

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : WHITE -v- THE QUEEN [2006] WASCA 62

CORAM : WHEELER JA
MCLURE JA
PULLIN JA

HEARD : 4 NOVEMBER 2005

DELIVERED : 7 APRIL 2006

FILE NO/S : CCA 74 of 2003

BETWEEN : GARY ERNEST WHITE
Appellant

AND

THE QUEEN
Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA

Coram : SCOTT J

File No : INS 144 of 2002

Catchwords:

Appeal and new trial - Grounds of appeal - Failure to warn - Corroboration warning - *Evidence Act s 50*

Criminal law - Accomplice - Prison informer - Witness with purpose to serve - Corroboration warning - *Evidence Act s 50*

Criminal law - Fresh evidence - Recanting witness

Criminal law - Non-disclosure by prosecution

Criminal law - Expert witness - Expertise unchallenged

Legislation:

Criminal Appeals Act 2004 (WA), s 30

Director of Public Prosecutions Act 1991 (WA)

Evidence Act 1906 (WA), s 50

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant : Mr S A Shirrefs SC & Mr G W Massey
Respondent : Mr B Fiannaca & Mr T G Wilson

Solicitors:

Appellant : Gary Massey & Associates
Respondent : State Director of Public Prosecutions

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

Asciak v The Queen [1990] WAR 120

Aydlett v The Queen, unreported; CCA SCt of WA; Library No 920346;
25 June 1992

B v The Queen (1992) 175 CLR 599

Bromley v The Queen (1986) 161 CLR 315

Carr v The Queen (1988) 165 CLR 314

Chamberlain v The Queen (No 2) (1984) 153 CLR 521

Chew v The Queen (1991) 4 WAR 21
Craig v The King (1933) 49 CLR 429
Davies v The King (1937) 57 CLR 170
De La Espriella-Velasco v The Queen [2006] WASCA 31
DPP v Kilbourne [1973] AC 729
Dyers v The Queen (2002) 210 CLR 285
Foo v The Queen (2001) 167 FLR 423
Gallagher v The Queen (1986) 160 CLR 392
Grey v The Queen (2001) 75 ALJR 1708
Hoy v The Queen [2002] WASCA 275
Jenkins v The Queen (2004) 79 ALJR 252
Kelleher v The Queen (1974) 131 CLR 534
Khan v The Queen [1971] WAR 44
Lawless v The Queen (1979) 142 CLR 659
Longman v The Queen (1989) 168 CLR 79
M v The Queen (1994) 181 CLR 487
Mallard v The Queen (2005) 80 ALJR 160
Mickelberg v The Queen (1989) 167 CLR 259
Mickelberg v The Queen (2004) 29 WAR 13
Mickelberg v The Queen, unreported, CCA SCt of WA; Library No 990056;
12 February 1999
Milne v The State of Western Australia [2005] WASCA 38
Mule v The Queen (2005) 79 ALJR 1573
Pileggi v The Queen [2001] WASCA 260
Pollitt v The Queen (1992) 174 CLR 558
R v Anderson (2000) 1 VR 1
R v Brown (Winston) [1994] 1 WLR 1599
R v Bryer (1994) 75 A Crim R 456
R v Clark (2001) 123 A Crim R 506
R v Easterday (2003) 143 A Crim R 154
R v Flower [1966] 1 QB 146
R v Gale [1970] VR 669
R v Geesing (1985) 38 SASR 226
R v Gilbert [2002] 2 AC 531
R v Johnson [2004] SASC 241
R v Latcha (1998) 104 A Crim R 340
R v Mankanjuola [1995] 3 All ER 730
R v Middleton (2000) 114 A Crim R 258
R v Poulter (1978) 19 SASR 370
R v Prater [1960] 2 QB 464
R v Ready [1942] VLR 85
R v Rosemeyer [1985] VR 945

Re K [1984] 1 NZLR 264
Robinson v The Queen (1999) 197 CLR 162
Tan v The Queen [2003] WASCA 324
Weiss v The Queen (2005) 80 ALJR 444

Case(s) also cited:

Bratt v Western Airlines (1946) 166 ALR 1061
Bugg v Day (1949) 79 CLR 442
Clark v Ryan (1960) 103 CLR 486
Director of Public Prosecutions v Faure [1993] 2 VR 497
Doney v The Queen (1990) 171 CLR 207
Garvey v The Queen [2004] WASCA 271
Gee v The Queen [2002] WASCA 180
Lambley v The Queen [2001] WASCA 38
Mallard v The Queen (2003) 28 WAR 1
Punevski v The Queen [2002] WASCA 268
R v Baskerville [1916] 2 KB 658
R v Brown (Winston) [1998] AC 367
R v Garofalo [1999] 2 VR 625
R v GK (2001) 53 NSWLR 317
R v Glennon (1992) 173 CLR 592
R v Humphrey (1999) 72 SASR 558
R v Juric (2002) 4 VR 411
R v Keir (2002) 127 A Crim R 198
R v Lavery (No 2) (1979) 20 SASR 430
R v Lucas [1992] 2 VR 109
R v Nanette [1982] VR 81
R v Pantoja (1996) 88 A Crim R 554
R v Slater (2004) 147 A Crim R 489
Ratten v The Queen (1974) 131 CLR 510
Stirland v Director of Public Prosecutions [1944] AC 315

WHEELER JA:

The appellant's trial

1 This is, as to some grounds, an appeal against conviction as of right,
pursuant to the former s 688(1)(a) of the *Criminal Code* (WA), and as to
others, an application for leave to appeal pursuant to s 688(1)(b). To the
extent that leave is required, I would grant leave to appeal.

2 The appellant was convicted after trial of the wilful murder of
Anthony David Tapley ("Tapley"). Tapley was born in 1966, so would
have been approximately 35 years of age at the date of his death. The
prosecution case at trial was as follows.

3 Tapley apparently had some problems with drugs, and had been
charged with stealing in relation to an offence in Port Hedland. Towards
the latter part of 2001, his parents became concerned for his welfare, since
he had not appeared when he was supposed to appear in court and because
they had not heard from him for a period of time which was longer than
the normal breaks in contact which had occurred between them. In due
course, Tapley's father reported him as a missing person.

4 Tapley had been at one time in a relationship with a Ms Ramah
Goodlet. Ms Goodlet had a son by another partner, but she and Tapley
had begun their relationship when the child was very small and both she
and her son had had a close relationship with him. They had lived
together at Walpole for a year or 18 months, approximately. During the
course of the relationship, she received a compensation payment of some
\$20,000, but because they both had amphetamine habits, they had spent it
all in a few months.

5 During the time that they were in Walpole, Ms Goodlet had received
\$500 from the appellant. \$400 of that was repaid to him at an early time,
leaving an amount of \$100 outstanding. Ms Goodlet's evidence was that
she received a telephone call from the appellant in relation to the
outstanding money, and he said, referring to Tapley, words to the effect
of: "If that cunt doesn't pay me the \$100 I'm going to blow his head off."
She then gave Tapley the \$100 and told him to repay the appellant.
Ms Goodlet had known the appellant for about four years by the time she
came to give evidence.

6 In due course, Ms Goodlet broke off the relationship with Tapley,
mainly because she was trying to give up amphetamines, while he was
not. She used to see him still about once a month. It appears that the

appellant did not approve of the relationship, since he used to say to her from time to time words to the effect of: "You're not still hanging around with that scumbag?"

7 Ms Goodlet last saw Tapley on 15 August 2001. She did not see him thereafter, and he made no contact with her on occasions such as Christmas, or the birthday of her son. At some time, she had a conversation with Tapley's father, who told her that he had reported Tapley as a missing person. Some time thereafter, someone from the Missing Persons Bureau had contacted her and asked her questions. She and her mother, and the appellant, were present together on one occasion after that when her mother told the appellant that the Missing Persons Bureau had been asking about Anthony Tapley, and her mother said to the appellant: "What do you want us to say?" The appellant replied: "I don't know what you're talking about. Never met the bloke."

8 Ms Goodlet's mother, Ms Miller, gave evidence of a friendship which she and a previous partner had had with the appellant. Some time after she had split up with the previous partner, she became involved in a casual sexual relationship with the appellant for about a year. On 17 August 2001, Ms Miller saw Tapley at the Maddington Tavern, and he asked if he could stay the night at her house. She agreed that he could. On 19 August 2001, she was with Tapley and another person at her house, drinking "quite a lot" of wine. She made a telephone call to the appellant at some stage during the day about getting some amphetamines. She got the amphetamines from him and returned home. She, Tapley and the other person shared the amphetamines. She was an occasional user and was "pretty well out there" after she had done so. After some more drink, the three of them discussed going to the house at which the appellant was then living to continue partying. The other person was too drunk to do so, but she and Tapley went there, Ms Miller driving them.

9 Shortly after they arrived, the appellant called Ms Miller over to him in an angry tone of voice. He put his face very close to hers and shouted at her in a manner which frightened her, since he never talked to her like that. He said to her: "What the fuck are you doing bringing him over?" He told her to get into her car. She did so and three girls, her daughter Boronia and two others, got into the car with her. She told Boronia that she did not want to leave Tapley there. She said she was "a bit scared". As she was getting into the car, she looked up towards the house and saw two men coming out from the back of it. Her daughter, Boronia, kept saying to her: "We just have to leave and we have to go now." She then drove the car back to her home. She was crying. Later that night, the

girls telephoned to ask if they could return to the house, and she drove them back there. She did not see Tapley after that occasion at the appellant's house and did not ask what had happened to him, since she "didn't want to know".

10 Ms Boronia Miller last remembered seeing Tapley at her mother's house. She did not recall seeing him at the appellant's house, and did not remember what she was doing on 19 August 2001. One of the other girls gave evidence that she, too, did not recall 19 August 2001. The third, who said she had for some years been "like a daughter" to the appellant, remembered seeing Tapley at Ms Miller's house. She did not mention being at the appellant's house.

11 The last deposit of a Social Security cheque and the last withdrawal on the deceased's bank account were made on 14 August 2001. He lodged no Social Security form after that date. There was evidence that he was somewhat erratic in his habits, that he was, as I have mentioned, a user of drugs, and there was some evidence that he had looked unwell or depressed at a time not long before his disappearance. There was evidence which suggested that some unknown others were hostile to him.

12 The evidence of Sydney Reid forms the basis of a number of grounds of appeal. It is alleged that he had a considerable motive to lie, for reasons which I will shortly describe. Reid's evidence was that Tapley owed the appellant money in August. On 19 August when Tapley came to the appellant's house, the appellant became angry and decided to make an example of him.

13 The property on which the appellant was living was a house in the middle of an industrial area of a suburb. It was a large property, which often had a number of trucks on it. Reid said that the appellant shot Tapley as Tapley tried to run from the property, shooting him before, during and after Tapley climbed a substantial gate onto the property.

14 The morning after the shooting, Reid went to the appellant's house and the appellant told him that "Ant" (Tapley's nickname) was dead and that the appellant had been up to Northam and the barbecue had gone well. The appellant said that the barbecue fire had been prepared for some other reason, but Reid did not know what it was. A week or so later, Reid again visited the appellant and the appellant said he had been up to Northam and said words to the effect of: "I'll never do it like that again. I didn't expect to see what I seen. Next time it'll be off the back of a boat."

15 There was a property just outside Northam which the appellant had visited. The owner of that property, Mr Stratton, gave evidence of his ownership of it, his association with the appellant, and his recollection of at least one occasion on which the appellant had visited the property for a barbecue. He thought that the appellant had visited on other occasions, but could not specifically recall. His property was called "Chitibin Farm".

16 The owner of the property adjoining Chitibin Farm, Mr Morgan, gave evidence that he and his brother leased the land at Chitibin Farm at the relevant time and visited it somewhere between daily and two or three times a week to work it. He said that when he began to lease it, no-one lived there, but, around 2000, some people came to live there, they being the appellant and another. (The evidence was that the other person was dead by the relevant time.) Those people had "camped" there for a while. He recalled going to the property one Monday morning in 2001 some time after his birthday, which was 15 August. He saw some people standing around and some vehicles. He recognised the appellant. There had been what appeared to be a large fire burning there, which had largely burned down. He heard one person speak to the appellant and the appellant replied: "He doesn't know anything." He described the location of the fire. When he returned some days later, the location where the fire had been burning had been scraped over with machinery of some kind.

17 Behind the house on Chitibin Farm, police located a very large number of bone fragments. Some were of animal origin. Nineteen were ultimately collected for closer examination and were found to be "highly consistent" with being human in origin. There was expert evidence describing the reasons for believing them to be human bones. They could be ascertained as coming from an adult (being a person over 20 years of age), but no other characteristics of the person could be identified. Several pieces of skull could be joined together, but it was possible that the fragments came from more than one person. They had been subjected to high temperatures. It was not possible to say how old the bones were.

18 At the property where the appellant lived, at which Reid said that the deceased had been shot, an examination of the gate, which consisted of unpainted steel tubing and chain link wire mesh with support bars, revealed a stain. A partial DNA profile belonging to a male person was recovered from that stain, which matched the relevant parts of the DNA profile of Tapley. The probability of finding that profile if the stain had come from a person unrelated to Tapley is approximately 1 in 60, based on Western Australian population data. It was not, of course, possible to tell whether the DNA had come from blood, or from skin, or from other

cellular material such as saliva. The material gave a positive reaction with a blood-screening test. That would not necessarily indicate that it was blood, since false positives could be caused by chemicals in vegetable or fruit matter.

19 Reid's evidence came to be given in the following way. Within a couple of weeks of the date of the alleged murder of Tapley, the former detective Don Hancock and his friend Lou Lewis were killed in a car bomb explosion on 1 September 2001. The day after that, a police operation headed by Superintendent Caporn commenced. Electronic surveillance of Reid commenced in October 2001. After a variety of investigations, Reid was arrested in February 2002 for the murder of Hancock and Lewis. Electronic surveillance of him concluded then. On 15 February 2002, he made admissions about the murder of Hancock and Lewis on a videotaped record of interview and was charged with that murder. Approximately two weeks later, he indicated that he may be able to assist police in the investigation of the deaths of Hancock and Lewis, and he was, within a week or so of that date, provided with security undertakings, in return for his assistance, by the Commissioner of Police, and with a letter from the DPP indicating that the DPP would support a reduction in sentence for Reid, depending upon the level of his assistance. He then provided a statement about the murder of Hancock and Lewis, implicating one Slater, who was a member of the Gypsy Jokers motorcycle gang.

20 On 24 March, Reid implicated the appellant in the murder of a person Reid knew as "Ant". He identified Tapley from a photoboard. The following day, letters of comfort were signed by the Assistant Commissioner of Police, to be provided to a sentencing Court. On 26 March, Reid signed undertakings to give evidence in relation to the deaths of Hancock, Lewis and Tapley. On 27 March, he entered pleas of guilty to the murders of Hancock and Lewis and was sentenced to life imprisonment with a minimum of 15 years, that being, of course, the shortest possible non-parole period for that offence. I refer in a little more detail to Reid's negotiations with police when I come to the relevant ground of appeal.

21 The evidence was that Reid had been a member of the Gypsy Jokers. A Mr Les Hoddy was a senior member, and the founder of the WA chapter of that organisation. The appellant was not a member, but was a very close friend and business associate of Hoddy, had a number of other friends in that organisation, and was welcome to attend the clubhouse provided that a member was present.

Grounds of appeal

22 The grounds of appeal fall into a number of categories. They are as follows:

- (1) Grounds 1, 5, 6 and 7 - Corroboration warning: These grounds are to the effect that the learned trial Judge insufficiently warned the jury about the dangers of relying on the evidence of Reid and that there was material incorrectly identified by the trial Judge as supporting Reid's evidence which was not capable of supporting it.
- (2) Admissions by appellant: Ground 8 alleges that his Honour misdirected the jury in a respect prejudicial to the appellant concerning the use that could be made of his out-of-court admissions.
- (3) Grounds 9, 10 and 12 assert that certain evidence of the forensic biologist concerning DNA was improperly admitted and, alternatively, that an inadequate direction was given concerning it.
- (4) Non-speculation: Ground 13 alleges that his Honour failed to direct the jury not to speculate in relation to the evidence of a number of potential eyewitnesses who were not called.
- (5) Non-disclosure/fresh evidence: Grounds 15, 16 and 18(b) and 19 deal with alleged non-disclosure of relevant material, or, alternatively, the discovery since trial of fresh evidence. This material consists of the product of electronic surveillance of Reid and of the appellant, and certain material concerning Reid's discussions with the police about what benefits he might receive from giving assistance to them.
- (6) Ground 18(a) concerns the evidence of Ramah Goodlet, who now says that a portion of the evidence which she gave at trial was false.

