[2003] WASCA 296

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	COURT OF CRIMINAL APPEAL
CITATION	**:**	MALLARD -v- THE QUEEN [2003] WASCA 296
CORAM	**:**	PARKER J WHEELER J ROBERTS-SMITH J
HEARD	**:**	10 - 14 JUNE, 11 - 15, 18 - 21, 25, 28, 29 AUGUST, 17 - 21 NOVEMBER 2003
DELIVERED	**:**	3 DECEMBER 2003
FILE NO/S	**:**	CCA 135 of 2002
BETWEEN	**:**	ANDREW MARK MALLARD Petitioner AND THE QUEEN Respondent

Catchwords:

Criminal law and procedure - Earlier appeal dismissed - Appeal by reference from Attorney-General of petition - Approach to be taken by Court in determining appeal by reference of petition - Principles

Evidence - New or fresh evidence - Distinction - Principles applicable

Evidence - Non-disclosure by the Crown - Effect of - Whether resulting in miscarriage of justice

Evidence - Confession by petitioner to police - Statements made by him in the third person - At trial claimed to be his "theories" about how the crime was committed by the killer - Whether genuine "confession" or mere "theorising"

Evidence - Polygraph or "lie detector" examination - Whether results admissible

Legislation:

Sentencing Act 1995 (WA), s 140(1)

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Petitioner	:	Mr M J McCusker QC, Dr J J Edelman & Ms C L Sargent
Respondent	:	Mr B Fiannaca & Mr P D Yovich

Solicitors:

Petitioner	:	Clayton Utz
Respondent	:	State Director of Public Prosecutions

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

Bonython v R (1984) 38 SASR 45
Bradshaw v The Queen, unreported; CCA SCt of WA; Library No 970228; 13 May 1997
Chamberlain v The Queen (No 2) (1984) 153 CLR 521
Clark v Ryan (1960) 103 CLR 486
Craig v The King (1933) 49 CLR 429
Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579
Easterday v The Queen [2003] WASCA 69
Frye v USA (1923) 293 F1013
Gallagher v The Queen (1986) 160 CLR 392

Grey v The Queen [2001] HCA 85
Hocking v Bell (1945) 71 CLR 430
Idoport Pty Ltd v National Australia Bank Ltd [1999] NSWSC 828
In Re Van Beelen (1974) 9 SASR 163
Kluck v Borland 413 NW 2d 90 (1984)
Lawless v The Queen (1979) 142 CLR 659
Lee & Ors v Loudes Martinez (New Mexico) No CS2003-00026 (Supreme Court No 27,915)
Mallard v The Queen, unreported; CCA SCt of WA; Library No 960505; 11 September 1996
Mickelberg v The Queen (1989) 167 CLR 259
Mickelberg v The Queen, unreported; CCA SCt of WA; Library No 970749; 30 October 1997
Murray (1981) 7 A Crim R 48
Nolan v The Queen, unreported; CCA SCt of WA; Library No 970260; 22 May 1997
Osland v The Queen (1998) 197 CLR 316
People v Kelly Cal 3d 24 (1976
People v Young 391 NW 2d 270 (1986)
Phillion (1974) 53 DLR (3d) 319
R v Apostilides (1984) 154 CLR 563
R v Beland and Phillips [1987] 2 SCR 398
R v Brown (Winston) [1994] 1 WLR 1599
R v Gallagher [2001] NSWSC 462
R v Gilmore [1977] 2 NSWLR 935
R v Hadland [1969] VR 725
R v Jarrett (1994) 73 A Crim R 160
R v Karger (2001) 83 SASR 1
R v McHardie and Danielson [1983] 2 NSWLR 733
R v Pantoja (1996) 88 A Crim R 554
R v Runjanjic and Kontinnen (1991) 53 A Crim R 362
Ratten v The Queen (1974) 131 CLR 510
Re Knowles [1984] VR 751
Re Matthews & Ford [1973] VR 199
State of Idaho v Perry Idaho Supreme Court 2003 Opinion No109, 5 November 2003
State Rail Authority of New South Wales v Earthline Construction Pty Ltd (in liq) (1999) 160 ALR 588
United States v Crumbie 895 F Supp 1354, 1363 (D.Ariz. 1995)
United States v Downing 753 F 2d 1224 (3rd Circ 1985)
United States v Scheffer 523 US 303 (1998)
Wong (1977) 1 WWR 1(BC)

Case(s) also cited:

Button v The Queen (2002) 25 WAR 382
Committee of Concerned Social Scientists, Amicus Brief to the United States Supreme Court in United States v Scheffer, August 1, 1997
Hunter and Sara v R (1999) 105 A Crim R 223
Kumho Tire Co Ltd v Carmichael (1999) 119 S Ct 1167
Lowery v The Queen [1974] AC 85
McKinney v The Queen (1991) 171 CLR 468
R v Brown, unreported; High Court of New Zealand; 19 September 1997
United States v Galbreth 908 F Supp 877 (D NM 1995)
United States v Padilla 908 F Supp 923 (SD Fla 1995)

JUDGMENT OF THE COURT:

History of the reference

1 On 23 May 1994 Pamela Suzanne Lawrence was killed at Mosman Park. On 2 November 1995 the petitioner's trial commenced, and he was convicted on 15 November 1995 of wilfully murdering Mrs Lawrence.

2 By notice of appeal dated 20 November 1995, apparently prepared by the petitioner himself, he appealed against conviction on the ground that the learned trial Judge erred in admitting into evidence certain oral conversations at the CIB police office on 10 and 17 June 1994. At the outset of the hearing of that appeal, application was made by his counsel for leave to amend the grounds by substituting five other grounds together with a ground 6, which referred to "new and fresh evidence" and asserted that particulars would be provided at or before the hearing of the appeal. No such particulars were ever provided, and on 11 September 1996 the Court of Criminal Appeal dismissed the appeal. There was no appeal against sentence.

3 On 8 July 2002 a petition for clemency was forwarded on behalf of the appellant pursuant to s 140 of the *Sentencing Act 1995 (WA)*. The Hon Attorney General decided to refer the case to the Court of Criminal Appeal pursuant to s 140(1)(a) of the *Sentencing Act*, which relevantly provides:

> " (1) a petition for the exercise of the Royal Prerogative of Mercy in relation to an offender convicted on indictment, ... may be referred by the Attorney General to the Court of Criminal Appeal either –
>
> (a) for the whole case to be heard and determined as if it were an appeal by the offender against the conviction ... ."

4 The notice of appeal has been the subject of a number of amendments both prior to the hearing of this reference and at the hearing. The final version of that document is an amended notice of appeal dated 18 August 2003, pursuant to leave granted and orders made on 15 August 2003 during the course of the hearing of the appeal. A perusal of the reference and of the various applications for leave to amend the grounds of appeal, and a comparison of the grounds of appeal with the submissions actually made by the appellant's counsel in closing, reveals that the appeal has been something of a moveable feast. We will return to that subject

briefly later. For the moment, it is sufficient to note that we have chosen to deal with the issues arising largely in the order in which they were dealt with in counsel for Mr Mallard's closing address.

5 It should also be noted that there was some controversy between counsel for Mr Mallard and counsel for the respondent, as to whether Mr Mallard was truly an appellant, or was rather to be referred to as an "applicant". We consider, consistently with authority, as a person whose petition has been referred to this Court by the Hon Attorney General pursuant to s 140(1)(a) of the *Sentencing Act*, he is properly to be described as "the petitioner".

Relevant legal principles

6 Leaving aside for the moment, issues surrounding polygraph evidence, there are four broad areas of legal principle which need to be considered, however briefly. There was not a significant difference, as to most of them, between the submissions put on behalf of the petitioner and on behalf of the respondent. However, it is desirable to set out what appear to be principles of significance for the determination of this appeal.

(i) Reference of the "whole case"

7 It was accepted on both sides that on reference the Court had a duty to consider the "whole case". The Court is required to consider the case in its entirety, subject only to the limitation that it is bound to act upon legal principles appropriate to an appeal.

8 However, there was at times a tendency for counsel for the petitioner to refer to this proposition as if it justified the hearing afresh of evidence at trial and evidence called on the appeal, without regard either to the verdict of the jury or to the previous decision of the Court of Criminal Appeal in this case. That was particularly noticeable in the petitioner's opening submissions, in which very detailed submissions were put as to discrepancies between the evidence of various witnesses as to the timing of certain events. Those matters were before the jury at the petitioner's trial, although of course they were not marshalled and emphasised in precisely the way in which the petitioner now seeks to marshal and emphasise them.

9 The respondent relied particularly upon ***Re Matthews & Ford*** [1973] VR 199 as authority for the proposition that on a reference the jurisdiction of the Court was confined to fresh material brought before the Court and that it could not re-adjudicate a ground of appeal already heard and

disposed of. The petitioner relied upon a decision of this Court in ***Mickelberg v The Queen***, unreported; CCA SCt of WA; Library No 970749; 30 October 1997. That decision is authority of the Court of Criminal Appeal of this State bearing directly upon the question of the way in which the Court ought to approach a decision of a previous Court of Criminal Appeal in relation to the subject matter of the reference. However, it is authority which supports the submission of the respondent. At page 6 of the reasons for decision of Malcolm CJ (with whom Steytler and Wheeler JJ agreed), his Honour noted that the basic submission of the respondent in that case was that the reference to the court of "the whole case" contemplated that decisions on issues already heard, after full opportunities for argument have been offered to both parties, should not be re-opened and again heard and determined on the same grounds of appeal. His Honour canvassed the various cases in a number of jurisdictions which shed light upon that proposition, and observed as follows (at 13):

> "Counsel for the Crown rightly contended that s 21(a) of the *Criminal Code* and s 140(1)(a) of the *Sentencing Act 1995* do not contemplate that the whole case should be retried on appeal. It was submitted that the provisions contemplated confining the jurisdiction of the Court to fresh material and do not contemplate that any matter, which had been previously dealt with at a trial and disposed of on an appeal which had already been heard and determined, should be re-opened in the absence of cogent fresh evidence. This submission is correct, subject to the qualification regarding new evidence in the last sentence in the passage quoted from *Ratten* above [referring to the passage in ***Ratten v The Queen*** (1974) 131 CLR 510, at which Barwick CJ said – page 517 – that if by reason of new evidence which is not fresh the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the court will quash the conviction]."

10 Of course, as counsel for the petitioner pointed out, the court in the ***Mickelberg*** decision to which we have referred did not grant the Crown's application to strike out certain grounds of appeal as attempting to raise issues already determined against the appellants. However, that application was not dismissed because the principle for which the Crown contended was unsound, but because of the difficulty, in a proceeding by way of preliminary objection, of evaluating the way in which matters which were either fresh or new in the relevant sense would interact with issues already determined.

(ii) New evidence/fresh evidence

11 Subject to questions of non-disclosure, which will be dealt with shortly, evidence which has not been produced at trial falls into two broad categories. One is evidence which was available at the trial or which could, with reasonable diligence, have then been discovered. The other consists of evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered. Only the second category comprises "fresh" evidence. The first category is frequently described as "new" evidence.

12 It has been suggested on a number of occasions that the distinction between fresh evidence and new evidence is of minor, or of decreasing, significance in the context of criminal appeals, a proposition which is supported to a degree by observations in some decisions of this Court (eg ***Nolan v The Queen***, unreported; CCA SCt of WA; Library No 970260; 22 May 1997 per Malcolm CJ with whom Pidgeon and Murray JJ agreed at 62 – 63). The distinction is nevertheless one which continues to be recognised. It was a distinction reasserted as recently as this year in a decision of this Court (***Easterday v The Queen*** [2003] WASCA 69 at [204]). It has been repeatedly recognised in decisions of the High Court. In ***Mickelberg v The Queen*** (1989) 167 CLR 259, for example, Toohey and Gaudron JJ explained that the underlying rationale for a Court of Criminal Appeal setting aside a conviction on the ground of fresh evidence is that the absence of that evidence from the trial was in effect a miscarriage of justice (at 301); see also ***Gallagher v The Queen*** (1986) 160 CLR 392 at 395, 402 and 410). However, in respect of new evidence, their Honours in ***Mickelberg*** went on to say, at the same page:

> "There is no miscarriage of justice in the failure to call evidence at trial if that evidence was then available, or, with reasonable diligence, could have been available: see *Ratten v The Queen* (1974) 131 CLR 510 at pp 516 – 517, per Barwick CJ, noting however, that there may be somewhat greater latitude in the case of criminal trials than in the case of civil trials."

13 Not only is the distinction between fresh and new evidence one which is well-established in the criminal law, but, as has been explained on a number of occasions, the distinction is one soundly based in principle. That principle was adverted to by Toohey and Gaudron JJ in the passage from ***Mickelberg*** already quoted. It was explained in somewhat more detail by Mason J in ***Lawless v The Queen*** (1979) 142 CLR 659 at 675 – 676. His Honour said:

> "However, it is not permissible for a court of criminal appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals no more than a likelihood that the jury would have returned a verdict of not guilty. Two considerations operate to bring about this result. The first is that in a criminal trial the accused is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he is tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will provide a ground for a second trial at which a different or refurbished defence may be presented. Accordingly, an accused person, if convicted, generally cannot complain of a miscarriage of justice if he deliberately chooses not to call material evidence, it being actually available to him at the time of the trial, or if he fails to exercise reasonable diligence in seeking out material evidence.
>
> The second consideration is that there must be powerful reasons for disturbing a conviction obtained after a trial which has been regularly conducted. ... If the evidence newly adduced falls short of establishing that the accused should not have been convicted, there is no overwhelming reason why the conviction, regularly obtained after a fair trial should not be allowed to stand."

14 Of course, as was noted in ***Ratten***, the accused person in the case of a criminal trial is afforded considerable latitude, because of the difficulty of the accused's position and the discrepancy between the resources perceived to be available to the Crown and to the accused. Evidence not actually available to an accused will often be treated as fresh evidence, notwithstanding that it could on a narrow view have been discovered by diligent enquiry. That is something which falls to be evaluated having regard to the circumstances of each case.

15 If the evidence is new but not fresh evidence, the Court of Criminal Appeal will quash a verdict of guilty only if that material either shows the appellant to be innocent or "raises such a doubt about his guilt in the mind of the court that the verdict should not be allowed to stand": ***Ratten v The Queen***, supra, 520 per Barwick CJ. If there is fresh evidence, a number of authorities have explored the way in which such evidence may

demonstrate that a miscarriage of justice occurred. In ***Lawless***, (1979) 142 CLR 659, Aickin J at 684 – 686 explained the task of the Court of Criminal Appeal by reference to the joint judgment of Rich and Dixon JJ in ***Craig v The King*** (1933) 49 CLR 429 at 439, which read:

> "The 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 a plausibility as well as relevancy. 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."

The same passage was quoted by Menzies J in ***Ratten***, and by Gibbs CJ in ***Gallagher v The Queen*** (1986) 160 CLR 392 at 396. In ***Gallagher***, Mason and Deane JJ expressed the test in terms of a "significant possibility of a jury bringing a different verdict" (at 402). Gibbs CJ at 399 agreed with that view, although his Honour emphasised 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 miscarriage 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."

Dawson J expressed tests similar to that enunciated by Gibbs CJ and Mason and Deane JJ (at 421) stating that the court would need to conclude that "a jury might entertain a reasonable doubt about the guilt of the appellant".

> "In *Mickelberg v The Queen* (1989) 167 CLR 259 Mason CJ (at 273) followed the test endorsed in *Gallagher v The Queen* by four of the five justices and expressly approved the remarks of Dawson J which we have quoted. . Brennan J (at 275) expressed

his preference for a test expressed in terms of 'likely' and not 'might'. Deane J adopted the 'significant possibility' test. Toohey and Gaudron JJ (at 302) said:

> 'In essence, the fresh evidence must be such that, when viewed in combination with the evidence given at the trial, it can be said that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused if all the other evidence had been before it ... or, if there be a practical difference, that there is "a significant possibility that the jury, acting reasonably, would have acquitted the [accused] ...". For ease of expression we proceed by reference to the formulation that the jury is likely to have entertained reasonable doubt had all the evidence been before it, noting, in that context, that it is necessary that the fresh evidence be credible in the sense that a reasonable jury could accept it as true, but it is not necessary that the court should think it likely that a reasonable jury would believe it.' "

16 To the extent that evidence is properly regarded as "fresh", we propose to apply the test as formulated laid down by the majority in ***Gallagher v The Queen*** and ***Mickelberg v The Queen***, namely, whether the petitioner has established that there is a significant possibility that, in the light of all the admissible evidence (including that given at the trial), a jury, acting reasonably, would have acquitted him.

17 Although the ultimate question concerns the court's opinion as to the effect of the fresh or new evidence on a jury, it is inevitable that, in the process of answering that question, the court will form its own assessment of the credibility of the witnesses. Regard will be had to the fact that, as Mason CJ, Deane, Dawson and Toohey JJ pointed out in ***Mickelberg v The Queen*** (at 494):

> " 'a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced'. Regard, however, will also be had to the possibility that, in some instances, a witness regarded by the court as credible beyond reasonable doubt, may be seen by a jury in a different light, and that a jury might have a different view of a witness, regarded by the court as not being capable of belief."

(iii) Material Non-Disclosure by the Crown

18 The respondent formulated its submissions of law in respect of these issues in terms which appear to us to be generous to the petitioner. So far as the duty of disclosure is concerned, the respondent asserts that the prosecution had a duty to disclose:

> "That which can be seen on sensible appraisal by the prosecution:
>
> (1) to be relevant or potentially relevant to an issue in the case;
>
> (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
>
> (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

In support of that proposition, the respondent cites ***R v Brown (Winston)*** [1994] 1 WLR 1599 at 1606, ***Bradshaw v The Queen***, unreported; CCA SCt of WA; Library No 970228; 13 May 1997 and ***Easterday v The Queen*** [2003] WASCA 69 at [195] – [197].

19 While the respondent's concession represents, it seems to us, an accurate statement of the current law concerning the prosecution's duty of disclosure, the question whether it precisely reflects the law applicable at the time of the investigation of Mrs Lawrence's death is one which might be open to argument. The principles enunciated in ***R v Brown (Winston)*** are, for example, different from the summary of the prosecution's duties arrived at after a detailed consideration of the then currently understood position in ***In Re Van Beelen*** (1974) 9 SASR 163 at 249, by the Supreme Court of South Australia. They also appear not to be entirely consistent with the views expressed in ***Lawless v The Queen***, a decision of the High Court delivered in 1979, which we propose to consider shortly.

20 Given that the respondent has conceded that its duties at the time of the petitioner's trial fall to be considered in this case against the standards set out in ***R v Brown (Winston)*** and the other cases to which we have referred, we propose to accept that concession and to apply that standard. However, it is worth noting that there has been an apparent broadening, to some degree, of the view taken of the prosecution's duties over the course of the last 20 years or so. That change, in either the substance or the emphasis of the law, illustrates the difficulty, in a reference such as the

present, in appreciating and giving due regard to the atmosphere of a trial conducted some considerable time ago, at a time when the law may, in principle or in practical application, have been perceived somewhat differently. Accepting the prosecution's concession in this respect gives the petitioner the benefit of the most generous view which can be taken towards his appeal.

(iv) Effect of Non-Disclosure

21 Similar comments can be made in respect of the concession by the respondent that cases of material non-disclosure by the Crown fall to be considered somewhat differently from the way in which evidence not available at trial (whether new or fresh) is generally to be considered. The respondent concedes that where there is found to be a departure from the requirements of a properly conducted trial, by reason of non-disclosure by the Crown, it cannot be said that there has been no substantial miscarriage of justice if the petitioner has lost "a chance fairly open to him of being acquitted". In that respect, the respondent cites ***Grey v The Queen*** [2001] HCA 85.

22 The respondent's submission in this case builds a concession upon a concession, since it appears that in ***Grey's*** case the respondent had conceded that the case was not to be determined by reference to the principles relating to fresh evidence but by reference to the principles governing the obligation of the Crown to make disclosure in criminal cases (at [9]). It appears from [23], from the observations of Gleeson CJ, Gummow and Callinan JJ, that the court regarded that concession as well made.

23 What is not apparent from the report of ***Grey*** is whether the court had cited to it ***Lawless v The Queen*** ((1979) 142 CLR 659), a decision in which, save for Murphy J in dissent, all Justices of the High Court apparently considered that, where the prosecution had failed to disclose to the defence the contents of a statement made by an eye witness to a part of the relevant events, an important question for the court's consideration was whether the evidence was to be treated as relevantly "fresh". All Justices seem to have been of the view that it would have been preferable for the prosecutor to have disclosed the material, with the strongest view being taken by Mason J who, at 678, observed that although there was no rule of law requiring the prosecution to produce that material he did "not condone" the failure to do so. Different views were expressed as to whether the evidence was fresh (Barwick CJ and Mason J finding it was not, Stephen J contra, Aickin J not deciding). All four of the Justices in

the majority took the view that even if the evidence were fresh it would not have been likely to have led to a different result on a new trial.

24 Certain observations, particularly of Stephen J at 673 and Mason J at 678, tend to suggest that non-disclosure might result in a miscarriage of justice, even where the evidence was not fresh, if deliberate concealment or misconduct on the part of the prosecution were involved. The court later held, in ***R v Apostilides*** (1984) 154 CLR 563 at 577 that misconduct of the prosecutor is not an essential condition precedent to a miscarriage of justice. However, that was in a somewhat different context of a case in which there was a failure on the part of the Crown to call a witness, copies of whose statements were made available to defence counsel. So far as we can ascertain, ***Lawless*** has not been overruled, nor its correctness doubted, save to the extent that the decision in ***Grey*** may be seen as inconsistent with it.

25 Again, as in the case of the prosecution's duty of disclosure, the respondent has accepted a view of the law which is most favourable to the petitioner. For the purpose of this appeal, we propose to accept that concession as rightly made.

The Crown Case

26 So that what follows can be understood, it is desirable to outline briefly the Crown case against the petitioner as it was at trial. We do so by adapting the reasons of Malcolm CJ in the decision of the Court of Criminal Appeal delivered on 11 September 1996. At one or two points there are matters in respect of which we interpolate a comment which appears in square brackets. His Honour the Chief Justice's summary is as follows.

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

28 Mrs Lawrence was a shopkeeper and jewellery maker who conducted a jewellery making business and jewellery shop known as "The Flora Metallica" in Glyde Street, Mosman Park. She was assisted in the business by a Mrs Jacqueline Barsden who was working at the shop on 23 May between 9.55 am and 3.00 pm. Mrs Barsden explained the nature of the business and the daily routine and what happened on that day. There was a shed at the back of the shop which was used as a workshop. Mrs Lawrence spent most of the day in the shed where there was

equipment for gold plating and coppering. It seems that in the middle of the day Mrs Lawrence said that she was going shopping. She went out and returned to the shop at 2.00 pm. At about 2.10 pm she went down to the shed. Mrs Barsden left for the day at about 3.00 pm. She closed the front door of the shop so that it could only be opened from the outside with a key, but it was not deadlocked. It could be opened from the inside.

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

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

31 There was no immediate suspect identified by the police who examined some 664 possibilities. As a result, the police identified 136 persons of interest, one of whom was the petitioner. [He was interviewed on a number of occasions, and allegedly confessed to the offence. The alleged confession is dealt with in detail under the next heading.]

32 The petitioner gave notice of alibi and at the trial advanced a further alibi, which included him knocking on various doors on the night in question and getting no answer. The significance of this alibi was that the notice of alibi was tendered into evidence, the petitioner gave evidence of it, but his evidence was rebutted by the evidence of Crown witnesses who said that they were at home at the time but had heard no-one knocking at their door. In one particular case, a Mr Clark had painted his front door that day. As a result of the storm, he had put up cardboard in the door

frame. The Crown placed considerable reliance on this evidence by way of rebuttal of the alibi.

33 It was clear that evidence of the alleged confessions was essential to the Crown case at the trial. The confessional evidence was said to be of particular significance because the Crown case was that, during the interviews on 10 and 17 June 1994, the petitioner correctly detailed certain aspects of the crime and accompanying facts which only the perpetrator could have known.

34 The confessional evidence was not the only evidence. There was also a body of circumstantial evidence which formed part of the Crown case. The petitioner had been placed in the lockup at Police Headquarters in East Perth at about 2.40 pm on Monday 23 May 1994. He was released approximately an hour later. A taxi driver gave evidence that he picked up the petitioner in Perth between 4.00 pm and 4.10 pm and took him to the Bel Air Flats at 2 Murray Avenue, Mosman Park. The taxi driver could not be precise about the time, but it was between 4.45 pm and 5.00 pm. There was evidence that, at the preliminary hearing, his recollection was that he had dropped off the petitioner just before 5.00 pm. There was also evidence that the taxi driver's next fare was shortly after 5.20 pm when he received a call outside Mosman Park Railway Station.

35 Two witnesses, Mr Mouchmore and Mrs Murtagh, gave evidence describing a person they had seen in Glyde Street about 4.40 pm or 4.45 pm. The learned Judge commented to the jury that it would be difficult to conclude on that evidence that the person they described and the person they saw was the petitioner. A Mrs De Florenca gave evidence of two persons she described as having been in the area of Mrs Lawrence's shop at around 5.00 pm. The trial Judge commented that this evidence was not such as to give rise to a doubt if the jury concluded, on the basis of other evidence, beyond reasonable doubt that the petitioner killed Mrs Lawrence.

