from two separate sightings which, in my submission, would have tended to influence them greatly to believe that that was the same person." It was clearly established at the trial that the car which the Allens sold had the same number and was of the same make and description as the car seen by Mr. Henry. On the Crown case there was the handwriting evidence to indicate that the vehicle had been sold to and consequently was in the possession of the appellant Peter Mickelberg following the date of sale. On that basis I would consider it unlikely that a juror would adopt the reasoning process outlined. The final address to the jury of the counsel for the Crown did not suggest this as an argument and his Honour's warning would, I consider, be sufficient to have prevented the jury adopting such a line of reasoning. All the evidence at the trial and the evidence that we have heard would indicate that any confusion by the Allens would be no higher than a genuine mistake by reason of counsel for the Crown showing them the underlay when they were not the author of the document and asking them questions on the basis that they were. I do not consider this could lead to a miscarriage of justice or in any way affect the result.

---------- ***BC8700685 at 18***

The more serious allegation in the ground of appeal is that Sergeant Pierce constructed the underlay from a photograph of Peter Mickelberg. Sergeant Pierce prepared the sketch on the 26th June and it was inserted in the Sunday Times on the 27th June on the basis that the subject was unknown and help was being sought in his identification. The significance of the allegation that photograph was used to aid the sketch is that if it were true then the police artist would not have been acting in good faith. It would suggest also that there was a conspiracy to falsely implicate the appellant Peter Mickelberg and that the conspiracy was on foot at that early stage. The initial allegation was that the police had access to a passport photograph. The evidence on the part of Sergeant Pierce was that he did not know the offender and that the exercise was for the purpose of obtaining information in respect of the person described to him by Mr. Allen and Mr. Henry. As it transpired it was Mr. Henry's description that was used to obtain the information. Sergeant Pierce said in his evidence that he did not have a photograph. Mr. Henry also gave evidence to this Court and said that the underlay sketch was prepared in his presence as a result of his instructions and he was very firm that there was no photograph present. He was an impressive witness. He was a civilian witness with no reason for him to be involved in any such conspiracy.

---------- ***BC8700685 at 19***

Mr. Henry stated that before he was asked to participate in a conference which led to the sketch he was shown a number of arrest photographs of previous offenders on police files. These were referred to as "mug shots". He did not recognise anyone. There was nothing to indicate that the appellant Peter Mickelberg's photograph would be in these mug shots. He had not previously committed the type of offence where his photograph would be kept in such a way. The allegation as first propounded was that the investigating police had obtained from the Department of Foreign Affairs a passport photograph. The respondent produced evidence to show that this was not the position. There was a request made for access to the passport records of the appellant Raymond Mickelberg and the evidence shows that this request was made on the 9th July some 12 days after the publication of the sketch in the Sunday Times. However, the record showed that no such information was requested or forwarded in respect of the appellant Peter Mickelberg. He had applied for a passport on the 14th July 1980. His application was in accordance with the normal practice subsequently stored at the Australian Archives Regional Office Perth at 384 Berwick Street, East Victoria Park. The Assistant Director filed an affidavit and deposed: "That Archives issue stamp indicates that the application for Australian passport No. M285916 by Peter Mickelberg remained in the custody of the Australian Archives from the time of its accession on March 5th, 1981 until the 7th August 1985 when it was returned to the Passport Office." Officers from both the Passport Office and Archives, including Mr. Mackey, gave evidence before us and produced the records of each office relevant to the obtaining and storing of the passpost application and its return to the Passport Office in August 1985. These records would show that at the relevant time the photograph attached to the passport application would not have issued to the State police or to any person. After that evidence was received the appellant amended his grounds of appeal by deleting the reference to "passport" leaving the ground alleging that there was merely a photograph and the ground would indicate that this was in the possession of the police on the 26th June 1986. No basis is suggested as to how the police could possibly have obtained the photograph at that stage and there is nothing to show how the police could have obtained a photograph prior to the 15th July.