There were other grounds, which were not pressed.

Ground 1, 5, 6 and 7 - Tainted witness, corroboration warning

23 These submissions concerned the way in which his Honour dealt with the evidence of Reid. It seems to be common ground that the prosecution case depended upon an acceptance of the truth of the evidence of Reid in at least its essential respects. If the jury had entirely disbelieved Reid, it would not have been possible for it to have convicted the appellant. In relation to Reid's evidence, the appellant advanced the following propositions:

- (a) That Reid was a "tainted witness". He had a considerable motive to lie, in order to obtain a reduced sentence for co-operation. He was motivated to ensure that his girlfriend Natasha Moutinho was protected. He was further plainly a person of bad character, being a self-confessed drug dealer and killer of Hancock and Lewis.
- (b) Although not technically an accomplice, he had confessed to being an accessory after the fact to the murder of the deceased in this case.
- (c) The potentially unreliable nature of his evidence "placed him in the same category as a prison informer".
- (d) The Judge was therefore required to give a "full" corroboration warning.
- (e) A "full" corroboration warning would contain the following elements:
- that it was "dangerous" to convict on Reid's evidence
 - that it was dangerous to do so unless the evidence of Reid was corroborated (it was accepted that the word "corroboration" need not be used)
 - the Judge was required to define "corroboration" in traditional terms and identify the material which was capable of constituting corroboration
 - the Judge should have made it clear that what he was saying to the jury was a warning and not a comment
- (f) His Honour was in error not only in failing to give a full corroboration warning, but in wrongly identifying certain evidence as capable of "supporting" Reid, when it could not.
- (g) The failure of defence counsel to express concern about the way in which his Honour directed in this area was irrelevant in the particular circumstances of the case.

24 All of these objections to his Honour's direction were couched without any reference whatever to the effect of s50 of the *Evidence Act 1906* (WA); however, it is convenient first to examine the propositions

put forward by counsel for the appellant against the background of the common law, without reference to s 50.

Proposition (a) - Reid had a purpose of his own to serve

25 This is plainly correct. It will be remembered that Reid had first told the police about the murders of Hancock and Lewis, and about his own involvement, and the alleged involvement of Slater, in those killings. His then lawyer had given him advice about what would happen if he pleaded guilty to the two murders. Reid said the tenor of that advice was that "the more I had to tell the more I got. Basically if I wanted to clear the air about anything it was all in my favour". He was told (it is not clear whether by his legal adviser or by the police) "... it would be a minimum of 15 or a maximum of 30. It was up to me which way I wanted to go".

26 The appellant's counsel on the appeal suggested to us that Reid had agreed with the proposition that he did not care who he nominated, as long as his sentence was reduced. The relevant passage of cross-examination however, does not support that submission. It reads:

"You were indifferent to any person that you nominated. You didn't care who you nominated as long as you got your own sentence reduced?---That's your opinion, yes."

27 There was also some suggestion on the appeal that one of the benefits obtained by Reid in return for his co-operation was the withdrawal of charges against him relating to some offences, and that Reid's girlfriend was not proceeded against for breaches of the community-based order. However, it is clear from the documentary exhibits dealing with these matters that they were not part of any "deal" between Reid and police. Rather, it seems that once Reid had implicated others - and particularly had implicated Slater for the murder of Hancock and Lewis - it was considered that it would be very difficult to ensure the security of Reid and Moutinho when they came to be dealt with for these matters and that, given the relatively minor nature of the offences by comparison with the offences to which Reid had confessed, the public interest would be best served if they were not proceeded with. Any sentences for those offences imposed on Reid could only have been concurrent with his life sentence for murder.

28 Even leaving aside the minor charges, and without having regard to any suggested admission by Reid that he did not care who he implicated, there was evidence from which the jury could conclude that Reid had a motive to lie about offences committed by others. He was aware that he

was facing a very lengthy sentence in relation to the murder of Hancock and Lewis, and it would be open to a jury to consider that he perhaps thought that implicating Slater in those killings would not be sufficient co-operation to have his sentence reduced to the minimum possible. He was also plainly concerned for the safety of Moutinho and, while he said he was more concerned for her than for himself, he did not expressly disclaim the suggestion he was concerned about his own safety also. Again, a jury may have thought that Reid would think that the more he had to offer police, the greater the protection he would be afforded.

29 Further, Reid was a person of bad character. He was a drug dealer and an associate of drug dealers. He was directly involved in the killings of Hancock and Lewis, and on his own account he had offered the appellant assistance in cleaning up after the murder of Tapley, although that assistance was not accepted. These would be reasons for a jury to scrutinise his evidence with care, as a witness having no apparent aversion to untruth, even if he did not fall into the category of an accomplice.

30 Of course, there were countervailing considerations. A jury might also think that the more people he implicated, the greater the danger of retaliation against him for breaking the code of silence (although that danger was perhaps less in relation to White, who was an associate of the Gypsy Jokers, than in relation to Slater who was a member of the club). Further, if the appellant was not the killer of Tapley, there would be an obvious risk for Reid that a renewed investigation of that matter would show his allegations against the appellant to be false, which would compromise his value as a witness in the Hancock and Lewis case.

Proposition (b) - Accessory after the fact

31 Australian Courts have not considered it necessary to warn in relation to accessories after the fact as if they were accomplices; see in this State *Khan v The Queen* [1971] WAR 44. The reason is said to be that a temptation presented to an offender to buy his own immunity from punishment by offering evidence against an alleged co-offender does not exist in the same way in the case of an accessory after the fact "whose interest lies in establishing, if he can, the innocence of the alleged principal offender" (*R v Ready* [1942] VLR 85 at 93, *R v Clark* (2001) 123 A Crim R 506 at [51]).

Proposition (c) - "Prison Informer" analogy

32 In the case of a prison informer, the accused person will often have met the informer only because the accused is already in gaol awaiting

trial, and even where that is not the case, often the accused is already suspected of being involved in the crime, and there is some other evidence connecting him with it (*Pollitt v The Queen* (1992) 174 CLR 558, particularly at 587 per Deane J and 615 – 616 per McHugh J). The informer alleges, in that situation, that the accused has made some admission. That is why, in *Pollitt*, the Court was of the view that in the ordinary case, the traditional corroboration warning in relation to a prison informer would be inappropriate, since there would very often be corroborative evidence which the informer might be tailoring his statement to meet. Rather, in the usual prison informer case, what should be sought is confirmation of the fact that an alleged confession to a prison informer by an accused person was made.

33 There is no analogy between the usual prison informer situation and the present case. Some similarities with the evidence of prison informers may exist; like most prison informers, Reid was plainly of bad character (*Pollitt* 586 per Deane J) and may well have been motivated by a perception that he would derive some benefit from his evidence (*Pollitt* 586 per Deane J). As a member of a motor cycle gang, he might be considered to be a person moving in a world where conventional standards of conduct and values such as truth and respect for the rights of others have little relevance (*Pollitt* 614 per McHugh J). The significant difference was that he was not implicating someone he knew to be already suspected of a crime. Another significant difference between the situation of Reid and that of a prison informer is that it is likely that jurors will lack any real appreciation of the sorts of pressures which may be acting upon prison informers, while the various factors which may have motivated Reid were explored in some detail at trial and seem to me to be readily comprehensible.

Proposition (d) - A "full corroboration warning" was required

34 I do not think that Reid fell into a traditional category of "suspect" witness, although those categories may not be closed: *B v The Queen* (1992) 175 CLR 599 at 616 per Dawson and Gaudron JJ, but *cf Carr v The Queen* (1988) 165 CLR 314 at 319 per Wilson and Dawson JJ. There is some support for the proposition that a corroboration warning was required at common law whenever a witness has "a purpose of his own" to serve, or that, if not required, it was "wise" to give such a warning: *R v Prater* [1960] 2 QB 464, *DPP v Kilbourne* [1973] AC 729 (at 740). That view has not been taken in this Court: *Asciak v The Queen* [1990] WAR 120. For the moment, I assume that the common law would require a warning in relation to Reid.

Proposition (e) - What is a "full" warning?

35 There are three limbs to the appellant's attack on his Honour's direction concerning the evidence of Reid. First, it is submitted that it was necessary for his Honour to say that it was "dangerous" to convict on the evidence of Reid unless that evidence was corroborated. Second, it was submitted that it should be made clear that that direction was by way of warning, not judicial comment. Finally, it is said that his Honour should have defined "corroboration", and identified corroboration evidence.

36 The submissions, to the extent that they rely upon the requirement that a particular form of words be used, must be rejected. It is not necessary to use the word "corroboration", nor is it necessary to use the word "dangerous". It is desirable that the warning be given in ordinary language so far as possible: see, for example, *DPP v Kilbourne* [1973] AC 729, *Kelleher v The Queen* (1974) 131 CLR 534 at 553 per Gibbs CJ, *Foo v The Queen* (2001) 167 FLR 423 at [30], *Milne v The State of Western Australia* [2005] WASCA 38 at [48] – [49] per Roberts-Smith JA.

37 For the moment, I assume that it is necessary for a "warning" to be given. In discussing the evidence of Reid, his Honour commenced by saying that the jury might well find that Reid was given very considerable advantages as a result of co-operating with the police. He referred, among other matters, to the minimum term of 15 years which he received for the wilful murder of Hancock and Lewis, to the fact that arrangements had been made for Moutinho to visit him in custody, and to the pending charges against Reid and Moutinho that were withdrawn. He said it was a matter for the jury to consider whether Reid's evidence was truthful and accurate in the light of all those matters and whether those matters affected his credibility as a witness. His Honour described the 15-year-term of imprisonment as one which the jury might think was "indeed a very lenient sentence for the criminal conduct in which he had been involved". He described Reid as a "self-confessed wilful murderer" who had received significant privileges.

38 His Honour told the jury it was open to them to conclude that Reid was at least prepared to assist in cleaning up after the murder of Tapley, assuming the murder to have occurred. He then told the jury that they "should consider Mr Reid's evidence with very considerable care". His Honour went on to explain that it was easy for a person implicated or involved in an offence to blame someone else for what had happened and for that reason "you should give very careful consideration to Mr Reid's

evidence before you act on it". He referred to Reid's dealing in amphetamines and his relationship with the police. His Honour then said:

"There is a significant risk of a miscarriage of justice in relying on evidence of that type which you will need to consider very carefully and which you will need to guard against. I suggest you look for other evidence coming from a source other than Mr Reid which tends to support the evidence which he gave and which in your view implicates the accused in the offence with which he is charged."

39 A little later, summarising his direction in respect of Reid, his Honour said:

"I have spent some time dealing with the evidence of Mr Reid and warnings that you need to take care with his evidence, because I am sure you will appreciate that his evidence is critical to the Crown case. It is a question for you whether you accept Mr Reid as a witness of the truth after carefully considering these warnings and whether you can rely upon his evidence as to what he said occurred."

40 His Honour plainly directed the jury's attention to all of the various factors which it was suggested could have an effect upon Reid's credibility. He pointed out to the jury the reason why such care had to be taken; that is, that there was significant risk of a miscarriage of justice in relying upon evidence of that type. A "miscarriage of justice" is a clear and concise description of the potential result of placing too much weight on the evidence of an unreliable witness. Presumably, no conscientious juror would wish to run such a risk. In connection with that phrase, his Honour's direction to the jury that they "should" give very careful consideration to Reid's evidence and that they "will need" to consider very carefully and to guard against that risk cannot have left the jury with any impression other than that it was necessary for them to scrutinise Reid's evidence with great care, and to guard against the risk to which his Honour directed attention. If any further clarification were needed, when his Honour later reminded the jury in broad terms of what he had said about Reid's evidence, not only did he use the word "warning", but it was also clear that the question whether the jury accepted Reid as a witness of the truth was one which only arose after "carefully considering these warnings".

41 The appellant criticises his Honour's direction in part because in the earlier part of his discussion of Reid's evidence, he said that it was a matter for the jury to consider whether Reid's evidence was truthful and accurate in the light of the matters to which his Honour had referred. However, that was plainly right. It was a matter for the jury to consider, albeit after giving the evidence the careful scrutiny which his Honour then discussed. It is also submitted that the use of the expression "I suggest" indicated to the jury that what his Honour said was comment only. However, the "suggestion" was that they look for supporting evidence, not that they should take care with Reid's evidence. After mentioning examples of the sort of evidence which the jury might consider as supporting Reid's evidence, his Honour concluded his discussion of that topic with the remark "... but the important thing is for you to consider Mr Reid's evidence with considerable suspicion and to look at it with very great care and scrutiny before acting upon it in all the circumstances of the case".

42 In my view, his Honour gave the jury a "clear and emphatic warning" of the potential danger of acting on the evidence of Reid. The direction was more favourable to the appellant in some respects than the "traditional" corroboration warning in that it did not say to the jury that the danger existed in acting upon such evidence "unless it was corroborated"; rather, the direction, although coupled with a suggestion that the jury should look for evidence supportive of Reid's, gave the impression overall that the danger was one which existed because of Reid and because of factors which his Honour had discussed (that is, it existed regardless of whether there was corroboration). I have referred elsewhere to what seems to me to be the potential difficulty with the traditional formula often advanced by counsel for appellants, which is that of potentially deflecting the jury's attention on to the search for corroboration, rather than keeping it focussed on the unreliability of the witness: see *Hoy v The Queen* [2002] WASCA 275 at [24]. I note in that context that the Australian Law Reform Commission in its interim report on evidence (Report No 26 Vol 1) discussed some research which tended to suggest that a jury given a corroboration warning may be deflected in that way, and may be more willing to convict as soon as it is satisfied that such evidence exists (at par 490).

43 Notwithstanding the potential danger, from the appellant's point of view, in any judicial focus upon the search for corroborative evidence as traditionally understood, the appellant submits, in relation to this ground, that his Honour was in error in not explaining to the jury adequately what corroborative evidence was, in failing to identify such evidence, and in

mistakenly identifying two matters as corroborative which were not capable of constituting corroboration.

44 It seems to me that the weight of authority in Australia suggests that it is not necessary for a trial Judge to identify each item of evidence which is capable of constituting corroboration, provided the Judge does correctly describe the type of material which is capable of being corroborative; see *Cross on Evidence*, 7th Australian ed 2004 at [15,255], and cases there cited (*cf*, however, *Jenkins v The Queen* (2004) 79 ALJR 252 at [29]). In any event, it is difficult to see a substantial miscarriage of justice where a trial Judge has omitted to draw to the attention of the jury some evidence which is corroborative, as such an omission would be favourable to the accused.

45 His Honour did describe corroborative evidence accurately. He suggested to the jury that they should look for evidence coming from a source other than Reid, which tended to support the evidence which Reid gave, and which in the view of the jury "implicates the accused in the offence with which he is charged". That, in my view, is an adequate description of corroborative evidence.

Proposition (f) - Material wrongly identified as corroborative

46 However, if material was wrongly identified by his Honour as being potentially corroborative when it was not, then he would have been in error, even if he did so when a corroboration warning was not strictly required: *B v The Queen* (1992) 175 CLR 599 at 620. The two matters which he did identify were not, it is submitted, capable of constituting corroboration. I deal with them separately.

47 The question of the stain on the fence was dealt with by his Honour in this way:

"For example, and it is only by way of example, the finding of DNA in the stain on the rail of the gate, if you accept it and if you accept that that was Mr Tapley's blood, may assist you in that regard. If you think that a remnant of Mr Tapley's blood remained on the gate after he was shot whilst trying to climb over the gate, then you may think that supports Mr Reid's evidence as to how the shooting occurred."

48 His Honour then reminded the jury of Turbett's evidence that there was a one in sixty possibility that it could randomly be the DNA of someone not related to Tapley.

49 As I understand the submission in relation to this direction, it was said that there was no basis upon which the jury could have found that the substance on the gate was blood. In that respect, the appellant relies upon Turbett's evidence that DNA could have been obtained from saliva or some other form of cellular material. It is submitted further that the forensic biologist Mr Goetz's statement was to the effect that he was unable to say that the stain was human blood.

50 However, there were two distinct tests, which it seems to me that this submission runs together. There was human DNA extracted from the stain. That can only have come from human cellular material, and was consistent with being Tapley's cellular material in the way in which Turbett described.