36 Mrs Raine described a man she had seen on the ground floor of the Bel Air Flats on the evening of 23 May. Her evidence, if accepted, strongly suggested that the person she saw was the petitioner. Her evidence was contested by the petitioner. If the encounter took place, it would have been about 5.15 pm or as late as 5.25 pm. Mrs Raine described the person she saw as carrying an iron bar. The person she saw also had a carton of Choc Milk. This particular fact did not tie in with other evidence. According to the police record, the petitioner had only $2

in his possession when he was in the lockup that day. When dropped off by the taxi he absconded without paying the fare.

37 The learned Judge in his summing up said that the evidence of Mrs Raine was only relevant if the jury were satisfied that the person she saw was the petitioner. Mrs Raine also gave evidence that the person she had seen on the night of 23 May was the same person as she saw in Murray Street the next morning. At that time, the petitioner was in the process of being arrested by police in Murray Street. Mrs Raine later identified the petitioner as the person she saw by picking him out from a photo board. The jury were given a comprehensive warning regarding the dangers involved in relation to identification evidence generally and the use of a photo board in particular.

38 Significant evidence was given by a Miss Katherine Barsden, the daughter of Mrs Jacqueline Barsden who worked at the shop. As at 23 May 1994 Miss Barsden was 13 years of age. She was aged 15 at the time she gave her evidence. On the evening of 23 May 1994 she was picked up by her grandmother at St Hilda's Girls School in Bayview Terrace, Mosman Park. Her grandmother was driving a light green Toyota Corolla Seca sedan. Miss Barsden's evidence was that when she got into the car she observed the time to be 5.00 pm on the digital car clock. Between two and five minutes later, but much closer to two than five, the car pulled up at the traffic lights at the T junction of Glyde Street and Stirling Highway, opposite Flora Metallica.

39 Her evidence in chief was:

> "I looked into the shop, the lights were on and the front door was closed. As soon as I looked into the shop there was a man standing there, so I kept looking and he was standing not where a customer would normally be - next to the right hand side of the pinup board - next to or behind the L-shaped display area."

40 She described what she saw as follows:

> "The man was 30-35 years old, medium build, slight beard, orange strawberry blond colour, scarf on his head, rustic orange border, slight pattern of blue or green.
>
> I kept staring and I felt the moment that he saw me or we made eye contact he bobbed down and I kept looking for another 30 seconds and he didn't reappear. In those 30 seconds the lights

changed to green and the car moved off. I didn't see Mrs Lawrence."

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

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

"There's someone in mummy's shop."

43 Mrs Wood then said:

"Have a good look."

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

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

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

47 A Mr Barry Whitford gave evidence that he received a telephone call from a woman who said that she was from Flora Metallica. They spoke about some salt and pepper shakers. His evidence was that this telephone call was made about 5.10 pm. Mr Whitford confirmed the accuracy of the time of the call by checking with Telecom and checking the accuracy of

his clock. The only person who could have made the call from the shop at that time was Mrs Lawrence. As the learned trial Judge pointed out to the jury, if the call came from Mrs Lawrence, then she was still alive at about 5.10 pm or very close to that time.

48 In this state of the evidence the learned trial Judge told the jury that there were various questions they had to consider. As formulated by the learned trial Judge, these were:

> "I am just simply referring to these pieces of evidence to bring together perhaps some of the pieces of evidence which bear upon the question of the events that occurred immediately surrounding the killing of Mrs Lawrence. You would have to consider for yourselves what you thought the evidence carried you to as to a conclusion as to what happened to her. How did the person who killed her get into the shop? Was it through the back door? If so, how did that person get through the back door? Was it because the door had been left on the rag or had been left ajar, or was it because she had already come into the shop before the person who killed her did? Was the person who killed her already in the shop having got in through the back door by being able to push it open because it was not properly secured? Was that person then seen by Kate Barsden, ducked down and was in the front part of the shops being secret when Mrs Lawrence came in and disturbed that person by making a telephone call from the rear.
>
> There are a number of different ways you can look at that evidence and it may help you to make a conclusion about those matters or you may find that of no assistance whatsoever either to understand or to know how the killing occurred or perhaps more importantly to evaluate what you think of what the accused person said, if you find that he said these things, later to the police about what occurred.
>
> They are matters which you could consider. Certainly you may have had some confidence that you know where in the shop she was killed, so how did she get there? Did she come forward having made the telephone call to commence the locking up process and did she there surprise and come upon the intruder? These are matters for you, you will see, but it would seem pretty clear, you may think - again it is a matter for you - that she was first struck down in front of that partition wall where the display

> board is and you have got the evidence firstly of Dr Cooke and also of Mr Bagdonavicius who also observed the scene about that and the nature of the blood spattering and the smearing in that area which indicates that blows were struck to her head low down at that point.
>
> Then of course, you have got the evidence that she was dragged to the rear of the shop later and perhaps you may think, but it would be a matter for you, that the spattering in that area - the region of the back door and on the fridge and on the sink cabinet may indicate that one or more further blows were struck there, perhaps not. The matter is entirely for you.
>
> You would want to give careful consideration I would suggest to you to that aspect for the reasons that I have mentioned. You would look to the timing of that also. You may think you need to reconcile in some way the evidence given by Kate Barsden and by Mr Whitford about times. It may not concern you. It is a matter entirely for you."

49 Mr Lawrence gave evidence that he began to be concerned that his wife had not arrived home by 6.15 pm. He telephoned the shop. There was no answer and the answering machine had not been switched on. He drove to the shop. The lights were still on. There was a pot outside with a eucalyptus tree in it. He opened the front door with his key and took the pot inside. The "open" sign was still above the front door. There was still a mat outside the door. The "A" frame was inside. Mr Lawrence noticed some blood on a partition and he heard a groan. He found his wife lying on the floor. She had blood in her mouth and was making gurgling sounds. He turned her onto her side and telephoned 000. The ambulance arrived shortly afterwards. He found the back door shut but unlocked. He found the door to the shed at the back open and the lights on. This was a work shed. There was a copper bath which was operating.

50 Mr Lawrence then went back into the shop. No jewellery was missing. No cash was missing from the cash box under the display counter. Mrs Lawrence's handbag was on the shelf behind the partition. A brown Oroton wallet was missing, as were her credit cards. She normally had $100-$150 cash in her wallet. Mr Lawrence's evidence was that on the night of 23 May Mrs Lawrence was wearing jeans and a [dark blue] jumper.

51 Mr Lawrence said that Mrs Lawrence's policy was that, if anyone was confronted in the shop by another person or in danger, they should hand over whatever was required of them without dispute. He said there were various tools in the back shed such as adjustable spanners, screwdrivers, pliers and clippers. They were used in the business. Shortly after 23 May 1994 Mr Lawrence checked the tools to see if any of them were missing. He thought an expanding spanner was missing, but he was not sure. The spanner he thought was missing was a Sidchrome spanner "10 inches in length" with an adjustable head. He would also describe it as "a wrench".

52 A possible inference from Mr Lawrence's evidence was that Mrs Lawrence may have been in the shop, but had gone out to the shed at the back to do some work, leaving the shop unattended. The intruder may have entered the shop and been disturbed by Mrs Lawrence. Alternatively, Mrs Lawrence may have been waiting in the shop and had been disturbed by the intruder.

53 The calling of the ambulance was logged at 6.37 pm. The ambulance arrived at 6.45 pm. In the meantime, the police had arrived at 6.42 pm. On this evidence, an important question for the jury was to determine where the petitioner was between 5.00 pm and about 6.20 pm when Mr Lawrence arrived at the shop. There was evidence that the petitioner was short of money, but the learned Judge warned the jury that this evidence did not carry the matter anywhere.

54 The petitioner's evidence was that after he left the taxi, he went to Ms Michelle Engelhardt's flat at 3/10 Murray Avenue at about 5.30 pm to change his clothes. On his account, he was there for about one minute. He said that after that he was walking around trying to score some marijuana. He was with a Mr Damien Kostezky. They visited a corner delicatessen between 6.00 pm and 6.30 pm to buy food. They then went to Ms Engelhardt's flat arriving there about 6.40 pm. Mr Kostezky, however, gave evidence that he met the petitioner at 7.00 pm. Ms Engelhardt gave evidence that the petitioner called at her flat at about 6.30 pm and stayed until after 7.00 pm. She recalled that it was after 7.00 pm because he left while a television programme called Home and Away was on and this programme had commenced at 7.00 pm.

55 Ms Engelhardt's evidence that the petitioner left her flat after 7.00 pm could not have been correct. There was irrefutable evidence that the petitioner was on a train travelling between Mosman Park and Fremantle at 6.58 pm. He would have boarded that train a Mosman Park

a few minutes before. This means that he must have left the flat some time before 7.00 pm. It also follows that Mr Kostezky's evidence that he met the petitioner at 7.00 pm could not have been correct.

56 There was a body of evidence from various witnesses at a number of flats in the area that they had been visited by the petitioner on the previous night, Sunday 22 May, when the petitioner was endeavouring to obtain drugs. The petitioner's evidence regarding his pursuit of drugs placed these activities on the Monday night rather than the Sunday night. The learned Judge directed the jury that it was for them to consider where the truth lay, but that the evidence raised questions whether the petitioner was confused or whether he was lying about these issues taking place on the night of Monday 23 May. His Honour said that the acceptance or rejection of the petitioner's evidence regarding his movements was significant, as it was the basis of his alibi. The jury were told they had to consider whether the evidence was deliberately untrue or simply mistaken in the context of the evidence given by other witnesses. If the alibi was rejected, the petitioner was left in the situation where he was unable to account for his movements. The learned Judge commented that this could be taken no further than giving rise to an opportunity or a motive for being in the area of Flora Metallica, or in the shop itself, with an opportunity to commit the killing.

57 It was in this context that the learned Judge gave the following direction to the jury:

> "You need to have very clearly in your minds, in my view, the fact that there is this further step to be taken. What we are concerned with there is evidence of opportunity. By itself it would seem to me that would not carry you to the conclusion beyond a reasonable doubt that it was this accused person who killed. As to that, I would have thought that was a conclusion which you could not reach adverse to him unless you accepted the police evidence of the confessions he made. As to that there are some very clear questions for you to consider."

58 The principal grounds of appeal relied upon by the petitioner were concerned with the confessional evidence.

The petitioner's "confessions"

59 The central issue at the trial, and the principal issue canvassed at the earlier appeal, was whether it was open to the jury to conclude beyond reasonable doubt that the petitioner was actually confessing and if so,

whether his confessions were reliable. Because of the peculiar circumstances in which the alleged confessions came to be made, the first issue was whether the petitioner had confessed at all to killing Mrs Lawrence, and if so precisely what he had said by way of confession.

60 The competing view, advanced by the petitioner, was that as to some of the things he was alleged to have said, he had not said them at all; to the extent that he had said things which might be understood as confessions to the killing of Mrs Lawrence, he had not intended them as confessions but had in his own mind merely been formulating hypotheses (or theories) to assist the police in their enquiries. If the jury accepted that he had indeed confessed to the murder of Mrs Lawrence, the question arose as to whether those confessions were to be understood as reliable accounts of what he had done, or as the product of a disordered mind responding in part to suggestions made by the police and producing, in part, flights of pure fantasy.

61 The course of the petitioner's confessional conduct is central to the submissions advanced by the petitioner on this appeal. It was said by the Crown witnesses to be as follows.

62 On 26 May Detectives Caporn and Emmett interviewed the petitioner at Graylands. The conversation was relatively short. He was asked about his movements on the afternoon and evening in question and about whether he had been to Flora Metallica. He told them that he had walked past the shop at about 7pm and had thought that there was a burglary because he had seen police there, and that he had passed the shop later on the same evening at about 9 pm and noticed police tape around it, and a van outside. He gave an account of his movements which he abandoned during later interviews, the thrust of which was that it had taken him a very long time to find a taxi from his first attempt in Perth at 5 pm, which he said accounted for his arrival at Ms Engelhardt's flat at about 6.30 pm. He said he had been to Flora Metallica about a week beforehand in order to attempt to sell some jewellery. He spoke not to Mrs Lawrence, but to the other lady that worked in the shop. He asked whether the detectives were able to tell him what Mrs Lawrence had been killed with.

63 On 27 May 1994, again at Graylands, the same two detectives interviewed the petitioner about some discrepancies between the account he had given them and information they had obtained from the taxi driver. When asked about his movements, he asked them whether it mattered. They replied that it did matter because Mrs Lawrence had been murdered

and the petitioner's whereabouts were not accounted for. He asked whether he was a suspect, and the detectives told him that if he were not they would not be there. He gave them an account of his movements which revolved around attempting to score drugs.

64 On 30 May 1994 the detectives seized certain items from the petitioner at Graylands, including clothing. He was advised that he was a suspect. He again asked what Mrs Lawrence had been killed with.

65 On 2 June 1994, interviewed at Graylands, he told detectives that he had tried to sell jewellery to Pamela Lawrence. There was some discussion about whether he owned bandannas. He again asked what she had been killed with and told detectives that he knew from the news that it was a blunt instrument. There was some rather unusual conversation about his interests, during the course of which he made claims which included a claim that he could speak six languages.

66 On 10 June 1994 the petitioner was out of Graylands and interviewed at detectives' offices. The interview was a very long one. Like the previous interviews, and as was the practice at the time, it was not recorded on video. The process that was followed was that one detective asked questions while the other took notes. Given the course which events then took, it obviously would have been preferable for the interview to have been videotaped or otherwise independently recorded. The failure of the police to take that course, and the admissibility of the resulting evidence, was the subject of the earlier appeal.

67 In broad terms, the interview was as follows. The petitioner gave a detailed account of his movements on the evening in question. He again talked about trying to sell jewellery at Flora Metallica previously, but said he had not otherwise been in the shop and never in the backyard. After lunch, it was put to him that the account that he had given did not fit with aspects of information available to police. He said that he was unable to remember details. He said he needed to think and there was a further break. He gave them another and different account of his movements and was told that that did not "check out". He said he was getting upset and nervous but did not know why and gave a further account of his movements. There was another toilet break.

68 He then said that he went into the shop on that night to "case" it for a burglary, that he heard someone and ran out. He said he had "locked eyes" with a girl in a green car outside. He then said that he had made up the story about going to the shop and about locking eyes with the girl.

There was a further toilet break. He then said he was going to the shop to case it, saw people coming and left. He denied seeing any witness. He denied killing Mrs Lawrence.

69 He then said a number of things which were, to say the least, odd.

70 It is apparent from what the petitioner was alleged to have said that he was by then becoming somewhat upset. He accused detectives of "fucking me around". He then said: "... it's murder and that's not me. There's a rush, people get scared, don't want to get caught. It doesn't mean anything in the end, in the end it doesn't mean anything, nobody cares". He began to cry and said that there were a "lot of blanks". He said that he said that "he" (that is, speaking in the third person) was "very scared" and was "evil". He referred in a variety of ways to the "evil person" who had killed Mrs Lawrence and to what "he" had done. He observed "I can't stop him when he's like that". He gave a detailed and vivid account of the way in which "he" had surprised Mrs Lawrence while she was locking up, had been scared of being caught, and had hit her. He described certain areas of the shop. All of that was in the third person except for occasional comments such as "I can't remember". Shortly after he was told that detectives needed to know more about "this person", he asked for a break and there was a 10 minute break while he went to the toilet.

71 On his return from that, he denied being in the shop and denied murdering Mrs Lawrence. He said that everything he had said had been lies and that he did not kill her. He began hitting himself on the forehead and when Superintendent Caporn attempted to restrain him he bit Superintendent (as he now is – so far as possible, we refer to witnesses in the appeal by their current titles) Caporn on the leg. The interview was then terminated.

72 There was extensive cross-examination at trial as to why Superintendent Caporn did not conduct a videotaped interview immediately following that conversation which we have just summarised. It seems the reason at least in part was to do with the petitioner's extreme agitation at the time. In any event, it was on 17 June that he was interviewed again, but on that occasion by Detectives Brandham and Carter. Superintendent Caporn explained that it was thought that it would be preferable for detectives unconnected with the earlier interviews to interview the petitioner.

73 On that occasion, the evidence was that the petitioner confessed in detail and in the first person to the killing of Mrs Lawrence. Certain aspects of statements he made during the course of that confession did not apparently fit with the known facts, and those matters were raised with him during the course of the confession. In the petitioner's submission, those matters demonstrate that either he was not intending to confess that he was the murderer, or that his confession was unreliable. The alternative view, which the jury presumably accepted, was that he was persisting in a pattern of grudging confession as his untrue accounts were rejected, together with a continuing attempt to mislead where possible. In any event, at the end of that detailed first person confession, it was said that the petitioner had again retracted the confession, saying that he had made it all up, had guessed about the killing from the media and from what he had heard, and that his explanation for the detail which he had provided was "I got inside the killer's head".

74 That history explains the very unusual nature of the videotaped interview which was taken. It was not a videotaped confession in the normal sense; that is, it was not a series of answers by the petitioner to questions about the offence itself. Rather, it is in form a confession by the petitioner to having confessed at an earlier time. The questions put to him were along these lines:

> "Question: You told us that you went out front on Glyde Street and that you were looking back and you saw that the Flora Metallica – the door was shut?
>
> Mallard: Yes.
>
> Question: And that you thought it was closed so it was safe to do a break. Is that what you told us?
>
> Mallard: That's correct."

Shortly thereafter the following exchange occurred:

> "Question: Okay, now you said you went into the shed –
>
> Mallard: Yes.
>
> Question: At the rear.
>
> Mallard: Yes.
>
> Question: And you said the door to the shed pushed

Mallard: Inwards.

Question: Inwards.

Mallard: Because being a small shed, being cluttered – being a small shed, you don't – I don't know, I just see it 'inwards'. I just feel – most sheds I know about are inwards."

75 A passage which exemplifies a number of features of the videotape is as follows:

"Question: [Referring to the back door] There was a key in it?

Mallard: No. I don't know. I didn't see a key.

Question: Alright. No problem. Okay. You described the steps to us and you described the rear door, and the flyscreen door you –

Mallard: May I say something else?

Question: Yes okay. Go on.

Mallard: If Pamela Lawrence was locking the store up, maybe she came in through the back way; the front door was already locked. Maybe –

Question: Okay.

Mallard: And she left the key in the back door, and that's why he had easy access and that's why she didn't hear him until he was marching down the store."

76 Those passages quoted give something of the flavour of the videotape. For the most part it consists of questions by the detective about whether the petitioner had previously told police that he had done certain things, and his agreement with the proposition that he had told them that he had done those things. On occasion during the course of the interview the petitioner spontaneously speaks of himself participating in those acts and does so in the first person, as in "I didn't see a key". On other occasions, he makes statements which appear to have the purpose of demonstrating that he is basing his knowledge on speculation (as in "maybe she came in through the back way") and on occasion he refers to the events he describes as if they involved some person other than himself (as in "that's why she didn't hear him").

77 The petitioner's case at trial in relation to these interviews had three aspects. As to some of the alleged confessions which were not videotaped, he denied that he had said certain things at all; if they had been said, he suggested that they had been put to him by the police rather than volunteered to the police by him. He said that on more than one occasion he had been threatened and mistreated by police officers (including being kicked, having a pistol shoved in his face, and threatened with being "killed") and that he had in effect said what he thought they wished to hear in order to avoid further mistreatment.

78 He also said that, to the extent that he had described the killing of Mrs Lawrence, he had done so only as part of a process of attempting to assist the police officers by sharing with them his theories of the way in which the murder may have been committed, based on information which he had obtained from the media and from the police officers. It was this last aspect of the petitioner's case at trial which was re-agitated forcefully before us. That is, it was submitted that the very peculiar nature of the videotape, together with discrepancies in certain respects between what was said by the petitioner on that videotape and the known facts, together with information available to the court about the petitioner's mental state, gives rise to a reasonable doubt as to whether the petitioner was confessing to his own involvement in the killing or merely theorising about how the true killer might have behaved.

79 Certain aspects of that submission will be revisited during the course of these reasons. For the moment, there are three observations we should make briefly about it. The first is that there has always been, and was maintained before us, a difficult ambiguity or inconsistency in the petitioner's account of why and how he came to discuss these theories with the police. In his evidence before us, for example, in answer to a question about why he had said to police that he had "locked eyes" with a girl, he said: "Because I trusted the police. I was trying to help them. They had beaten and intimidated me in interviews." There is, of course, a degree of contradiction in the notion that the petitioner would have trusted those who had so recently mistreated him. Further, it appeared to us that there was no reason ever advanced by the petitioner as to how it could "help" police to tell them that which he did not believe to be true.

80 The second observation is that this was an issue squarely before the jury at trial. We discuss below the extent to which the view taken by a reasonable jury about this issue might have been affected, if at all, by the matters raised by the petitioner on this appeal. However, the jury would no doubt have been greatly assisted in forming a view not only by hearing

the evidence of the petitioner at trial, but also by viewing the videotape in which it was said that, as on other occasions, the petitioner had thought that he was discussing theories of the night in question with detectives. The trial was a complex and difficult one, involving an assessment of credibility and a consideration of all the surrounding evidence we have described, but it does not seem to us that the jury could have been unaware of the importance of a careful assessment of the alleged confessional evidence.

81 Third, to the extent that it is necessary for us to assess the whole of the case ourselves, we note that on the previous appeal, Malcolm CJ, with whom other members of the court agreed, said:

> "There was a significant issue whether the statements made by the [petitioner] in the third person were intended to convey what he himself did. In my opinion, looking at all of the evidence relating to the interviews, the jury were entitled to infer that the [petitioner] was clearly referring to himself when he spoke in the third person. There were times when I gained the distinct impression that some of the things said by the [petitioner] in the third person in the video interview were a deliberate attempt to cloud the issue or simply an attempt to be clever." (***Mallard v The Queen***, unreported; CCA SCt of WA; Library No 960505; 11 September 1996.)

Having had the opportunity to view the videotaped interview ourselves, we would agree with those observations.

Fresh/new/undisclosed evidence relating to the murder weapon Grounds A, B(iii)

82 According to Superintendent Caporn, in the interview of 10 June 1994 he asked the petitioner "What did he hit her with?" and the petitioner replied "A wrench". Inspector Brandham said that, when asked to draw the murder weapon, the petitioner drew a wrench. That drawing became an exhibit. Mr Lawrence said that he felt that there might have been a Sidchrome spanner missing from the back shed. ("Wrench" and "spanner" are of course synonymous terms.) However, the back shed appears to have been one primarily used by Mrs Lawrence for her business purposes in creating jewellery. The evidence was that it contained a variety of different sorts of tools, and that Mr Lawrence could not be quite sure what, if anything, was missing. There was evidence that there was also in the shed a variety of copper anodes, used in the electro

plating of jewellery, many but not all of which had a considerable quantity of copper sulphate adhering to them.

83 At trial, the petitioner denied saying that Mrs Lawrence was killed with a wrench. He gave evidence that his sketch of the wrench was "a sketch of a supposed weapon that we were talking about in our theory which I said was a gas wrench to be used on acetylene equipment. I have no idea what a gas wrench looks like. That is what I assumed it would look like in my theory." At the time at which he drew the wrench the petitioner described it as a "big pipe wrench that had a ratchet system and was rusty". He said it was similar to the one he had drawn.

84 The Crown opened and closed the prosecution case on the basis that the wrench drawn by the petitioner was the murder weapon. It apparently did so largely relying upon his confession. It was acknowledged that there were other possibilities. In closing, there was reference made in passing to the iron bar which Ms Raine said she had seen the petitioner holding and in that connection there was reference to the fact that particles of iron oxide (that is, rust) had been found in Mrs Lawrence's wounds.

85 His Honour, the learned trial Judge, directed the jury:

> "You may need to form a conclusion about the nature of the weapon. Certainly it would seem not the anodes, not the copper anodes, but is it a wrench of the type that was drawn in the sketch and that sort of size ... "

It is to be noted that his Honour apparently did not regard it as essential for the jury to form a view about the nature of the weapon.

86 As noted earlier, as well as evidence relating to iron oxide there was also evidence that there was some blue pigment in Mrs Lawrence's wounds. There was no significant amount of copper, which on the evidence at trial ruled out at least those anodes which had deposits of copper sulphate on them. The evidence of the petitioner's witness Dr Jerreat, on this appeal, was that even a clean anode would cause copper deposit in the wounds, so we can rule out the anodes altogether.

87 In the light of the evidence at trial, the petitioner submits that the following material, adduced in evidence on this reference, establishes that a wrench of the type drawn by him could not have been the murder weapon, and that the non-disclosure of that material which was not disclosed, together with the fresh or new evidence obtained on the point,

leads to the conclusion that he has lost a chance reasonably open to him of acquittal. That material is:

- In a comprehensive summary of facts sent to the Director of Public Prosecutions, Superintendent Shervill stated that a crescent wrench was tested which inflicted dissimilar wounds to those apparently inflicted on Mrs Lawrence. That was a reference to an experiment conducted by the forensic pathologist and certain police officers, in which both a copper anode and a wrench were used to hit a pig's head in order to attempt to replicate Mrs Lawrence's wounds.

- Sidchrome wrenches (that being the brand written on the drawing by the appellant) are because of their composition not likely to rust.

- Sidchrome has never supplied the Australian market with a Sidchrome wrench or spanner painted in any blue colour, while a blue paint layer from a forklift located near the deceased's premises did contain Prussian Blue pigment.

- A wrench "could not have caused many of the injuries to the deceased because it had a blunt crushing-type mechanism rather than a chopping-type mechanism" according to the forensic pathologist Mr Cooke.