---------- ***BC8700685 at 21***

The evidence led before us to suggest that Sergeant Pierce has used a photograph prior to the 27th June when making the sketch is firstly the evidence of Mr. Cherry, a private consultant in the area of police criminal sketches and a resident of the United States. He came to the conclusion by making inferences from certain aspects of the sketch. To understand this evidence it becomes necessary to understand how Sergeant Pierce prepared the sketch. In cross-examination at the trial Sergeant Pierce said that he used a Penry photofit facility in order to preliminarily describe the features which the witnesses were describing to him. The appellants obtained and read to the court an affidavit from Mr. WE. Ryan who, under the professional name of Jacques Penry, was the inventor of the Penry Facial Identification Technique which he described in his affidavit. He said that "photofit" is a method of preparing composite facial images by means of sets of photographic facial features arranged in five principal categories, namely, hair and forehead; eyes; nose; mouth and chin and jawline. He said that in his research and preparation he had access to many thousands of police file photographs and it would appear from his affidavit that there were selected 576 photographs of facial features in the kit that was used specifically for male Caucasians. He deposed: "6. Photofit is now used widely throughout the world, superseding a previously used system known as Identikit, and to my knowledge Photofit has been exclusively adopted by the police forces, amongst others, of Argentina, Australia, Bahrain, Brazil, Canada, Cyprus, France, Hong Kong, Iceland, Italy, Israel, The Netherlands, New Zealand, Nigeria, Peru, Puerto Rico, Spain, Sweden, Switzerland, West Germany, the United States and the United Kingdom. 7. Photofit has been adopted by the Western Australian Police Force as a means of facial

depiction in the solution of crime." There was in court, and we examined, one of the photofit kits obtained by the Western Australian Police Force. It is contained in a wooden case and it classifies by numbers many photographs of portions of the face. There is a frame in which they can be inserted. The witness who may have seen the suspect selects individual items that appear to him to have the closest similarity to the suspect, such as the eyes and a photograph of the eyes selected can be inserted into the frame. The witness then selects other parts of the face and if the result does not appear satisfactory further adjustments are made. When a satisfactory result is arrived at the face as constructed can be photographed. The evidence before us would indicate that Mr. Ryan was not correct in his appreciation that the system has been "exclusively adopted" by the police forces to whom he refers. Each of the police forces referred to no doubt have purchased one or more kits, but there are indications that some did not use them at all or did not use them in the way contemplated by the designer. Mr. Domingo, a detective and composite artist with the New York City Police Department, stated his department did not use the photofit facility. He would obtain information from the witnesses and would then show the witness arrest photographs that are in the files and the witness would be instructed to seek facial similarities in those photographs (A T/s. p. 556). He would ask the witness to see if he could see similar eyes or a similar nose, mouth or hair-style. When all that reference material has been gathered Mr. Domingo would draw a sketch. His department has the instruction book which was used as a last resort but they do not have the whole facility. Mr. Cherry, who is a retired police officer of the Metropolitan Police Department Washington, said that the designer left an abbreviated copy with him for evaluation purposes. Mr. Cherry said he did not feel it was effective so he did not use it. The evidence would indicate that if the Penry photofit facility was used in the way designed it would be of limited use and it is not surprising if there were adaptations to it. Sergeant Pierce was using it in a modified and adapted form. He said in his affidavit: "12. In my experience the Penry Photofit Facility alone produces an unacceptable facial depiction because it appears dead and flat and there is insufficient flexibility for the witness. I have overcome this by using a translucent sheet of drafting film placed over the Penry Photofit features. I then trace the features onto the drafting film and adjust those features and add detail at the direction of the witness. 13. For example, the angle of the eyes is most important in depicting a particular face. The Penry Photofit Facility does not permit any adjustment to the angle of the eyes. I developed a system to overcome this by using a mirror placed vertically between the eyes in such a manner that the angle of the eyes can be changed by moving the Penry eye strip up and down. The witness is then able to direct me as to the proper angle of the eyes. I then draw one eye in at that angle and then place the second eye in a similarly symmetrical position. My system also permits the eyes to be moved closer together or further apart at the direction of the witness. 14. In drawing each of the facial features, the Penry Photofit Facility is used as a starting indication. My final drawing of individual features may become considerably different as a result of adjustments directed by the witness. 15. On occasion I have used Ingres paper in place of drafting film in the preparation of facial depictions. When paper was used a light box was needed. 16. I have used photographs as references on occasions in the preparation of facial depictions. On those occasions photographs are used in the same way as the strips from the Penry Photofit Facility." Sergeant Pierce said in evidence that he did not use the frame that was provided in the kit in order to insert and secure the pieces selected. He would place over the piece selected a transparent drafting film and would then draw on it and would alter his drawing in the way suggested by the witness. This would appear to be a method approaching that used by Mr. Domingo. The pieces in the photofit facility were no more than an aid to base his initial drawing. The ground of appeal as originally drafted but not subsequently argued stated that "Ex. 21 which purported to be a photofit constructed by the Penry photofit method was not a photofit constructed by that method and did not contain a single feature of the Penry photofit facility". Mr. Ryan's affidavit stated that there was not a single feature in it. These two aspects were ultimately not argued and it can be seen there is no substance in them. Sergeant Pierce in reality was not using Mr. Ryan's prescribed methods. The only reference that Sergeant Pierce made to its being "a Penry photofit facility" is the reference to which I have already referred which occurred in cross-examination and he said no more than that he used the facility in order to "preliminarily describe the features". He then referred to his making drawings.