51 Further, a quite different screening test gave a positive reaction for blood. It would have been possible for a false positive to be obtained in a number of ways, and Mr Goetz, having conducted a further and more sophisticated test for blood, described those in the document which became exhibit 11 in the appeal. There were only four possibilities. The material could be human blood, but below the detectable level required for the particular test which Mr Goetz ran. It could be human blood, but too degraded to obtain a result from that test. It could be human DNA (because of the DNA test results) combined with a chemical reactant such as a plant peroxide which would lead to a false positive on the first screening test. Alternatively, it could be human DNA combined with animal blood.

52 In my view, taking the two tests together, it would be open to the jury to find that it was too much of a coincidence to expect that a plant material capable of giving a false reaction for blood, or animal blood, should come to be found in precisely the same position on the gate as that which had yielded human DNA. Having regard to the DNA evidence, it would be open to the jury to conclude that this stain was consistent with it being Tapley's blood. That would be very far from being evidence upon which the appellant could be convicted, but it would be material which would tend to implicate him in the offence with which he was charged. A similar process of reasoning might lead a jury to reject, as too unlikely a coincidence, the possibility put forward in the appellant's evidence which was to the effect that Tapley's DNA might have been left on the gate at a time when he had gained access to the property on a previous occasion by climbing through the gate.

53 The second matter referred to by his Honour as potentially corroborative was the discovery of human bone, which had apparently been burnt, at the property at Northam. The only reason advanced by the appellant for suggesting that this material could not be corroborative, was that Mr Morgan, who said he had seen the appellant at a large fire at the property in August 2001, also said that he had seen there a third person, whom he had never met before, and that he thought that the person was the person named as Reid in a caption accompanying a photograph which he later saw in the newspaper. When asked how certain he was that the person was Reid, Morgan said, "Yeah, I would say it was him but he was a fair distance from me; yeah". Mr Morgan was unable to select Reid when shown photo boards containing 12 photographs, one of which was a photograph of Reid. Based upon that evidence, the appellant's submission as I understood it was that in order to accept Reid's evidence of the account of his conversation with the appellant about the fire, it would be necessary to reject Morgan's evidence that Reid had been there. Given the quality of that evidence of identification, it would not have been difficult for the jury to have rejected Morgan's suggestion that it may have been Reid who he saw at the property that day. In that case, the jury would be left with the discovery of burnt human bones at a property associated with the appellant and with evidence of the appellant being at that property at a date close to the last sighting of Tapley. That was capable of being corroborative, although it was, of course, not material upon which, taken alone, it would have been open to a jury to convict.

Proposition (g) - The role of defence counsel

54 Finally, in relation to the warning which his Honour gave, it is relevant to note that counsel for the appellant at trial took no issue with it, and sought no redirection. The point of the warning is, of course, to ensure the fairness of the trial, by ensuring that the jury scrutinise adequately evidence which may be suspect, and do so with the full appreciation of its dangers. The failure of trial counsel to object to the terms of a direction having this purpose has an important bearing on the question of whether any miscarriage of justice has occurred, even if the direction is incomplete or not in conventional terms: see *R v Clark* (*supra*) at [17] per Heydon JA. The requirement for a warning does not depend upon a request being made by counsel, but the conduct of trial counsel is relevant: *Jenkins v The Queen* at [29] – [32]. A point of this kind not taken at trial should not lightly be made a ground for quashing a conviction: *Tan v The Queen* [2003] WASCA 324 at [115].

55 Counsel for the appellant conceded in effect that counsel's conduct was a relevant consideration, but sought to diminish its significance by asserting to the Court that counsel for the appellant at trial had been 74 years of age (which he may have been; we do not know) and that it was his last case (which it was not). Counsel for the appellant suggested that counsel at trial had been negligent in the way in which he conducted the case, although he conceded that there was not such "flagrant incompetence" as to justify a ground of appeal based on the conduct of counsel.

56 Although the submission was made, nothing in trial counsel's conduct (apart from his not taking issue with this direction) was pointed to as constituting negligent conduct. An examination of the transcript does not suggest any negligence on counsel's part. He cross-examined police witnesses and Reid thoroughly, in relation to the various pressures which might be operating on Reid. He cross-examined other witnesses (for example, Mrs Miller) who gave evidence adverse to the appellant, in a way which elicited evidence about the degree to which they were affected by alcohol and/or drugs at relevant times. He passed fairly lightly over other aspects of the evidence, such as Turbett's expertise in relation to DNA, for obvious forensic reasons. He was a very experienced trial counsel, and I see nothing in the transcript to suggest that that experience was not brought fully and properly to bear on the appellant's case. His failure to take issue with his Honour's direction in relation to the evidence of Reid would be therefore, if there were any question of the adequacy of that direction, a relevant factor in evaluating it.

Evidence Act s 50

57 For reasons which I have given, it seems to me that his Honour's direction was an adequate one even if one were looking at it in terms of a "traditional corroboration warning". However, it seems to me that no such warning was required in the circumstances of this case, for reasons I now explore.

58 Since grounds of appeal based upon a failure to give a "full corroboration warning" are common in this Court, and particularly in relation to the evidence of accomplices, it is important to make it clear that such a ground is not a proper ground of appeal. The question for this Court is not whether a direction conforms to what has, at common law, been regarded as an appropriate direction in such a case; nor is it whether, tested against those common law requirements, the direction is "good enough", even if not entirely conventional. Rather, the question is, having

regard to s 50 of the *Evidence Act*, read in the light of authority relevant to its proper construction, whether there are particular identified circumstances which not only justify, but require, a warning of a particular identified character: *Chew v The Queen* (1991) 4 WAR 21 at 82 per Murray J (and to similar effect, in a different statutory context, see *R v Clark* at [73] – [75] per Heydon JA).

59 I have analysed his Honour's direction in common law terms, because of the way in which this appeal was conducted. However, I would not be prepared to grant leave in a future case in respect of a ground which alleges that a warning in terms required by the common law should have been given merely because a witness fell into a category in respect of which such a warning was, at common law, required to be given. Instead, if a Judge is alleged to have dealt inadequately with evidence of a "suspect" character, it will be necessary for the ground to identify what danger there was in acting upon the evidence which jurors, bringing their collective experience of human nature to bear, and assisted by cross-examination of the witness (where relevant) and the submissions of counsel, would not have understood, or may have overlooked, without the assistance of the Judge. If, where a comment was made, a warning is said to have been required, it will be necessary to identify, having regard to the primary fact finding function of the jury, what circumstance would require a direction, rather than simply assistance by way of comment, with that function.

60 In order to understand why this is so, it is desirable, in my view, to examine s50, and such authority as there is which may bear upon its interpretation, in order to understand what it does and does not require. I do this in some detail because this is a matter frequently arising, and of considerable practical importance for trial Judges.

61 The predecessor to s 50 was s 36BE of the *Evidence Act*. It relevantly provided as follows:

"(1) On the trial of a person for a sexual assault offence or an offence under chapter XXII of the *Criminal Code* –

- (a) the Judge is not required by any rule of law or practice to give in relation to any offence of which the person is liable to be convicted on the charge for the offence a warning to the jury to the effect that it is unsafe to convict a person on the uncorroborated evidence of the person upon

whom the offence is alleged to have been committed; and

- (b) the Judge shall not give a warning to the jury of the kind described in paragraph (a) unless satisfied that such a warning is justified in the circumstances."

Section 50 now reads:

"50. Corroboration warnings not generally required

- (1) In this section "**corroboration warning**" in relation to a trial means a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence of one witness.
- (2) On the trial of a person on indictment for an offence -
- (a) the judge is not required by any rule of law or practice to give a corroboration warning to the jury in relation to any offence of which the person is liable to be convicted on the indictment; and
- (b) the judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances."

62 That was the provision which was considered by the High Court in *Longman v The Queen* (1989) 168 CLR 79. The majority reasons in that case were those of Brennan, Dawson and Toohey JJ. At 85 – 86, their Honours noted that the mischief at which that provision appeared to have been aimed was the adverse reflection which a warning cast indiscriminately on the evidence of all alleged victims of sexual offences, and the corresponding protection which the giving of a warning conferred on an accused in those cases. Their Honours said, "It is evident that the legislature regards the reflection as unwarranted and the protection as unjust." By extending the reach of the former 36BE, it seems to me that the legislature has indicated that it regards all of the warnings traditionally given in relation to those categories of witnesses who have been in the past considered to require a corroboration warning - including accomplices - as generally undermining the balance of a fair trial. It is worth noting, in that context, that the section does not merely confer a discretion not to warn in a particular case; rather, it forbids a warning unless particular circumstances justify it.

63 Their Honours then asked whether s 36BE dispensed with *any* requirement to warn wherever the evidence of an alleged victim of a sexual offence was uncorroborated, or only with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims as a class. They noted that to construe it in the former way would be to place alleged victims of sexual offences into a category of especially trustworthy witnesses whose evidence need never be the subject of a warning and that such a wide construction would sterilise the trial Judge's ability to secure a fair trial. Applying that observation to s 50, it is plain that the legislature has not elevated those witnesses who were previously considered untrustworthy into a class of especially trustworthy witnesses. However, they are not to be considered untrustworthy "as a class".

64 Their Honours noted (87) that the warning to which 36BE was directed was a warning about the uncorroborated evidence of the particular witnesses there identified as a class, but did not affect the requirement to warn about other perceptible risks of miscarriage of justice. Looking at both par (a) and par (b) of s 36BE, their Honours concluded (89) that a warning could be given only if the Judge was satisfied that the warning was justified in the circumstances. Justification might be found in any requirement of a rule of law or practice which might apply in the circumstances "other than the requirement to which paragraph (a) refers". In the particular circumstances of *Longman's* case, their Honours noted that there was one factor "which may not have been apparent to the jury and which therefore required not merely a comment but a warning to be given to them" (91). That factor was the loss of the means of testing the complainant's allegations, having regard to the long period of time which had elapsed prior to the charging of the applicant in that case. That is, their Honours considered that the only factor in *Longman's* case justifying a warning, as opposed to a comment, was that forensic disadvantage stemming from delay. The need for the warning arose because that was a factor which the jury might not have appreciated had the warning not been given. I will return to this point shortly.

65 It is important to note also, the way in which their Honours dealt with the effect that s 36BE had upon the rule of practice which prior to its enactment required a warning as to the evidence of the victim of a sexual offence. The majority in *Longman* noted that par (a) of s 36BE abolished the requirement to give a warning, but not a Judge's discretion to comment on the circumstances of the case. They explained that "no longer may the Judge tell the jury that it is dangerous to convict in the circumstances described in par. (a) because the experience of the Courts has shown it to be so, but the Judge may invite the jury ... to make their

own evaluation of the alleged victim's evidence in the light of common human experience". They observed that the evidence of sexual assault victims was "subject to comment on credibility in the same way as the evidence of alleged victims in other criminal cases, but to comment only". Their Honours went on to add that the discretion to comment "should not be exercised so as to convey to the jury, whether by a phrase, gesture or intonation, a caution about the general reliability of the evidence of alleged victims of sexual offences which is tantamount to the warning the requirement for which par. (a) eliminates". They concluded that in the light of par (a) "... there is no particular set of circumstances which can justify the trial Judge in giving the jury a warning based upon general experience [concerning the alleged victims of sexual offences]. It would make no sense to treat the warning which par. (b) permits - a warning based upon particular circumstances - as being restricted to the same kind of warning as that to which par. (a) refers - a warning based upon general experience" (88). They noted that there was authority for the view that a Judge's omission to give a warning of the kind to which par (a) referred could not found a successful appeal, and added, "In principle, that must be so for par. (a) abolishes any requirement to give that kind of warning" (89).

66 If one applies those observations concerning the effect of s36BE upon warnings in relation to alleged victims of sexual assault to the very similar terms of s 50, a number of propositions follow. First, the omission to give a warning of the kind dealt with in s 50(2)(a) cannot found a successful appeal. Rather, the section positively prohibits a warning to the effect that the experience of the Courts has shown it to be dangerous to convict on the evidence of any category of witness, where that witness falls into a category which would previously have been the subject of a "corroboration warning". A Judge may comment upon the evidence of such a witness, but comment only; the Judge should not go further than inviting the jury to evaluate the evidence of the witness in the light of the various considerations which may affect its probative value. Any requirement to do more - that is, to warn, rather than to comment - arises not by reason of the category into which the witness falls, but by reason of particular circumstances of the case. A particular circumstance which may (and perhaps will) require such a warning may be a "hidden danger" which the jury would not appreciate without being assisted by a warning.

67 The reasons of Deane J in *Longman* are relevantly to similar effect. His Honour said that it would be to mislead the jury to convey to them either that the law of Western Australia regards complainants in such cases as an unreliable class of witness or that it is a general requirement of

that law that juries be warned against acting merely on the evidence of such complainants (95). Like the majority, his Honour went on to observe that the responsibility of a trial Judge did include giving an appropriate caution or warning "in circumstances where there are potential dangers in acting upon particular evidence which may not, without such a caution or warning, be appreciated by the jury" (95 – 96). That is, it seems to me, that Deane J was, like the majority, of the view that it was open to a trial Judge to comment on evidence of a witness who fell into the first paragraph of s 36BE, but not to give any warning which stemmed from general experience with such witnesses. His Honour also seems to have been of the view that the prohibition on warnings of that kind left unaffected the ability to warn in relation to particular evidence where the jury might not otherwise appreciate the danger of it. Deane J made additional observations about the function of appellate courts, to the effect that it would undermine the legislative intent discerned in s 36BE(1) for an appellate court to seek to confine the trial Judge's discretion to warn or not to warn by reference to particular categories of case.

68 McHugh J considered that the "practical effect" of s 36BE(1)(b) was to abolish the traditional rule requiring a warning in relation to evidence of complainants in sexual cases (106). His Honour noted that if the evidence in the particular case disclosed any circumstance which suggested that the evidence of the complainant may be unreliable, the trial Judge still had a duty to make the jury aware of those dangers (107). His Honour considered that cases would frequently arise where the circumstances would require a stronger warning, the terms of which would depend upon the particular circumstances of the case (p 107). In support of that proposition, his Honour cited *Carr v The Queen* (1988) 165 CLR 314 at 318. In that case, Wilson and Dawson JJ said that:

"The principle is that, since the circumstances of cases are infinitely various, the interests of justice to be served in each case are more likely to be protected by a trial Judge who is free to sum up the case for the jury in a manner best suited to the facts of that case."

69 Although there have been many decisions since 1989 in which what is now called the "*Longman* warning" has been discussed, none so far as I can see has affected the underlying analysis of the former s 36BE of the *Evidence Act*: rather, those principles have been restated (eg, *Robinson v The Queen* (1999) 197 CLR 162 at [19]). The principles enunciated by the majority in *Longman*, which are consistent with the views of Deane

and McHugh JJ in that case, should therefore be applied to the interpretation of s 50 of the *Evidence Act*.

70 That section is in almost identical terms to the former s36BE(1), save that it now extends to encompass all of those witnesses in respect of whom there was formerly a rule of law or practice which required the giving of a "corroboration warning". In relation to any such witness, the trial Judge is now positively forbidden to give to the jury a warning to the effect that it is dangerous to convict on the evidence of a category of witness because the witness falls into some suspect "category". The Judge may comment upon the evidence of a witness, provided that the Judge makes it clear that it is for the jury alone to evaluate the evidence of that witness, in the light of common experience. Where, however, there is a particular danger in acting upon the evidence of a witness which a jury might not otherwise appreciate, a warning should be given. It may be that the need to warn is not confined to "hidden" dangers, but that is the most usual case in which a need to warn is said to arise: *Bromley v The Queen* (1986) 161 CLR 315 at 319, 325 and see *R v Johnson* [2004] SASC 241 at [44] – [47], where some examples are discussed.

71 The understanding of s 50 outlined above is consistent, in my view, not only with authority binding on this Court, but also with its legislative history, and with the views which have been taken in other Courts, either as a result of legislative change which is broadly similar to s 50, or as part of the general development of the common law.