- Dr Cooke had inspected a variety of tools, including spanners, in a friend's workshop and had been unable to find one which appeared to be capable of matching certain of the wounds sustained by Mrs Lawrence. Similarly, Detectives Brandon and Carter had attempted without success to locate a wrench which would be likely to produce wounds similar to certain of those described on the scalp of Mrs Lawrence.

- Finally, in 2002, at the request of those acting on behalf of the petitioner, Mr Cooke performed a further experiment with a pig's head, using a Sidchrome spanner supplied to him, and was not able to replicate certain of the injuries sustained by Mrs Lawrence.

88 The material relating to the rust and the paint can be quickly disposed of. Although the petitioner's drawing of the wrench labelled it a "Sidchrome", he also described it as "rusty". Two obvious possibilities, if a wrench/spanner were the relevant weapon, were either that he was mistaken in his recollection as to the brand, or alternatively that rust had adhered to it as a result of its having been stored with or used on some rusty object.

89 So far as the paint was concerned, it does not seem to have been suggested at trial that the entire weapon was blue. Rather, it appears from the outset to have been more likely that it had some blue adhering to it. A layer of blue paint from the forklift was indistinguishable from the blue paint specks found in the deceased's head wounds. However, paint of that colour and composition is relatively common. There were further layers in the paint from the forklift, which were of a composition not reflected in material found in Mrs Lawrence's head wounds. For that reason Mr Lynch, principal chemist at the Chemistry Centre WA, said in evidence on this appeal that he considered it unlikely that the forklift was the source of the paint in Mrs Lawrence's wounds.

90 So far as the rest of the material is concerned, although it has a number of nuances and variations, the broad thrust of the petitioner's submission can be summarised as being to the effect that: a wrench could not have been the murder weapon; and this fact was known to the prosecution but not disclosed to the defence. Had the jury known that it could not have been the weapon, doubt would have been cast on the petitioner's confession to use of a wrench as the weapon. That proposition falls to be evaluated against the evidence given at trial, and the evidence given before us, as to the likely weapon.

91 Dr Cooke, the forensic pathologist, gave evidence at a preliminary hearing. It is to be noted from the transcript that at that preliminary hearing defence counsel was assisted by Dr Pocock, also a forensic pathologist, who sat with defence counsel, heard the evidence of Dr Cooke, and viewed the photographs tendered through him. Dr Cooke's evidence commenced with a description of the injuries. As to the weapon, he was asked: "... Are you able to say what might have caused these particular injuries?". His reply was as follows:

> "It's always difficult to make that assessment, of course; certainly a heavy type of object. Some of these injuries have a non-specific look about them. They could be caused by almost any blunt object, but some of them also have a chop-like

> appearance to them. I was subsequently, as shown on page 11 of my report, shown a metal bar, which I understand was a copper anode or cathode used as part of electrolysis, and I thought that showed – that type of weapon bar may have fitted some of these injuries quite well."

In response to a further question, he reiterated that some of the lacerations were non-specific but others fitted the anode very well. He was asked: "Right, so it may have been caused by that implement or some other blunt instrument?". His answer was "or something similar ... ". Some further cross-examination revealed that for a short time counsel appeared to have been under the impression that Dr Cooke had been shown an iron bar, rather than the copper anode. However, Dr Cooke then described the copper anode in some detail.

92 At trial, Dr Cooke's evidence was along the following lines. He again explained that he was shown the heavy copper bar or anode. He described it in more detail and identified photographs of it. He described the experiment with the pig's head, to the extent of explaining that he had struck the pig's head with the anode to establish what the result would be in terms of the shape of wounds. (We note that it was Dr Cooke's evidence before us that at the time of the hearing of the appeal, he had forgotten any experiment involving a crescent spanner; whether he recalled that experiment at the time of the trial is simply not known.) He described the shape of the injuries to the skin of the pig's head as being "close" to the injuries on Mrs Lawrence's skull.

93 However, he noted that the anode was very heavy and unwieldy and that it was difficult to strike the pig's head with it. He noted also that the copper sulphate on those bars was deposited in the pig's head and that no similar deposits were found in Mrs Lawrence's wounds.

94 He was then shown the videotape of the appellant's confession and made the observation that he thought it "fits fairly closely" with the sites of the injuries actually found.

95 Asked whether the injuries to Mrs Lawrence were consistent with being struck with a blunt object, he answered that they were. Cross-examined about the copper anode and the injuries, he agreed that one of the things which led to his conclusion that the implement fitted the injuries reasonably well, was the sharpness of the edge of the anode. He went on to explain that it was not tremendously sharp, like a knife edge, but that it "has a degree of pointiness" to it. By way analogy, he suggested that if one pictured a ship's hull with the bow and the stern,

viewed from above, then the bow would have the right sort of profile for the injuries. That was discussed in some detail. He was not specifically asked at any time whether a wrench or spanner could have caused the injuries, nor did he suggest that such a weapon could have caused them.

96 At the appeal, he gave evidence in more detail, but to the same effect, in respect of the copper anode, explaining precisely what it was about the profile of that anode which fitted with aspects of the injuries to Mrs Lawrence's skull. He again noted that certain of the injuries were non-specific and could have been caused by almost any heavy object, but that others appeared to have a particular sort of profile. He explained that the anode was very heavy and unwieldy and that it was difficult to inflict injuries with the anode; indeed, the anode deformed when used. He again referred to the bow of a ship analogy in describing the type of implement which he considered to be relevant.

97 He referred to an experiment he had conducted with a block splitter subsequent to the trial, and told the court that the head of that implement caused an injury which resembled a portion of the wounds to Mrs Lawrence's head, but that because of the lack of a "shoulder" where the head joined the handle, the block splitter was in certain respects inconsistent with the injuries inflicted. He accepted that there were wrenches which could have the "shouldering" shape which he considered would fit with the injuries.

98 As we have noted, Dr Cooke told the court he had no recollection of an experiment with a wrench. However, he also said that he was asked several times prior to trial whether a wrench could cause injuries of the type found. It appears that those questions came from the investigating police or from the prosecutor. He said: "A specific type of wrench was never put to me, but I was many times asked could a wrench cause them. My answer then, as now, was yes, a wrench could cause them." Although he was ready to admit that a wrench could cause the injuries and he was still of that view, he had not yet been shown a wrench which he felt comfortable with, because none had a shape similar to the anode.

99 He described attending a friend's mechanical workshop prior to trial to examine a range of tools including wrenches, but not finding a tool which fitted the profile he was looking for. He did not visit a gasfitter's workshop, since the possibility of a gasfitter's wrench was not at that time put to him.

100 During cross-examination and re-examination, he was shown pictures of two different types of wrenches, taken from the internet, and a variety of other possible wrenches or spanners were hypothetically put to him. Some of those he agreed had, or might have, features which would take them closer to being an implement capable of inflicting the precise wounds which he had found on Mrs Lawrence.

101 In the end, his evidence on this appeal is perhaps best summed up in the following questions and answers from re-examination:

> "But you said that you have always accepted ... that it's possible that a wrench could inflict those injuries? – Yes.
>
> Have you ever found such a wrench that would do that – Not to my entire satisfaction, no. No not at all."

102 The position then seems to us to be as follows. At trial, it was clear that the implement which Dr Cooke described as best fitting the profile of the wounds found on the head of the deceased was an implement which was different in shape from an ordinary Sidchrome adjustable spanner. Although there was some argument before us about the interpretation of the petitioner's very roughly sketched drawing of the murder weapon, it seems reasonably clear that the description given at trial of the implement best fitting the profiles of some of the wounds, was an implement not identical with that drawn by the petitioner.

103 The evidence at trial was not that the wounds were consistent with being inflicted by either a spanner or a wrench, but that they were consistent with infliction by a blunt instrument, albeit that some were consistent with one which had some sort of chopping edge. It was always Dr Cooke's view that the injuries could have been made by a wrench of some type, and that was the evidence which he would have given at trial, had he been asked. We note that the appellant's witness on this appeal, Dr Jerreat, "could not exclude" such a weapon.

104 Looking at that material in the light of the petitioner's description and drawing, the evidence would appear to support two propositions; first, that the petitioner had not drawn the murder weapon with precision; second, that an implement with some similarities to that drawn by the petitioner might have been capable of being the murder weapon. The evidence before us of Mr Hogan, the petitioner's counsel at trial, was that he understood (in our view accurately) that the Crown asserted the weapon to be "similar" to that drawn by the petitioner, and that he always took the view that the jury could have found that the weapon was not a wrench.

105 In our view, nothing in the evidence before us relating to the likely murder weapon alters the position as it was seen to be at trial. The more detailed material which is before us as to the experiments of Dr Cooke, both before and after the trial, with different implements, and the material concerning the efforts to find an appropriate implement, go no further than establishing that no wrench which can clearly be said to be capable of inflicting injuries of the type seen on the deceased has been found. Indeed, no implement capable of inflicting precisely those injuries has been found.

106 There must at trial have been room for doubt about the murder weapon, in part because of the evidence of Dr Cooke as to the appropriate profile, and in part because of the evidence of Ms Raine as to the iron bar which, if the jury accepted that she had seen the petitioner, would have suggested an entirely different weapon. Although the evidence as to the experiments and enquiries in relation to the murder weapon which were conducted prior to trial should in our view have been disclosed to the defence, the petitioner has not thereby lost a chance of acquittal reasonably open to him. All that that evidence was capable of doing, was giving greater weight or emphasis to evidence already before the jury which suggested that the identity of the murder weapon could not be established with certainty.

107 Finally, it is desirable to refer briefly to the apparent significance of the murder weapon at trial. In some cases, it might be that even a "greater emphasis" upon uncertainty surrounding this issue would be critical, so that non disclosure of material touching that issue would inevitably affect the fairness of the trial. This is not such a case, for a number of reasons. First, as we have noted, an iron bar was an alternative weapon, on one view. The identity of the weapon, though often referred to as a wrench (no doubt because of the petitioner's description) was not advanced by the prosecution as one of the "15 things", known to the murderer, which had been described by the petitioner. The issue about the weapon, to the extent there was an issue, arose in the context of a trial in which it was clear that the petitioner had at some points confessed in a manner inconsistent with the known facts (as, for example, in the video interview in which he described Mrs Lawrence's purse as a "glomesh" purse). Some, but not all, of the inconsistencies between the confessions and the known facts were specifically referred to by the learned trial Judge in his directions to the jury. A confession to the use of a weapon which may not have been that actually used, would have been but one more inconsistency. Last, we note that before us, there was evidence of a conversation the petitioner had with an undercover police officer, in

which he informed the officer that the weapon was not "a monkey wrench like the cops thought, but in fact a gasfitter's wrench ... ". This emphasises the possibility of some deliberate misdescription of the weapon by him, consistent with what the jury may well have found to be his deliberate misdescription of the purse and other matters.

The evidence of Ms Barsden (Ground F)

108 As noted, Ms Barsden was a young girl who gave evidence at the trial that she had seen a male person in Flora Metallica shortly after 5 pm on the evening in question, in an area of the shop where customers would not normally be found. It was her evidence that she felt that the man had seen her looking at him and that once they made what she felt to be eye contact, he had "ducked down". The importance of her evidence was not so much as evidence identifying the petitioner as a person in the shop at the relevant time; to the extent that it might have identified the petitioner, it had the weaknesses inherent in all momentary identification. However, the particular significance of her evidence was that it corresponded closely with the petitioner's account of being in the shop, and being seen by a passenger in a car stopped at the traffic lights, with whom he "locked eyes".

109 On the appeal, the petitioner complains of the failure of the prosecution to disclose either certain sketches made by Ms Barsden on the evening in question, or the various drafts of statements which led to her deposition. In the light of the very close correspondence – some might say the exact correspondence – between the materials contained in those documents and the evidence actually given by Ms Barsden at trial, it is difficult to see how this can seriously be advanced as giving rise to any possibility of a miscarriage of justice. It appears to us that the very reasonable explanation for non-disclosure of those documents was that there was no material difference between them and the evidence of Ms Barsden which was disclosed.

110 Turning first to the sketches, when Ms Barsden returned to her home that evening and attempted to describe to her mother what she had seen in Flora Metallica, she drew some rough sketches in pencil and in felt tip pen, which she annotated. At the hearing of this appeal she said that they were quick sketches prepared for her mother in order to illustrate key features of what she was attempting to explain to her mother. The drawing, it has been stressed by counsel for the petitioner, apparently shows a person with a beard but does not show a moustache. There is no visible hair. The annotation describes the head covering worn by the

person as a scarf with a solid border, orangey colour, and "some green and blue in the pattern". It also mentions a "long face".

111 The description which Ms Barsden gave at trial was of a person with a slight beard, orange strawberry blonde in colour (corresponding precisely with the drawing and annotation). There was no mention of a moustache, also corresponding with the drawing. The man was described as having a scarf on his head with a rustic orange border or a "rustic orange colour" and a slight pattern of blue and green (corresponding with the annotation).

112 There had also been disclosed to the defence a drawing prepared by a police artist under Ms Barsden's direction, which depicted a person with a scarf on his head, a stubbly type of beard and faint, if any, moustache. It is hardly surprising that it was not thought necessary to disclose Ms Barsden's rough child-like sketches, since they conveyed no different information.

113 So far as the various alterations to the statement were concerned, they were relatively few and appear for the most part not to have gone to any matter of significance. For example, the statement clarified the fact that Ms Barsden's grandmother was driving the car and that Ms Barsden was sitting in the front passenger seat. As Ms Barsden was 13 years of age at the time, that is what one would have expected. The principal difference is that as the various alterations to the original statements were made, the description of the man as wearing a "gypsy-type scarf" of a light material with an orange border and mixed colours with blue and green and cream was altered, so that the deposition eventually described the man as wearing "what looked like" a gypsy-type scarf, and the patterning was described as "mixed coloured and patterned" with references to specific colours omitted. There was an addition of a reference to Ms Barsden having been shown a cap and not being able to say if it was what she saw on the man in Flora Metallica, but being able to say that it has "the same colours of what I saw".

114 The cap sometimes worn by Mr Mallard was in evidence at the trial and before us. It is a velour cap with an orange braid border. It is reddish in colour (at the appeal before us Ms Barsden referred to a "terracotta orange" and terracotta might be an alternative description). It has a small pattern which is in shades of brown. The pattern appears to be faded in some parts. The cap is made of a velour-type material and therefore has a nap; that is, rather than being a flat weave, it has a short pile which reflects light at different angles as the wearer moves. The colour therefore

appears to alter somewhat, particularly altering from light to dark, with the angle of the light. From a distance, it is difficult to determine what colour or colours appear in the pattern.

115 So far as the various alterations to the statement were concerned, it was Ms Barsden's evidence before us that alterations were never made to her statement other than in her presence. Although she had no specific recollection of why some changes were made, her evidence was that changes were only made at her request. The only alteration which appears to be of any significance is the removal of the reference to the mixed colours of blue and green. However, that evidence was in fact given by Ms Barsden at the trial. She was not cross-examined about it. Cross-examined before us, her evidence was that what she was attempting to convey was a small pattern of mixed colours. She commented we are "not talking primary colours here" and her evidence before us was that the pattern and colours of the cap, which she was shown again, were "extremely close, if not the same" as the pattern and colours of the object on the head of the person she saw in the shop.

116 It can be seen then that Ms Barsden's initial statement and sketches corresponded very closely with the evidence she gave at trial. There were really no discrepancies for counsel to explore. It was also suggested however that, if the sketches had been disclosed, it would have been clear to counsel that Ms Barsden was describing a person with a beard, but no moustache. There was some cross-examination of Ms Barsden at trial about the beard and its length. She described it as being a beard covering both sides of the face, "like re-growth", and that there "might have been more hair around where a goatee would be". There is plainly no mention of a moustache. The photographs of the petitioner taken at the time of his arrest show him with a quantity of facial hair around his cheeks and chin; there was some debate at the appeal as to whether this could be described as stubble or re-growth or as a light beard, or as a goatee together with some stubble, but all of that is obviously a jury question. Likewise, it is clear from the photograph that the petitioner had a substantial moustache. All of that was material which was before the jury at the trial. Any apparent differences between Ms Barsden's description and the actual appearance of either the petitioner or the cap were matters the jury was well able to evaluate. The materials not disclosed throw up no additional differences. There is simply no substance in this issue at all.

117 For completeness, we note that it was also sought to make something at the appeal of the fact that Ms Barsden described the person she saw as of "medium build". It is not clear, and she was never asked, whether she

was referring to the petitioner's build in the sense of his being heavy or light, or to his height. It appears that in discussions with the police artist she arrived at an estimate of approximately 6 foot (183 cms). The petitioner is in fact considerably taller, being approximately 6 ft 7 (199 cms). She was not asked at trial about any estimate of height, and, as we have noted, the question of what was meant by "medium build" was not clarified with her. We cannot see this as being an issue of any significance, given that Ms Barsden's estimate of height was that of a 13-year-old girl, seated in a motor vehicle, estimating the height of a standing person some little distance away. It should also be noted that it is an estimate consistent with some estimates given by other persons who can only have been describing the petitioner; for example, the taxi driver who took him to Mosman Park on the afternoon of the murder estimated his height as "about 6 feet".

Evidence of Ms Engelhardt (Ground G)

118 It should be recalled that Ms Engelhardt was the person with whom the petitioner had for a time shared a flat. Her evidence at trial was that on the day of the murder she had been at the flat from approximately 3 pm and that the petitioner had returned at approximately 6.30 pm, leaving thereafter at a little after 7 pm. It was clear from other evidence that her estimate of his departure after 7pm could not have been correct. The significance of her evidence was that it contradicted a possible account of the petitioner's movements and meant that, so far as she was concerned, he was absent from the flat during the period within which the murder must have been committed. Other witnesses also gave evidence about his movements to and from the flat.

119 There are two aspects of the notice of appeal which bear on Ms Engelhardt's evidence. The first is, that the police had in their possession and did not disclose to the defence at trial a draft statement of Ms Engelhardt which differed in two relevant respects from the deposition which she eventually signed and which was provided to the defence. The second relates to evidence which she was prepared to give on the hearing of this appeal. The two are interrelated.

120 In the handwritten draft statement, in a passage dealing with the time after 3 pm and before 6.30 pm on the day of the murder, appears the sentence "[The petitioner's] hat was hanging above my door inside". Other portions of the statement make it clear that the hat is the velour cap previously described. A little later, the handwritten statement, describing the petitioner's appearance at the flat at 6.30 pm, contains the sentence

"He didn't have any sought [*sic*] of headwear on". The sentence about the hat hanging above the door has a somewhat different appearance from the rest of the portions of the handwritten statement. Although it is in the same handwriting, the line spacing is somewhat closer than the balance of the document. It gives the appearance of a sentence inserted as something of an afterthought. That was also the opinion of Superintendent Caporn, who interviewed Ms Engelhardt at the time, although he had no independent recollection of the manner of taking of the handwritten statement.

121 Superintendent Caporn also obtained a typewritten statement from Ms Engelhardt, that being the deposition which was provided to the defence. In his affidavit sworn for the purpose of this appeal he deposes that "Other than excluding hearsay, supposition and irrelevancies," the typewritten statement did not differ significantly in content from the handwritten statement. In evidence during the course of this appeal, the Superintendent said he was unable to say precisely why any particular changes had been made between the handwritten and the typewritten statement. However, it was his recollection that Ms Engelhardt had displayed considerable confusion and uncertainty about clothing which the petitioner had been wearing at any particular time. Any such confusion would not be surprising, for reasons which we explore shortly.

122 The typewritten deposition does not contain the sentence to the effect that the petitioner's hat was hanging above the door. In place of the sentence about not having any sort of headwear on, there appears in the typewritten deposition the sentence "I'm not sure of what trousers he had on or if he was wearing his cap. It was raining and he was wet."

123 At the preliminary hearing Ms Engelhardt's evidence made no reference to whether or not he was wearing a cap on that occasion, but was to the effect that his hair was "dripping" wet. At trial her evidence was that the cap was commonly on the hook over the door, and that he wore it about "half the time" (although in cross-examination, in response to the proposition that she had only seen him wearing it on one occasion, she replied that she did not know). She also said at trial that he was wet when he returned to the flat and that he had gone straight to the bathroom on that occasion and emerged drying his hair.

124 The significance of any evidence from Ms Engelhardt to the effect that the appellant's cap was hanging over her door between the hours of 3.00 and 6.30 pm is clear. Any credible evidence to that effect, whether positively believed by a jury or not, would cast doubt on the proposition

that it was the appellant who had been seen by Ms Barsden in Flora Metallica. It would not positively rule the appellant out, since the evidence at trial was that there were two other bandanna-type items, although of different colours, which he usually had in his possession. However, it was the cap which Ms Barsden thought was very similar to what she had seen.

125 The fact that Ms Barsden had described an incident in which someone looking out of the shop had apparently seen her looking at him and had "ducked down" was very significant confirmation of the accuracy of the petitioner's statement to police about being in the shop at about the same time and being seen by someone on that occasion. Doubt cast upon that account would weaken an important support for the accuracy of the confession which he made.

126 It seems not to be in dispute that the handwritten statement of Ms Engelhardt should have been disclosed, and would have been something in relation to which defence counsel would have wished to cross-examine her. The question which arises in this matter is whether the existence of that handwritten statement, in the light of the evidence given at trial and on the appeal, gives rise to a significant possibility that, had it been available, the petitioner might have been acquitted; or whether he has, to use the expression from ***Grey***, lost a chance fairly open to him of being acquitted.

127 Having regard to the circumstances in which Ms Engelhardt knew the petitioner, her circumstances at the time of trial, her evidence at trial and particularly having regard to her evidence at the hearing of this appeal, we are of the view that the petitioner has not lost such a chance. This is so, either for the reason that Ms Engelhardt would not at trial, if cross-examined on the handwritten statement, have been prepared to accept that the petitioner's cap had been hanging above the door; or alternatively that, if she had given evidence that the cap was hanging above the door, that evidence would have been entirely lacking in cogency and plausibility. In order to understand that view, it is necessary to elaborate somewhat on Ms Engelhardt's evidence.

128 Ms Engelhardt was one of a number of witnesses at the trial who gave evidence about the somewhat peculiar habits of the petitioner in relation to clothing. It was clear that his clothing was unusual and colourful; items in his wardrobe included the cap, colourful paint-spattered torn jeans, green, red or purple shirts and T-shirts and a stick or staff which he often adorned with a rag or scarf. He was in the

habit of wearing numerous layers of clothing at one time, and of removing or varying them during the course of the day. On occasion, for example, he would wear two pairs of trousers and a pair of shorts, all at the same time. On the first occasion on which Ms Engelhardt met him, he was wearing the paint-spattered jeans and during the course of that time removed them to reveal purple loose pants which he was wearing underneath. It is not surprising that Ms Engelhardt was somewhat confused about what clothing he may have been wearing on any particular occasion.

129 At the time of first meeting the petitioner, Ms Engelhardt was a very heavy user of cannabis. She conceded in cross-examination at trial that she had been using a lot at the time and that it affected her memory. By the time she came to give evidence at trial, she was in an advanced state of pregnancy and had been abstaining from drugs for some time.

130 Although it does not appear that she bore any particular malice towards the petitioner, she had reason, at about the time she was first interviewed by police, not to like him and to be concerned about his behaviour. For example, he had been staying in her flat on the understanding that he would pay the rent or some of it, but had apparently failed to do so. He had told Ms Engelhardt a number of stories about being an undercover police officer or working for Interpol and being on an assignment of some kind directed against the Mafia. In addition to those matters, which Ms Engelhardt in due course discovered were quite false, he had given her a name which she discovered to be false. It appears that at some time during the investigation of the murder, police assisted Ms Engelhardt to move house, because of some concern for her welfare if the petitioner were released from Graylands and attempted to contact her. So far as one can discern from those matters and from the flavour of Ms Engelhardt's examination and cross-examination both at the preliminary hearing and at trial, she might be said to be a witness largely favourable to the Crown and one who, although not consciously biased against the petitioner, would be unlikely to be favourably disposed towards him.

131 By the time of the hearing of this appeal, it seems that significant changes had taken place in Ms Engelhardt's attitude. It is difficult to convey the flavour of her lengthy cross-examination. However, the following features should be noted.

132 It seems that at some time during the course of the investigation of the murder, Ms Engelhardt gained the impression that a charge against

her, relating to possession of an implement for the smoking of cannabis, would be "dropped". This did not occur. She swore an affidavit for the purpose of this appeal in which she deposed that it was suggested to her by police that they would not pursue that charge if she was "helpful" with their enquiries. She appeared annoyed by the failure to drop the charge.

133 By the time of the hearing of this appeal, Ms Engelhardt had been contacted by a very large number of people in relation to this matter. She had had discussions with some of them, and it appears that others had attempted to discuss matters with her but she had not been willing to participate. They included a writer, a journalist, a prison chaplain (all of whom it appears informed her that there was reason to believe that the petitioner was innocent); the petitioner's mother; lawyers representing the petitioner; and detectives who were concerned about the allegations in the affidavit which she had sworn. While it is understandable that those acting for the petitioner and for the respondent would wish to know if Ms Engelhardt could shed light on any matters relevant to this appeal, the unfortunate result of all those approaches appears to have been that by the time she came to give evidence Ms Engelhardt was hopelessly confused about what had and had not occurred, and resentful of the entire process, so that she quickly became frustrated and upset if asked to make the effort to recall particular matters. At a number of points during the course of her cross-examination she made observations to the effect of the following answer:

> "If I'm seen as an unreliable witness, am I allowed – exempt from this whole thing? Can I leave? Because I've got a terrible flu, I can't really remember anything."