---------- ***BC8700685 at 25***

Mr. Cherry expressed his conclusion in an affidavit that was filed. He served as a police officer in the Metropolitan Police Department Washington for 19 years until his retirement in 1980. Since then he has been a consultant. He stated that most witnesses do not possess "the near total recall" which would be required to call to mind fine details of a person's face and be able to relate those memories to a police artist. He stated: "8.As a consequence of my study of the police sketch and the photograph of Peter MICKELBERG, I make the following particular observations: a)EYES: The set of the eyes, their position in the head, relationship one to the other, spacing from the eyebrows and distance between the geometrically almost identical in appearance and proportion. b)EYEBROWS: In the photograph the subject's eyebrows are possibly bleached out by the lighting that was used. This gives them the look of thinning or becoming feathery as they taper towards their outer extremity. This anomaly is virtually duplicated in the drawing, considering that a drawing cannot precisely duplicate a photograph since it involves the

uncertainty of the artist's hand. This particular feature is one that is so subtle that it is doubtful that such a feature could either be recalled or articulated. That it occurs in both the photograph and the drawing leads me to conclude that one would almost certainly be used to influence the other. c)NOSE: The particular tilt of the right nostril, giving the look of the nose tilting slightly to the right, appears almost identical in both the photograph and the drawing. The general shape and proportion of the nose bulb which is not particularly outstanding or memorable and therefore not a good subject for recall memory, is far too similar to be coincidental. d)MOUTH: Considering the personal draftsmanship of the artist the mouth is somewhat stereotypical white, male, except for the width which is in direct proportion to the photograph. Again, since this particular feature is of no special consequence then why should it be recalled with such a degree of accuracy as to width and proportion? e)JAW AND CHIN: The jawline and the shape of the chin in both the photograph and the drawing are virtually identical in shape and proportion. This feature taken by itself would not be especially suspect except that as feature in the photograph it is not particularly outstanding, but none-the-less it has been duplicated in the drawing. 9.Based on my experience and for the reasons detailed above, I conclude that parts of the passport photograph of Peter MICKELBERG were incorporated into the finished drawing which has marked on it the letters 'MO, AT/82'."

---------- ***BC8700685 at 26***

Mr. Cherry developed this in evidence. He referred to similarities between the photograph in Ex. 78 and the underlay of Ex. 21. He referred to the fact that he had an initial reaction when he saw these similarities and said (A T/s.): "But the longer I looked at the photograph and the longer I examined it against the drawing then I started to begin to determine certain things that were comparable beyond chance. I have dealt in this business for so long - about 20 years of doing drawings - that I understand what can be done by a police artist. I have no problem with that whatsoever - if it looked identical to Peter Mickelberg. The problem I have is that this drawing incorporates features from a photograph of Peter Mickelberg. I say with the greatest kind of reluctance, this is not the kind of evidence I enjoy giving. This drawing was put together using the photograph of Peter Mickelberg."
In cross-examination he said that when he reached his decision he did not check to see whether there was a photofit laydown which might match or explain the similarities. He also agreed there were a number of differences between the photograph and the composite sketch. His comparisons were made in court between Ex. 78 and the composite sketch. That is, they were made by using the photograph seized from the house as distinct from the passport photograph.