72 Section 50 had its origin in what was called the "Murray Report", a general review of the *Criminal Code* undertaken in 1983 by the then Crown counsel, Mr Murray QC. During the course of a discussion of then s 52 of the Code which required corroboration as a matter of law, certain comments were made about corroboration requirements generally. The author noted what was then the recommendation of the Criminal Law Revision Committee (1972) (CMND.4991) in the UK, to remove the requirement that a Judge warn the jury in relation to the uncorroborated evidence of accomplices. He suggested that that seemed to be "a very sensible recommendation", but one beyond the scope of his review. He noted also what was then a proposal in Queensland to alter s 632 of the Queensland *Criminal Code*, which at that time required corroboration of the evidence of an accomplice, and the proposal by the Tasmanian Law Reform Commission to abolish all legal requirements for corroboration. Writing apparently of the Tasmanian proposal, Mr Murray QC observed this:

"Shortly put, the proposition in favour of that action which seems to me to be unanswerable, is that the Court is required in any jury trial to make proper observations with respect to the facts and the witnesses for the assistance of the jury, and the Court always follows that course. Therefore, if in any type of case, any witness for any particular reasons appears to the Judge to be one about whom the jury ought to be warned to be careful, then that warning can be made and it can be made in terms which are sensible and useful to the jury having regard to the particular facts of the case before them."

73 In introducing the Bill which inserted s 50 as it now is into the *Evidence Act*, the responsible Minister expressly noted that it was a Bill which continued the implementation of the Murray Review. In explaining what the position would be once that Bill was enacted, the Minister said:

"The Court may comment on the facts and the witnesses. If in any case any witness appears to the Judge to be one about whom the jury ought to be warned to be careful, that caution can be given at the Court's discretion." (Parliamentary Debates, Legislative Assembly, Wednesday, 19 October 1988, pages 3939 – 3940).

74 Considering s 50 in 1991, Pidgeon J had noted that the intent of s 50 was to extend the operations of the former s 36BE (*Aydlett v The Queen*, unreported; CCA SCt of WA; Library No 920346; 25 June 1992 at 16). In the same case, Seaman J (at 25) expressed the view that s 50 deliberately altered the pre-existing law as to warnings and as to corroboration "although there may be some cases in which, to avoid a perceptible miscarriage of justice, a Judge may be satisfied that the traditional form of warning should be given".

75 In the UK, s32(1) of the *Criminal Justice and Public Order Act 1994* abrogated the requirement that a Judge direct a jury that it was dangerous to convict on the uncorroborated evidence of a complainant in a sexual case or of an accomplice. That provision was considered in *R v Makanjuola* [1995] 3 All ER 730 by the Court of Appeal, in terms which were later adopted by the Privy Council in *R v Gilbert* [2002] 2 AC 531. The observations of the Court of Appeal which were adopted by the Privy Council included the following (Gilbert [13]):

"To carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to

the policy and purpose of the Act. The Judge will often consider that no special warning should be given. However, where a witness has been shown to be unreliable, the Judge may consider it necessary to urge caution and in a more extreme case (such as if a witness has been shown to have made previous false complaints or to bear the accused a grudge) a stronger warning may be appropriate and a Judge may 'suggest it would be wise' to look for some supporting material before acting upon the impugned witness's evidence. Judges are not however required to conform to any formula and an appellate court would be slow to interfere with the exercise of discretion by a trial Judge who has had the advantage of assessing the manner of a witness's evidence as well as its content. Where the Judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the Judge's review of the evidence and his comments as to how the jury should evaluate it. Where some warning is required, it is for the Judge to decide its strength and its terms. It 'does not have to be invested with the whole florid regime of the old corroboration rules'."

76 These views are broadly similar to those of Ormiston J, who conducted a detailed review of the history of corroboration warnings and the effect of s62(3) of the *Victorian Crimes Act*, introduced in 1980, against that history: *R v Rosemeyer* [1985] VR 945.

77 Authority in this Court has not been as clear as it might have been in relation to the relevance of s 50 in the past. There has perhaps in some cases been a tendency to analyse a direction to see if it was "good enough" in traditional terms, with s 50 regarded almost as a provision which excuses a failure to give "full" direction in traditional terms in some cases. For example, in *Lambley v The Queen* [at 17], the Court appears to have suggested that a warning will be both justified and required whenever the circumstances show some intrinsic lack of reliability in the witness. However, in the particular circumstances of that case, it may well have been common ground that the witness was in a category "similar to" a prison informer, so that a jury would not, unassisted, appreciate what the dangers of the witness's evidence might be. A case which is often cited in this Court is *Foo v The Queen* [2001] WASCA 406 at [30] of which Parker J, with whom Steytler J and Olsson AUJ agreed, said:

"Notwithstanding the effect of s 50, however, it will usually be essential in this State, in an appropriate case, that a jury receive a clear and emphatic warning from the trial Judge of the

potential dangers in acting on the evidence of a witness to convict, which dangers exist because that witness is an accomplice, *and which the jury might not appreciate without the warning*. That will usually be essential whether or not the evidence of the witness is the sole evidence and whether or not there is corroboration of that evidence. The form of the direction may well be different inter alia by virtue of those matters." (Emphasis supplied)

78 I quoted that passage myself in *Hoy v The Queen* [2002] WASCA 275 at [18], and at [19] expressed the view that such a warning may also be appropriate even where the dangers are apparently obvious. However, having regard to the authority which I have discussed, it now seems to me that only if the words which I have emphasised in *Foo*, relating to "hidden" dangers, are given their full effect, should that passage be regarded as accurate. The authorities do leave open the possibility that even where a danger is one which a jury will be able to appreciate unassisted, a warning may nevertheless be required. There may, for example, be cases in which, although the danger is apparent, it is a danger which, because of the attractive features of the particular witness, a jury may too readily overlook. However, as the warning is justified by reason of the "superior experience" of the Courts in relation to particular types of evidence which are apparently safe to act upon (*Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 604 per Brennan J), it is likely that it will only be in a very small category of cases that a danger which is apparent to a jury will nevertheless require a warning to be given.

79 Applying that analysis to the present case, the jury could not conceivably have failed to understand the dangers inherent in acting upon the evidence of Reid. Reid's motivation, and the various pressures which were capable of acting upon him, had been canvassed at length in the cross-examination of Reid and of other witnesses. There was no hidden danger which required his Honour to "warn" the jury about it.

80 In fairly summarising the relevant issues of fact, it was of course necessary for his Honour to remind the jury of the reasons for approaching Reid's evidence with caution. He did so. He did not mention the countervailing considerations to which I have referred; it may be that he should have. To the extent that his Honour gave what appears to have been a version of the traditional corroboration warning, he did that which was prohibited by s50. However, that was an error favourable to the appellant, and would, of course, not justify quashing the conviction.

Ground 8 - Admissions by appellant

81 In his general direction to the jury concerning the way in which the evidence of witnesses should be considered, his Honour said that there was a rule known as the rule against hearsay which, as a general proposition, meant that what someone said outside court was not generally to be used to prove the truth of what was then said. His Honour said that there were exceptions to that rule and that one concerned statements made out of court by an accused person. He went on to say:

"In this case you have heard something of what it is said that the accused said to Mr Reid. The reason why you are permitted to hear that evidence is the law recognises that usually a person will not admit something which is against his interests unless it is true, so in looking at evidence of that type you must firstly determine whether you are satisfied that the statement said to have been made by the accused was made - that's the first question - and if you conclude that it was then you are entitled to look at the whole of the statement or statements that the accused made, not only to those portions which may be adverse to him."

82 His Honour then briefly explained the drawing of inferences and the way in which the jury should proceed if it seemed that more than one inference was reasonably open. He concluded his direction concerning the evidence generally by saying:

"You must decide which of the evidence you accept or whether, and it's certainly open to a jury to conclude in some respects that none of the evidence is satisfactory. That's very much your area of responsibility but I stress again that you must always bear in mind that the obligation is upon the crown to prove the case beyond reasonable doubt."

83 The complaint in relation to this ground is that the direction carried with it the real risk that the jury would be more likely to accept "this evidence" - as I understand it, this means the evidence of Reid that the appellant made certain admissions to him. A further submission is made that the direction prejudiced the appellant, particularly since his Honour failed to remind the jury that whether or not the utterances were true was solely a matter for them.

84 I accept that it is undesirable for a trial Judge to tell a jury that the reason that admissions against interest are exceptions to the hearsay rule is

that it is unlikely that they will be made unless they are true. The High Court, in a decision delivered subsequent to the appellant's trial, expressly stated that it is undesirable to direct juries about the traditional reasons why admissions against interest are commonly regarded as reliable: *Mule v The Queen* (2005) 79 ALJR 1573 at [23]. Importantly, however, the Court did not in that case suggest that it would be necessarily an error likely to cause a miscarriage of justice if such an explanation were given.

85 I accept, for the purposes of the present argument, that there may be circumstances in which an admission against interest is such a critical part of the case against an accused person that a direction which explained that such admissions were commonly regarded as reliable might be prejudicial, and might be so prejudicial as to cause the trial to miscarry. That is hardly this case. In the present case, the alleged admissions, while important, were not the critical part of Reid's evidence. Reid gave direct evidence that he had personally witnessed the appellant shooting the deceased six times. Reid's credibility was the central issue in the trial. The jury would well have understood, both from the way in which the trial was conducted overall, and because of his Honour's reference to the "first question" as being whether the statement was made at all, that it was for them alone to determine whether the appellant had actually made the statements in question. If they found the statements were made, the evidence of the fire and the burnt bones at Northam would be available to explain what was referred to, and whether the statements were true.

86 The appellant's counsel recognised that ground 8 was a relatively weak ground, accepting that it would not, on its own, require that the appellant's conviction be quashed. In my view, it lacks substance, even as a makeweight.

Grounds 9, 10 and 12 - Expert evidence concerning DNA

87 The evidence the subject of these grounds is that of Mr Turbett. He was the scientist in charge of the forensic biology section at the PathCentre, having been in charge of forensic biology there for approximately four years. He held a Bachelor of Science with Honours and a PhD from the University of Western Australia.

88 He had prepared a report for police. In accordance with the usual practice, a copy of the report had been disclosed to trial counsel for the appellant, but the report itself was not put in evidence. There was no evidence at trial, and there is no evidence before us, which suggests whether counsel for the appellant at trial had, or had not had, any conversations with the prosecutor or with Mr Turbett about Mr Turbett's

qualifications, or had any knowledge of Mr Turbett's qualifications from other trials in which counsel had been involved.

89 Mr Turbett's evidence was not the subject of any objection at trial, and his qualifications were not further explored either in evidence in chief or in cross-examination. In relation to the stain on the gate which he had examined for the presence of DNA, his evidence was that he found a partial DNA profile at three of 10 *loci* which matched the same three *loci* from the deceased's DNA profile. He performed a statistical analysis on the results. He explained the statistical analysis in the following way.

"We have measured how likely each of the results are in the various populations in Western Australia and we've got some computer programmes that we can employ. You enter the data, the DNA profile, into the system and then it gives us a result.

So you have a system that measures the likelihood in relation to each of the 10 markers - - -?---Yes.

- - - that a person in the community will have that particular marker. Is that correct?---Yes.

Using that process, were you able to arrive at a statistical conclusion in relation to the partial DNA profile?--- Yes.

What was that conclusion?---The probability of finding this partial DNA profile if the stain recovered from the left gate had come from someone other than and unrelated to Tapley is approximately one in 60, based on Western Australian population data.

I assume from that that you cannot exclude Anthony David Tapley as being the donor of that stain. Is that correct?---No. He cannot be excluded."

90 He was cross-examined about this evidence, and said the following:

"So out of the 10 items that you were looking for to give certainty that it was Tapley's blood, seven were not reportable?---Yes.

And three were significant?---Yes.

Is that why you call it a partial DNA?---Yes, sir

Because it has only got three out of the 10 items that you were looking for?---Yes.

...

Now, your figure of one person – one in 60 - - -?---Yes.

That's the odds that it would be by anybody else than Tapley?---No.

What do you mean by that?---It's a measure of how likely if - if you were to just go out into the population and pick someone effectively at random, it's the chance of finding someone that would have that particular combination of DNA.

...

In respect of the odds, you've told us that you give evidence in many court cases?---Yes.

These days DNA is a very effective instrument in helping in crime detection?---It can be, yes.

What do you usually get in DNA matches? You talk in millions, don't you?---It depends on the quality of the result. For a partial DNA profile of that order, three markers out of 10, that is entirely expected.

Have you ever given evidence in a case to match blood on a 1:60 basis?---Not before, no.

What's the lowest figure you have ever come to?---I don't remember.

Usually in millions, isn't it?---If it's a full DNA profile, then yes.

Partial?---The statistical weight will decrease as the profile gets smaller.

...

So could I say that you don't know whether or not somebody spat on the gate or somebody cut themselves on the gate or bled?---That's correct, yes.

It would be sheer speculation from a scientific point of view?---Yes.

...

That stain could have been on the gate, whether it's saliva, blood or some other stain containing human DNA, for 2, 3, 4, 5 years?---I don't know."

91 It can be seen from the cross-examination that the appellant's trial counsel not only accepted Mr Turbett's expertise, but in some respects relied upon it, to make a number of points. Those points were that, while it could be said with certainty that the stain contained human DNA, it would be "sheer speculation" to say how the stain came to be on the gate, that it was not possible to say how long it had been on the gate, and that the match with the deceased's DNA was only partial and did not have the significance statistically which the average juror might consider DNA evidence to have (that is, it was not to be expressed in terms of "millions" to one).

92 The submission made about the expertise of Mr Turbett is to the effect that "a trial Judge has a continuing responsibility, particularly in a criminal trial where a witness has been allowed to express an opinion on a critical issue, to ensure that such opinion is not left for the jury's consideration where it has become clear that the person who expressed it has no qualification to do so, or has provided no factual or scientific foundation for the opinion expressed" (citing *R v Anderson* (2000) 1 VR 1 at [59], *R v Latcha* (1998) 104 A Crim R 340 at 395). The answer to that proposition is that it has not become clear that Mr Turbett had no qualification, or had provided no factual or scientific foundation for his opinion. The evidence does disclose that he has a Bachelor of Science with Honours and a PhD (presumably in a scientific field). He has experience in forensic biology which includes approximately four years in charge of that subject at the PathCentre. He has been accepted as an expert in previous cases in relation to DNA evidence. During the course of his cross-examination, he expressed no hesitation, based upon his expertise, in giving evidence about the statistical relevance of his findings. Such indications as exist in the evidence, then, suggest that he did have relevant qualifications and experience.

93 No doubt, had the question been explored more fully, greater detail of the precise area of Mr Turbett's expertise might have emerged. However, trial counsel for the appellant chose not to require such detail.

The obvious forensic reason for that decision is that the whole point of the cross-examination was to minimise the relevance and significance of the DNA evidence and that it was useful to have an expert acknowledging its limited relevance. Given that there was some evidence indicating that Mr Turbett had relevant expertise, and that there was no suggestion at trial to the contrary, there was no basis upon which his Honour should have rejected his evidence: *cf R v Middleton* (2000) 114 A Crim R 258 at [16] – [22] per Anderson J.

94 The further submission is made that the probability evidence given by Mr Turbett was unreliable, as no evidence was led of the nature and size of the database from which the calculation was made. It is said that that meant that the jury had no means of being able to evaluate the "strength" of the evidence by reference to its factual or scientific basis. However, in an adversarial system, it is open to an accused person to choose what matters will or will not be put in dispute. In this case, in the absence of any special factor, such as Tapley belonging to an uncommon ethnic group, the appellant's trial counsel presumably considered that it would not be useful to go into the way the database worked. That does not relieve the prosecution from the burden of proving its case. However, the existence of the database, which apparently relates to the Western Australian population as a whole, and the method of analysis by computer programme having been described, that was, in my view, a sufficient foundation for the reception of the evidence, in the absence of any challenge to its reliability.

95 So far as his Honour's directions are concerned, there are two submissions made about his direction concerning Mr Turbett's evidence. One is that it is said that he failed to explain to the jury the significance of the statistical evidence. In the end, no more was said about this than that his Honour should have explained to the jury that there was no valid evidentiary foundation for the statistical analysis and that they should give it no weight. That submission must be rejected, for the reasons which I have already given.

96 It is also submitted that his Honour failed to direct the jury that, although expert evidence was there to assist them, it was up to them to determine how it should be used, if it should be used at all. The significance of Mr Turbett's evidence was, as I have noted, explored with him during the course of cross-examination. His Honour reminded the jury of some of that evidence, and did so accurately. He also reminded the jury of the appellant's evidence that Tapley had come to his house on occasion and had climbed over the gate, or squeezed between the gates. It

may well be that there are cases in which it is important that a direction be given to ensure that a jury does not give undue weight to expert evidence. However, the issues surrounding the significance of Mr Turbett's evidence were relatively simple and were explored in detail during the course of the evidence. I am unable to see what a direction could have added by way of assistance to the jury.