134 At one point during the course of her evidence in the appeal, Ms Engelhardt was prepared to say that the hat had been hanging on the hook over her door between 3.00 and 6.30 pm on the evening of the murder. However, she also said: that although she had a memory of seeing the hat there, she could not say when or what day that recollection related to; that she had not recalled the hat at all until she spoke to counsel for the petitioner; that if she had seen the hat on the hook on the day in question it could have been any time that day; that she did not remember what her recollection, if any, was about the hat when she came to sign her handwritten statement; that she did not want to commit to something she was not one hundred per cent sure of; that there were things in her handwritten statement that she became uncertain about; and that she assumed that the petitioner did not have the hat on the day in question

because it had been hanging on her hook on the day the police took him away (which is apparently a reference to the following day).

135 The conclusion which we draw, then, is as follows. It seems most probable that the whereabouts of the cap between 3 and 6.30 pm on that evening was one of the matters in her handwritten statement about which Ms Engelhardt became unsure, and to which she would not have been prepared to commit herself in evidence at the trial. That appears to us to be the natural and probable reason for the alteration, and the evidence of Ms Engelhardt on the appeal, to the extent that it sheds any light upon that issue, tends to confirm that view. To the extent that Ms Engelhardt was prepared on the hearing of this appeal to suggest that she had a positive recollection of seeing the cap over the door at the relevant time, it is our view that because of the manner in which that evidence was given and its context, it must be regarded as so lacking in plausibility and cogency as to be unable to cast any doubt upon the evidence given at trial.

State of the petitioner's clothing (Ground B(iii), (v))

136 There are a number of aspects of the grounds of appeal which go to this issue. By way of background, in tests conducted and disclosed prior to trial, no blood of Mrs Lawrence was found on any of the petitioner's clothing. During the course of his confession the evidence was that the petitioner had said that, in relation to Mrs Lawrence's purse and his clothes "I washed them in salt water because salt water fucks with forensics". He said that he did this down by the river near the bridge (Stirling Bridge). He said he "soaked them in salt water just where the waves were lapping. I pushed the [credit] cards into the sand, at the same time washing my hands [Inspector Brandham observed a wash/hand rubbing motion] and looking around to make sure no-one was looking". Asked whether he was wet when he returned to Ms Engelhardt's flat, he answered "Yes soaked, I washed my clothes and it was raining too".

137 There is a combination of undisclosed material and arguably fresh evidence which is relevant to the state of the petitioner's clothing. There was not disclosed to the defence prior to or at trial a report of Mr Lynch, the principal chemist at the forensic science laboratory, who had tested certain items of clothing (jeans, shirts and trousers) seized from the petitioner. That report revealed that the residual soluble salts detected in the clothing items were not consistent with immersion in river water, as represented by a sample of the water from adjacent to the Stirling Bridge, unless they were subsequently washed in fresh water. The petitioner's shoes were also examined visually and no visual indication of immersion

was evident. In relation to the last item, Mr Lynch was not asked at the hearing of this appeal what visual signs of immersion might have been expected to be seen. That report clearly should have been disclosed.

138 Earlier this year, Mr Lynch performed an experiment in which he soaked new cotton clothing (jeans and a shirt), and a silk shirt, in a sample of water from near the Stirling Bridge, and then performed a test designed to determine whether heavy rainfall would have removed all traces of immersion in river water. His opinion was that the jeans and cotton flannel shirt, but not the silk shirt, retained very elevated levels of residual salinity after exposure to significant rainfall. In brief, if Mr Mallard had washed jeans or cotton clothing worn by him in the river in such a manner as to wet them thoroughly, it appears from the tests that rain water would not have washed out those high residual levels of salinity. The view always expressed by Mr Lynch was that subsequent washing in fresh water, even without any detergent or soap, could easily wash out those levels of salinity.

139 Further tests conducted on the petitioner's clothing in 2003 found no evidence of the DNA of the deceased on the petitioner's clothing. Although tests for blood of the deceased were conducted at the time of trial, the tests which were more recently conducted are of a more sensitive kind, and it seems to be common ground that tests of this kind were simply unavailable in 1994. In that sense, the evidence is "fresh" although the results are relevantly the same as the results of the earlier tests for blood – that is, no material relating to the deceased was found on the petitioner's clothing.

140 Various arguments were addressed to us on behalf of the petitioner and the respondent, directed to the amount of blood from the deceased which might have been expected to have been found on the petitioner's clothing in any event. It was a premise of the petitioner's argument, to an extent, that his clothing would in some areas at least have been heavily soiled with blood, so that the failure to locate any of the deceased's DNA was particularly significant. There was a related argument advanced to us, which was not based on any fresh or new or non-disclosed material, and which was made at trial (although not in precisely the same way) that if the petitioner had killed Mrs Lawrence then those persons who saw him subsequently should have observed blood on his clothing, but did not.

141 In relation to the degree of blood spattering or soiling likely to be found on the petitioner's clothing, we agree with the comment made by the Court of Criminal Appeal in the earlier appeal that that is somewhat

speculative. At trial Dr Cooke said that as a result of blows to the head there "may well" have been spattering of blood. His evidence was that with each individual blow there may not necessarily be a lot of spattering, but once the injury was suffered the blood would well-up and flow quickly. Dr Cooke thought that there would have been heavy blood soiling of the arms, hands or gloves, but by that he meant a heavy "spatter". Mr Bagdonavicius, medical scientist in the forensic biology section at the Path Centre at the relevant time, gave evidence at trial that if there was any blood on the clothing it would only be around the lower legs.

142 Mr Hall, the forensic witness called on behalf of the petitioner at the hearing of this appeal, considered that whether one would expect to see blood spatter on an assailant during the course of an assault is very difficult to determine. He noted that there was experimental evidence that demonstrated that it was possible to generate considerable "forward spatter" in the course of an assault with very little blood settling onto the assailant.

143 It appears therefore that, while there may well have been blood on the hands and/or arms and perhaps on the lower part of the jeans or trousers of the petitioner, the amount to be expected cannot be determined. We see no reason to depart from the view expressed by the Court of Criminal Appeal on the previous occasion in relation to the significance, if any, of the petitioner's not being observed by any person to have blood on him.

144 Turning to the undisclosed material and the more recent experiments, the first observation to be made is that the petitioner denied at trial that he had killed Mrs Lawrence or had done any of the things which he had confessed to doing, including washing his clothes in the river. He was not asked therefore, and there would have been no point in asking him, precisely what he meant by washing them in the river. It is not clear from the confessional statements which he made whether he was intending to convey a washing of part of his clothing while he was wearing it, or a partial or total immersion of his clothing and/or himself in the river. It is not clear what items of clothing he was referring to. The question of whether he was wearing shoes at the time of washing (he frequently going barefoot) and, if so, whether he immersed the shoes in water or removed them for the purpose of going down to the water is all entirely speculative.

145 However, it is fair to suggest that tests showing that none of the clothing worn by the petitioner could have been immersed in river water

would have been of some significance. However, it is our view that the tests conducted are not capable of demonstrating that none of the petitioner's clothing had been immersed in river water, for the reason that at least two of the four items tested had been washed by the petitioner prior to testing, in fresh water.

146 On 30 May 1994, prior to seizing the petitioner's clothing, Superintendent Caporn said to him: "We need to take your clothing. Have you washed any of this?" The petitioner replied: "There is no dirty washing. I did it all yesterday." In his evidence on the appeal, the petitioner admitted washing the blue jeans. He was not asked about the red shirt. He denied washing the trousers. He also denied washing the green shirt, claiming that since it was silk it needed to be dry-cleaned. So far as the jeans and the red shirt are concerned, then, there is uncontradicted evidence that they had been washed. So far as the green shirt is concerned, one might have some reservations about the petitioner's evidence that it had not been washed because it required dry-cleaning. There is some implausibility in the concept of a person who lived the petitioner's hand-to-mouth lifestyle, with no fixed abode, getting his living by "scamming" as he at one point put it, and wearing clothing which was eccentric, stained and torn, being likely to go to the trouble of dry-cleaning the shirt. Putting that to one side however, it is to be noted that a silk shirt (of a thin fabric) was the item from which apparently rainwater might, having regard to Mr Lynch's experiments, be thought to remove residual salts.

147 That analysis leaves only the blue trousers as items which, had they been washed in river water, might have had residual salts in them, if one accepts the petitioner's evidence that they had not been washed prior to being seized. The difficulty there, however, is that there is evidence that the petitioner was wearing both the blue trousers and the jeans at various stages on the day of the murder. In accordance with his habit of layering clothing and changing during the day, it appears that at some time he wore both and on other occasions wore only one garment. It would be open to conclude that if the trousers bore no signs of immersion in river water, that was simply because they had not been worn at the time of the killing or that, if they had been worn, they had been under the jeans, so that only the jeans became spattered with blood and required washing.

148 Had it been open on the evidence to take a view that <u>all</u> of the items seized had not been washed, then it would follow that one would have expected at least one of them to bear some sign of immersion in river water. However, since only one or at most two of those items falls into

the unwashed category, the failure to find any sign of immersion has no significance one way or the other.

149 Finally, as to the DNA testing, Mr Bagdonavicius' evidence on this appeal was that in 2003 he conducted tests on two pairs of jeans, the blue trousers, the shoes, and the green silk shirt. Selected areas were tested. No reportable DNA profiles were obtained from any of those items. The first comment to be made is that, as we have observed, the tests are in one sense identical to the tests which were before the jury at trial. The only difference is that the present tests were more sensitive and therefore, all things being equal, even more likely to detect DNA if present.

150 As Mr Bagdonavicius noted, dealing with a negative is very difficult. He sampled only those areas in which he thought it was possible there might be blood, so that only relatively small areas of the clothing were tested in any event. He selected areas of the trousers by bearing in mind that staining may well have been on the lower part of the garments as well as from possible blood splash present at the scene.

151 Mr Bagdonavicius said that the ability to obtain a DNA profile could be affected by the combined effects of washing and degradation. As to washing, he explained that biological material tended to become fixed over time, or with heat, so that it was easier to remove it from fabric the sooner the fabric was washed. Degradation affected the ability to obtain a DNA profile because the biological material would degrade over time. He said it "could take years". Most significantly, Mr Bagdonavicius' tests did not detect any reportable DNA material at all – not even from the petitioner.

152 Having regard to the fact that some at least of the items tested were washed relatively soon after the murder, to the fact that the more sensitive DNA test was conducted on material that may have degraded over the intervening decade, to the absence of any DNA even from the petitioner, and to the identity of result (in the sense of no relevant material being found) with the 1994 blood tests, it is our view that the recent DNA testing, even if relevantly fresh evidence, gives rise to no likelihood that a jury might return a different verdict taking it into account.

Original statement of Winch (Ground F – final paragraph)

153 The petitioner points out that in an original handwritten draft statement taken from a Mr Winch, who saw the petitioner in a shop in Fremantle on the evening in question but some time well after the murder, it is suggested that Mr Winch and the petitioner had "locked eyes". The

draft was not disclosed to the defence. That expression was altered at some stage so that the final deposition of Winch, which was disclosed, simply recorded that the petitioner had stared at him in a way which made him feel uncomfortable.

154 The significance of this draft to the petitioner's case is not entirely clear. It was certainly the evidence of Superintendent Caporn that, during his interview with the petitioner, the petitioner had said that while he was in the shop he had "locked eyes" with a witness in a car outside. That expression was put to him on the videotape by Inspector Brandham, and he agreed that he had said that.

155 As we understood it, the suggestion which was being made was that the use of the similar phrase in two contexts should lead or could lead to an inference that the expression was not one used by the petitioner but one used by the police officers, and that it followed that the statement attributed to the petitioner had been invented by those officers; perhaps in the alternative it was being suggested that the expression was used by the petitioner because it had been suggested to him by the police officers, during the course of their suggesting to him the whole incident with the witness.

156 A passage in the petitioner's outline of submissions dated 10 June 2003, and which was repeated by counsel on a number of occasions, was to the effect that Ms Barsden had given evidence that she had "locked eyes" with a man in Flora Metallica as she was driven past. The suggestion, as we understand it, is that consciously or unconsciously that expression, used by police in their discussions with Ms Barsden, was then transferred by them to their discussions with the petitioner.

157 It appears to us that the appearance of the expression "locked eyes" in the handwritten statement of Winch is too flimsy a foundation for the submission which we understand to be built upon it. The submission is founded in part upon the factually erroneous proposition that Ms Barsden had always said that she had locked eyes with a man in Flora Metallica. A search of the trial transcript reveals that she used a similar expression only once, at trial. That was in cross-examination, when she said "... I feel that the moment that our eyes locked was when he dropped down". It does not appear in any version of her draft statements or deposition, and it is not the evidence which she gave at the preliminary hearing. The gist of her evidence, and the flavour of the words that she used is, as she said at the preliminary hearing: "I saw the man and I was staring and I feel that he might have noticed that I was looking or made eye contact ... ". In

effect, she was consistently saying that she assumed he saw her, because he looked at her and then bobbed down. In cross-examination on this appeal, she said that she was not trying to convey that he stared into her eyes or she into his.

158 It follows that there is no foundation for the suggestion that the expression "locked eyes" was used at any time in conversations between the police and Ms Barsden. The first reference to that expression appears in the interviews between the police and the petitioner. While the draft of Mr Winch's handwritten statement is undated, the sequence of events was such that he would have been interviewed after interviews between the police and the petitioner. That conclusion flows from the fact that prior to the interview with the petitioner in which he is alleged to have said that he had been to a porn shop in Fremantle, police had no reason to know that he may have entered a shop in that area.

159 Mr Winch was interviewed by Inspector Brandham, who gave evidence on this appeal that, as one would have expected, he was briefed by Superintendent Caporn after Superintendent Caporn had interviewed the petitioner and that he became aware of the expression "locked eyes" during the course of that briefing. The expression "locked eyes" is a striking way of describing eye contact which appears to at least one of the parties to have some significance. It is conceded by Inspector Brandham that the words were his and that they probably found their way into Winch's draft as a result of his awareness of that expression. The memorable nature of the expression, and its convenience for describing a particular sort of eye contact, is vividly illustrated by the fact that at trial the prosecutor and the trial Judge used it as a shorthand for what had been described by Ms Barsden in her evidence, notwithstanding that she used a similar expression only once, and by the fact that on the hearing of this appeal counsel for the petitioner used that expression to describe Ms Barsden's evidence at trial.

160 We are unable to see any substance in this point. Nor does it appear to us that the handwritten statement should have been disclosed, since it was in substance identical with the typed deposition which was disclosed.

Undisclosed information concerning other persons of interest (Ground E)

161 The portion of the notice of appeal dealing with this issue is entitled "Fresh evidence of the presence of additional suspects at the crime scene shortly before the murder". That characterisation is misleading in a number of respects. In what follows, we focus upon information

concerning three individuals, other than Peter Lawrence, who are identified by the petitioner as being of relevance to this ground.

162 There were no "additional suspects". The evidence was that the police did not suspect any of the persons identified in relation to this ground as having possibly been the offender. The undisputed evidence was that 136 "persons of interest" had been "generated" by reports and information of various kinds during the course of the investigation. That fact was known to the defence at trial, although the various reports which "generated" those persons were not provided to the defence (and were not sought).

163 These three persons, along with obviously many others, were such persons, who were not considered, after investigation, to be relevant to the inquiry. Material concerning them was therefore not material which the prosecution had any duty to disclose. Indeed, if the view was taken that those persons were irrelevant, then it would have been wrong to render more complex the already difficult task of the defence by deluging them with information concerning the 136 persons. It is, of course, always possible that in making such a judgment the police may have been mistaken, but it is our view that in the present circumstances the judgment of irrelevance was correct.

164 Further, to describe one of the persons as being "at the crime scene" is taking a generous view. That person was seen approximately three kilometres away, although it is true that he was seen on foot at a time which would have permitted him to walk to Mosman Park so as to arrive at the crime scene at or before the relevant time.

165 Briefly, one of the persons was a man seen as wearing a "high-top beanie" in the general area at about the right time. The initial description was extremely vague. The evidence given in this Court made it clear that the headwear in question did not match any aspect of the description given by Ms Barsden.

166 Another person was reported because he was in the habit of wearing a bandanna on occasions. The police investigation into the report about him led Detective Senior Sergeant Carter to the view that the person's description was different from that of Ms Barsden. The person was identified, and enquiries revealed that he had not been sighted in the vicinity about the time of the offence, was not reported by any other person and, in broad terms, there were no other suspicious circumstances associated with him.

167 Finally, the person who was seen approximately three kilometres away was seen at a time vaguely approximate to that of the crime, in the sense that he could from that location have travelled to the crime scene in order to arrive there at or before the killing. He wore a bandanna and behaved in a somewhat unusual manner, but there was nothing to link him with the offence. He was never able to be identified.

168 In summary, this material was not fresh, since the defence was always aware that there were numerous persons of interest and could have asked for information about them at any time. It was not disclosed because it was considered to be irrelevant, and the evidence which is before us justifies that assessment.

The petitioner's mental state (Ground B(i))

169 One of the particulars of "fresh evidence" which is relied upon to establish that the petitioner's confessions were unreliable and should not have been admitted, or that a jury which had that evidence would be likely to have a reasonable doubt relating to them, is said to be the evidence of the psychiatric illness of the petitioner which is contained in affidavits of Dr Patchett.

170 On no conceivable view could this material be considered to be fresh evidence. Leaving aside the obvious difficulty of the proposition that the mental state of an accused person was something which was neither known to, nor ascertainable with reasonable diligence by, the accused and his advisors at trial, psychiatric evidence as to the mental state of the petitioner was adduced by defence counsel at trial, on a *voir dire* directed to the admissibility of the confessional material. That was the evidence of Dr O'Dea.

171 Although Dr Patchett gave evidence before us, it was conceded by counsel for the petitioner that there was no material difference between the views expressed by Dr O'Dea on the *voir dire* and the views expressed by Dr Patchett. The only difference appears to have been that Dr O'Dea described the petitioner's mental disorder as a "bipolar" one while Dr Patchett described it as "unipolar", but that is a difference which appears to be relevant only for the purpose of prognosis and treatment, and not to affect in any relevant sense the symptoms which one would have expected to exist or to be observable at the relevant time. Not only is the evidence of the petitioner's mental condition not fresh, but precisely that evidence was adduced before the learned trial Judge for precisely the purpose for which the petitioner now seeks to adduce the evidence of Dr Patchett; that is, to challenge the reliability of his confession.

172 Although there is no ground directed to failure or incompetence on the part of counsel, certain of the oral argument made in support of this particular on behalf of the petitioner tended to suggest that there had or might have been some failure by counsel, so that this Court ought to assess all of that evidence even if it was not fresh. It was submitted that there was no apparent forensic reason for failing to adduce the evidence of Dr O'Dea before the jury at trial.

173 Trial counsel gave evidence on the appeal before us, and was unable to recall specifically what process of reasoning led him not to call Dr O'Dea to give evidence before the jury. However, he did agree with a suggestion, put to him in cross-examination, that medical evidence showing an aberrant mental state was in his view capable of prejudicing the petitioner in the eyes of the jury.

174 It appears to us that there was an obvious forensic reason for the omission by trial counsel to call medical evidence to discuss in detail the mental state of the petitioner. First, it would have been plain to the jury that the petitioner was a very unusual person. In evidence, a variety of matters which set him apart from "normal" experience were mentioned. They included his living essentially on the streets and on his wits, his unusual dress and use of a staff, and his many untrue, grandiose and unlikely claims made to various people, such as working for Interpol, being involved in "busting" the Mafia, having deep interests in metaphysics and other somewhat esoteric subjects, speaking many languages and the like. Most importantly, there were frequent references in the evidence to his having been interviewed while residing at Graylands, which is notoriously a facility for those who are mentally ill. It might have been thought that there was ample material to support the submission that a person such as the petitioner might have had the otherwise very unlikely idea that he was in a position to "help" police by theorising with them about the murder.

175 On the other hand, although expert psychiatric evidence may have assisted the thrust of the submission outlined above, by confirming the petitioner's grandiose and unusual speech and thought patterns, there were apparent disadvantages associated with it. The evidence of Dr O'Dea at the *voir dire* described the petitioner at the relevant time as having been in a "manic" state. He was described as liable to become "up-tight and upset" and verbally threatening in situations of stress. He was described as having a "rich fantasy life" but as being able to determine whether his ideas were fact or fantasy. The last of those observations might well have supported an inference that in his confessions, and particularly in the

videotaped confession, the petitioner was quite able to distinguish between being asked about his own movements and being asked about some hypothetical murderer. The discussion of his "manic" state could well have led to or strengthened a view that he was the type of person who might react disproportionately if, during the course of a robbery, Pamela Lawrence became upset and hysterical, as the police alleged that he had said she did.

176 As we have noted, an argument that criticised counsel's decision not to call psychiatric evidence was only raised obliquely in argument rather than directly by the grounds of appeal. Presumably that was because, as we have explained, such criticism is entirely lacking in substance.

The petitioner's myopia (Ground F, penultimate paragraph)

177 This is another matter which, although referred to in passing in the notice of appeal as "new" evidence, was sometimes, during the course of argument, put in terms which tended to suggest an allegation of incompetence or inexplicable omission by trial counsel. The issue can be disposed of very briefly.

178 Evidence was called at the hearing of this appeal to the effect that the petitioner had suffered for a considerable period of time from myopia; that is he was short-sighted. His evidence on the appeal was that he did not normally wear glasses unless watching television or driving. His evidence also was that sometime before the killing of Mrs Lawrence he had lost his glasses. There was evidence that he and members of his family had mentioned to trial counsel that he had poor eyesight and did not have his glasses at about the time of the offence.

179 There was also at the hearing of this appeal medical evidence about the degree of the petitioner's visual impairment at the relevant time, based upon records of corrective glasses which had been prescribed for him in the past, and records of tests of his eyesight in the past. There was some debate about the degree to which firm views could be expressed based upon that material, but it is not necessary for us to deal with that issue. The point of all the evidence was to support a submission that he would have been unable to tell whether Ms Barsden was a male or female and would have been unable to tell whether or not she was looking at him, if he had been in Flora Metallica at the relevant time. It then followed, it was submitted, that he could not have made to the police those statements which it was alleged that he had made about being seen by a girl in a car.

180 It is to be noted however that it was never suggested that the petitioner was in a position to describe Ms Barsden with any precision or that when he had "locked eyes" with her he had been able to distinguish her features well enough to be able, for example to describe the colour of her eyes or to identify her if he saw her again. All that was suggested was that he had noticed that a girl was looking or appeared to be looking at him.

181 The medical evidence was that persons with poor eyesight improve their vision by squinting, and do so unconsciously when they need to focus on something properly. The petitioner's own evidence was that he had not worn glasses for a month or more before the offence but that during that period of time he competently drove a car. Also during that period, his evidence was that while standing on the opposite side of the road to Flora Metallica (that is, much further away from the shop than Ms Barsden is alleged to have been) he looked into the shop and was able to identify a person inside as being a policeman, wearing a light blue, short-sleeved, collared shirt, having short blonde hair and carrying a black handled torch. His evidence at the trial included evidence that in the week prior to the offence he was walking past Flora Metallica and, happening to "glance" into it, noticed that there was a gold gum leaf in the window. There is nothing in any of that material which appears to us to be capable of casting doubt on the proposition that at the relevant time the petitioner would have been able to notice that there was a girl in a car and that she appeared to be looking at him.

Patterns of bloodstaining (Ground B(iv))

182 We do not propose to go in detail through all of the material which relates to this portion of the grounds of appeal. It is alleged that there is fresh evidence that the petitioner's description of Mrs Lawrence being hit at the front of the shop and then dragged to the back is inconsistent with the distribution and patterns of bloodstaining as depicted in the photographs of the crime scene. That raises two issues; the first is whether the evidence is fresh, and the second is whether the alleged inconsistency exists.

183 The allegedly fresh evidence is that of Mr Hall, forensic scientist at the Victoria Forensic Science Centre, and an expert in bloodstain pattern analysis. Mr Hall's evidence was not given at trial. However, Mr Hall's evidence was that the service of experts in bloodstain interpretation was available for some time in Australia prior to 1994. Indeed, some evidence as to bloodstain interpretation was given by Mr Bagdonavicius at trial.

184 It is submitted however that Mr Hall's evidence is fresh because it has been obtained as the result of discovery of photographs of the crime scene which the prosecution failed to disclose to the petitioner or his counsel prior to or during the trial. The evidence before us was that all but two of the nine photographs relied upon by Mr Hall were in a booklet of photographs, copies of which were made available to the trial Judge, members of the jury and to defence counsel. As is not unusual, the quality of the copies is not as good as the quality of the originals. There is however no suggestion that, had an analysis had been thought desirable by the defence, the originals would not have been available for view. As to the other two photographs, Mr Hall gave evidence that his interpretation of an area shown on one of them could be made by a reference to one which had been disclosed, and that the other was not essential to his conclusions. In effect, he agreed that his conclusions could have been drawn from the photographs which were provided to the defence. This is not surprising, since the two which were not provided are clearly photographs taken from somewhat closer and perhaps from a slightly different angle, but which reveal the same areas as areas appearing in the other photographs. We would not therefore regard Mr Hall's evidence as fresh evidence.