---------- ***BC8700685 at 27***

Further evidence called in support of the proposition was from Mr. James Proven, a detective sergeant who has been retired for 11 years and was for 11 years prior to that involved with facial depiction of persons suspected of criminal acts and was employed by the Edinburgh City Police. When the photofit system was introduced he attended a training course in its use under the supervision of the inventor and he worked closely with it. In his affidavit he deposes to having seen a photographic enlargement of the underlay of Ex. 21 and a photographic enlargement of a passport photograph enlarged to a similar scale. He also had in his possession a film positive copy of the enlargement of Ex. 21 and when this was placed over the enlargement of the passport photograph there were a number of similarities. He referred specifically to four areas and said that within the bounds of his experience it would be highly improbable that even one feature could be such a photographic resemblance to the real person based entirely on a verbal description and using the photofit facility. This led him to express the view that the similarities are consistent with the underlay being traced on drafting film from the passport photograph. This was outlined in further detail in evidence. There are a number of factors that make it unconvincing. Mr. Proven was experienced in the use of the photofit facility in the method contemplated by the inventor. It is however a method that other administrators considered had limitations. It was the method to which Mr. Domingo, the next witness to whom I will be referring, classified as a "composite assemblage" as distinct from a "composite artist". Sergeant Pierce was acting as an artist making some use of the photofit facility and was using a method that had been subsequently developed over a period. This developed into an area in which Mr. Proven did not have experience. I do not consider he would be in a position to say what the likely results would be from using the methods developed by Sergeant Pierce. Mr. Proven does not purport to have greater skills than the experience of a detective sergeant working constantly with the photofit facility. He has no formal qualifications nor in reality is there an organised branch of knowledge whereby one could predict the likelihood of items sketched in these circumstances corresponding to reality. Mr. Proven was not a member of the International Association of Identification.

---------- ***BC8700685 at 28***

There was also called on behalf of the appellant Peter Mickelberg, Francis John Domingo who is a detective with the New York City Police Department and is a member of the International Association for Identification and is chairman of that association's forensic art committee. He has written a manual on standards and guidelines for composite artists. He expressed the view in respect of Ex. 21 that that must have been produced with the assistance of reference material and his evidence showed that this could be photographs or it could be photographic images from the photofit unit. He explained the method he used of obtaining descriptions from witnesses and obtaining likenesses from facial features of arrest photographs and making a freehand sketch from that material. He explained in cross-examination the manual he had written and in which it defined "composite art" as: "A freehand drawing made by combining various parts of a single graphic image. It is usually of a person but may be of an object.He referred to the distinction to which I have already referred between composite art and composite assemblage. He considered Mr. Proven's methods came within the classification of composite assemblage whereas Sergeant Pierce's was composite art.

---------- ***BC8700685 at 29***

The evidence to support the proposition that a photograph was used to aid the sketch are the theories advanced by Mr. Cherry and Mr. Proven. They are no higher than theories based on experience. They are based on what they consider to be similarities between the sketch and the photograph and on what they assess the chances are of achieving such a similarity without the aid of a photograph. Their evidence must be considered in combination with the evidence already available and that would show that the investigating officers did not have a photograph of Peter Mickelberg available to them prior to the sketch being published in the Sunday Times. The allegation initially was that it was a passport photograph whereas the evidence shows that at the relevant time that was in the Australian Archives. There was no seizure of any photograph or of any items until after the relevant date. There is Mr. Henry's evidence that no photograph of Peter Mickelberg was seen by him at the time he saw the sketch prepared. There is no conceivable way as to how Sergeant Pierce could have obtained such a photo. The matter could be taken further if there was other evidence of fabrication in other areas. This is no such evidence. There would be no motive or reason for Sergeant Pierce to be using a photograph. To put it at its highest it could be no higher than a possible theory but it would be rebutted by overwhelming evidence that the police had no photograph of Peter Mickelberg in their possession prior to the publication of the photograph.