Ground 13 - Potential eyewitnesses and non-speculation direction

97 This ground is extremely difficult to follow. Reid's evidence was that a person he knew as "Rainbow" and a person whom he knew as Lionel or Ritchie (Richard Samuels) were also present at the time at which the appellant shot the deceased. There was evidence that Samuels at least was a member of the Gypsy Jokers motorcycle club. Reid's evidence was that he had not ever discussed the killing with Lionel or Rainbow and that his reason for not doing so was "nothing to talk about. Nothing to do with me. It was none of my doing. It was just things you don't talk about" (AB 276).

98 There was evidence elicited during the course of evidence-in-chief and cross-examination of a number of witnesses, that the Gypsy Jokers had a code of silence and did not want to admit to police what crimes they, or others, had committed. For example, in cross-examination of Superintendent Caporn, it was put to him that initially when talking to police in "the interviews" (from context, it seems the earlier interviews, concerned with the Lewis/Hancock murders) Reid did not wish to be called a "dog", and Caporn replied: "This is a common thing with bikie gang members; that they don't want to admit to police what they've done and what others have done."

99 The appellant points out that neither the prosecution nor the defence called Rainbow or Samuels as a witness and that no explanation for the failure to call them was given by anyone. The submission is then made that "the clear inference conveyed by the prosecution through its questioning was that Samuels was in the camp of the [appellant] and would never testify against an associate of the club. As such it was imperative that his Honour direct the jury 'that they may not speculate about what those witnesses might have said but must decide the case only on the evidence that has been led'", citing *Dyers v The Queen* (2002) 210 CLR 285 at [15] and [123].

100 The reason I do not understand this ground, is that it is not clear how any speculation about what Samuels or Rainbow might have said would have been prejudicial to the appellant. Any speculation must inevitably

have proceeded along the following lines. Rainbow and Samuels, if called, would have been likely to say that they did not see the appellant shoot Tapley. They would have said so either because that was the case, or alternatively because, as a result of the code of silence, they would not have admitted to witnessing an offence. Speculation of that kind would simply go nowhere; if it had any effect at all, it would be to the detriment of the prosecution. During the course of his closing submissions, the prosecutor noted that the jury had not heard from Rainbow or from Samuels and told them that they should not speculate as to what those witnesses would have said. That was, no doubt, because the prosecutor considered that there might be a risk of speculation adverse to the prosecution case, of the kind which I have mentioned.

101 Even if it was necessary for his Honour to ensure that the jury did not speculate, he gave an appropriate direction at a number of points. In his opening remarks to the jury, his Honour said: "You must make your decision on the evidence brought before you in this courtroom and upon nothing else" (AB 17). At the conclusion of the trial, he directed the jury that their verdict must be based solely on the evidence and on nothing else (AB 639, 673).

102 It seems to me that the real complaint which is implicitly made is that, had there been no evidence about the code of silence, the jury might have (improperly) speculated that because Rainbow and Samuels were not called by the prosecution, that was because they would not have supported Reid. That view of this ground is fortified by counsel for the appellant's submission during the course of argument that the "vice" in the failure to give a non-speculation direction arose "because of the specific evidence as to the code of silence". Counsel submitted that that evidence was objectionable, while conceding that it had "partial relevance" in relation to Reid.

103 Evidence of the alleged "code of silence" was not only relevant, but it was an important part of the defence case, which involved, in part, the proposition that since Reid had implicated other members of the Gypsy Jokers in the murders of Hancock and Lewis, he would be fearful for his own safety and that of his girlfriend, and anxious to co-operate with police in any way possible in order to ensure that they would be protected. That was why evidence of the code of silence was elicited during the course of cross-examination of Superintendent Caporn.

Grounds 15, 16, 18(b) and 19

104 These grounds fall into four categories of material. Ground 19 can be dealt with briefly.

Ground 19 - Failure to disclose police notes

105 The relevant handwritten notes appear to be those of Brown and Robertson who were the first and second officers to interview Reid on 14 February 2002. The appellant's counsel advised us during the course of the argument that this material was not pressed "as significantly as I did earlier" (in reality it was not pressed at all) as it had now become clear that there was a videotape, which was made available to trial counsel for the appellant.

Ground 15, 16 - Relationship between Reid and the appellant

106 There was surveillance material relating to Reid between 30 October 2001 and 14 February 2002, by way of listening devices at his house and in his car, and telephone intercepts on his telephone. That is, there was material relating to surveillance for a period of approximately three and a half months commencing approximately two months after the murder of Hancock and Lewis and two and a half months after the alleged date of the murder of Tapley. The significance of that material is said to be that on 8 February 2002, there was material which disclosed hostility by Reid towards the appellant, which, it was submitted, arose out of a debt owed by Reid for money lent by the appellant for Reid's legal fees. The appellant himself gave no evidence of such a debt. The date of the transcript of the surveillance material is 7 February, but whether it is the 7th or the 8th does not matter for present purposes. As well as reading the transcript, I have listened to the relevant tapes.

107 The material relates to a series of conversations between Ms Moutinho and Reid. At first, Moutinho is complaining, loudly and at length, about having a headache, about being bored, about "rotting" and about wishing to get out of the house. Reid suggests she go to visit Julie (who, it is common ground, was the appellant's girlfriend). She said she could not go there because of "you and Gary [the appellant]". Reid replies that "it's got fuck all to do with you and Julie", and when she suggests that it would be awkward for her to visit, he says that it would not be awkward. However, she then says that she is in any event in no state to visit anyone.

108 Later on the same day, Ms Moutinho again complains about how much she hates sitting around the house and she hates "living like this". She suggests that Reid goes to "make up with Gary". Reid says that he is not going to "suck up to Gary". It is by no means clear that the dispute, if any, between Reid and the appellant relates to money lent for legal fees. However, at one point Ms Moutinho does say something that sounds like "he's (that is, the appellant) the one that lent you the money so you could go and see a lawyer". She suggests that Reid should be "sucking up" to the appellant because the appellant had helped him out. However, Reid replies that the appellant "made it quite clear yesterday". They again have a difference of opinion about whether she can go and visit Julie.

109 Although Ms Moutinho sounds querulous and somewhat hysterical at times on the tape, Reid's voice is quite calm for the greater part of the conversations, until he apparently becomes impatient with her towards the end. There is nothing in his manner of speaking about the appellant to suggest any hostility. The tenor of the conversation is therefore that there has apparently been some sort of difference or dispute which Reid thought had been made "quite clear" by the appellant, and that Reid would not be the first to make a move to change that position.

110 It is not surprising that this material was not disclosed to the appellant. There were apparently "hundreds of tapes". None of the other tapes are suggested to have any relevance to this matter. The tapes are very difficult to hear (the ones I listened to involving a television playing fairly loudly in the background, as well as the usual household bangings and crashings). There were only brief references to the appellant. They were the result of the investigation into the murder of Hancock and Lewis; not of Tapley.

111 There is a question obliquely raised by the State's submissions in this case as to whether the tapes should be regarded as material of which the prosecution was "aware" for the purposes of the appellant's trial. If the material, although in the possession of the Police Service, had been collected in circumstances far removed from any investigation into the case against the appellant, and if there was no reason to suppose that those conducting the investigation relating to the appellant could have been aware of them, then it may well be appropriate to consider the non-disclosure of those materials according to principles relating to the discovery of fresh evidence, rather than according to the principles relating to prosecution non-disclosure. The issue not having been squarely argued, however, I am content for the purpose of this appeal to

consider this material according to the principles relating to prosecution non-disclosure.

112 The material which I have described was material potentially bearing upon the relationship between Reid and the appellant, and therefore upon Reid's motive to give false or exaggerated evidence relating to the appellant. That is, it went potentially to Reid's credit. *Grey v The Queen* (2001) 75 ALJR 1708 is authority for the proposition that non-disclosure of material directly relevant to the credit of a critical prosecution witness will occasion a miscarriage of justice. Reid was a critical prosecution witness. The question then arises as to whether in the context of this case, the material was realistically capable of having an impact upon Reid's credit.

113 The first observation to be made is that if there had been any dispute or disagreement or hostility between Reid and the appellant at the relevant time, that would have been something that the appellant would be aware of, so that it would have been open to his counsel to cross-examine Reid about it. In particular, if there had been any dispute concerning money lent for legal fees, that would be a debt of which the appellant would be aware. Nothing of that kind was put to Reid. Rather, it was put to him in cross-examination that he had a grudge against the appellant because the appellant had reported him to Les Hoddy over his use of drugs (it being asserted that members of the Gypsy Jokers were not allowed to inject drugs). Reid disagreed that he had been reported for injecting drugs, but did agree that the appellant had reported him to Les Hoddy. He said this was because he owed the appellant some money for drugs for which he had not paid.

114 The appellant in his evidence-in-chief said that he was on good terms with Reid, but that Reid "had done a few things to upset me". These "things", whatever they were, were not explained, nor were they put to Reid. He said that there was also a domestic incident which occurred, after which he did not trust Reid. He said he did report Reid to Les Hoddy, but was not asked what he had said to Hoddy.

115 There was other material suggesting that there had, on occasion, been disputes between Reid and the appellant. Mr O'Connor gave evidence that in August 2001, he had visited Reid, that the appellant had arrived at Reid's house, and that Reid and the appellant had had a conversation which "got a bit heated". In cross-examination he said that the argument had been something about a court case when the appellant had been surety for Reid in relation to a charge of assault.

116 Although she was not asked, other than in very general terms, about the relationship between the two men, Ms Moutinho described the appellant as "Sid's friend". The surveillance material would potentially have opened up a line of cross-examination of her, directed to the proposition that they were not always on friendly terms. However, she did not suggest that the appellant and Reid were always on harmonious terms. There was nothing in her evidence to detract from the other evidence which suggested that there had from time to time been differences between the two.

117 The monitored conversation between Reid and Moutinho is, in my view, consistent with the evidence which emerged at trial, of two men who were generally on friendly terms, but who may have had a falling out from time to time. There is nothing in the conversation which is suggestive of any particular hostility on Reid's part, or of a desire for revenge, or any thing of that nature, which could have significantly altered the position as the jury must in any event have appreciated it.

118 Accepting that Reid's credit was a critical issue in the trial, it is my view that the non-disclosed material was of peripheral relevance, at best, to that issue. It was not inconsistent with anything which had emerged from any of the witnesses who were asked about the relationship between Reid and the appellant. Its non-disclosure has not led the appellant to lose a chance of acquittal fairly open to him, since there is no reason to believe that disclosure could have affected the conclusions which the jury must in any event have drawn about that relationship.

Grounds 15, 16 - "Consciousness of Innocence"

119 There was electronic surveillance of the appellant's home from 8 March to 29 March 2002, a period of some three weeks. The significance of this material is said to be that in numerous conversations between the appellant and his girlfriend, Julie, there is no mention of Tapley. It is said that this fact is consistent with the appellant's "consciousness of innocence", and was therefore admissible in support of his defence. At the time of the surveillance, it is submitted that the appellant was aware that Reid had been arrested and charged with the murder of Hancock and Lewis, so that it was significant that he was not discussing Tapley with anyone.

120 It is difficult to see how this material could be said to be relevant. In any trial, a jury is required to proceed on the assumption that the evidence put forward is all of the relevant evidence which there is. A jury would therefore have understood in this case that all of the evidence linking the

appellant with Tapley's death had been adduced. In particular, it was clear that there was no evidence of a direct admission to anyone, the only references the appellant made to Tapley being his remarks to Reid about "Northam", and his odd response to Mrs Miller's discussion of Missing Persons inquiries.

121 A failure by the appellant to mention Tapley in the surveillance material would be relevant only if it would be a reasonable inference to draw that a person in the position of the appellant would, knowing that Reid had been arrested, have then discussed Tapley with his girlfriend. That proposition does not appear to follow, for a number of reasons. The first is that a person who has a consciousness of guilt is unlikely to begin discussing offences which he has committed, in circumstances where he is aware that a person who has been a witness to that offence is under investigation. The fewer people who know, one would have thought, the better. The less often the offence is mentioned, the less likely it is that any person will intercept or overhear an admission, or will later have information which can deliberately or inadvertently be made available to investigating authorities.

122 Further, in the circles in which the appellant moved, there was evidence from Reid and from Moutinho to the effect that Reid did not discuss his illegal activities with her. They were just something about which she did not need to know. There is no reason to suppose that the appellant's relationship with his girlfriend would be different. The evidence of Reid was to the effect that in the circles in which he moved generally, an offence once committed was "just a forgotten subject". His evidence was that he did not discuss Tapley's murder with the appellant, apart from the brief conversation which he recounted.

123 Most importantly, however, the appellant's submissions are founded upon the false premise that the surveillance captured every conversation which the appellant had during the period in question. A review of the surveillance logs, however, reveals very many entries which read "can't hear properly", "too far away to hear", sounds like male voice" and so on (examples taken from 19/03, 20/03). Further, to the extent that conversations are intelligible, there are references such as that (on 21/3), where the appellant says to Julie, "I'm in so much fucken shit Julie, you just don't know". While remarks such as this cannot be said to be necessarily references to Tapley, there is clearly some concern on the appellant's part from time to time about some unspecified, possibly unlawful, activities.

124 The absence from the surveillance material of any direct reference by the appellant to an involvement in the death of Tapley, would seem to be a neutral fact.

Ground 18(b) - The DNA evidence

125 This part of the appellant's case relates to a recording of Ms Moutinho talking on the telephone to another person, giving an account of a police visit, apparently in connection with the investigation into the murders of Lewis and Hancock. She tells the person to whom she is speaking that the police say "they've got witnesses .. (indistinct) ... got, ah, DNA results, blah blah blah ...". Most of the conversation is unintelligible, it is impossible to know what the DNA is said to relate to, and the context of the conversation is unknown. It is submitted on behalf of the appellant that had this material been disclosed, it would have been open to counsel for the appellant to have cross-examined Reid about whether Reid was "tricked" into confessing to the murders of Hancock and Lewis.

126 It is not clear why this question was relevant to the trial of the appellant. The submission was made that if Reid had been cross-examined about being tricked, by the police telling him that they had his DNA when they did not, and if he had answered that he was tricked in that way, then "... where that goes is (a) he has made the admission of his involvement in the murder of Hancock and Lewis in circumstances where he was tricked into so doing, his anger and fury in relation to what had happened. Faced then with the prospect of a 30-year minimum and doing all he could to get out with the least minimum he could possibly get of 15 years. It goes to what was working on his mind at the time that he made the statement". In the end, that proposition seems to come back to the proposition that Reid was faced with a potential 30-year minimum sentence and naturally desired very keenly to get a much shorter minimum. Whether he was tricked or not into confessing does not appear to be relevant. However, because it is unclear to whom Moutinho is talking, who she is talking about, and what the DNA is said to relate to, it could not, in any event, have been used for any purpose.

Ground 18(a) - Recantation of Ramah Goodlet

127 At trial, Ms Goodlet's evidence, some of which has been mentioned earlier, was relevantly as follows. She spoke of her first meeting Tapley when she was about 10 years of age and the history of her relationship with him. When she and Tapley moved down to Walpole, the appellant gave her \$500. It was repaid in two stages, the first repayment being

\$400. There was then an amount of \$100 outstanding. She received a telephone call from the appellant in relation to that money, in which he said words to the effect of: "If that cunt doesn't pay me the \$100 I'm going to blow his head off." She gave Tapley the \$100 and told him to repay the appellant.

128 She had known the appellant since she was about 20, seeing him from time to time at the Maddington Tavern. He was a close friend of her mother. When she was in a relationship with Tapley, the appellant used to say to her: "You're not still hanging around with that scumbag?" She last saw Tapley on 15 August 2001. At some time an officer from the Missing Persons Bureau spoke to her about Tapley. That, she thought, was after Christmas.

129 She recalled an occasion some time after the Missing Persons Bureau had contacted her when she, her mother and her sister, Boronia, were at her sister's house. Boronia was present, but was in another room at the time. Her mother said to the appellant words to the effect of: "The Missing Persons Bureau has rang us and asked us if we know anything about Anthony Tapley. What did you want us to say?" The appellant replied: "I don't know what you're talking about. Never met the bloke."

130 In cross-examination she agreed that she had always been friendly with the appellant and that he had assisted her. She agreed that he assisted her to go down to Walpole because he wanted her to get off drugs, and that she was grateful, and embarrassed when the money was not paid back. She confirmed that the appellant rang up and was angry with the deceased because he had not paid back the money, and said he would shoot him. In relation to the conversation that her mother had with the appellant about the missing persons inquiry, she agreed with the proposition put to her by counsel that: "You and everybody there said 'Well, we'll say nothing. It's not our business'."