185 So far as the substance of Mr Hall's evidence was concerned, there were a variety of minor observations, but the principal question at issue was whether the bloodstain patterns were consistent or inconsistent with the account given by the petitioner to police of hitting Mrs Lawrence at the front of the shop and then dragging her to the rear. The view which was advanced in reliance on Mr Hall's evidence, was that the petitioner's account would have resulted in only two significant areas of pooling of blood, whilst a third area could be seen in the photographs.

186 During the course of his evidence before us, it appeared that Mr Hall's opinion was based in part on the photographs and also in part upon the evidence at trial of an ambulance officer, Mr Rigby. That evidence was to the effect that he had (together with police officers and another man, who appears to have been Mr Lawrence), assisted in moving Mrs Lawrence from her position near the back door to another area, and that "before that" he did some tests and bandaged her head because it had been bleeding. At that point he agreed that the bandages and the tests were done where Mrs Lawrence was originally positioned. On its face, that evidence suggests that although Mrs Lawrence was moved from her position near the back door, there would have been no reason to expect any further significant bleeding in the new position to which she was moved.

187 However, Mr Rigby gave further evidence at trial, when asked what he did when he got the woman out to the other area, that "that was where I bandaged her skull tightly ... ". The sequence then seems to be that Mrs Lawrence's head was bandaged at first where she lay, but that it was rebandaged at another position in the shop. That view is supported by the evidence given at trial by then First Class Constable Staples, who said that when he arrived one of the constables assisted Mr Lawrence in holding a "cloth" to Mrs Lawrence's head, that the constables then assisted the ambulance officers to move Mrs Lawrence into what he described as "an open area" so that there was room to treat her properly, and that it was there that the St John's Ambulance officer placed a broad bandage on Mrs Lawrence's head. That evidence was confirmed at trial, albeit in response to questions of a somewhat leading nature, by the other constable attending.

188 Mr Hall's evidence before us was that if there had been an initial temporary bandage, he would expect that there would be more blood found in the new position to which Mrs Lawrence was moved. It seems to us therefore that the argument which the petitioner seeks to make in reliance upon the evidence of Mr Hall cannot be sustained, since it is predicated upon an assumption inconsistent with the unchallenged evidence at trial.

The photograph(s)

189 Although it never formed part of the grounds of appeal, some stress was placed during the hearing of the appeal on the possibility that the petitioner was shown a photograph or photographs of the deceased, which would explain, it was submitted, why he had been able to describe the injuries inflicted on her head with what Dr Cooke considered to be reasonable accuracy. Because there was considerable discussion of the issue, we think it desirable to mention it briefly. During the course of the videotape record of interview, when asked about the attack on the deceased, the petitioner at one point began his answer with the words "Well judging by the ... photographs ... ". That comment was not followed up during the course of the police interviews with the petitioner. At trial and before us, his evidence was that he was shown, not a number of photographs, but one particular photograph, showing the deceased lying face down. At trial his evidence was that she appeared to be lying on a wooden background that seemed to be floorboards. The police denied ever showing a photograph of the deceased to the petitioner during the course of the interviews.

190 It is sufficient, we consider, to deal with this issue, to note that the question of whether the petitioner had been shown a photograph or photographs, was always a live issue before the jury at trial. It must have been plain to the jury that photographs of the deceased had been taken for the purposes of the investigation. The question whether the petitioner might have been able from a single photograph to deduce the three areas of principal injury to the deceased's head, as well as the contest of credibility as to whether any photographs were shown, was a matter properly open at trial. No further light has been shed on it, in our view, by any of the material adduced in evidence at this appeal, including the sketch produced by the petitioner for defence counsel at trial, but not used, which he said was a sketch of the photograph he had been shown.

Peter Lawrence (Ground E)

191 The way in which the petitioner's case concerning Peter Lawrence evolved during the course of this appeal is a matter which ultimately causes us some concern. No reference to Mr Lawrence appears in the petition or in the notice of appeal dated 26 July 2002. The proposed notice of appeal dated 12 February 2003 contains a reference to persons alleged to be "additional suspects". Particulars of additional suspects in the petitioner's response to the respondent's request for further and better particulars, filed 6 March 2003, lists Mr Lawrence amongst 13 alleged additional suspects. At some stage many of those were discarded so that only Mr Lawrence and the other persons of interest we have described, fall to be dealt with.

192 Oddly, although he had been named amongst many others as a "possible suspect" in March 2003, Mr Lawrence's name appeared on a list of proposed witnesses in this appeal prepared on behalf of the petitioner, and his name continued to appear on amended versions of that list for a number of days after the commencement of this appeal. The opening submissions by counsel for the petitioner did not suggest what evidence he might be called to give, and in the end his name simply disappeared from the witness list. During the hearing of the appeal, on 11 August 2003, very detailed proposed particulars of this ground were provided. Some of them referred to the additional "suspects" dealt with earlier in these reasons, but the majority contained very detailed allegations concerning Mr Lawrence.

193 We should make it very plain that we do not criticise those acting for the petitioner for making such allegations against Mr Lawrence. It is always open to a person accused of a crime to attempt to prove that the

offence was committed by another. The process no doubt may be distressing for the other person, and carries an element of unfairness in the sense that he or she is accused in a public forum without actually being a party and being in a position to offer a defence. However, that right of an accused person is a necessary consequence of the need to ensure that he or she is able to make the fullest possible defence. Further, we do not criticise the bringing forward of those particulars at a late stage during the course of the appeal, notwithstanding that, for reasons which we shortly explain, they ultimately were demonstrated to be lacking in substance. There was a great deal of material provided to those acting for the petitioner, and some of it was apparently provided later than it should have been, so that it was necessary for the petitioner's solicitors and counsel to sift and digest quite large quantities of material in a relatively short space of time. It is not surprising that in those circumstances material was put forward which, had there been time for better investigation and reflection, might not have formed part of the case.

194 However, it is the way in which that material was treated after the evidence had been heard which is of concern to us. The evidence referred to in the particulars concerning Peter Lawrence fell into three broad categories.

195 The first category of material was not fresh or new evidence at all, but consisted of material which was always known prior to and at trial. Most of the "evidence" falling into that category in the particulars is not even evidence, but simply argument and argument, in our view, which cannot be supported. For example, it is suggested that the description given by Ms Barsden of the person she saw inside the shop fits the description of Peter Lawrence. Peter Lawrence gave evidence at trial, so that if this issue had been considered to be of any relevance it would have been something the jury would have been well able to assess. Having had tendered to us a photograph depicting him at the date of trial, we note that he did not have a "long" face, does not have a strawberry blonde beard, that he had at that date a neat full, beard, rather than a light one, and was clearly older than 30 – 35 years of age.

196 We do not propose to go through in detail the material which was available at trial. It is sufficient to note that, at trial, no suggestion was made by the petitioner's counsel that Mr Lawrence might have killed his wife. This was presumably due to a combination of the fact that none of the material then available could possibly support such an inference, together with the very powerful evidence against such an inference, which demonstrated that Mr Lawrence had called an ambulance for his wife

while she was still alive and at a time when there then still remained a possibility that she would survive at least for a sufficient time to be able to identify her assailant.

197 The second category of material contained in these particulars is fresh or new, but does not appear to us to be capable of implicating Peter Lawrence rather than some other person, even if it were accepted at face value. That material consists largely of one or two very weak indications that there may have been some limited attempt to "clean up" the crime scene. For example, it is alleged in the particulars that there is fresh evidence from Mr Bagdonavicius that blood splashes on the side of a fridge adjacent to the sink had been diluted or splashed with water. Before us, Mr Bagdonavicius said he was unable to say whether the apparent dilution could have been water or cerebro spinal fluid. Even if it had been water, which is a finding which does not commend itself to us on the evidence, it is not clear to us why that should lead to a conclusion that it was Mr Lawrence, rather than some other person, who had been splashing water.

198 Finally, the material in the particulars which did appear to be fresh or new and did appear to support an inference that may have implicated Mr Lawrence, was demonstrated during the course of the evidence before us to be quite incapable of bearing the construction placed upon it by counsel for the petitioner. The most striking evidence falling into this category is that contained in particular E(iii) which commences: "Fresh evidence will be given by Bagdonavicius, that gives rise to the inference that there had been an attempt to wash out blood stains on the bottom of the business shirt worn by Peter Lawrence ... ". To explain the background to this particular, it should be understood that, in attempting to assist his wife at Flora Metallica, Peter Lawrence got blood on various items of his clothing. She was bleeding profusely and there was considerable blood at the scene. As a routine procedure during the course of the investigation, police seized the clothing Mr Lawrence had worn at the time. Mr Bagdonavicius inspected that clothing and prepared a report.

199 In his report, on a sketch of Mr Lawrence's shirt, Mr Bagdonavicius wrote the words: "Washed out?". His evidence before us was that when he wrote those words he was referring to the strength of the colour of the particular stains, rather than suggesting any conclusion about the way in which the shirt might have been treated. Further, he gave evidence that, although any opinion as to how those bloodstains got onto the shirt is speculation, it was his view that there was a "strong possibility" that transference of blood from another item of clothing produced those

bloodstains. He gave evidence that there was some evidence of blood transference within the shirt itself and that other light bloodstains on various other items of clothing stored in the same bag were consistent with transference from other items of clothing. The mechanism for the transference apparently would occur, if the shirt and other bloodstained clothing was stored together in a bag. The evidence of the police was that at the time at which they seized the clothes that Mr Lawrence had been wearing at the relevant time, they found them stored all together in a rubbish bag. The position then, after all the evidence had been given, was that there was no evidence to suggest any attempt at laundering the clothing, and that there was evidence pointing to the mechanism of transference as the way in which those particular stains had arisen.

200 It is unfortunate that, in the face of evidence of the type which we have described, and after the opportunity for reflection, the petitioner's counsel nevertheless persisted in relying upon the submission that Mr Lawrence was an alternative "suspect". He did not refer to that portion of the notice of appeal at all during the course of his closing. Nor did he refer to it during the course of his final submissions in reply. However, when the respondent's counsel, during the course of his closing submission, suggested that it would be appropriate for the court to treat those particulars as having been abandoned, those acting for the petitioner passed him a note, the gist of which was communicated to us, to the effect that those particulars were still relied on. It is our view that counsels' ability to raise grave allegations concerning third parties, if it appears to be in the interests of his client to do so, carries with it a corresponding responsibility. In our view, once it became apparent that there was no evidence capable of belief which was capable of supporting the particular relied upon, it would have been appropriate that reliance upon that particular should be abandoned.

Polygraph evidence (Ground D)

201 Sometime prior to trial the petitioner wrote to Mr Hogan asking him to arrange for the petitioner to undergo specialist's tests and examinations including speech, language and eye tests. He wrote that he was not able to give a detailed account of his movements from the time he arrived at Bel Air Apartments in the taxi and that he wished to make a statement about it. He then added:

> "I then wanted to confirm that statement using HYPNOSIS and TRUTH SERUM plus a lie detector. Even if the truth serum and lie detector is not allowed in court. I still want it done! At

> least I can tell the court that I have subjected myself to these to prove that 'I am innocent'."

202 No such tests were arranged and no attempt was made to lead such evidence at trial.

203 In early March 2001, Ms Colleen Egan, a reporter with "The Australian" newspaper contacted Mr William Glare on behalf of the petitioner. We were informed that Mr Glare and Mr Van Aperen are the only two polygraph examiners in Australia.

204 Ms Egan supplied Mr Glare with a brief of the petitioner's trial, which he read. On 13 March 2001 he conducted a polygraph examination of the petitioner at Casuarina Prison. He subsequently produced an affidavit sworn 17 December 2002 to be used in this appeal. However, prior to the hearing he unfortunately suffered a serious illness which incapacitated him and he was unable to testify.

205 On 3 July 2003 at the instigation of those advising or assisting the petitioner, Mr Steven Van Aperen conducted a polygraph examination of the petitioner at Casuarina Prison, details of which are contained in his affidavit sworn 17 July 2003.

206 Mr Van Aperen is a certified forensic polygraph examiner. He conducts his own business.

207 Earlier he had been a police officer in the South Australian police force from March 1984 and joined the Victorian Police Force as a uniformed officer in 1988 rising to the rank of senior detective in 1994.

208 He holds a Bachelors Degree in Criminal Justice Administration (Royal Melbourne Institute of Technology University, 1995) and a Diploma in Security Management (1997).

209 In 1996 he attended Western Oregon State University in the United States of America to train in the science of forensic psychophysiology under Dr Stan Abrams PhD, a clinical psychologist. He graduated from that course on 26 July 1996. His training reached the standards for forensic polygraph examiners set by the American Polygraph Association.

210 In August 1996 he received certification by Axciton Systems, manufacturers of computerised polygraph instrumentation, in Houston, Texas. This certification related to training on the calibration and

operation of computerised polygraph instrumentation when conducting polygraph testing.

211 He is a member of the American Polygraph Association and of the American Association of Police Polygraphists. He has attended several conferences on the polygraph and psychophysiological detection of deception and was engaged in other related activities.

212 Mr Van Aperen has conducted numerous presentations on polygraphy to various police departments and other organisations in Australia.

213 Since 1996 he has conducted 338 polygraph tests in cases including homicide, rape, sexual assault, theft, fraud and other matters.

214 Mr Van Aperen described polygraph techniques as being derived directly from "basic scientific principles and research in psychology and human psychophysiology". He asserts that physiological measurement techniques for the detection of deception have been developed and subjected to scientific evaluation for almost 100 years. He asserts that "it is well established" that certain stimuli produce voluntary changes to a person's physiology that are controlled by the autonomic (sympathetic and para-sympathetic) nervous system and that one such stimulus occurs when a person is lying.

215 As Mr Van Aperen explained it, when a person is lying, changes in that person's physiology, controlled by the autonomic nervous system, include increased skin conductivity (palmar sweating), increased blood pressure and decreased respiratory activity. These changes are measured with polygraphic instruments. He stated that modern polygraph techniques initially grew out of law enforcement application.

216 According to him, the most commonly employed testing format is the comparison question test, or control question technique ("CQT"). In the CQT there are three categories of questions. The first category comprises those which relate to the particular matter under investigation (eg did you steal that $500 cheque?). These are referred to as relevant questions. The next category is control or comparison questions. They are asked within the same format of the test and are deliberately designed to produce a "lying" response (such as "have your ever deliberately harmed anyone?"). The purpose of the control or comparison question is to provide a meaningful way to compare and interpret the relative strength of physiological reactivity to the relevant questions. The remaining

category of questions is those which are designed simply to "fill out" the test.

217 Interpretation of the test outcome is made by systematically comparing the strength of reactions to the relevant questions against the comparison or control questions. Negative scores (indicative of deception) are assigned when reactions to relevant questions are stronger than reactions to control or comparison questions. Positive scores are assigned when the reactions to control or comparison questions are stronger than reactions to relevant questions. The scores are subsequently tallied for the entire test. All relevant questions combined, a total numerical score of minus six (or a greater negative number) indicates overall deception to the relevant questions. A total of plus six or greater indicates overall truthfulness to the relevant questions. A total score between minus six and plus six is deemed to be inconclusive.

218 In his affidavit and evidence Mr Van Aperen also described his understanding of the Guilty Knowledge Test ("GKT"). This is administered in two forms – the Known Peak of Tension test and the Searching Peak of Tension ("SPOT") test.

219 A Known Peak of Tension test is used to determine if the examinee has knowledge of a particular case fact in respect of a crime that is known only to the perpetrator and the police.

220 A SPOT test is used to determine a case fact known only to the perpetrator of the offence.

221 The assumption underlying both of these is that only the perpetrator would have knowledge of the particular facts surrounding the crime (and will produce an autonomous reaction when asked about such facts).

222 A polygraph examination procedure begins with a "carefully structured" interview (the pre-test interview) in which the issues to be tested are discussed in detail with the examinee. According to Mr Van Aperen, the intent is that during the pre-test interview, questions concerning the issues under investigation are constructed between the examiner and the examinee so that they are clear, succinct and clear of ambiguity. The examinee is instructed to answer all questions with a simple yes or no. During each testing phase recordings are made of the examinee's physiological responses to each of the questions. The entire set of questions is asked at least three times.

223 In the petitioner's case Mr Van Aperen conducted an extensive pre-test interview. In the course of that he informed the petitioner that no matter what the results of the examination were, they would be provided to the Office of the DPP. The petitioner agreed to that.

224 Mr Van Aperen utilised an Axciton computerised polygraph for the testing. That recorded on a moving chart, relative changes of blood pressure, rate and strength of pulse beat, electro-dermal response and thoracic and abdominal respiratory patterns.

225 Mr Van Aperen conducted first what he described as a GKT or SPOT test to determine whether the petitioner had knowledge of what type of instrument was used in the murder. That test was conducted in the following way:

> "X This part of the test is about to begin. Please remain still
>
> R1 Do you know for certain if Pamela Lawrence was struck with a spade?
>
> R1 Response: No
>
> R2 Do you know for certain if Pamela Lawrence was struck with a hammer?
>
> R2 Response: No
>
> R3 Do you know for certain if Pamela Lawrence was struck with a baseball bat?
>
> R3 Response: No
>
> R4 Do you know for certain if Pamela Lawrence was struck with a spanner?
>
> R4 Response: No
>
> R5 Do you know for certain if Pamela Lawrence was struck with a wrench?
>
> R5 Response: No
>
> R6 Do you know for certain if Pamela Lawrence was struck with an anode?
>
> R6 Response: No

R7 Do you know for certain if Pamela Lawrence was struck with an iron bar?

R7 Response: No

XX This is the end of the test please remain still."

226 Mr Van Aperen's examination of the three charts produced in response to these questions showed no strong autonomic reactions (sympathetic) to any of the implements "which was alleged to have been the murder weapon". It was his evidence that if one of the implements had been used to strike Pamela Lawrence the offender would have had a strong autonomic reaction to that implement.

227 Mr Van Aperen analysed the chart using the *Polyscore* scoring algorithmic software developed by the John Hopkins University Applied Physics Laboratory USA, which he said "… is designed to evaluate polygraph recordings to render an independent opinion from the examiner regarding the probability of truthfulness or deception".

228 The *Polyscore* chart analysis of the Series 1 GKT showed the petitioner's reaction to each of the questions was negligible. The strongest reaction in the first test of the series was to question R1 ("spade"). The strongest reaction in the second test was to question R5 ("wrench"). The strongest reaction in the third test was to question R3 ("baseball bat"). Mr Van Aperen said that even if any of those reactions had been significant (which he said they were not) the different reaction in each test is "strong evidence" that if any of those items was the murder weapon then the petitioner did not know that.

229 As it was put in the petitioner's submissions, Mr Van Aperen's conclusion was that if one of the items in the GKT was the murder weapon, then the petitioner is not the murderer.

230 The second series of tests were CQT tests.

231 The following extract from the transcript of the polygraph tests gives an indication of the process by which the control questions are formulated between the examiner and the examinee (TS 3 July 2003 pages 43-49):

"TESTER: Okay. Now, um, with this next test I'm going to do, um, this is what we call a single issue zone of comparison test. Okay? Now, obviously what I need to do is ask you direct questions in relation to the issue like I did just previously. So

what I'd like to do is review through the questions with you, um, that are going to be on the test.

MR MALLARD: Okay.

TESTER: Okay. So, um, firstly, one of the questions that I'm going to ask you is regarding whether or not you struck Pamela Lawrence on the head on the 23rd of May 1994, do you intend to answer truthfully each question about that?

MR MALLARD: Yes I do.

TESTER: And I just need - - in the test, I just need you to say yes. Okay. No problems.

MR MALLARD: Ha ha.

TESTER: That's okay. Nothing to worry about - -

MR MALLARD: It's just … (indistinct)…pedantic

TESTER: The other questions that are going to be on the test (*sic* are) is, um, did you strike Pamela Lawrence on the head on the 23rd of May 1994?

MR MALLARD: No.

TESTER: The other question. On the 23rd of May 1994 whilst inside a shop called Flora Metallica, did you strike Pamela Lawrence on the head?

MR MALLARD: No. I did not enter Flora Metallica.

TESTER: Okay. That's fine. That's fine, but that question relates to whether or not you, I guess, were inside the shop and struck her at that time.

MR MALLARD: No.

TESTER: No. Okay. Um. Now, my job today is to find out whether or not you were involved in this and what I need to do in order to do this, I want to find out exactly a little bit more about the type of person you are. There's - - I guess what I want to be able to show is that you're not the sort of person that would do something like this but also - -

MR MALLARD: Absolutely.

TESTER: - - that you're not the sort of person that would lie about doing something like this if you've already done it. Okay. So what I need to do is ask you questions about the type of person you are, your personality and so on.

MR MALLARD: Yes.

TESTER: Now, ah, the next, ah, three questions I'm going to ask you are very important because, ah, they're specific issues I need you to be, you know, upfront with me in relation to these issues. Okay.

MR MALLARD: Absolutely.

TESTER: Um. So what I'd like to ask you. These questions are going to relate to before, ah, the death of Pamela Lawrence, so before this incident. Okay.

MR MALLARD: Mm Hm.

TESTER: So I don't want to have any cross-over into that period of time. So just bear with me for a second. Now, what I'm going to do I'm just going to write them up so just bear with me.

MR MALLARD: Okay.

TESTER: I won't be long - - -

TESTER: - - - won't be long.

MR MALLARD: Okay.

TESTER: Okay. On a scale of 1 to 10, how truthful would you rate yourself, 1 being not very truthful, 10 being 100 per cent truthful? What would you give yourself as a self-assessment?

MR MALLARD: Ten.

TESTER: Ten. Okay. Are you the sort of person that would deliberately hurt - - physically hurt people or - -

MR MALLARD: No.

TESTER: - - intentionally hurt people?

MR MALLARD: No.

TESTER: Okay. Um. What I am going to do now is I'm just going to run through some questions. Now, these relate to before this incident. Okay. So, um, forget about the incident, I'm going to talk about before that, and there's going to be - - the questions are going to be quite self-explanatory. Um. Firstly, let me ask you. Are you the sort of person that would deliberately hurt someone?

MR MALLARD: no.

TESTER: Okay. If I was to say to you between the ages of 15 and 30, so between the ages of 15 and 30 did you ever deliberately hurt someone physically?

MR MALLARD: No.

TESTER: So there was never ever any stage that through growing up or, um school or anything you deliberately went out to hurt someone?

MR MALLARD: No.

TESTER: Okay.

MR MALLARD: In fact I was bullied at school.

TESTER: Okay. Um. Was - -

MR MALLARD: Was there a victim as I am now.

TESTER: Okay. Was there any time that - - do you have any brothers or sisters or anything - -

MR MALLARD: I have a sister.

TESTER: Okay. Was there a time where you ever physically, um, struck her or anything like that?

MR MALLARD: No, none at all.

TESTER: Okay. Um. Next question. During the first 30 years of your life, did you ever cause physical harm to someone?

MR MALLARD: No.

TESTER: Do you know - - do you understand what I meant by that question?

MR MALLARD: Yes.

TESTER: Can you explain it to me?

MR MALLARD: Any form of physical harm, a slap or a kick or a punch or anything like - - anything to that effect.

TESTER: No problem.

MR MALLARD: I've just thought of an incident at school when I was young, early age, where in retaliation of being beaten, I punched the guy in the stomach - -

TESTER: Mm hm.

MR MALLARD: - - but that was it.

TESTER: Okay. Well - - okay. No problem.

MR MALLARD: Trying to be honest.

TESTER: Yeah, no, I appreciate that. Um. So was it just that one time?

MR MALLARD: Yes. Yes.

TESTER: Okay.

MR MALLARD: That was early in my school - -

TESTER: Sure. No, that's fine.

MR MALLARD: - - that - - that was second year of high school, I think.

TESTER: Sure. Okay. In that case, I'll put - - I'll actually ask you this. Other than what you've told me, so it excludes that one time - - so other than the one you told me. Between the ages of 15 and 30, did you ever deliberately hurt someone physically?

MR MALLARD: No. No.

TESTER: And other than what you've told me, during the first 30 years of your life, did you ever cause physical harm to someone?

MR MALLARD: No.

TESTER: Okay. The other question I've got for you is are you the sort of person that would lie to someone in authority?

MR MALLARD: No. Definitely not.

TESTER: Okay.

MR MALLARD: Absolutely not.

TESTER: Okay. Good. In that case, I might ask you this question. Before 1992, did you ever lie to someone in authority?

MR MALLARD: No.

TESTER: Okay. All right. So that could be teachers, that could be parents, could be anything along those – nothing major perhaps?

MR MALLARD: Nothing. No, nothing to the way you're putting it. I know what you mean. I have, um, exaggerated and, um - -

TESTER: Nothing - -

MR MALLARD: - - nothing of a serious deception, no.

TESTER: . . . (indistinct) . . . be able to show that you're not the sort of person that would - -

MR MALLARD: Yeah, no.

TESTER: Yeah.

MR MALLARD: No. I can truthfully say no.

TESTER: Okay. All right. Um. One of the other questions I'm going to ask you is, is your first name Andrew?

MR MALLARD: Yes. My first names are Andrew Mark.

TESTER: Okay.

MR MALLARD: I actually like my full names being used.

TESTER: Okay. Actually, better still, I'll change that. I'll actually ask: are you currently sitting down? Make that easier.

MR MALLARD: Okay. Ha ha. Unfortunately I tend to be very pedantic and - -

TESTER: That's all right. Okay. Um. Now - - okay. The questions that I have reviewed with you, and we'll go through them again a bit later - -

MR MALLARD: Mm hm.

TESTER: - - are the - - are the questions that I'm going to ask you in this series of testing. Um. I'm not going to ask you any other questions about any other issue in this text. Okay.