---------- ***BC8700685 at 30***

I do not consider there is any evidence of the required standard to show that a miscarriage has occurred nor is there any evidence which would be likely to affect the results of the trial. This would be sufficient to dispose of these grounds of appeal; I would however go further. Sergeant Pierce was an impressive witness who satisfied me he was acting honestly and was carrying out his function of drawing sketches sincerely and efficiently. I do not consider any jury would reject his evidence by reason of the theories advanced.
I have read the reasons of Wallace J. and Olney J. in respect of the other grounds and I would agree with them. I wish to add the following comments. Fingerprint Evidence
There was no witness, who testified, who stated that the fingerprint is a forgery. The nature of the evidence on behalf of the appellants was that the crime mark could have been made by the natural finger of the appellant Raymond Mickelberg or it could have been made by a rubber silicone finger. The evidence was it is not possible to tell and one of the reasons was because it was a poor print. If the evidence in a trial stopped at that point it still would be strong circumstantial evidence adduced by the prosecution because it would be unlikely and not within reason for there to be in existence a rubber finger and it could not be in existence without the participation of the suspect. The prosecution would not normally be required to negate the existence of such a finger. Its existence would be in the knowledge of the accused person. To avoid inferences arising from what would otherwise be strong circumstantial evidence it would be for the accused person to introduce evidence to show that there was a possibility that someone was in possession of an artificial finger capable of making the mark. The prosecution would then be required to negate that possibility. At the trial the appellant did not introduce such evidence for that purpose. His case was that he did handle the cheque by reason of having been handed it by the police before the detection of the fingerprint.

---------- ***BC8700685 at 31***

The appellant now submits in effect that he did not realise until he consulted further experts that the rubber finger was capable of leaving the mark. His submissions were that similar rubber fingers were available at the time of the offence some of which were seized by the police, therefore the police would have had in their possession the

means to make the fingerprint and this possibility was the explanation for the print being on the cheque. The basis of the proposition is that police officers visited the appellant's home on 15th July 1982 and on the appellant's evidence seized rubber hands. The respondent's evidence is that no hands were seized until the 26th July after the detection of the mark and the documentary evidence being the warrants is consistent with this. The evidence to support the earlier seizure is that of the appellant and his immediate family. We were referred to this evidence which was given at the trial. It was not an issue at the trial. The appellants' evidence in other areas appeared not to be accepted when it was in conflict with the police evidence. It would appear to me that once the police explained what they seized and supported the evidence with what was written in the warrants it would have been accepted. The state of the evidence is now that I do not consider the result in the minds of reasonable men would be affected. There is further evidence to indicate that an artificial finger of the quality required was not in existence at the time of the offence. The appellant instructed Mr. Bardwell, a retired detective inspector of Queensland who is now carrying on business as a consultant and in January 1983 he was handed a rubberized cast of the right index finger and found he could not obtain an impression from it. After this consultation the appellant created another cast which ultimately became Ex. A7 at the trial. It was tendered during the appellant's evidence. He stated that on the 15th July the police took everything that was cast in brass bronze and anything that was cast in rubber. He was then shown Ex. A7 and the following questions were asked (T/s. p. 1063): "Would you look at this? Is this the sort of work that you were doing? - Yes, that is mine. Had this been taken? - All that sort of work had been taken." The exhibit was received in evidence. The purpose appeared to be to show the type of things that were taken and to explain a conversation that took place on the 23rd September when it is claimed that they were referred to. It would nevertheless have given the jury the impression that it was in existence at the time of the seizure. He was asked about the hands in cross-examination as follows: "What is the brass and the rubber hand all about? - Sir, they are the objects, amongst hundreds of others, that were seized from my house. Particular reference was made by Hancock on, I think, 23rd September, from memory, and by Tovey on the (I think) 15th as to what a crazy hobby I had." Mr. Cannon, who was acting as counsel and conducting the examination, gave evidence on the appeal. His evidence was that this hand was manufactured in 1983 after the visit of Mr. Bardwell. He said that on instructions he tendered it at the trial. He said he made a deliberate decision not to comment on it as he was not going to tender a hand that was supposed to be in existence at a certain time when he knew for a fact it was produced at different time. He was cross-examined on the basis that he was instructed to produce the hand for a legitimate purpose to use it in connection with the demonstration board that was to be used at the trial. I consider this would weaken the credibility of the proposition that a cast of the same quality of Ex. A7 was in existence at the time of the offence and was seized by the police on the earlier occasion and used by them in a fraudulent way. It would not, in my view, be within reason to suggest that another offender would have stolen such a finger to fabricate the mark. I would regard it as a further factor to take into account that the appellant's evidence at the trial indicated he could have handled the cheque whereas the defence now sought to be pursued would be on the basis that a print from his finger was not placed on the cheque.