131 The evidence as given at trial was not entirely consistent with one of the statements which Ms Goodlet had previously made to police. She was not cross-examined about that difference, no doubt because the change which she made was favourable to the appellant. The previous statements, which were made exhibits in this appeal, were broadly as follows.

132 There was a first statement signed on 4 April 2002. In that, Ms Goodlet described her relationship with Tapley and her separation from him. She described her relationship with the appellant and indicated

why it was that she knew that the appellant and the deceased knew each other. She did not describe any particular dealings between the two men, or any conversation with the appellant about the deceased.

133 The next statement was dated 17 May 2002. It contained the material which was contained in the first statement, together with some additional material. It included the reference to the conversation which her mother had had with the appellant about the missing persons inquiry. It included a reference to a telephone conversation in which the appellant spoke to her about repayment of the \$100, in similar terms to the evidence which she gave at trial. However, the origin of the debt was described differently. In this statement, she had said that she thought that in about February 2000 Tapley came home and told her that he had bought an ounce of amphetamine from the appellant. She estimated its value at about \$6000. She understood the telephone conversation about the \$100 to relate to money still owed in relation to the purchase of the amphetamine.

134 On 29 April 2003, Ms Goodlet completed a supplementary statement in which she said that, on reflection, she believed that the debt did not relate to the purchase of amphetamine. She said she recalled that Tapley had purchased a quantity of amphetamine from someone, but she was not sure from whom. She said that he "could have" purchased it from the appellant. She said that, after discussion with her mother and thinking about the matter, she then recalled the appellant giving her \$500 in cash to go down to Walpole, and believed that she had got the two transactions confused. In this statement, she specifically referred to par 27 of the earlier statement, which concerned the telephone call from the appellant, and she quoted what it was that she had said the appellant had said to her. The statement then reads: "*Gary made this threat, however I now believe the \$100 related to the \$500 loan he gave me.*" (Emphasis supplied)

135 In this appeal, she said that the portion of the statement which was quoted as direct speech from the appellant was not accurate, and that what she said at trial to the same effect was also not accurate. She said that the passage came to be in the statement in the following way:

"It came about when I was at the police station with the police making the statement. We got to the topic of the phone conversation and it came about that the police were asking me how angry he was and I was saying, you know, he was really angry. The police said:

Well, he was angry enough to have said he wanted to hurt Ant?

I said:

Yeah, probably. [I can't quite remember his exact words.]

Okay. Was he angry enough to have said he wanted to shoot Ant?

I said:

I don't know. I don't know - "

136 Later versions of this conversation in Ms Goodlet's evidence omitted the words in square brackets.

137 The true position, she said in her evidence at this appeal, was that the appellant had been very angry and that to the best of her recollection he had said: "Tell that cunt to come and pay me my money." She said that the appellant's anger was directed at Tapley. She explained that even though the loan had been to her, because she was in a relationship with Tapley, "... it [presumably responsibility for the loan] falls back on the man". Her evidence on the appeal was also that, contrary to what she had said in the supplementary statement, she was now positive that the amphetamine purchased by Tapley "definitely wasn't" from the appellant. Although she had previously said that it was Tapley who always went to get the amphetamines, she said that she knew who they were getting amphetamines from, and that it was not the appellant.

138 Before I deal with Ms Goodlet's evidence further, it is desirable to consider the principles which apply in relation to the evidence of a recanting witness.

139 There is some authority for the proposition that evidence of a recantation by a witness should not be received unless *prima facie* the evidence carries some conviction. It has been said in South Australia that:

"Evidence of a change of story should not be received as a matter of course [citation omitted]. It seems to me that before evidence is heard, the contents of the affidavit, including the explanation for having given false evidence, should carry some degree of conviction and should give rise to a substantial apprehension of a miscarriage of justice."

(*R v Poulter* (1978) 19 SASR 370, at 385, per King J, *R v Geesing* (1985) 38 SASR 226, at 229, per King CJ.) In *R v Flower* [1966] 1 QB 146, at 149, Widgery J commenced his discussion of principle with the words "when this court gives leave to call fresh evidence which appears at the time of the application for leave to be credible ... ", which suggests a similar approach.

140 The reason for that approach would appear to stem from the potential for abuse in such cases, and the consequent caution with which the Courts approach the evidence of a recanting witness. As a general principle, it would seem to me to be correct that a Court of Criminal Appeal should not receive the evidence of a recanting witness unless there is some material which suggests that the evidence may be relevant and credible.

141 However, in the present case, the desire of Ms Goodlet to recant her evidence came to the attention of the Court through an affidavit sworn by the solicitor for the appellant. He deposed in that affidavit to a conversation that he had had with Ms Goodlet, in which she informed him that her account at trial of the relevant telephone conversation with the appellant was not true. He deposed that she had asked him what would happen to her in relation to that evidence and that he advised her that, because he was acting for the appellant, he could not give her legal advice, but that he would arrange for her to have such advice. She did seek her own legal advice, and, in due course, he was advised that she was not prepared to give a statement to him. In those circumstances, because the indication given by Ms Goodlet was only in very general terms, but in terms which did seem to suggest that her recantation related to evidence which was material, and because the appellant was plainly not in a position to put any further information before the Court, we considered it necessary to hear the evidence of Ms Goodlet, despite the fact that very little was known about it at the time at which she was called by counsel for the appellant.

142 Counsel for the appellant also called another witness in support of Ms Goodlet's account of various matters. Because it seemed to be the most convenient use of time, we then permitted counsel for the respondent to call certain witnesses in rebuttal of aspects of Ms Goodlet's evidence.

143 Having had an opportunity now to consider the matter in more detail, it seems to me that perhaps the better course as a matter of principle would have been to examine Ms Goodlet's evidence once it had been given, and to consider whether it carried "some degree of conviction" before determining whether it should formally be received as evidence in the appeal. Because of the view which I have now reached concerning

that evidence, it would, in that event, have been unnecessary for the respondent to call rebutting witnesses, one of whom attended from Geraldton. However, that evidence having been received, I would deal with it in accordance with the principles set out below.

144 The starting point for a consideration of the recanting witness is *Davies v The King* (1937) 57 CLR 170, in which the High Court had this to say (at 183 - 184) about the situation which arises where a witness resiles from evidence given at trial:

"A declaration by a witness that he has committed perjury cannot possibly be accepted as a ground in itself for setting aside the result of a trial in which the witness has given evidence. If the contrary were held, the whole administration of both civil and criminal justice would be undermined. The subsequent discovery that some evidence (as in this case) is said by the witness who gave it to be false, or is actually proved to be false, cannot, as a general rule be allowed as a ground in itself for setting aside a verdict or judgment. But if the verdict is open to objection upon a ground affected by such evidence, the case is different. It would not be wise to attempt to frame a universal rule even for such cases. As the Full Court indicates in its judgment, the subsequent statement that the original evidence is false may be explainable by pressure brought to bear upon a witness or by the operation of any one of an indefinite number of motives. Each case should be treated in relation to its own facts."

145 The reference to the verdict being "open to objection upon a ground affected by the evidence" is explained by the facts of that case. There had been identification evidence, of doubtful reliability, which was not the subject of a clear warning of the danger of such evidence. The Court would have hesitated to grant leave on that ground alone, but the only other evidence was that of admissions alleged to have been made to the recanting witness, who, after trial, first swore a declaration stating that all his evidence at trial was false and then another that it had all been true.

146 The first question which seems to arise is that of what the role of the Court should be in evaluating the evidence of the recantation. As has often been pointed out, evidence of a recantation is a species of fresh evidence, although of a particular kind. In relation to fresh evidence generally, the Court of Criminal Appeal has "some responsibility of examining the probative value of the fresh evidence". The Court performs

that task in order to ascertain whether the fresh evidence is cogent, plausible and relevant: *Craig v The King* (1933) 49 CLR 429, at 439.

147 It is not necessary that the Court should positively believe the fresh evidence. Although the Court inevitably will form its own assessment of the fresh evidence and of any additional evidence adduced which might tend to support, contradict or weaken the fresh evidence, it is necessary for the Court to keep in mind the possibility that, in some instances, a jury, acting reasonably, might come to a different view from the Court of the credibility of the witness, or of the cogency of the fresh evidence: *Pileggi v The Queen* [2001] WASCA 260, at [49] per Parker J, Malcolm CJ and Wallwork J agreeing, and see *Mickelberg v The Queen* (2004) 29 WAR 13 at [432] per Steytler J.

148 In assessing the evidence of a recanting witness, the Court will scrutinise with particular care the reason given by the witness for giving untruthful evidence at trial and the reason given for the change in the evidence which has taken place. As Widgery J said in *Flower* (at 150 - 151):

"Witnesses may have second thoughts for a variety of different reasons. Some may become emotionally disturbed, others brood on the effect of their evidence, whilst others are subjected to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at that time. It is trite to say that every case depends on its own facts but in our view there is no general requirement for a new trial merely because the witness's account in this court differs from that given in the court below. So much depends in every case upon the reason, if any, given by the witness for having changed his or her testimony."

See also *R v Geesing* (*supra*) at 229, 230, 231 per King CJ, 241 per White J; *R v Gale* [1970] VR 669 per Winneke CJ, at 672 – 673; *Re K* [1984] 1 NZLR 264, at 270; *Pileggi* at [49].

149 Having assessed the evidence of the recanting witness in the way I have discussed, a question arises as to how the Court assesses the impact of the recantation upon the fairness of the trial. The correct approach will, in my view, depend upon the assessment which the Court makes of the evidence of the recanting witness. In *R v Bryer* (1994) 75 A Crim R 456, Fitzgerald P, at 458, canvassed two possibilities. His Honour said:

"Logically, if the recantation is true, the jury at trial ought not to have had the recanting witness's evidence implicating the accused; there should have been either no evidence from the recanting witness, or evidence from the recanting witness exculpatory of the accused, either directly or because inconsistent with the accused's guilt. Consideration of what the jury's verdict might have been on that basis would often lead to a conclusion that a conviction was unsafe, eg, because the applicable evidence would not sustain a conviction. However, the ordinary application of the 'fresh evidence' test would require the appellate court to consider what the jury might have done if it had had contradictory evidence from the recanting witness, demonstrating that the recanting witness was, at best, unreliable and probably a perjurer."

150 Considering the first of those alternatives, if the appellate court considers that the recantation is true, then it will be necessary to assess what the jury's verdict might (not would) have been had the jury either not had any evidence from the recanting witness (in the case of a simple retraction of evidence), or had the jury had before it the evidence which the recanting witness later gave (in the case of a substituted version of the evidence). Considering the matter in that way will often lead to a conclusion that a conviction was unsafe, depending upon an assessment of the relevance and significance of the evidence which is recanted. Consistently with *Davies* (at 184), a similar conclusion may be reached if the Court is not prepared to accept the recantation as true, but reaches instead the conclusion that the recanting witness is so untrustworthy that his or her evidence "ought not to be allowed to enter into the reason for any verdict of guilty". Where the Court is not itself able to reach a conclusion, but considers that the recantation has some cogency and plausibility, then it is necessary to consider what a jury might (not would) have done if it had had before it both the evidence at trial and evidence of the recantation.

151 Which of these approaches - that of notionally "subtracting" the recanted evidence from the trial, or of notionally putting both versions before the jury - is appropriate will depend upon the circumstances of the case, and an assessment is not always easy; compare the different approaches of Murray J at [112] and Steytler J at [433] of *Mickelberg*. Sometimes, it will be appropriate to consider both, as in *R v Poulter* (*supra*) at 380 where Bray CJ said, of the recanting evidence in that case:

"I think that any reasonable jury properly directed and not having Mrs Baker's evidence before it, or having both versions of her evidence before it, might well have acquitted the applicant, though, of course, it might equally well have convicted him."

152 In the present case, it is my view that the recanting evidence of Ramah Goodlet, rather than her trial evidence, lacks any cogency and plausibility. It is not necessary to consider what a jury, having that evidence before it, might have done.

153 Ms Goodlet's evidence was an odd mixture of a desire to be very specific (for example, about threats which had been made to her by the police) and vagueness (for example, about how she had learned that the appellant was proposing to appeal). Her explanations for her behaviour were, at times, contradictory, and it was difficult to make sense of them. On occasions when her behaviour appeared to be difficult to understand, she explained it simply by blanket assertions that she had been "hysterical", or "in shock", without being entirely clear about what had caused these extreme emotional states. She appears to have given contradictory accounts of how it was that certain matters came to be in her statement. Although her sister, Boronia, was called to reinforce her evidence that she had expressed concerns about her statement at times, Boronia's evidence was not consistent with hers.

154 Before I turn to an analysis of those aspects of Ms Goodlet's evidence, it is convenient to make some observations about demeanour. It has now been almost a year since the two women gave evidence. My observations on demeanour are drawn, as to both women, from notes made during the course of the evidence of each, and as to Boronia (who I refer to by her first name to avoid confusion with her mother) from a clear recollection of her manner of giving evidence.

155 So far as Ms Goodlet is concerned, the only comment which need be made about her demeanour is that she appeared to me to be fully capable of understanding the questions which were put to her, including questions involving such difficult concepts as the difference between saying that she "did not remember" something because she had no recollection of an event, and saying she did not remember it because she remembered the event and she remembered that what was put to her positively had not happened. The difficulties and inconsistencies in her evidence do not therefore appear to me to be explicable by any confusion or looseness of expression on her part.

156 Boronia was a very different witness. The transcript does not reflect the extremely long pauses during portions of her evidence, during which it appeared to me plain that she was attempting to invent some plausible answer to cover what she knew to be a deficiency in her evidence. It appeared to me that she was a witness who was very anxious to be seen to be supporting Ms Goodlet, and thereby supporting the appellant, but without any independent recollection of the material portions of the events which she was purporting to describe. Boronia appeared to me to be perhaps the most fearful witness I have seen, but I found wholly unconvincing her suggestion that she was, or had at any time been, fearful of the police, as opposed to being fearful of the consequences for herself if the appellant, or the appellant's friends, thought that she may have been assisting the police in any way.

157 Dealing first with Ms Goodlet's evidence, on the appeal, in examination-in-chief about how the recanted portion came to be in her statement, she was asked the leading question: "Were there any threats or intimidation made to you by police officers?" She replied that there "Certainly was". The threats and intimidation, she said:

" ... started as soon as I got in the car to be taken to Curtin House. The police told me the details of Anthony's murder, what they thought had happened. I didn't know anything about these details, so this was all a shock to me and I was absolutely hysterical. They terrorised me, telling me that my son was being taken away from me, that I was being charged ... "

158 The charge referred to was a charge of being an accessory to murder and/or of conspiracy to murder. During the course of her evidence Ms Goodlet was initially positive that these striking events had occurred on the first occasion on which the police had taken a statement from her. She later agreed, however, that she "very well may have" given an earlier statement to police. She agreed that the statement of 4 April had been made by her. That was apparently taken by Gosnells police and may have been taken, on her evidence, either at her house, or at Gosnells police station.

159 Notwithstanding Ms Goodlet's shock and terror, caused by behaviour which was apparently designed to pressure her into making a statement which would incriminate the appellant, her evidence was that she had told the police only the simple truth (leaving aside her "confusion" about the reason why the money was owed to the appellant). That "truth" was as I have described it at par [135]. The conclusion would then follow that the

police officer taking the statement had embroidered her words by adding the sentence concerning the appellant's threat to blow Tapley's head off.

160 Ms Goodlet's distressed mental state, caused by the behaviour earlier described, together with the fact that she had been at the police station for a very considerable time, caused her not to read her statement at the time at which it was made. She was given time to read it, she agreed, but she merely "pretended" to do so and then signed it, so that she could leave the police station.

161 The police gave her a copy of her statement, but she did not reread it until a later time when she saw Mr Bates, the Crown Prosecutor. She gave the copy of her statement to her sister, Boronia, and told her to burn it. She did this because the police had told her that, for her own safety, she should get rid of it. The clear implication in this evidence is that the police were suggesting to Ms Goodlet that the appellant, or the appellant's friends, would be a threat to her safety, were they to discover that she had told police anything which was useful to the investigation. An interesting aspect of Ms Goodlet's evidence, is that she did not, at any time, express surprise at, or disagreement with, the proposition that the appellant and/or his friends could be a threat to her. Rather, the clear tenor of her evidence at this point was that she - a person who knew the appellant reasonably well, not least because of her mother's former connection with him - readily accepted that the appellant could pose such a threat.