MR MALLARD: Okay.

TESTER: I want you to know that. Um. Now, in order for me to assure you that - - and convince you that I'm not going to do that, I'm going to ask you these questions in the test. Are you completely convinced that I will not ask you an unreviewed question during this test - -

MR MALLARD: Yes, I trust you.

TESTER: - - because I'm not going to, but I just want to make sure that your mind is here, not elsewhere. That's why we ask that question.

MR MALLARD: I trust you, Steven.

TESTER: Okay.

MR MALLARD: I trust you.

TESTER: And the other question is - - I'm going to ask is, is there something else you're afraid I will ask you a question about even though I told you I would not, because I'm not going to, but I just want to make sure that you know that I'm not going to. So the question is: is there something else you're afraid I

> will ask you a question about even though I told you I would not?
>
> MR MALLARD: No, and even if you were, I would be fine with that - -"

232 Following this, Mr Van Aperen rehearsed the test with the petitioner before reattaching the petitioner to the polygraph machine and then conducted the test as follows:

> "TESTER: Yeah, that's good. Now, just before we start. Once again, I need you to sit perfectly still during the test; no finger movements or facial movements or feet movements or anything like that. Just simply answer the questions yes or no. Um. And also, obviously it's a very sensitive instrument so I want you to be sure that you understand how important it is for you to be completely truthful to every question. Okay. Just for your protection. You've told me the complete and absolute truth to each of the questions I've previously reviewed with you?
>
> MR MALLARD: Yes.
>
> TESTER: Okay. This part of the test is about to begin. Please remain still. Are you currently sitting down?
>
> MR MALLARD: Yes.
>
> TESTER: Regarding whether or not you struck Pamela Lawrence on the head on the 23rd of May 1994, do you intend to answer truthfully - -
>
> TESTER: - - - intend to answer truthfully each question about that?
>
> MR MALLARD: Yes.
>
> TESTER: Are you completely convinced that I will not ask you an unreviewed question during this test?
>
> MR MALLARD: Yes.
>
> TESTER: Other than what you've told me, between the ages of 15 and 30 did you ever deliberately hurt someone physically?
>
> MR MALLARD: No.

TESTER: Did you strike Pamela Lawrence on the head on the 23rd of May 1994?

MR MALLARD: No.

TESTER: Other than what you told me, during the first 30 years of your life did you ever cause physical harm to someone?

MR MALLARD: No.

TESTER: On the 23rd of May 1994, while inside a shop called Flora Metallica, did you strike Pamela Lawrence on the head?

MR MALLARD: No.

TESTER: Other than what you told me, before 1992 did you ever lie to someone in authority?

MR MALLARD: No.

TESTER: Is there something else you're afraid I will ask you a question about, even though I told you I would not?

MR MALLARD: No.

TESTER: Okay. This is the end of the test."

233 According to Mr Van Aperen's analysis of the three charts the petitioner's polygram showed no strong or consistent unresolved responses to the relevant questions. The results indicated a total overall score of plus six. It was his opinion that the petitioner was truthful in his responses that he did not strike Pamela Lawrence on the head. He said that on the basis of scientific research by Ansley the confidence in the truthful outcome is approximately 96 per cent. The polyscore chart analysis of the series 2 CQT test returned a result "*strongly no deception indicated, probability of deception is less than .01%*".

234 The final portion of the polygraph examination was directed to ascertaining whether the petitioner was being truthful in his responses that he had never told the police that it was him rather than someone else who struck Pamela Lawrence.

235 Once again Mr Van Aperen conducted a pre-test interview in which he discussed the questions he was going to ask.

236 The first question was whether the petitioner was the sort of person who would deliberately lie to people. The petitioner immediately answered no, not deliberately. He gave a similar answer to the question whether he was the sort of person who would lie to protect himself. There was then a discussion, (which proceeded quite slowly) with the petitioner adding comments after long pauses (the process is quite apparent on the video). He began by saying that he had never told a serious lie nor a lie to protect himself. A little later he admitted that he did lie to Michelle Englehardt by telling her he was an Interpol agent. He explained however that this was a self-esteem issue – he did not want her to know who he was and that he was "on the street". He said that it was not to hurt or deliberately deceive her, merely to impress her. After some further exchanges he said that he had lied in the past but only ever to exaggerate his own importance and to impress people, but never on a serious issue to hurt or deceive. He said when confronted by serious issues and/or authority he would not lie. Again, he described himself as, exaggerating, mostly. A little later he said that he had told "small lies" to people to convince them to buy something from him, or that he would be able to pay them back money when he was trying to get marijuana on account. He said if the question was put in terms of "serious lies" he would understand that.

237 Mr Van Aperen then went through the questions that would be asked and again after that the petitioner seemed to show some concern to clarify just what was meant by the question going to whether or not he had previously lied. In the course of that further discussion he mentioned that it was also on his mind that he had pretended to be a police officer so a person would let him into a place. He did not elaborate on that further, saying that it was very complicated.

238 The third series of tests were then conducted. The first of those was:

> "… Okay. This part of the test is about to begin. Please remain perfectly still. Is your first name Andrew?
>
> MR MALLARD: Yes.
>
> TESTER: Regarding whether or not you've ever told police that it was you rather than someone else that struck Pamela Lawrence, do you intend to answer truthfully each question about that?
>
> MR MALLARD: Yes.

TESTER: Are you - - excuse me. Are you completely convinced that I will not ask you an unreviewed question during this test?

MR MALLARD: Yes.

TESTER: Other than what you told me, between the ages of 15 and 30 did you ever tell a serious lie to a personal friend or relative?

MR MALLARD: No.

TESTER: Have you ever told the police that it was you rather than someone else that struck Pamela Lawrence?

MR MALLARD: No.

TESTER: Other than what you told me, during the first 30 years of your life did you tell a serious lie to someone who really trusted you?

MR MALLARD: No.

TESTER: Regarding Pamela Lawrence have you ever said to the police that it was you rather than someone else who struck her?

MR MALLARD: No.

TESTER: Other than what you told me, before 1992, did you ever tell a serious lie to protect yourself?

MR MALLARD: No.

TESTER: Is there someone else – something else you are afraid I will ask you a question about even though I told you I would not?

MR MALLARD: No.

TESTER: This is the end of the test."

239 Mr Van Aperen's hand-scoring analysis of the three charts showed no strong nor consistent unresolved responses to the relevant questions. There was a total overall score of plus nine. He concluded that the petitioner was truthful in his responses that he had never told the police

that it was him rather than someone else who struck Pamela Lawrence. The *Polyscore* chart analysis returned the same result as that for the Series 2 CQT tests.

240 The respective positions of the parties on the issue of the polygraph were advanced through the evidence of Mr Van Aperen and by Professor Charles Honts who were called by the petitioner and Professor William Iacono, Professor John Furedy and Dr Drew Richardson, who were called by the respondent.

241 The submissions on behalf of the petitioner may briefly be summarised in the following way.

242 The test for the admissibility of expert opinion evidence should be taken as that articulated in ***Osland v The Queen*** (1998) 197 CLR 316 at 336 in which Gaudron and Gummow JJ said that:

> "Expert evidence is admissible with respect to a relevant matter about which ordinary persons are '[not] able to form a sound judgment … without the assistance of [those] possessing special knowledge or experience in the area and which is the subject of a body of knowledge or experience which is sufficiently organised or recognised as a reliable body of knowledge or experience'."

243 It was submitted that ordinary persons cannot form a sound judgment about whether or not a witness is telling the truth and that accordingly polygraph evidence would enable a jury to form a sound judgment about that – the only question then being whether the requirement of "reliability" is satisfied. This was said to have been recognised by Kirby J in ***State Rail Authority of New South Wales v Earthline Construction Pty Ltd (in liq)*** (1999) 160 ALR 588 at 618 where at [88] Kirby J approved as "entirely accurate" Lord Devlin's comments that:

> "I doubt my own ability … to discern from a witness' demeanour, or the tone of his voice, whether he is telling the truth."

244 His Honour said that in the future, technology might be developed which would assist courts in determining issues of witness' credibility. Referring to polygraphs, Kirby J noted that polygraphs are already in use in some jurisdictions in the United States although in Australia they have not been treated as sufficiently reliable for judicial use.

245 It was submitted that although a majority of the Supreme Court of Canada in ***R v Beland and Phillips*** [1987] 2 SCR 398, rejected evidence of polygraph examinations for reasons going to whether ordinary persons are capable of forming a sound judgment about the issues to which the examinations would relate, expressed as concern that the polygraph relates only to credibility, the approach of the minority in that case should be preferred. It is not a matter of credibility but one which goes directly to a fact in issue, namely the state of the petitioner's knowledge of the alleged murder weapon.

246 Counsel for the petitioner submitted that over the last 20 years a "vast literature" has developed in relation to the validity of polygraph examinations and that the polygraph is now generally accepted in the relevant scientific community as a valid test, which produces reliable results, or at least, (as it was put), results significantly better than chance.

247 The respondent contends the evidence is simply inadmissible. It was argued that the statements made by the petitioner to Mr Van Aperen on 3 July 2003 are self-serving hearsay, made nine years after the relevant events took place.

248 It is contended that the opinion expressed by Mr Van Aperen as to the truthfulness of the petitioner's answers is an inadmissible opinion because the basis upon which he purports to state it is not a proper subject for expert opinion. There is nothing in the material which establishes polygraphy as the subject of a reliable body of knowledge or experience. Furthermore, credibility is a subject within the experience of, and uniquely the province of, a jury.

249 Further grounds of objection are that Mr Van Aperen is not an expert in the scientific field upon which polygraphy purports to be based and several of the conclusions he asserts about the accuracy of the results of polygraph examinations are unsupportable even according to the evidence of Professor Honts.

250 Finally, it is submitted that the evidence Mr Van Aperen seeks to give is intended to do no more than bolster the credibility of the petitioner and is therefore strictly inadmissible in any event.

251 In Australia, the starting point for the admissibility of expert evidence is usually taken to be the judgment of Dixon CJ in ***Clark v Ryan*** (1960) 103 CLR 486 at 491:

> "The rule of evidence relating to the admissibility of expert testimony as it affects the case cannot be put better than it was by *J.W. Smith* in the notes to *Carter v. Boehm*, 1 Smith L.C., 7th ed. (1876) p. 577. 'On the one hand' that author wrote, 'it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it'."

252 In ***Bonython v R*** (1984) 38 SASR 45, which dealt with the admissibility of police handwriting evidence, King CJ (with whom Mathieson and Bollen JJ agreed) said (at 46):

> "The general rule is that a witness may give evidence only as to matters observed by him. His opinions are not admissible. One of the recognised exceptions to this rule is that which relates to the opinions of an expert. This exception is confined to subjects which are not, or are not wholly, within the knowledge and experience of ordinary persons, *Clark v Ryan* (1960) 103 CLR 486. On such subjects a witness may be allowed to express opinions if the witness is shown to possess sufficient knowledge or experience in relation to the subject upon which the opinion is sought to render his opinion of assistance to the court. Before allowing a witness to express such opinions, the judge must be satisfied that the witness possesses the necessary qualifications, whether those qualifications be acquired by study or experience or both. But when it is established that the witness is an expert in the relevant field of knowledge, he will be permitted to express his opinion, however unconvincing it might appear to be, *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292 … the weight to be attached to his opinion is a question for the jury."

253 His Honour described the test to be applied in the following passage **(**at 46 - 47**)**:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is

> permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.
>
> An investigation of the methods used by the witness in arriving at his opinion may be pertinent, in certain circumstances, to the answers to both the above questions. If the witness has made use of new or unfamiliar techniques or technology, the court may require to be satisfied that such techniques or technology have a sufficient scientific basis to render results arrived at by that means part of a field of knowledge which is a proper subject of expert evidence. Examples of cases in which that question arose are *Gilmore* [1977] 2 NSWLR 935; *McHardie* (1983) 10 A Crim R 51 and *United States v Williams* 583 F 2d 1194 (1978)."

254 Whilst ***Osland*** is a recent case in which the High Court had occasion to articulate the test for admissibility of expert (opinion) evidence, the test itself was not there in issue. It was sufficient for Gaudron and Gummow JJ to express it broadly and in concise form. There may be some difference between their Honours' formulation that the relevant matter be one about which ordinary persons "are not able to form a sound judgment" without the assistance of an expert, and the ***Clark v Ryan*** formulation which required it only to be one on which inexperienced persons "are unlikely to prove capable of forming a correct judgment upon it" without such assistance. For present purposes, however, for reasons which will become apparent, it is not necessary for us to answer that question.

255 Polygraph evidence has not previously been admitted in any reported case in Australia. Its use appears to have been confined to the USA and Israel, although even there it is controversial. Freckleton and Selby

(Expert Evidence, Law Book Co, Vol 1 p 1890) note that in the US the preponderance of authorities are against the admission of polygraph evidence.

256 The only reported Australian case is ***Murray*** (1981) 7 A Crim R 48, a decision of Sinclair DCJ in the District Court of New South Wales. In the course of the trial an accused sought to adduce evidence of the results of a polygraph examination conducted by Mr Glare. His Honour held the evidence to be inadmissible for the following reasons (at 49):

> "(1) The sole purpose of the evidence is to bolster the credit of the accused as a witness. However, the veracity of the accused and the weight to be given to his evidence, and other witnesses called in the trial, is a matter for the jury to assess and on general principle such evidence, as counsel seeks to adduce, is excluded.
>
> (2) The witness seeks to express an opinion as to ultimate facts in issue, which is peculiarly the province of the jury to determine on facts presented to them by witnesses who perceived them by the exercise of their physical senses.
>
> (3) It purports to be expert evidence but the witness is not qualified as an expert, he is merely an operator and assessor of a polygraph. Furthermore the scientific premise upon which his assessment is based has not been proved in this Court or in any other court in Australia.
>
> (4) Devoid of any proved or accepted scientific basis, the evidence of Mr. Glare is simple hearsay, which is inadmissible and of no probative value."

257 Having referred to two Canadian cases (***Wong*** (1977) 1 WWR 1(BC) and ***Phillion*** (1974) 53 DLR (3d) 319 his Honour concluded that (at 50):

> "The polygraph technique purports to be a scientific diagnosis of the testimony of a witness. Whatever may be the situation in some States of the United States of America, this 'evangelical sideline', as it was described, in passing, by Mr Glare which no doubt holds a genuine fascination for some people, has no place in a criminal trial in New South Wales where a machine operator seeks to express an opinion as to the veracity of an accused person's denial of the substance of the charges brought against him."

258 It is said on behalf of the petitioner that although a polygraph examination could have been conducted at the time of the petitioner's trial in 1995, the evidence is admissible on this appeal for three reasons.

259 The first is said to be that in 1995, the state of science of polygraph examinations was not as developed as it is today and the evidence is therefore "akin" to fresh evidence and ought to be admitted on that basis.

260 It is next submitted that in any event the petitioner did ask his lawyer, Mr Hogan, to organise a polygraph examination before trial so that he could prove his innocence but that was not done. There was no apparent forensic advantage to be gained from ignoring that request (as to which see ***Re Knowles*** [1984] VR 751 at 769). The petitioner should not be deprived of the opportunity to introduce this evidence as a result of a failure of his lawyer to act on his request.

261 Finally, in the context of the particular nature of this appeal, which rests primarily on whether the petitioner's "so called confession" was no more than his "theorising", it is in the interests of justice that he not be denied the opportunity to call scientific evidence, which is generally accepted, to support his assertion that he was not the murderer and was not confessing.

262 The first point will be dealt with later.

263 At the time of the petitioner's trial (and indeed as the law presently stands in Australia) polygraph evidence was inadmissible. The petitioner himself seems to have understood that a lie detector test was not admissible in court as he specifically adverted to that in his letter to Mr Hogan. It seems clear enough that Mr Hogan did not pursue the matter because he too, believed such evidence would be inadmissible.

264 In ***Knowles*** the petitioner had been convicted of the murder of his wife. There had been a struggle in the course of which she was stabbed in the neck. His defence was that the stabbing had occurred by accident. Before a trial, information became available to the defence lawyers that a former fiancée of the deceased and a former husband of hers, were each able to give evidence that she became aggressive when under the influence of alcohol. No such evidence was sought to be led at trial. That was because the lawyers acted on a line of single Judge authority in Victoria that in homicide cases in which either self defence or accident was an issue, evidence of the violent propensity of the deceased (and of which the accused had no previous knowledge) was not admissible. However, in one case such evidence had been permitted. The Court of

Criminal Appeal held that the latter view of the law was plainly correct. The conflict between the authorities had been resolved in that way by the Full Court in a decision given after the petitioner's trial.

265 The Full Court (Crockett, McGarvie and Gobbo JJ) said (at 769):

> "We must consider whether counsel ought to have sought to lead Swaine's evidence and ought to have requested that inquiries continue as to [the deceased's] propensity and to have called such evidence as those inquiries revealed. If Swaine's evidence and evidence such as that of Saunders had been tendered the probability is that it would have been admitted. It would have been likely to have been admitted either because the trial Judge regarded it as legally admissible or through the operation of the practice usually followed by trial judges that the benefit of the doubt, even on a ruling of admissibility of evidence, is to be given to the accused: see *R. v. Patel* (1951) 35 Cr. App. R. 62, at p. 66; [1951] 2 All E.R. 29. If the trial Judge had excluded the evidence and conviction had resulted the petitioner would have been able to appeal against the conviction on that ground. In our view there is no question but that counsel should have sought to lead the evidence. As mentioned above, it would have given the case on the whole of the evidence a complexion far more favourable to the defence. It would also have provided substantial support for the petitioner's credibility as a witness and this was of the utmost importance to his defence.
>
> We can see no forensic reason other than error of law as to its admissibility which would have led defence counsel to decide not to call the evidence."

266 And on the same page went on to say:

> "The decision not to call the evidence of the past conduct of the deceased was not a decision upon the best tactics to follow nor a decision as to the best of two or more courses to follow where each course appeared to have its advantages and disadvantages. Decisions of those types depend essentially on the judgment of counsel and counsel for the defence, familiar with all aspects and features of the trial, is in by far the best position to make such decisions. Decisions such as those, even if an appeal court thought that counsel had made an unwise or imprudent decision,

> would almost never found a successful appeal based on miscarriage of justice. The Crown argued that the decision now being considered was of the same type as those decisions but we do not agree."

267 The Court noted that the course to be taken in the conduct of the defence of an accused person is left to the judgment of the defence lawyers. A trial will not normally be regarded as having miscarried if an accused has been afforded a proper opportunity of choice and that choice has been made by the accused's legal representatives. However, there may be some circumstances in which such a choice could be vitiated. The Court referred to ***Ratten v R*** (1974) 131 CLR 510 per Barwick CJ at 517 and ***R v Hadland*** [1969] VR 725 at 728. Their Honours then concluded (at 770):

> "In this case counsel, believing the evidence to be inadmissible and without prospect of being admitted, would never have applied their minds to whether they should call Swaine's evidence and other evidence to a similar effect. Due to this fundamental error no choice was made by counsel as to whether or not it was in the interests of the petitioner to call this evidence. This resulted in the failure to tender the evidence. The error and omission were carried through to the appeal from the conviction. The affidavits indicate that counsel who argued the appeal on behalf of the petitioner was either guided by what senior counsel at the trial told him, that the evidence was inadmissible, or was unaware that such evidence was available. In this case, the error of counsel as to the admissibility of the evidence amounted to a vitiating factor.
>
> Where there is a vitiating factor there may be circumstances where a failure to call important evidence which was available or could by reasonable diligence have been available to the defence, will lead to a miscarriage. The fundamental error by counsel as to the admissibility of the evidence of Swaine and evidence such as that of Saunders, which led them to think they had no choice and therefore to fail to make a choice whether or not to call it, could bring about a miscarriage of justice in the circumstances of this case, regardless of whether the evidence amounts to fresh evidence …"

268 The Court held that by reason of the error by counsel that the evidence of the earlier conduct of the deceased was inadmissible,

evidence of fundamental importance to the petitioner's defence had not been called and in all the circumstances of the case that brought about a miscarriage of justice.

269 If it be assumed, in the petitioner's favour, that the reasoning in these decisions should be followed in this case, it can be seen that obviously this ground of the petitioner's appeal can succeed only if the polygraph evidence would have been admissible on his trial.

270 It must immediately be accepted that expert opinion evidence should not be rejected merely because the technique, instrument or methodology has not been used in court before (***R v McHardie and Danielson*** [1983] 2 NSWLR 733 at 763). Likewise, even where such evidence has been rejected as not satisfying the requirements for admissibility at one time, that may change. Subsequent theoretical or practical scientific developments may later lead to a conclusion that in light of the more developed state of the particular field of expertise it may meet the requirements for admissibility. Counsel for the petitioner claimed that is the situation here.

271 Until 1993 the principles applicable in the United States of America to the reception of expert evidence were those set out in the judgment in ***Frye v USA*** (1923) 293 F1013 which coincidentally, concerned a predecessor of the polygraph, described in that case as the "systolic blood pressure deception test".

272 The ground upon which the appellant put his case there was set out in the judgment:

> "The rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence."

273 The Court held (at 1014):

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

274 The ***Frye*** test (or "general acceptance test") was subsequently followed in almost all United States Federal courts and most of the 50 States. Although it was subject to considerable and at times strong criticism, it nonetheless continued to be law in the United States until 1993.

275 The party offering the novel scientific evidence has the burden of demonstrating that it has been accepted as reliable among impartial and disinterested experts within the scientific community (***Kluck v Borland*** 413 NW 2d 90 (1984) at 91).

276 The courts will have regard to whether or not the proponent of novel scientific evidence has some personal vested interest in securing its admissibility. In ***People v Young*** 391 NW 2d 270 (1986) it was held that the evidence of a State police detective who performed tests on evidence at a State crime laboratory was inadmissible as failing to meet the criterion requiring impartiality and lack of financial interest.

277 In the 1980s some United States courts moved away from the ***Frye*** test, preferring to focus more on the relevance of the evidence and an evaluation of its propensity to mislead or confuse. Freckleton and Selby observe (*supra*, Vol 1, page 2255) that the result was a stringent standard which focussed both upon relevance and reliability, rather than merely upon acceptance within the relevant profession (citing ***United States v Downing*** 753 F 2d 1224 (3rd Circ 1985).

278 The learned authors note that in ***Downing*** the Court explicitly rejected the ***Frye*** standard and made reliability of the expert evidence its

criterion for admissibility – although recognising that reliability depends upon a number of factors, acceptance within a particular scientific community being one of them (albeit not determinative).

279 Subsequent developments of the ***Frye*** test eventually resulted in a conclusion that the admissibility of expert testimony upon the application of a new scientific technique involves a two step process – first the reliability of the method must be established usually by expert testimony and secondly the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Furthermore, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. "Reliability" was still to be shown in terms of ***Frye*** "general acceptance" (***People v Kelly*** Cal 3d 24 (1976)).

280 The question whether the ***Frye*** test was the proper criterion for the admissibility of "novel scientific evidence" was finally resolved by the United States Supreme Court in ***Daubert v Merrell Dow Pharmaceuticals Inc*** (1993) 509 US 579.

281 281 The Court held that the ***Frye*** test had not survived the *Federal Rules of Evidence 1975 (US)* which had focussed on whether scientific evidence would "assist a trier of fact to understand the evidence or to determine a fact in issue". The Court unanimously found that a "rigid general acceptance" requirement would be in conflict with the "liberal thrust" of the Federal Rules and their general approach to relaxing the traditional barriers to expert opinion evidence.

282 As Freckleton and Selby explain (*supra* Vol 1 page 2258) the majority in ***Daubert*** noted the distinction between scientific validity (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). In a case involving scientific evidence, evidentiary reliability is necessary for admissibility. This would be based upon scientific validity. The requirement that the evidence "assist" the trier of fact necessitates a valid scientific connection to the pertinent enquiry as a condition of admissibility. The Court adumbrated a series of indicia which would generally be relevant to the enquiry where the particular scientific evidence would assist the trier of fact. Those indicia included the question whether a technique had gained general acceptance within the scientific community. The majority confirmed that the focus of the enquiry is upon the principles and methodology rather than the conclusions they generate.

283 Like ***Frye*** itself, the ***Daubert*** decision has proved highly controversial in the United States.

284 It is noteworthy that the ***Frye*** test was not rejected by the United States Supreme Court for any lack of legal principle; the judgment in ***Daubert*** turned entirely on the recognition that it had been superseded by the *Federal Rules of Evidence 1975*.

285 The ***Frye*** test has been adopted and applied in a number of Australian jurisdictions (***R v Gallagher*** [2001] NSWSC 462; ***Idoport Pty Ltd v National Australia Bank Ltd*** [1999] NSWSC 828 at [239]; ***R v Runjanjic and Kontinnen*** (1991) 53 A Crim R 362; ***R v Karger*** (2001) 83 SASR 1.

286 In ***R v Pantoja*** (1996) 88 A Crim R 554 Hunt CJ at CL (with whom Hidden J agreed) endorsed the application of the ***Frye*** test in New South Wales, in the context of DNA evidence. He pointed out that such evidence had been accepted in accordance with the approach to scientific evidence generally adopted by that Court in ***R v Gilmore*** [1977] 2 NSWLR 935 at 939-941. His Honour expressly referred to ***Frye***, upon which ***Gilmore*** was based, noting that although that case had been reversed by ***Daubert*** that had been because of the Federal Rules of Evidence and did not involve a reversal of the principle enunciated in ***Frye***. His Honour held that New South Wales courts should continue to adopt the approach accepted in ***Gilmore*** until that decision was further considered by that Court or the High Court.