---------- ***BC8700685 at 34***

The matter goes further inasmuch as there is evidence to which I have not as yet referred that shows that there are experts who would testify that the crime mark was not a forgery. I would refer particularly to Mr. Warboys who is the senior chief fingerprint officer and head of the Fingerprint Photographic and Crime Scene Examinations Services of the Metropolitan Police Force, New Scotland Yard, London. He expressed the opinion in his affidavit that there is no doubt in his mind that the crime mark was placed on the cheque by the appellant's natural finger and there is no evidence to indicate that it had been placed there by silicone or rubber casts. He explained further in his affidavit and in evidence why he considered it was placed by a natural finger. I would refer to his evidence particularly as he has had recent experience in the detection of forgeries.
Mr. Thompson who is currently the supervisory fingerprint specialist with the Central Bureau of Investigation Washington also expressed the view that in his examinations everything pointed to a legitimate finger. Mr. BJ Norton who was until the 30th May an inspector with the Victorian police and officer in charge of the Fingerprint Bureau has also had experience with the detection of forgeries and expressed the view that the crime mark was made by the finger of the appellant and that there are no apparent signs of forgery.
The first ground of appeal is that as fingerprints can be forged it must follow that the following direction of his Honour was a misdirection: "As his evidence in that regard was not challenged, you may safely accept that a fingerprint is, in effect, an unforgeable signature."

---------- ***BC8700685 at 35***

His Honour did not say fingerprints cannot be forged. His Honour referred to Sergeant Henning's evidence that there is no documented evidence of two fingers leaving the same print and referred to that evidence not being

challenged. The sergeant was obviously referring to two natural fingers leaving the same print. The context of his Honour's remark is that a fingerprint made by a natural finger is an unforgeable signature by reason of the fact that there is no known instance of two natural fingers leaving the same print. His Honour did not refer to the possibility of a rubber cast leaving an identical print as that possibility was never raised and was not an issue. The nature of the defence was that it was Raymond Mickelberg's fingerprint but that the circumstances under which it appeared on the cheque would not have compromised him. His Honour very carefully explained that to the jury and put the appellants' case.
I would conclude the area of fingerprints by saying I can see no merit in the suggestion that investigating officers had access to the fingerprints through the Central Bureau in Sydney. Fingerprints were taken by the Commonwealth police as a result of an arrest in 1978 and a copy given to the State police by reason of their receiving the appellant into the State lockup. The State police destroyed them on the request of the appellant. Inspector Henning supervised this destruction but it would not be reasonable to expect him to recall the incident when conducting investigations in 1982. Nor would it be reasonable in the circumstances to expect the State police to be checking through the Commonwealth police to see if they still had the prints available. Handwriting

---------- ***BC8700685 at 36***

The new evidence which it is claimed existed in respect of handwriting is from Mr. G. Roberts, a consulting chemist and an examiner of the questioned documents. He said in his affidavit that as a result of his examination he is of the opinion that whilst there are several points of strong similarities between the questioned document and Peter Mickelberg's handwriting there are also several points of difference and as a result he is of the opinion that it cannot be concluded without having significant doubts that the Talbot Note was written by Peter Mickelberg and he points to the differences. At the appeal the respondent called further evidence to support the evidence given at the trial that it was Peter Mickelberg's handwriting. The respondent called Mr. Gregory who is now the director of the document fraud section of the Department of Immigration and previously was in private practice and is a member of the Australian Society of Forensic Document Examiners. He had been consulted by Mr. Cannon on behalf of the appellants prior to the trial and examined the Talbot Note and came to the conclusion that the author of the entry "Robert Talbot" was the same person who had written the documentation in the name of Peter Mickelberg. He was not called at the trial. The Crown also called on, at the appeal, Mr. DM. Ellen who is head of the document section of the Metropolitan Police Forensic Science Laboratory in London. He examined the documents and concluded that the disputed writings in Ex. 20, that is the first four lines in capital writing, were written by Peter Mickelberg. The main Crown evidence was from Sergeant Billing, that was before the jury at the previous trial. After weighing up all the available evidence I would not consider that the view expressed by Mr. Gregory would affect the result.

---------- ***BC8700685 at 37***

In respect of the remaining grounds I am in agreement with my brethren. I would dismiss the appeals.

Order

Appeal dismissed.

Mr HA Wallwork QC and Mr GH Lawton (instructed by Messrs. Lawton & Gillon) appeared for the appellant.

Mr PK Searle (instructed by Messrs. Lohrmann Tindal & Guthrie) appeared for the petitioner.

Mr JR McKechnie, Ms MA Yeats and Mr M Mischin (instructed by the State Crown Solicitor) appeared for the respondent.

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