162 Ms Goodlet did not discover the erroneous portion of her statement until a week, or thereabouts, prior to the trial, when she met the Crown Prosecutor and went over her statement with him. She agreed, in cross-examination, that she found Mr Bates, the prosecutor, to be a reasonable man, pleasant and polite, and clearly a person from whom there was nothing to fear. However, nevertheless she did not correct her statement with Mr Bates because "I was in shock and I was scared". When asked what she was in shock about, she said it was "about everything that was written in my statement. I hadn't read it until that day". I have no idea what this answer could possibly mean, since almost all of the statement was, even on Ms Goodlet's evidence, precisely what she had told police, and the greater portion of it consisted of a matter-of-fact history of her relationship with Tapley.

163 Having gone through the statement with the prosecutor, she considered, on reflection, that she had been mistaken about the reason the debt was owed. She agreed that when she told Mr Bates that she wanted to change a portion of her statement, he readily agreed for that to occur.

She agreed that the police officer who took her supplementary statement of 29 April 2003 had treated her with respect, and had been non-threatening. It is noteworthy therefore that, during the course of this statement, she positively confirmed that the appellant had made precisely the threat which is quoted in direct speech in the earlier statement.

164 Ms Goodlet said that she had felt able to say that she wanted to change the portion of her statement concerning the reason for the debt, because the earlier account of that in her statement had been her own mistake, with the police incorporating into her statement words she had actually said. She therefore felt that there would not be a difficulty changing that (despite the fact that the change was plainly one which was favourable to the appellant, reflecting well rather than adversely on his character).

165 However, in relation to the portion which concerned the threat, she said that she had repeated it in court, lying under oath, because she "had to" say what was written in her statement. Her explanation was: "I didn't know what else to do. I couldn't go against the police."

166 I have noted earlier Ms Goodlet's account of the way in which she said the police had treated her at the time of taking the statement. She said on more than one occasion that she had been scared of the police, referring to threats they had made to her. However, at other points, she gave a somewhat different reason for being scared and for not wanting to offend the police. She said, during cross-examination, for example, "I was going with what the police had written because they promised me protection". She made it clear that the protection which she thought was offered was "from Mr White's friends".

167 So far as her reason for coming forward at the appeal was concerned, Ms Goodlet said that she had heard "through the grapevine", just "around", that the appellant might be appealing and she had thought that this was her chance to "stand strong" and to get the truth out. She did not say how it was that she came to see the appellant's solicitor, Mr Massey, and how she knew that he was acting for the appellant. She had seen the solicitor in February 2004 as a result of an appointment made by his secretary (affidavit of Mr Massey, sworn 30 November 2004). She was unfortunately not asked how that appointment came to be made, or by whom.

168 She told this Court that she had been in a casual sexual relationship for about one to one and a half years with a member of the Gypsy Jokers.

In her evidence-in-chief, she was asked whether it was perhaps early 2004, late 2003, that the relationship commenced, and she could not be "exact". However, when it was put to her in evidence-in-chief that, since she was giving evidence in March 2005, a year ago would be March 2004, she agreed, "Yeah, roughly about that". She said in her evidence-in-chief no pressure had been placed upon her to come forward.

169 In cross-examination, when she was asked to recall whether it was as long as a year and a half ago that she had commenced that relationship with the Gypsy Joker, she said "more likely" a year and that they had been friends "for a little while" before that relationship commenced. It seemed to me that she had realised that the earlier possibility of up to a year and a half would mean that the relationship had commenced before she saw Mr Massey. She then said that a friendship had commenced "around March" the previous year. Although she was not sure how she had become aware that the appellant was appealing, having just heard "through the grapevine. I know a lot of people", she was able to be clear that it was not the Gypsy Joker's grapevine, asserting that she did not know any Gypsy Jokers, apart from the one person discussed. It is somewhat surprising that she was not able to recall anything more about what had led her to make what she obviously considered was a decision of some significance, both for the appellant and for herself.

170 As I have noted, when Ms Goodlet decided to say something about her alleged earlier perjury, she first spoke to the appellant's solicitor. She was asked about the contents of an affidavit which he swore on 30 November 2004, in which he deposes that he asked her why she had said in court that which was untrue, and she had told him she had worries about the police. He also deposes that she went on to say: "I told them [the police] what I thought they wanted me to tell them." The significance of that conversation, if accurately recounted, would be, of course, that it suggests that the words in the statement were Ms Goodlet's words, said because of some perceived pressure, rather than words which had been written down for her and which she later felt herself unable to change. In cross-examination, she was taken through the conversation set out in Mr Massey's affidavit, and agreed that certain portions had taken place, while not being sure whether others had. The passage that I have referred to was then put to her, with this response:

"Did you say to Mr Massey, 'I told them what I thought they wanted me to tell them'?---Is the conversation between me and Mr Massey relevant?"

She was directed to answer the question and said that she did not remember saying that. I reminded her of an exchange which I had had with her shortly beforehand, in which I pointed out that it was important to be clear about whether she did not remember something because she did not remember the occasion, or whether she did not remember something because she remembered the occasion, but the thing had not occurred. In the light of that, I asked her what she said about the question that had just been asked and she said: "It's possible", although she did not believe she had said that to Mr Massey.

171 Finally, Ms Goodlet said that she had told her sister what had happened at two points. She had told Boronia what had happened at the police station shortly after she left the police station, and after she had lied in court, she told her sister "straight away" that she had said in court that which was not true. Her sister's account is not consistent with that.

172 I should add that a number of police officers were brought into court during the course of Ms Goodlet's evidence, and she was not able to identify any of them as officers who had behaved in the improper way which she had described. I would not place any weight on this circumstance, since if she truly had been harassed and threatened in the way she described, and if she had had dealings with a number of police officers during the course of the investigation, it would not be surprising if she was unable to recall the faces of those responsible.

173 My firm view of Ms Goodlet's evidence is that she is, as a recanting witness, wholly unreliable. There are inconsistencies in her account of how her statement came to be taken. Her account of how it was that she came to maintain in court that which she believed to be untrue contains inconsistencies, and is unconvincing. Her account of how she came to come forward on this occasion is unconvincing. That does not mean, however, that the evidence that she gave at trial was unreliable. She confirmed all of that evidence, save for the one sentence, in her evidence before us. She plainly regrets giving that evidence, and may well regret having been as forthcoming as she was with the police. The pressures which may be acting upon her are unfortunately all too obvious; the fact that she has now succumbed to them is no reason to doubt her reliability at trial.

174 Boronia said that Ramah Goodlet had spoken to her shortly after seeing the DPP and had told her that there were "bits" in the statement which were not correct. There was some discussion between them, the content of which was never made entirely clear, about Ms Goodlet speaking to the DPP or the police about changing a portion of her

statement. Boronia did not mention anything about Ms Goodlet speaking to her immediately after she had given evidence in court and saying that she had lied in court. Her story was consistent with that of Ms Goodlet to the extent that she said that Ms Goodlet had told her that there were two things wrong with the statement, one of which she had said to the police and the other which she had not, and that she proposed perhaps to change one, but not the other. However, her account was that Ms Goodlet had spoken to her not on the two occasions which Ms Goodlet recounted, but on a different occasion.

175 Boronia was cross-examined about whether she and Ms Goodlet had discussed Ms Goodlet coming forward to speak to the appellant's solicitor. She said that she was aware that Ms Goodlet was going to go and talk to him, or perhaps that Ms Goodlet had spoken to him, it was not entirely clear which. She was asked whether they had discussed what Ms Goodlet would say to Mr Massey. Her answers about that were extremely confusing, and it seemed to me that she was endeavouring to be consistent with what she thought that Ms Goodlet may have said, rather than acting from any independent recollection. Portions of the exchange are as follows:

"You knew that what she was saying to Mr Massey was that this part about the telephone conversation in her statement was wrong. Correct?---I wasn't sure. Well, I wasn't sure that that was what she had said to him. Yeah, I mean like I didn't know what she was going to talk to him about, like I didn't really - yeah.

What did you think she was going to talk to him about?---Well, I knew she was going to talk to him, you know, just about like everything that was going on but, you know, I didn't know that it was specifically about that bit.

What do you mean "everything that was going on"? What did she say to you that she was going to go and talk to him about?

WHEELER JA: Or had talked to him about, whichever it is.

FIANNACA, MR: Had or - - -?---Yeah, well, about like her statement and like what she was - yeah, yeah.

Just think carefully about this, Ms Miller. What did your sister say to you she had talked to Mr Massey about or was going to

talk to him about?---She said that she talked to him about her statement, and like what she was - yeah, yeah.

Did you understand that she was talking - sorry, had talked- - -

WHEELER JA: Sorry, just before you go on, Mr Fiannaca, I just really want an answer to that one if at all possible.

FIANNACA, MR: Certainly.

WHEELER JA: You said that you knew she was talking or had talked to Mr White's lawyer about her statement. Did she tell you what it was about her statement that they were talking about?---No."

176 So far as one can tell, the end result was then that Boronia did not really know what it was about her statement that Ms Goodlet was going to discuss with Mr Massey. Boronia gave evidence of her own conversations with Mr Massey and the flavour of that evidence can be gleaned from this exchange:

"FIANNACA, MR: When do you say that you spoke with Mr Massey?---Last week.

Last week, was it? Can you tell me what he said to you?---I've just got to remember the phone call. He rang me up and said that he'd spoken to Ramah and - I've just got to remember - I can't remember exactly, like, what he said but he told me that he'd spoken to Ramah, like, earlier on and that if - well, yeah, if - like, if - I'm sorry.

This was only one week ago?---Yeah, I know, I know.

Can you tell us please what Mr Massey said to you?---He asked if, like, I could - if - verify what Ramah was saying in her statement and I - and, like, how she come and told me and I said I could and then also - and then I told him, like, about what happened to me.

You said that you said to Mr Massey that you could - - - ?---Yes.

- - - verify what Ramah had said in her statement?---Yes.

How did you know that you could verify what she had said in her statement?---Well, the bits - okay - just verify the facts that, you know, what she said about it being wrong; if I could verify that it was - that - sorry. Could you ask that again?

How did you know what Ramah had told Mr Massey?---I didn't know what she'd told Mr Massey.

Then how could you know that you could verify what she had said?---Okay, well, she must - yeah, she - all right, yeah, I know what you're saying now. She did talk to me about it. Now I understand, sorry. She did talk to me about it and was worried and, like, I told - I told her I would back her up because she told me, like, the bits being wrong and stuff and I told her I'd back it up because, you know, like, I was - yeah."

177 In the end, then, it seems Boronia's evidence was that she would "back up" her sister, although she was not at all clear what it was that she was backing-up. There is, oddly, some suggestion in the evidence quoted above that she thought that Mr Massey had a "statement" from Ms Goodlet which Boronia could verify, or that she understood him to have more detail of Ms Goodlet's evidence than is contained in Mr Massey's affidavit. Of course, if a third party was telling both Ms Goodlet and Boronia what they should say, it would be understandable that Boronia would know, in broad terms, what Ms Goodlet was likely to say, even where there was in fact no statement.

178 Boronia was also cross-examined about her relationship with the appellant and his associates. She said that she was still "good friends" with the appellant. Prior to his arrest, she had seen him on almost a daily basis for a number of years. She agreed that she had, at one time, given the police a statement saying that her sister was angry with her for being friends with the appellant, but said that that portion of the statement was not true. She agreed that she did go and see Les Hoddy about her statement that she had given to the police. Mr Hoddy lived "across the road" from her. She agreed that she had showed him the statement, told him that she did not know anything, and that she was crying at the time. It was put to her that she was crying because she was afraid that Mr Hoddy and the appellant might think that she was assisting the police. She denied that, and said that she was crying because she had, on the day before that event, been "interrogated" by the police for some nine hours. She did not appear to be indignant at the suggestion that her "friend", the

appellant, and Mr Hoddy, might have intimidated her. Rather, she appeared to be frightened and to be very anxious to exculpate them.

179 The most charitable view to take of Boronia's evidence would be that the alcohol abuse of which she spoke in her evidence had seriously affected her memory, and her ability to respond coherently to questions. In that case, her evidence would simply be worthless. However, my clear impression was that of a witness who was motivated by fear to "verify" a story which she knew to be false. That is consistent with the view which I would take of Ms Goodlet's recantation.

180 For the reasons outlined above, it is my view that, having examined the probative value of the recanting evidence of Ms Goodlet, this Court should not conclude that any reasonable jury could regard it as credible. Because of the peripheral relevance of the evidence in any event, to which I turn in a moment, it is also my view that, even if a jury might have a doubt as to the truth of that portion of the evidence at trial which was recanted, that would not lead to a conclusion that the verdict was unsafe.

181 In my view the only conclusion reasonably open is that Ms Goodlet was at trial a witness of truth to the extent that her evidence was adverse to the appellant, and that she was also a witness who, for reasons of her own, was anxious to understate, or water down, anything which she might say which was adverse to him. That is evident not only in her recantation in relation to the words allegedly used by the appellant in the telephone conversation in question here, but also in the changes in her account of the nature of the debt, from the first statement in which she seemed fairly clear that it was an amphetamine-related debt, to the second statement and her evidence at trial in which she thought that it was related to the appellant's desire to assist her to move to Walpole, to her evidence given on the appeal, in which she retracted her view that the amphetamines "could have" come from the appellant and asserted that she was positive that he could not have been the source of them. Such a view of Ms Goodlet would add greater force to those aspects of her evidence which were adverse to the appellant. They were that he had, at one time, been "very angry" with Tapley, that he had spoken disparagingly of Tapley to her, and that he had responded to an inquiry about what he wanted said about Tapley's disappearance in a way which suggested that he understood why he was thought to be vitally interested in that question and which suggested that he was prepared to lie about his association with Tapley.

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McLURE JA

182 Finally, even if one were to accept Ms Goodlet's recantation, the effect of it would be peripheral. As Ms Goodlet's evidence at trial made clear, and as the jury would well have understood, the debt being discussed between the appellant and herself was not a debt which was owing at the time of Tapley's death. It had been owing some time previously, and it had been repaid. This was not a case in which the appellant had made a threat to shoot Tapley in connection with a debt which existed at the time of Tapley's death. Rather, the prior existence of the debt and the fact that the appellant had had to chase up repayment was simply a factor which might suggest a less than harmonious relationship between Tapley and the appellant on a prior occasion. Even on Ms Goodlet's present evidence, there is no doubt that the appellant had been "very angry" with Tapley. His anger was such that she was prepared to agree with the police that he "probably" was angry enough to say that he wanted to hurt Tapley. The threat to "blow his head off" was a more colourful and forceful expression, but the general thrust of the conversation remains unchanged.

Conclusion

183 In my view, none of the grounds has been made out. I would dismiss the appeal.

184 **McLURE JA:** I have had the advantage of reading in draft form the reasons to be published by Wheeler JA. I agree that the appeal should be dismissed generally for the reasons she gives. However, I have some additional observations on the grounds relating to non disclosure (15, 16 and 18(b)) and the recantation evidence (18(a)).

185 I start with non disclosure. On my understanding of the law, the approach to and issues for determination on the facts in this case are: (1) was the prosecution obliged to disclose the relevant material to the defence; (2) if yes, does the failure to do so give rise to a miscarriage of justice; (3) if yes, the Court must allow the appeal unless it concludes affirmatively that no substantial miscarriage of justice has occurred: *Criminal Appeals Act 2004* (WA) s 30; *Mallard v The Queen* (2005) 80 ALJR 160 at [16] - [17] per Gummow, Hayne, Callinan and Heydon JJ; at [83] per Kirby J; *Grey v The Queen* (2001) 75 ALJR 1708; *Lawless v The Queen* (1979) 142 CLR 659 at 678 per Mason J; *R v Easterday* (2003) 143 A Crim R 154 at [194] - [203] per Steytler J.

186 In *Mallard*, the State conceded that it should have disclosed a number of matters pursuant to cl 57 to cl 60 of the Statement of Prosecution Policy and Guidelines made and gazetted pursuant to the

Director of Public Prosecutions Act 1991 (WA). Clause 59 of the Policy provides:

"When information which may be exculpatory comes to the attention of a prosecutor and the prosecutor does not intend adducing that evidence, the prosecutor will disclose to the defence –

- (a) the nature of the information;
- (b) the identity of the person who possesses it; and
- (c) when known, the whereabouts of the person."