287 In ***Runjanjic*** (*supra*), in which the South Australian Court of Criminal Appeal held that evidence of "battered woman syndrome" was admissible, King CJ held (at 366) that:

> "An essential prerequisite to the admission of expert evidence as to the battered woman syndrome is that it be accepted by experts competent in the field of psychology or psychiatry as a scientifically established facet of psychology. This must be established by appropriate evidence."

288 We accept the proposition in ***Kluck v Borland*** (*supra*) that the party offering the novel scientific evidence has the burden of demonstrating that it has been accepted as reliable among impartial and disinterested experts within the scientific community.

289 It was submitted on behalf of the petitioner that even if we were to take the view that Mr Van Aperen's evidence of the CQT tests relates

solely to the credibility of the petitioner, we should nevertheless accept there is a difference between self-serving statements by an accused or a paid "oath-helper" and an expert, impartial examiner who gives evidence of the results of a technical examination. In support of this submission counsel rely on the statement in *Phipson on Evidence* (2000, 15th ed Sweet & Maxwell, London, [37-13]) that evidence of a polygraph examination "… is in reality little different from a police officer giving evidence that during an interview the accused shuffled, stammered or sweated profusely".

290 We note, however, that the passage quoted immediately continues:

> "While a jury might draw certain conclusions about the truthfulness of a man who behaved in this way as a result of their own intuitions about human behaviour, it is thought that such evidence would be inadmissible, in part at least because the conditions of a police interrogation are so different from the ordinary circumstances of life to which the jury and the accused are accustomed. For the same reason, we do not think that evidence of the results of polygraph tests would be admitted in England in their present state of development."

291 In any event, we do not agree with the initial observation. We consider that the learned authors misapprehend the nature of polygraph evidence. The fundamental difference between polygraph evidence and that of the police officer example is that the latter gives evidence only of his or her physical observations. Such a witness is not permitted to say that based on such observations he or she thought the accused was lying (or telling the truth) – yet that is exactly what it is sought to have the polygraph examiner do.

292 The Supreme Court of Canada has excluded the results of polygraph examinations sought to be led to establish the truth of an accused's denials of committing the crime. In ***Phillion*** (*supra*), the appellant at his trial for murder had sought to introduce evidence of a polygraph operator based on a polygraph test he performed on the appellant to determine whether the appellant's denial to him of having committed the murder was true. The evidence was offered to show that the appellant had lied to the police when he confessed to them. The trial Judge refused to admit the evidence. The appeal to the Ontario Court of Appeal was dismissed, as was the appeal to the Supreme Court of Canada. All members of the Court held the evidence was inadmissible. Richie J, with whom Martland and Judson JJ concurred, said (at 140):

> "The polygraph evidence which was sought to be introduced is accurately recorded in the judgment of the Court of appeal as follows [20 C.C.C. (2d) 191 at p. 192, 53 D.L.R. (3d) 319 at p. 320, 5 O.R. (2d) 656]:
>
> > 'Q. Mr. Reid, on the basis of your experience and the recordings that you made of Mr. Phillion, during the course of the polygraph test, did you form an opinion as to whether he was telling the truth when he answered no to the relevant questions?
> >
> > 'A. I am of the opinion that he is telling the truth when he answered no to the relevant questions.'
>
> Among the relevant questions were the following:
>
> > 'Did you stab Leopold Roy on august 9th, 1967?
> >
> > 'Did you kill Leopold Roy on august 9th, 1967?'
>
> In my view, Mr. Reid had neither the qualifications nor the opportunity to form a mature opinion of the propensity of the man he was subjecting to the test either as to truthfulness or otherwise. His opinion, however, was not based on the statements made by the appellant, but on his own expertise in interpreting the recordings of the machine. If the statements had been made to Mr. Reid alone, there is in my opinion no doubt that they would have been inadmissible as self-serving, second-hand evidence tendered in proof of its truth on behalf of an accused who did not see fit to testify and I am not prepared to hold on the evidence of this case that the presence of the polygraph machine or the expertise of its operator made them admissible. The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath and substitute for his own evidence the results produced by a mechanical device in the hands of a skilled operator relying exclusively on its efficacy as a test of veracity."

293 ***Phillion*** was affirmed by the Supreme Court of Canada in ***Beland*** (*supra*). Several accused had been tried by Judge alone on a charge of conspiracy to commit robbery. They each testified and denied participation in the conspiracy. Each stated that he was ready to submit to a lie detector test. They applied to take a polygraph test and adduce the

results of that test. The trial Judge held that the evidence would be inadmissible. The accuseds' appeal to the Quebec Court of Appeal was allowed, however on appeal to the Supreme Court of Canada that Court restored the convictions.

294 MacIntrye J (with whom Dixon CJC, Beetz and LeDain JJ concurred) held that the admission of such evidence in the circumstances of the case offended several of the rules of evidence, including that against producing evidence solely for the purpose of bolstering a witness' credibility and that against the admission of past consistent out of court statements. At page 416 - 417 his Honour said:

> "… it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal but, in my view, it cannot prevail in the face of the realities of court procedures.
>
> I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of error in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well-established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no

> greater degree of certainty in the process than that which already exists."

295 At page 417 - 418 his Honour continued:

> "What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science. Then, it may be asked, what does it do? It provides evidence on the issue of the credibility of a witness. This has always been a collateral issue and one to be decided by the trier of fact. Is the trier of fact assisted by hearing, firstly from witness 'A' that he was not present at the scene of the crime, and then from witness 'B', a polygraph operator, that 'A' was probably truthful? What would the result be, one may ask, if the polygraph operator concluded from his test that witness 'A' was lying? Would such evidence be admissible, could it be excluded by witness 'A', could it be introduced by the Crown? These are serious questions and they lead to others. Would it be open to the opponent of the person relying upon the polygraph to have a second polygraph examination taken for *his* purposes? If the results differed, which would prevail, and what right would there be for compelling the production of polygraph evidence in the possession of a reluctant party? It is this fear of turmoil in the courts which lead me to reject the polygraph."

296 The present position in the United States is most usefully set out in the judgment of District Judge Richard J Knowles of the Second Judicial District Court, Bernalillo County, New Mexico as recently as August 2003 in ***Lee & Ors v Loudes Martinez (New Mexico)*** No CS2003-00026 (Supreme Court No 27,915).

297 In outlining the forensic history of polygraph evidence his Honour noted that polygraph evidence was held inadmissible 80 years ago in ***Frye***. Following the standards for the admission of scientific evidence being changed by ***Daubert***, supporters of polygraph evidence sought its admission under the new standards. His Honour noted they have had little success either before courts that have maintained pre-***Daubert*** standards

or courts that have adopted ***Daubert***. 27 States and the District of Columbia apply a per se rule of exclusion of polygraph evidence for all purposes. 17 States admit polygraph evidence at trial only when its admission is stipulated (agreed) to in advance by all parties. Appellate decisions in such cases do not claim that the evidence is probative or becomes reliable due to the stipulation. Two other States admit stipulated results but in limited circumstances and another two allow the admission of polygraph evidence without stipulation but only in post-trial proceedings. One State generally bars admission of polygraph evidence, but the decision is left to the discretion of the trial Judge.

298 Knowles DCJ observed that in ***United States v Scheffer*** 523 US 303 (1998) the Supreme Court of the United States held that military courts' per se rule excluding polygraph evidence did not violate a defendant's right under the Fifth or Sixth Amendment to present a defence, but beyond that holding the decision "lacks precedence value given the fractured makeup of the Court's three opinions".

299 In contrast to the majority of State courts only two Federal circuits have a per se rule barring admissibility. Most Federal appellate courts leave admission of polygraph evidence to the discretion of the trial courts, but generally such evidence is excluded on the basis of ***Daubert***.

300 His Honour noted that a District Court in ***United States v Crumbie*** 895 F Supp 1354, 1363 (D.Ariz. 1995) admitted the evidence with severe limitations while noting that "the prejudicial effect of permitting the jury to hear the specific responses to the question of whether the defendant committed the ultimate crime in the case is overwhelmingly prejudicial". ***Crumbie*** is a case relied upon by the petitioner in the present proceedings. It is submitted that evidence of polygraph examinations should be admissible on the same conditions as those imposed by the court in ***Crumbie***, they being that:

(a) the party seeking to use the evidence must provide sufficient notice to the opposing party;

(b) the opposing party must be given a reasonable opportunity to administer a polygraph examination which is materially similar to the previous examination; and

(c) the evidence to be led be subject to the rules of evidence so that the respondent may cross-examine the petitioner's experts and may lead any evidence which might attempt to

show the polygraph examinations are not as reliable as claimed.

301 In ***Lee v Martinez*** Knowles DCJ noted that the ***Crumbie*** decision failed to mention any of the studies which challenged the validity of polygraph tests and that it and one other case are exceptions, even within their own Federal circuits, to the general rule that polygraph evidence is not admitted in Federal courts.

302 It is interesting to note that in ***Lee v Martinez*** evidence going to the use of the polygraph was given by Dr Iacono, Dr Raskin and Dr Honts.

303 The conclusions of law arrived at by Knowles DCJ were (*ibid* page 24-25):

> "1. Polygraph test results and the conclusions derived from them are not based upon an overarching theory. To the extent it is merely argued that there is a hypothesis that the test reliably detects deception, that hypothesis has not been subjected to field research. The existing laboratory research, given the problems described above, is woefully inadequate to support admissibility in court in real life contexts.
>
> 2. There is no theory, as stated above. The technique has been subjected to limited peer review publication. The conclusions of the relevant publications do not enhance confidence in the test result, particularly considering the effectiveness of counter-measures.
>
> 3. The potential rate of error is vague and unreliable. Given the effect of ignoring base rates as endorsed by proponents, the reliability of test results as reflected in an actual percentage misrepresents the confidence level in the test.
>
> 4. There are no set standards other than those set out in Rule 11-707 NMRA 2003. Those standards are insufficient for the reasons set out above.
>
> 5. Control question polygraph tests are not accepted in the relevant scientific community at a significant level, particularly considering the age of the technique.

6. The technique is not based upon well-recognized scientific principles and is not capable of supporting opinions based upon reasonable probability rather than conjecture.

7. If the risk of counter-measures is ignored, there is an argument that all of the studies taken together support a conclusion that a successful polygraph result makes a fact in issue more or less probable. However, given the state of the art of polygraphy, the limited probative value polygraph test results is substantially outweighed by the danger of confusion of the issues, undue delay, and waste of time and therefore polygraph evidence becomes inadmissible under Rule 11-403 NMRA 2003.

8. At least one court has found that testimony that someone has passed a polygraph examination is extrinsic evidence of a specific instance of conduct (passing the polygraph) that supports a witness's credibility, and is therefore inadmissible under Rule 11-608 B. US v Piccinonna, 729 F.Supp. 1336, 1338 (S.D.Fla.1990), aff'd by U.S. v. Piccinonna, 925 F.2d 1474 (11th Cir. 1991).

9. Because of the inherently subjective nature of the test procedure, the polygraph examination can not be repeated. Successful repetition of a test is the cornerstone of the scientific method. It lacks test-retest reliability.

10. The results of polygraph testing are not sufficiently reliable for admissibility in courts in New Mexico."

304 In ***State of Idaho v Perry*** Idaho Supreme Court 2003 Opinion No109, 5 November 2003, the Idaho Supreme Court reversed a District Court ruling allowing the admission on behalf of the accused of polygraph testing by Dr Honts. The Court applied ***Daubert*** in the context of the Idaho Rules of Evidence. The Court referred to one of its earlier decisions holding that for scientific evidence to be admitted, it must be supported by appropriate validation, establishing a standard of evidentiary reliability, and must assist the trier of fact to understand the evidence or to determine a fact in issue.

305 Having examined the evidence and the authorities, the Court concluded that (at page 8):

> "In this case, the results of the polygraph are useful to bolster Perry's credibility but do not provide the trier of fact with any additional information that pertains to Perry's case. The fact of whether the alleged act occurred is for the jury to decide. *Charley*, 189 F.3d at 1270. Additionally, credibility questions are left to the trier of fact, in this case a jury. *See Goodwin*, 232 F.3d at 609. the polygraph results in this case do not help the trier of fact to find facts or to understand the evidence as required by I.R.E. 702. *to admit these results is an attempt to substitute the credibility determination appropriate for the jury, with Dr. Honts' interpretation of the alleged involuntary physiological results from the polygraph examination. Dr. Honts usurps the role of the jury as the ultimate finder of credibility.*
>
> Therefore, this Court holds Dr. Honts' testimony as well as the polygraph results, inadmissible and reverses the decision of the district court" (our emphasis).

306 In addition to the affidavit and oral evidence of the expert witnesses to which we have adverted, we have been referred to extensive articles, journals and other publications bearing on the topic. It clear from the evidence and the material that there has been a long running dispute between polygraphers who argue for the use of polygraphy as evidence in courts and certain psychologists, physiologists and others who regard polygraphy as lacking any scientific basis and not having been shown to be reliable and therefore oppose their evidentiary use (although some of the latter acknowledge the GKT test has some limited utility as an investigative tool). Professor Honts himself described the protagonists as engaging in "… lengthy and often acrimonious debate …" (Honts et al (1995) International Journal of Psychophysiology). On our reading of the material that would seem to be an accurate description. Freckleton and Selby state (*supra* Vol 1 – 1890):

> "The polygraph's reliability remains controversial with passionate opponents of its reliability (see the discussion in *Kapardis* (1997) (page 216-223)) remaining probably in the ascendancy in relation to its forensic, as against its investigative, use."

307 Professor Honts, described by counsel for the petitioner as perhaps "the spearhead" of those advocating the admissibility of polygraph evidence, is currently Professor of Psychology in the Department of

Psychology at Boise State University, Idaho, USA. He has held that position since 1995. Between August 2000 and May 2003 he was head of the Psychology Department at Boise State University. He has had numerous research and teaching appointments at tertiary institutions in the United States. He has provided instruction on psychophysiology, psychology, physiology, polygraph examinations and related topics at a number of institutions and for a number of organisations including the Federal Bureau of Investigation and the United States Secret Service.

308 He is a charter member of the American Physiological Society. He is the author of over 100 professional publications and reports, almost all of which concern the psychophysiological detection of deception. In his affidavit he says that since 1983 he has provided expert witness testimony in courts on polygraph examinations and child witness issues in more than 60 proceedings across the United States.

309 Professor Honts asserts that polygraph tests have gained general acceptance in the scientific fields of psychology and psychophysiology "and in the areas of those disciplines devoted to credibility assessment".

310 He concedes that there is no overarching theory which describes all aspects of why the polygraph works but says that polygraphy holds this lack of comprehensive theory in common with essentially all of applied psychology and that the lack of overarching theory poses no problem for applying the technique in examining the credibility of criminal suspects in the context of a criminal investigation or court proceeding. It is Professor Honts' evidence that polygraphy (which he also describes as "psychophysiological credibility assessment") is based on a scientific theory or proposition that can be tested with the methods of science (that is, falsified), namely that any conscious effort at a deception by a rational individual causes involuntary and uncontrollable physiological responses that may include measurable reactions in blood pressure, peripheral pulse amplitude, breathing and electro-dermal response. He says that the rationale of the CQT test predicts that guilty subjects will produce larger physiological responses to the relevant questions to which they know they are deceptive, than to the relatively unimportant comparison questions. Innocent subjects are expected to produce larger physiological responses to the comparison questions, to which they are assumed to be either deceptive, or at least uncertain of the veracity of their answer, than to the truthfully answered relevant questions.

311 Professor Honts referred to numerous studies published in what he claimed were peer-reviewed scientific journals which he says indicate that

the CQT is a very accurate discriminator of truth tellers and deceivers. Generally, he expressed the view that independent evaluations of the accuracy or reliability of polygraph testing showed accuracy rates ranging from in excess of 86 per cent to about 90 per cent.

312 The Professor also relied upon surveys, the existence of a large number of peer reviewed publications, the proliferation of peer-reviewed scientific publications and journals and a report by the National Research Council of the National Academy of Sciences as evidencing that the polygraph is generally accepted in the relevant scientific community as a valid test. He claims that the National Research Council report estimated that the polygraph in forensic settings was 89 per cent accurate.

313 In his evidence-in-chief Professor Honts expressed the general conclusion that polygraph CQT tests conducted in respect of a person's credibility on a specific issue can be highly accurate. But he said there are caveats on that in that the tests have to be run properly, they need to be on a pertinent issue and then there are other issues about countermeasures and other factors.

314 Professor William Iacono is Professor of Psychology, Psychiatry, Law and Neuroscience and an Adjunct Professor of Child Development at the University of Minnesota in the United States of America. He was Director of the Clinical Psychology Training Programme at that University between 1995 and 2002. He has studied polygraph testing for about 20 years and psychophysiology, the basic science from which polygraph testing is an application, is one of his areas of specialisation.

315 He is a past president of the International Society for Psychophysiological Research and has published over 200 scientific articles, including over two dozen on "lie detection" or polygraphy. He has served as a polygraphic consultant to various United States government agencies, including the US Congress Office of Technology Assessment, the Central Intelligence Agency, the United States General Accounting Office, the Joint Security Commission of the Clinton Administration and the US Department of Defense. He served on the Department of Defense Polygraph Institute's Curriculum and Research Guidance Committee for approximately four years. He has testified on the topic before legislative committees and Federal and State level in the United States and in the United States State and Federal Courts.

316 Professor Iacono maintains there is no such thing as a "lie detector test". He says there is no pattern of physiological activity that is uniquely

associated with lying or any human emotion. All that can be determined when a polygraph procedure is administered, is whether a person responds more strongly to one type of question than another. A polygraph cannot be used to determine why a person responds differentially to certain questions.

317 Professor Iacono says that the CQT is not a test, but is rather a type of interview that is assisted by a physiological recording. He says that it is neither objective nor standardised. Instead, each examiner formulates questions based on his or her understanding of the facts of the case and how the "pre-test" interview with the suspect proceeds. Two examiners giving a CQT to the same suspect are thus likely to use different questions.

318 He points out that the scoring of the CQT is also subjective and is itself influenced by the examiner's impressions of the suspect's truthfulness.

319 He emphasises the importance of noting that the control question in a CQT is not a control in the scientific sense. If it were it would be identical to the relevant question in all respects but one, namely whether the answer was truthful or a lie.

320 Professor Iacono posits that in the present case, a true "control" in the scientific sense would exist if the petitioner was accused of two murders, that of Pamela Lawrence and that of another woman murdered under similar circumstances. Unbeknown to him, however, the second murder would be a fiction invented by the police so that he could be asked a question on the polygraph examination that would involve both a serious accusation and a known truthful response. If the petitioner responded in the same way to both questions, it could be inferred that he was telling the truth about the real murder. If he responded more to the question about Pamela Lawrence, it would be known he was lying.

321 Professor Iacono explained that CQT so called "control" questions differ in many ways from true scientific controls in that it is not known for certain if the subject is lying in response to them, nor how the accusation they contain compares in significance to the accusation made in the relevant questions – hence it is not known why a person might respond more to a control than a relevant question. A control question may have special significance to an examinee that is unknown to the examiner.

322 In terms of general acceptance, Professor Iacono testified that scientists generally at arms length from the polygraph profession who

have expressed opinions regarding the scientific basis of polygraph testing have repeatedly found the test to have little scientific support. He maintained this has been shown in surveys of scientists, how polygraph test validity is dealt with in psychology text books and in independent scientific reviews. He referred to a number of these in evidence and several of them were provided to us.

323 One aspect of Professor Iacono's evidence which should particularly be mentioned is his observations about the possibility that the petitioner may have "habituated" to relevant questions.

324 The polygraph examination conducted by Mr Van Aperen was the second polygraph examination undergone by the petitioner. The first was that conducted by Mr Glare.

325 Mr Van Aperen's polygraph examination took place more than seven years after the petitioner was convicted of the crime. The murder itself occurred some nine years before the test. From the time of his arrest, through his trial and incarceration, his first appeal and the first polygraph examination, the petitioner has repeatedly discussed and answered questions about the allegations. According to Professor Iacono, such rehearsal and repeated questioning gives the subject an opportunity to become emotionally prepared for questions about the crime and reduce the likelihood that strong physiological reactions will continue to be elicited by such queries. In psychological terms, the subject may have habituated to the stimuli represented by the relevant questions. The control questions, by contrast, involve new matters not previously raised and are thus more likely to elicit a strong physiological reaction.

326 Professor Iacono was severely critical of the report by Ansley cited by Mr Van Aperen in support of his contention that the accuracy of "real life" polygraphy testing has been estimated at 98 per cent. The article by Norman Ansley was published in a polygraph trade journal "Polygraph". Professor Iacono's evidence was that this is not a scientific journal and Mr Ansley does not have scientific credentials. The report purports to review 10 studies using real life cases to estimate how accurate the polygraph test is in real life. In Professor Iacono's view, the conclusion of 98 per cent accuracy estimated by Mr Ansley and the author's analysis, are wholly without merit. Not one of the 10 studies listed in the table involved a citation to an article in a scientific journal. He referred to a similar example, namely a report by Edwards (1981) who surveyed Virginia polygraphers to ask them how many of their cases were "verified" as to the guilt or innocence of the person they tested, and how

often their test was correct. He said those who responded to this uncontrolled, unscientific, self-serving survey indicated, as expected, that they were almost never wrong.

327 Professor Iacono referred to the report "Of the Polygraph and Lie Detection" by the National Research Council of the National Academies, National Academies Press, Washington DC 2003. He gave details of references to that report. The panel noted that polygraph testing was not based on sound scientific theory, research in the area was of poor quality and overestimated accuracy, that the tests are not standardised and are easily influenced by how examiners conduct them and that computerisation of scoring has added negligibly to improved accuracy.

328 Although Professor Iacono is one of those who accepts that GKT is a procedure that does have a proper scientific foundation and that it can be carried out in a manner which would constitute evidence with probative value, he observes that the test described by Mr Van Aperen as a GKT test was not a true GKT test at all, was not properly conducted and did not reflect a proper understanding of the technique.

329 We note though, that acceptance of the GKT test goes to its use as an investigative tool, not evidence of truthfulness or otherwise.

330 It is not necessary for us to set out in any detail the evidence in relation to how a GKT examination may properly be conducted. Suffice to say that Mr Van Aperen's version of the GKT has none of the requisite features. In particular, the test requires that the police know the correct response to each item and that the correct response to each item is unknown to all suspects but the perpetrator.

331 In the present case the answer to the question (whether any one of the specified items was the murder weapon) is not known to the police – and to the extent there exist hypotheses as to what the likely murder weapon was, the petitioner knows what those hypotheses are as a consequence of his arrest, interrogation, trial and the appeal process. As Professor Iacono pointed out, in his video interrogation by the police the petitioner spoke of the murder weapon being a wrench and he drew a picture of a wrench. According to Professor Iacono, the very fact that he did this makes the wrench highly salient among the multiple choice alternatives on the first series of Mr Van Aperen's tests. Hence, even if the petitioner was completely innocent, he should have given the strongest response to this possible murder weapon. The fact that he did not has no bearing on his innocence. In Professor Iacono's opinion, the petitioner

should have responded like a guilty person to the item "wrench", because, like a guilty person, the word had a special meaning to him. In the Professor's opinion "the fact that he did not consistently respond strongly to this item actually indicates that he 'beat' the test, not that he was innocent".

332 Professor Iacono's conclusion was that Mr Van Aperen's three polygraph tests shed little light on the petitioner's claimed innocence, even on the assumption (which he disputed) that the CQT test is scientifically valid. The purported GKT test has no value at all; it only indicates that the petitioner does not respond to items that have obvious relevance to him, despite the expectation that strong responses would be elicited. He adverts to certain problematical aspects of the CQT tests and suggests that the petitioner's preoccupation with the control questions in his second CQT series would favour his passing this test even if guilty.

333 We note Professor Iacono's testimony that the U S Department of Justice has consistently opposed the use of polygraph tests in criminal trials.

334 He acknowledged that his views stand in sharp contrast to those of Dr Honts on the scientific basis of polygraph testing but maintains that his views are shared by psychologists who have critically examined polygraph testing and who are at arms length from the polygraph profession.

335 Professor Furedy has been Professor of Psychology at the University of Toronto, Canada since 1975. His specific areas of professional interest are expressed in over 400 publications, including various areas in psychophysiology, and in particular such "purported" applications of that science as lie detection and bio feedback.

336 He has been employed as a consultant to the Australian Security Intelligence Organisation on whether to follow the United States' practice in using the polygraph for security checks, and has been a consultant and expert witness on problems related to the use of the polygraph in both the civil and criminal jurisdictions, both in relation to "hostile" and "friendly" polygraphy.

337 He is highly critical of and strongly opposes, the use of the polygraph for evidentiary purposes.

338 Professor Furedy contends that the CQT is not a test at all in the sense that an IQ test is a test. The latter are controversial in terms of their

validity (that is, how accurately they measure intelligence) but are scientifically based and are standardised procedures with a predetermined length and set of questions, so that the test given by one competent operator is essentially the same as that given by another. He points out that in contrast, the so called "control" questions of the CQT are constructed by the examiner as a result of discussion with the examinee. He argues that as the examination is not a standardised test, and because the relevant/control comparison does not involve the difference between deception and no deception, a "deceptive" result may occur simply because the examinee, although not deceptive, is more concerned or anxious about the relevant questions than issues related to the "control" questions. He points out that psychophysiology's only universal law is that the greater the psychological impact or significance of a stimulus, the greater the autonomic response to it.

339 Professor Furedy's evidence was that even psychophysiologists who support the CQT (such as Professor Honts) agree that countermeasures that cannot readily be detected can affect the relevant/control comparison outcome and that there is now a large body of experimental literature and high quality scientific journals supporting that position.

340 Fundamentally, Professor Furedy is of the view that the polygraph procedure is completely unstandardised and has no scientific rationale. Furthermore, and importantly, as the CQT polygraph is not a standardised test, it is not possible to state in general terms what its accuracy is, because that will vary with each polygraph examination.

341 According to Professor Furedy, research now shows that countermeasures to polygraph tests are not just "possible" but can be quite effective in increasing responsivity to the control questions. That of course has the effect of leading to the conclusion that the examinee is less concerned about (ie less responsive to) the relevant questions than the control questions. A simple and potentially effective psychological countermeasure, which can be worked out by anyone with enough time to think about how to "beat" the CQT polygraph, is to think exciting thoughts (eliciting anger or fear) whenever a control question is asked. Such countermeasures cannot readily be observed by the examiner.

342 Professor Furedy strongly disputes Mr Van Aperen's contention that modern polygraphy has been derived from scientific principles and evidence of psychology and psychophysiology – it is his firm view that the CQT polygraph has no sensible scientific rationale at all. He was particularly critical of the very precise figure given by Mr Aperen

regarding his degree of confidence, based on the Axcitron computerised programme, that the petitioner was "innocent". He referred to that as "… pseudo scientific exactitude", saying that research on the "accuracy" of the polygraph is meaningless, because it depends too much on the beliefs of the examiner and the examinee, the relationship between them and what goes on in what is an unspecifiable dynamic interview situation. He referred to a committee report ("The Porges Committee") which was scathing in its criticism of the *Polyscore* computer programme. We have read that report and agree that it is particularly caustic, concluding that the marketing of the *Polyscore* algorithm (which is the one Mr Van Aperen used) as providing a probability of deception in the field is "unwarranted" and "professionally irresponsible".

343 Dr Drew Richardson has a PhD in physiology, his dissertation for which centred on various non-invasive technologies used to measure autonomic nervous system changes associated with a "lie detection" task.

344 He has worked as a synthetic organic chemist before joining the United Stated Federal Bureau of Investigation in 1976 where he was a field investigative agent until 1978 and then a supervisory special agent in the FBI laboratory until August 2001. For about two years in the early 1990s he was formally associated with the FBI laboratory's polygraph research programme. During that time he prepared materials related to various cardio-vascular indices used in "lie detection" task, pharmacological countermeasures, neurophysiological indices that might be used in a concealed information task and methods of mathematical models of polygraphical data transformation. He is a graduate of the basic polygraph examiner's course taught at the United States Department of Defense Polygraph Institute.

345 In Dr Richardson's opinion the CQT test is fundamentally lacking and flawed with regard to underlying scientific theory. It is not a specifiable and repeatable test in any formalised sense, and what are referred to as the "control" questions (and more recently as "comparison" questions) add no degree of scientific "control" to the procedure whatsoever.

346 Some of his reasons for reaching these conclusions include that the autonomic nervous system physiology being measured by a polygraph examiner can react to the stimulus associated with polygraph questions for a number of reasons other than deception. Some of those include fear of being caught in a lie, fear of unjustly being accused of lying, surprise, anger, noise, movement, pain (which can be caused at random points by

the pressure of the cardio cuff which is part of the polygraph), variations in the voice inflexion of the examiner and a host of other operator actions or errors which might be committed by any examiner. Dr Richardson says that these various types of reactions are largely indistinguishable and several of the causative stimuli are nearly impossible to control.

347 He points out that polygraph procedures are not standardised. Thus, there is virtually an infinite number of dimensions along which the "relevant" and "control" questions can differ, including time, potential consequences to the examinee, and amount of time and attention paid to "developing" the questions. In his opinion no logical inference can be drawn from the comparison of the examinee's reactions to the relevant and control of questions. The accuracy of the CQT test can therefore only be rhetorically, or anecdotally, but not empirically, evaluated. There is no way independently to measure the emotional content or affect of the control questions, nor the relational nature of the affect or chosen relevant and control question pairings. This problem is intrinsic to CQT polygraphy and means that the results of a CQT polygraph cannot be meaningfully analysed.

348 He noted that all experimental studies dealing with the subject of countermeasures (and the National Academy of Science's report) conclude that the use of countermeasures can seriously degrade the accuracy of polygraph examinations.

349 We have given this very brief outline of some of the aspects of the evidence given by these witnesses merely to give some indication of the extent to which they differ. We do not propose to canvas all of the evidence they gave nor that which may be drawn from the extensive range of publications to which we have been referred. We have considered all of that evidence and material.

350 It is as well to observe at this point that an assessment of expert evidence is not to be determined by the number of experts called by one party as against the number called by the other party. It is necessary to evaluate the evidence of experts in the same way as that task is undertaken in relation to any other witness, as well as by taking proper cognizance of the experts' respective qualifications and experience and the soundness of their opinions.

351 We are mindful that we are here concerned with the issue of admissibility and that if the admissibility threshold is crossed the weight to be given to the opinions of expert witnesses in a criminal trial is a

matter for the jury. The mere fact that experts conflict does not mean their evidence is inadmissible or that the area of expertise is not one apt for the expression of a scientific or expert opinion (***Chamberlain v The Queen (No 2)*** (1984) 153 CLR 521 per Gibbs CJ and Mason J at 598; ***Hocking v Bell*** (1945) 71 CLR 430, 440).

352 We are obliged to say that overall we find the evidence of Professors Iacono and Furedy and Dr Richardson most persuasive.

353 In the late 1980s Professor Furedy initially came from a position of substantial acceptance of the scientific basis of polygraph evidence and the reliability of polygraph tests, similar to that of one of its leading proponents, David Raskin. From there, having had occasion to study the subject in more detail, he came to a strongly contrary position. His analogy for expressing the problem with general acceptance of the polygraph within a certain academic or scientific community while it lacked real scientific justification, was graphic. He had originally likened polygraphy to tea-leaf reading but eschewed that analogy because that practice is not held in high regard by most people in the United States, especially educated people. The better analogy, he thought, was that of entrail reading in ancient Rome. As he expressed it, (at AT1585):

> "… the reading of entrails to determine the outcome of important events like battles was considered by most in Rome to be admittedly controversial but a scientifically-based way of foretelling the future, and they relied on it in that way in exactly the same way as the polygraph is relied on by even educated people in North America and even organisations like the CIA and FBI to be a controversial but scientifically based way of telling the truth or telling honesty. In both cases the issue is one which is very important for the scientist so that people get to believe in any procedure even though when examined, using commonsense and logic like Cicero did in ancient Rome, it becomes clear that it's not a scientifically based procedure."

354 The criticisms of Professors Iacono and Furedy of many of the published studies relied upon by Mr Van Aperen and Professor Honts as showing high levels of accuracy and general acceptance of the polygraph, seem to us to be cogent. We have already referred to the criticism of Mr Ansley's report.

355 In substance, we are not satisfied on the evidence that polygraphic examination (specifically CQT) has been accepted to any appreciable

extent as scientifically valid and reliable, by members of the psychological and psychophysiological community, (which we consider to be the relevant scientific community: see ***R v Jarrett*** (1994) 73 A Crim R 160) as to constitute part of a body of knowledge or experience which is sufficiently recognised to be accepted as a reliable body of knowledge or experience. Nor has it be shown to have a sufficient scientific basis to render results arrived at by the application of polygraphic technique part of a field of knowledge which is a proper subject of expert evidence.

356 Most of the publications of those arguing for the acceptance of polygraphic evidence appear in "peer" publications, but the "peer group" is that of other polygraph examiners who would appear to have a vested interest in the outcome.

357 The petitioner has failed to demonstrate a degree of publication in prestigious academic or scientific journals, or any other indicia, which might reveal a sufficient degree of recognition and acceptance of the technique, notwithstanding that it is controversial.

358 It was common ground between all the experts called that there is no overarching theory which can explain the CQT test. We do not accept Professor Honts' evidence that the lack of such a theory is problematic only for planning future research or for expanding the technique to areas beyond the research data base. Whilst those problems do exist, the absence of an underlying theory or rationale must strike directly at the claims that the technique is properly to be described as the product of scientific study and that it has a significantly higher degree of accuracy than chance. Furthermore, as a consequence, the CQT test is not specific and nor is it capable of being verified by repetition or replication in any scientific sense.

359 It is a fundamental assumption of the test that the autonomous responses measured by the polygraph machine are attributable to (and only to) an awareness by the examinee that he or she is lying. Yet that assumption is patently unsound. The evidence shows that such responses may be due to any number of factors, some within the cognisance of the examinee and others not, but in any case quite likely frequently to be incapable of observation or appreciation by the examiner. Such responses may be to either relevant questions or to control questions. So a marked response to a relevant question (because for example the mere allegation is extremely offensive or upsetting to an innocent examinee) would be likely to lead the examiner to score the answer as a lie. On the other hand, a guilty examinee who has habituated to the allegation contained in the

relevant question (or who has adopted simple unobservable practical countermeasures to control questions (such as tightening his thigh muscles, curling his toes in his shoes, biting his tongue, thinking of things which make him angry or upset, to mention but a few of the numerous examples in the literature)) may respond less markedly to the relevant questions than to the control questions and so lead the examiner to score his answers as truthful.

360 The subjective nature of the CQT test process is manifest in the conduct of the pre-test interview and the formulation of the control questions, as well as the conduct of the "test" itself and the subsequent scoring of it. The subjective aspect at each of these stages must necessarily have a compounding effect which cannot lead to any confidence that CQT tests are capable of producing reliable, repeatable results.

361 We accept the evidence of Professor Iacono that numerical scoring of polygraph testing is affected by the subjective judgment of the examiner. He opined that as Mr Van Aperen was well aware the petitioner had passed Mr Glare's polygraph test Mr Van Aperen's test was not "independent" of Mr Glare's and his scoring was likely to be coloured by the expectation that the petitioner would pass.

362 This was the "Rosenthal effect" which in his oral evidence he explained has to do with the fact that as human beings we have a certain expectation that things are supposed to turn out a certain way and will conduct ourselves, perhaps inadvertently, to get the effect that we expect.

363 This effect was discussed by Knowles DCJ in ***Lee v Martinez*** (*supra*, at page 21):

> "49. The Rosenthal Effect is a phenomenon that has been recognized in psychology for approximately thirty years. It recognizes that psychologists and scientists and others who have an investment in a theory are likely to unconsciously arrange an experiment in such a way that they get favourable results. It is the reason that it is necessary that test results need to be replicated by an independent researcher.
>
> 50. The Rosenthal Effect can affect an individual polygraph examiner because the hypothesis in an individual test involves the examiner's sense of whether the test subject is guilty or not. The examiner necessarily has access to

> the case facts and interviews the examinee in a pre-test interview. Based on the case information and how the interview develops – for example the examinee might seem truthful – it can affect the attitude of the examiner. The Court noted the following statement from Dr. Honts: 'In my experience in New Mexico in testifying before juries clearly indicates that, (the jury will make use of the polygraph as they see fit) and that they have decided to convict despite a polygraph that showed the person was truthful.' TT, 7/3/03, 114. the context of the statement and the observation of the witness led the court to conclude that Dr. Honts was invested in the outcome and that he was surprised that a jury could reach a different conclusion.
>
> 51. The risk of the Rosenthal Effect is exacerbated by the lack of standards in the profession."

364 We accept Professor Iacono's evidence that the result of the polyscore software scoring of Mr Van Aperen's CQT tests, that the "probability of deception is less than 0.01%" is simply indefensible. The NAS report found the software methodology to be "unscientific and flawed" and as Professor Iacono explains, it is not possible to diagnose or predict human behaviour with accuracy to four (*sic*) decimal places. Secondly, as he says, this probability statement means in effect, that for every 10,000 people tested under circumstances just like those under which the petitioner was tested, only one with a score like his would actually come from a deceptive person. There is no database to support such a conclusion. In fact, he says, if one took all the subjects studied in all the scientific research ever published on the accuracy of polygraph tests, one could not identify 10,000 confirmed innocent study subjects.

365 We apprehend there appears to be a view in some quarters that the polygraph machine itself tells whether or not the subject is lying. That view is possibly the result of deliberate assertions by polygraph examiners, part of whose technique involves seeking to convince the subject that the machine will detect any lie he or she tells. The purpose of this is to instil in the subject an apprehension about the consequences of lying, and so increase the autonomous response. This aspect has attracted the following comment from Freckleton and Selby (*supra*, Vol 1 – 1890):

> "For its effectiveness, it has been suggested that polygraphy depends on implanting into the subject a belief in the

> infallibility of the machine and on the design of effective control questions. 'The whole fragrant stew of imposition, trickery and downright lying (by the examiner, not the subject) is reminiscent of a certain type of hard police interrogation of subjects whom the interrogators "know" to be guilty': Elliott (1982. pp 104, 108)."

366 One obvious difficulty with this approach is that for example, an innocent person who recognises a relevant question may produce a strong autonomous response because he or she is either afraid they may wrongly be shown to be lying, or simply because the mere allegation is upsetting. Be that as it may, we mention this only to make the point that it is important to be clear about the nature of the evidence sought to be led. It is opinion evidence. It is the opinion of the examiner that the subject is or is not lying.

367 Put shortly, the opinion is formed on the basis of the assumption that every person will provide an autonomous response when telling a lie, the examiner's formulation of the control and relevant questions, the readings actually recorded on the machine, a comparison of the responses to relevant and control questions and an entirely subjective assessment by the examiner of the significance of differences between the results.

368 Counsel for the petitioner put it that whatever may have been the state of knowledge and professional acceptance in the past, polygraphy has been the subject of continued development over the last 20 years or so to the extent that evidence of that kind ought now to be admitted. We do not accept that submission. To the contrary, the evidence (including that of Professor Honts) shows that the examinations conducted by Mr Van Aperen do not represent any improvement in the technique over what was available 10 or even 20 years ago, except in the area of the computerised statistical analysis conducted by the *Polyscore* software programme, which we are satisfied has been shown to be entirely unscientific and worthless. The polygraph evidence therefore cannot be said to be "fresh evidence" in that sense.

369 On the whole of the evidence of the other material before us, it has not been shown that the polygraph technique is a reliable method for determining truth or untruth and nor is there the degree of acceptance within the relevant scientific community which would indicate that it is seen as being so. That being the case the evidence of the polygraph examination would not have assisted the trier of fact (the jury).

370 We respectfully agree with the reasoning and conclusions of Knowles DCJ in ***Lee v Martinez***, which we think reflect in large measure the conclusions to which the evidence on this appeal leads us.

371 There is insufficient basis to regard Mr Van Aperen's opinions as any more than expressions of subjective belief or speculation about the credibility of the petitioner with respect to self-serving statements made by him out of court.

372 The evidence would go beyond bearing merely on an issue relevant to the petitioner's credibility – it purports to present an opinion directly on whether the petitioner is truthful in his denial of the offence. That is for the jury to determine and given the lack of scientific support for the polygraph technique, they would not properly be assisted by the evidence of opinion based on that.

373 In our view, the polygraph evidence is not admissible and would not have been admissible on the petitioner's trial. That being so, the fact that Mr Hogan did not seek to lead at that trial was not an error, much less an error of the kind referred to in ***Knowles***.

374 This ground must fail.

Conclusion – Appeal Dismissed

375 For the reasons set out above, it is our view that the appeal should be dismissed. However, there are also some observations about the conduct of the appeal, rather than its substance, which we believe it desirable to make.

The conduct of the petitioner's case

376 We have already raised, earlier, one limited aspect of the conduct of the petitioner's case which has been the cause of some concern to the court. There are two others we wish to mention. The first of our concerns finds an echo almost 30 years ago, in the reasons of the Supreme Court of South Australia in relation to another petition, that of Van Beelen. In ***In Re Van Beelen*** (1974) 9 SASR 163 at 251, the court said the following:

> "Before parting with this judgment, we feel constrained to refer to the opportunities afforded to the petitioner's counsel, during the period of twenty-one days for which this Court was occupied in the hearing, to present the petitioner's case. Some may think that the time occupied, and the expense incurred, was out of all proportion to the nature and difficulty of the issues

> which properly arose for our decision, and that much of the argument received amounted to the extrapolation of a red herring. But whatever warrant there may be for such strictures, we simply say that we entered upon the hearing with the firm resolve that the petitioner's counsel was to be accorded every opportunity of arguing any submission which seemed to him worthy of presentation"

377 Save that this hearing occupied 22 days, the passage quoted is precisely apt to describe this hearing.

378 Although we too have acted in accordance with the resolve that the petitioner's counsel should be able to argue any submission which seemed to him worthy of presentation, it should be pointed out that such a course, however desirable fom the point of view of the petitioner, is not without cost. There is an obvious cost to the public, which pays for the Judges, court staff, and officers of the DPP, not only for the time occupied in hearing but in preparation and, so far as the Judges are concerned, in considering and deciding each point. There is the cost to the public of the time of those witnesses who are public officers, who are diverted from their ordinary duties to prepare for and to attend at the appeal. There is an emotional and sometimes financial cost to those other witnesses who are required to revisit events occurring many years ago, and to attend at court for what is sometimes lengthy cross-examination. There is a cost to all of those who could be regarded as victims of such an offence, generally the family and friends of the deceased, who have vividly put before them memories which one would hope the passage of time would be beginning to soften.

379 The power of the Attorney General to refer matters to this Court pursuant to s 140 of the *Sentencing Act* is a very important and necessary power, directed to ensuring that justice is done in an individual case and that public confidence in the administration of the law is maintained, by providing a mechanism for dealing with those exceptional cases where, notwithstanding a regular trial and an appeal, there is nevertheless reason for concern about a verdict. It would not be desirable to circumscribe in any way the power of the Attorney General to make a reference, or the circumstances in which it was open to him to do so.

380 However, it must also be recognised that there are potential difficulties with the procedure. Although, as we understand it, the normal practice is for the Attorney General to seek advice as to whether or not a petition should be referred, and although it is open to those advising him

to make whatever enquiries and have regard to whatever material they see fit, it nevertheless in the general run of cases is only open to the Attorney General in a limited way to test the strength of any claims which might be made in a petition. Further, because the matter is to be dealt with as on an appeal, once the reference is made it is open to the petitioner to apply to amend in a way which may have little or nothing to do with the original grounds upon which the reference came to be made. It would therefore appear to be possible, for example, for a petition to be made, and for a reference to flow from that petition, based on grounds which are limited in compass and which perhaps may fairly readily be shown to be unsustainable. Nevertheless, because making the reference gives rise to the opportunity to issue subpoenas and to obtain additional information, even a reference limited in its original scope, or perhaps lacking in substance, would give rise to the opportunity to fish through a great quantity of material to see if anything can be found to support any additional grounds.

381 We are not suggesting that the present appeal was embarked upon as a fishing expedition, although it appears to have developed that characteristic. It does however illustrate some of the problems which it appears to us may arise from the procedure. In the present case, the only material in the petition which eventually found its way into the grounds of appeal as they appeared in their final form before us, were allegations relating to the unlikelihood of the wrench as the murder weapon, the evidence relating to the blue paint, the material relating to Dr Patchett's allegedly fresh evidence and a polygraph (although not the particular polygraph examination ultimately relied upon by the petitioner). As will be apparent from these reasons, it is our view that of those matters, only the issues concerning the wrench raise any serious matters for consideration. A large quantity of other material contained in the petition was abandoned by the petitioner, and even a cursory inspection of the petition suggests that the decision to abandon those matters was well made.

382 The myriad of other issues raised by the amended notice of appeal dated 18 August 2003 were added as the appeal progressed, some of them at a very late stage. Again, as will be apparent from these reasons, only a small number of those matters appear to give rise to serious issues.

383 The foregoing considerations do not bear upon the task of this Court in determining the matters which were raised by the final version of the notice of appeal. However, it seemed to us desirable to record some of the broader public interest issues which might be thought to be raised by

the progress of this reference. The relevant authorities might at some stage wish to consider whether there is any value in amending s 140 of the *Sentencing Act*. It might be possible to arrive at some procedure by which some of the disadvantage and some of the public cost which we have identified which flows from this type of procedure could be limited, without unfairness to a petitioner. For example, we note that in his letter of 22 July 2002 to the petitioner's legal adviser, the Hon Attorney General requested a notice of appeal prepared "in conformity with the matters raised by the petition". In the present state of the law, it was not open to him to confine the hearing to those issues. Because of the relatively low threshold applicable to applications to amend in such a case, this Court was obliged to permit amendments which went well beyond the petition. Some statutory power in the Attorney General to confine the grounds pursuant to s 140(1)(a), or the prescription of a statutory test for amendment, appropriate to the situation where a petitioner has already had one opportunity to appeal, may be worthy of consideration.

384 We should also record briefly our other final concern, which is about the way in which the closing submissions on behalf of the petitioner were made. That concern relates to the raising for the first time in closing submissions of material which could not have been anticipated as arising from either the notice of appeal or from the manner in which the appeal was conducted on behalf of the petitioner. It has two aspects.

385 The first is that, as is clear from these reasons, a number of aspects of the petitioner's case were concerned with non-disclosure of material, largely by the police but as to one document apparently by counsel for the Crown at the petitioner's trial. That was always understood. However, in closing, the petitioner's counsel spoke for the first time not in terms of non-disclosure, but of deliberate concealment of material. The flavour of the closing submission was to the effect that there had been deliberate decisions made by a number of persons not to make material available to the defence, with the intention thereby of wrongly strengthening the prosecution case and depriving the petitioner of a fair trial.

386 Allegations of that kind were never aired prior to closing submission, and were not put to any of the witnesses to whom it might be thought that those allegations related. There was some cross-examination of some witnesses about their reasons for taking certain decisions – for example, for altering words of a statement – but it could not reasonably have been understood from that cross-examination that any such allegation was contemplated. It is not necessary to determine whether there was misconduct by any person, in order to dispose of this appeal. However,

we do wish to record our view that it was improper to raise that issue at the time at which it was raised.

387 The other issue raised for the first time in closing submission in reply we understood to be a suggestion that there might be occasion for a reasonable bystander to apprehend bias on the part of the members of the Court hearing this appeal. It was submitted that it was a "matter of concern" which counsel submitted should be "ventilated but put to one side", that at the time of trial the then Director of Public Prosecutions was a person who had subsequently been appointed to this Court, being McKechnie J. It was submitted that "in other jurisdictions ... it may have prompted the court to call in outside Judges".

388 Senior Counsel appeared immediately to resile from the suggestion which had been made, saying "... we place reliance upon your Honours' ability to act with judicial impartiality". However, the suggestion of bias was of concern to us, and has been carefully considered by us. An electronic search of the transcript of the appeal has been undertaken. It contains no mention of McKechnie J by name. It contains a number of references to the "DPP" or to the "Director of Public Prosecutions". Most of those references are plainly references to the office generally, so that witnesses would refer to material being provided "to the DPP" in the sense of being delivered physically to that office, without any indication as to the person to whom material may have been delivered.

389 Looking to references to the Director of Public Prosecutions personally, rather than generic references to the office, there appear to be two. One is in the context of some mild criticism about a failure to comply promptly or perhaps completely with a subpoena; that subpoena was clearly directed to the present occupier of the office of DPP. The other is in evidence by Superintent Shervill that he had had discussions with the then Director of Public Prosecutions about charging the petitioner with the killing of Mrs Lawrence. As we understand it, there is nothing in the materials before us which could be understood as suggesting that there was any impropriety, or even lack of judgment, in the decision to charge the petitioner, as opposed to criticism of the way in which the prosecution was conducted.

390 When one looks at the statement of agreed facts, which refers to material which was not disclosed to the defence, it seems clear that most of the material which was not disclosed was material which was in the possession of the police and was not disclosed to any person at the office of Director of Public Prosecutions. The material which was delivered to

the office of Director of Public Prosecutions was a comprehensive summary of facts. In the normal course of events, one would have expected the prosecutor at trial, rather than the Director of Public Prosecutions personally, to determine which of the various materials available to the prosecution should be disclosed. There is no suggestion in any of the materials in this appeal that that usual course was departed from.

391 The result of our consideration of those issues is that it is plain that the suggestion made during the course of closing, that it was possible that the matters raised during the course of this appeal could reflect adversely on the then Director of Public Prosecutions personally, was simply factually incorrect. It was never a question appearing to arise on the face of the grounds of appeal. Of course, in a very broad administrative sense, any falling short of the standards required of a prosecutor, or any error or omission in the conduct of a prosecution, is in one sense the "responsibility" of the person whose duty it is to supervise and guide those prosecutors. Criticisms of that kind are routinely made in criminal appeals without it being thought by any person that they are inappropriate for determination by this Court. We do not however understand the submission made on behalf of the petitioner to be concerned merely with that abstract level of responsibility.

392 We would conclude with the observation that, had the submission made on behalf of the petitioner had any factual foundation - that is, had it been reasonably open to suggest that there may have been a cause for concern in relation to the question of bias – Senior counsel for the petitioner would have been failing in his duty to his client and to this Court in failing to raise it prior to the hearing of the appeal, at a time which might have permitted the making of some alternative arrangement. His raising it for the first time in closing submissions in reply (even if only to immediately step back from it), was not only pointless but improper.

Appeal dismissed

393 It is the order of the Court that this appeal be dismissed.