187 The appellant in this case relied on the prosecutor's common law duty of disclosure as formulated in *R v Brown (Winston)* [1994] 1 WLR 1599 and approved by the Full Court in *Easterday* (at [196]). The Court in *Brown* at 1606 held that the prosecution is obliged to disclose to the defence:

"[T]hat which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly 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)."

188 The prosecution's duty of disclosure can extend to information relating solely to credit: *Grey v The Queen*.

189 The appeal in this case was conducted on the basis that the prosecution knew, or ought to have known, of the relevant material so as to invoke the non disclosure rule rather than the principles applicable to fresh evidence.

190 The information the subject of the non disclosure grounds is contained in transcripts of conversations the subject of covert surveillance of Reid and the appellant. The appellant contended that the prosecution was required to disclose to the defence:

- (1) the content of a series of conversations on or about 8 February 2002 between Reid and his girlfriend Ms Moutinho which, according to the appellant, disclosed hostility by Reid towards the appellant;

- (2) the surveillance record of numerous conversations between the appellant and his girlfriend Julie in a three week period in March 2002, in which there was no mention of Tapley;
- (3) a record of a telephone conversation between Ms Moutinho and an unknown person in which Ms Moutinho suggests that the police said they had DNA results.

191 As the High Court observed in *Davies v The King* (1937) 57 CLR 170 at 180, and affirmed in *M v The Queen* (1994) 181 CLR 487 at 493, the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:

"[N]ot only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled."

192 The Court in *Mallard* evaluated the significance of the prosecution's breach of duty of disclosure by reference to the effect or consequence of the new material on the verdict. Kirby J did so (at [57]) for the purpose of determining whether there was a miscarriage of justice. As I read the majority (at [42]), they did so for the purpose of determining whether the proviso applied.

193 I propose to approach the matter on the basis that a breach by the prosecution of its common law duty gives rise to a miscarriage of justice that requires the Court to allow the appeal unless it considers that no substantial miscarriage of justice has occurred. In the circumstances of this case, that directs attention to the effect or consequence of the omission. When considering the proviso, the task is not to be undertaken by attempting to predict what a jury, whether the jury at trial or some hypothetical future jury, would or might do: *Weiss v The Queen* (2005) 80 ALJR 444 at [35]. *Weiss* was a case in which inadmissible evidence was adduced at trial. However, the principles stated in that case are, in my assessment, equally applicable where there has been a wrongful rejection of admissible evidence or a failure by the prosecution to disclose relevant material to the defence. On the facts of this case, the correct

question is whether it is possible to conclude that the relevant material would, or at least should, have no effect on the verdict that was returned by the trial jury (*Weiss* at [43]). Before *Weiss*, the question was whether, had the material been made available to the appellant so that he could cross-examine on it and introduce it into evidence, he would inevitably have been convicted. That is, whether the appellant had thereby lost a fair chance of acquittal: *Grey* at [27].

194 Whether the prosecution has breached its common law duty is to be assessed as at the time it is required to be performed (that is, prospectively not retrospectively). Whether or not the relevant material would or should have no effect on the verdict that was returned by the trial jury is undertaken on the whole of the record of the trial.

195 I am satisfied that the prosecution ought to have disclosed to the defence the content of Reid's discussion with his girlfriend concerning his relationship with the appellant. The conversation occurred some six or seven weeks before Reid informed the police of what he said the appellant had done to Tapley. It disclosed problems between Reid and the appellant, and Reid's evidence was critical to a successful prosecution. However, for the reasons given by Wheeler JA, the material was not inconsistent with anything that emerged from any of the witnesses at trial who were asked about the relationship between Reid and the appellant. It is possible to conclude, as I do, that the error would, or at least should, have no effect on the verdict that was returned by the trial jury.

196 As to the surveillance material of the appellant's conversations with Ms Moutinho, I agree, for the reasons given by Wheeler JA, that the material is neutral. I am not persuaded that the prosecution was under a duty to disclose it. Even if it was under a duty to disclose it, the evidence is of such peripheral significance that I consider no substantial miscarriage of justice has occurred.

197 I also agree with Wheeler JA's analysis of Ms Moutinho's telephone conversation with an unknown person in which she referred to DNA results. I am satisfied that the information was not directly or indirectly relevant to a fact in issue or to the credit of any witness, in which event, the prosecution was under no duty of disclosure.

198 I turn now to the recanting witness. It is said that evidence tendered on an appeal from a witness at the trial who wishes to change his or her story is treated as a species of fresh evidence: *R v Geesing* (1985) 38 SASR 226 at 230. The rationale for a court of appeal setting aside a

conviction on the ground of fresh evidence is said to be that the absence of the evidence from the trial, was in effect, a miscarriage of justice: *Mickelberg v The Queen* (1989) 167 CLR 259 at 301; *Easterday* at [205].

199 The Court will conclude that the unavailability of the fresh evidence at the time of the trial will have involved a miscarriage of justice if the Court considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence had been before it at the trial: *Gallagher v The Queen* (1986) 160 CLR 392 at 399; *Mickelberg v The Queen* (1989) at 273, 275, and 302.

200 In determining whether there is such a significant possibility, the Court of Appeal must be satisfied that the fresh evidence has cogency, plausibility and relevancy: *Lawless v The Queen* (1979) 142 CLR 659. The fresh evidence has to be credible in the sense that a reasonable jury could accept it as true but it is not necessary that the Court think it likely that a reasonable jury would believe it: *Mickelberg v The Queen* (1989) at 302 per Toohey and Gaudron JJ (citing *Lawless* at 676 - 677 per Mason J and *Gallagher* at 410 per Brennan J).

201 The Full Court of the Supreme Court in *Mickelberg v The Queen*, unreported, CCA SCt of WA; Library No 990056; 12 February 1999 said (at 22):

"Although the ultimate question concerns the court's opinion as to the effect of the fresh ... 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, 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."

202 Thus, the role of the Court of Appeal on a fresh evidence application is to determine whether the evidence is capable of being accepted as true by a reasonable jury.

203 That is unlike the approach to fresh evidence taken by the English Court of Criminal Appeal in *R v Flower* [1966] 1 QB 146 where the outcome depends on whether the appellate court is positively satisfied that the fresh evidence is true or false or, if not positively satisfied of its truth, accepts that it might be believed by a jury. If the Court positively

disbelieves the fresh evidence, the application will fail. If the Court is not positively satisfied of its truth and accepts that it might be believed by a jury, the Court will order a retrial if the weight of the evidence justified that course.

204 The fresh evidence in *Flower* was that of a recanting witness. The Court had before it an application for leave to adduce on appeal fresh evidence from a witness who had given evidence for the prosecution. It made a preliminary assessment of the cogency of the evidence before granting leave to adduce the evidence in the appeal. I agree with Wheeler J that that is a desirable approach, although it is unnecessary to comment on whether leave would have been granted.

205 The approach of the Court in *Flower* has been followed by intermediate courts in Australia when dealing with recanting witnesses: *R v Poulter* (1978) 19 SASR 370; *R v Geesing* (1985) 38 SASR 226; *R v Bryer* (1994) 75 A Crim R 456.

206 In *Poulter* the majority (Walters and King JJ) disbelieved the recanting witness's new evidence and her explanations for giving the original evidence and the new evidence. They also saw no reason to doubt the truth of the original evidence and dismissed the application. All members of the Court in *Bryer* concluded that the application should be dismissed because they disbelieved the recanting witness on relevant matters.

207 In *Geesing*, the Court was unable to reach a positive view that the new evidence was false and had serious misgivings as to the truth of the original evidence. In the circumstances of that case, the conviction was quashed without ordering a retrial.

208 However, the Full Court in *Mickelberg v The Queen* (2004) 29 WAR 13 applied the fresh evidence rules in dealing with the evidence of a recanting witness. Steytler J, with whom Malcolm CJ agreed, said (at [432]):

"Lewandowski was, as I have said, a recanting witness. That fact requires the Court to look very closely at his evidence, evaluating not only its relevance, but also its credibility and cogency, taking into account all relevant factors, including the evidence given by Lewandowski at the trial, other evidence given at the trial and since, the reasons offered by Lewandowski for giving false evidence at the trial and the reason offered by

him for his change of testimony. In reaching the conclusion, expressed above, that the essential gravamen of Lewandowski's evidence was capable of acceptance by a jury (and it is important to remember that it is not necessary that the Court should think it likely that a reasonable jury would believe it, only that a reasonable jury could accept it as true (*Mickelberg*, at 302, per Toohey and Gaudron JJ) or as sufficiently cogent and plausible to lead a jury to have a reasonable doubt (*Gallagher*, at 397, per Gibbs CJ, citing Mason J in *Lawless* at 676)), I have looked closely at Lewandowski's evidence, taking into account the matters to which I have referred and bearing in mind the strictures expressed in the applicable cases.

209 It has not been suggested that the approach taken in *Mickelberg* (2004) was in error and I propose to follow it. The evidence of Ramah Goodlet and Boronia Miller was objectively unconvincing and implausible for the reasons detailed by Wheeler JA. I am satisfied that the evidence of Ms Goodlet is not capable of being accepted as true by a reasonable jury. For the sake of completeness, I record that the objective features of her evidence and the circumstances in which she came to give it caused me to positively disbelieve Ms Goodlet's new version of events and her explanations for giving the original evidence and then recanting. I have no reason to doubt the truth of the original evidence.

210 In any event, even if the new version of events was cogent and plausible, the variation from the original evidence was not of such a nature as to give rise to a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the new evidence was before it.

211 **PULLIN JA:** To the extent that leave is required, I would grant leave to appeal. I have read a draft of Wheeler JA's reasons. I agree with them and agree that the appeal should be dismissed. I add the following observations concerning grounds 15, 16 and 18(a).

212 In relation to grounds 15 and 16, I refer to surveillance tapes concerning Reid. Reid was under surveillance between 30 October 2001 and 14 February 2002. It was 24-hour surveillance. Counsel for the appellant advised that there were hundreds of tapes. To listen to all of these tapes would therefore take many months. It was not suggested that this Court should be left to undertake that task.

213 The first written submissions filed by the appellant contain par 44 which read:

"... the extensive nature of this material, and in particular the hundreds of tapes which have yet to be properly examined, gives rise to the realistic possibility of raising new issues concerning the credibility of Reid which were not disclosed by the evidence used by the prosecution at trial."

214 Counsel for the appellant was then asked at the hearing what the appellant's submission was. The following exchange took place:

"SHIRREFS, MR: It is 24-hour surveillance over three and a half months.

McLURE JA: You say there are hundreds of tapes.

SHIRREFS, MR: Yes.

McLURE JA: I assume you are not pursuing this submission - they have yet to be properly examined and might give rise to a realistic possibility. I mean, if you haven't worked it out now - - -

SHIRREFS, MR: Yes, I accept that. Certainly at the time this was prepared, a long time ago, the opportunity had been limited but the starting point for an examination of them is essentially looking at the log to see what can be discerned from the log, but in terms of the ability to sit down and go through them that's limited insofar as the applicant is concerned. He can't do that where he is at Casuarina.

WHEELER JA: We don't know how many pages of logs we're looking at or anything like that, do we, or do we? Does that appear from anywhere?

SHIRREFS, MR: I haven't looked at them. My instructor has, your Honour.

WHEELER JA: All right. It's not in the affidavit and we don't know.

McLURE JA: But, anyway, you only rely on the specific aspects to which you have - - -

SHIRREFS, MR: What we have been able to pick up from the logs.

McLURE JA: That is all you rely on."

215 Counsel then concentrated on the recording of a conversation between Reid and his girlfriend. Counsel for the appellant asked the members of the Court to listen to the tape rather than to refer only to the transcript. I have done so.

216 Apart from a section where Ms Moutinho was raising her voice in semi-hysterical fashion and Reid was responding calmly, it is difficult to hear what is being said. According to Ms Moutinho though, the accused and Reid had some disagreement which Ms Moutinho thought required Reid to apologise to the accused. Her main concern seems to have been that this disagreement meant that she could not see "Julie" who was the girlfriend of the accused. Reid could not understand why this was so. Counsel for the appellant said that this tape showed the existence of animosity between Reid and the accused and that animosity between Reid and the accused provided a motive for Reid to identify the appellant as the killer.

217 I observe, as Wheeler JA has observed, that this tape is not the revelation of a new line of inquiry. There was evidence given at trial of occasional hostility between Reid and the accused. Wheeler JA has identified the evidence given concerning an instance of a heated conversation between Reid and the accused. As Wheeler JA however explains, the tape to which we were asked to listen does not support the suggestion that there was such hostility on Reid's part towards the appellant that it would explain why Reid identified the accused as the killer.

218 Some submissions were also made by counsel for the appellant to a transcript of another tape-recording of Ms Moutinho speaking about some DNA evidence concerning the murder of Hancock and Lewis which was said to lead Reid to confess to the killing of Hancock and Lewis. Counsel for the accused suggested that Reid had been tricked into making the confession. Counsel for the appellant had difficulty explaining the relevance of this. His contention was that Reid would have been angry at the police for tricking him into confessing and this led him into making accusations against the appellant concerning the murder of Tapley. I do not accept that contention.

219 In my opinion, none of the material referred to would have opened up any new line of inquiry. The fact that the tapes were not available did not mean that the appellant lost a chance of acquittal fairly open to him.

220 I now turn to ground 18(a). The evidence of Ms Ramah Goodlet and her sister Boronia led before this Court was not evidence led at trial. Section 40 of the *Criminal Appeals Act* authorises this Court to admit further evidence in the appeal. See the discussion in *De La Espriella-Velasco v The Queen* [2006] WASCA 31 at [146] - [154]. The admission of further evidence can only go to a ground of appeal alleging a miscarriage of justice. See *De La Espriella-Velasco* (*supra*) [155] - [156].

221 If the further evidence is "new" evidence, then it is not enough merely to show an increased chance of acquittal. However, if the evidence is "fresh" evidence, then the Court only has to reach a conclusion that there would have been an increased chance of acquittal in order to decide that there was a miscarriage of justice. See *De La Espriella-Velasco* [157] - [158]. The evidence of Ms Goodlet and her sister is fresh evidence.

222 The Court of Appeal still has a role to perform when further evidence is given before it. In the first place the evidence will have to pass the usual test of relevance. The evidence must also be credible, cogent and plausible. It will be credible if a reasonable jury "could accept it as true": *Mickelberg v The Queen* (1989) 167 CLR 259 at 302 per Toohey and Gaudron JJ (Mason CJ agreeing). See also *Mickelberg v The Queen* (2004) 29 WAR 13 at [432] per Steytler J. Evidence will be plausible if it has the appearance of truth.

223 The mere fact that the Court of Appeal is doubtful about the truth of the evidence because of concerns about the credibility of a witness, will not be enough to deny the evidence the attribution of fresh evidence leading to a conclusion that there has been a miscarriage of justice. The decision in *Mickelberg v The Queen* (2004) 29 WAR 13 is an example. Members of the Court expressed concern about the quality of Lewandowski's recanting evidence, but that did not lead the Court to conclude that the evidence was not at least plausible and capable of acceptance by a jury.

224 The evidence of Ramah Goodlet confirms that she gave evidence at trial that the accused had said to her, in referring to Tapley "If that cunt doesn't pay me the \$100 I'm going to blow his head off". She also

confirmed that she gave the police a statement to that effect. Evidence that the appellant said that if he was not paid money by Tapley he would "blow his head off" was relevant and evidence by Ms Goodlet that this evidence was false is also relevant.

225 The further evidence which Ms Goodlet placed before the Court was that the accused in fact said "Tell that cunt to come and pay me my money".

226 As Wheeler JA has explained, in assessing the evidence of a recanting witness, the Court must scrutinise with particular care the reason given by the witness for giving untruthful evidence at trial and the reason given for the change in the evidence which has taken place. Like Wheeler JA, my conclusion is that the evidence of Ms Goodlet and her sister was unreliable. There is no explanation for why she gave what she now says was false testimony at the trial. She said that the police told her to get rid of the statement she had given them because "people will be running through my house to kill me and to get my statement, so I was scared". This reveals that she was scared about the consequences to be suffered at the hands of persons other than the police of giving her statement. She was "shocked" and "hysterical" when told what the police told her the details of Tapley's murder. She said she was "terrorised" when "they" said her son would be taken away from her and that a policeman "mentioned" she would be charged "with accessory in relation to the murder or conspiracy". But if these threats were made and induced her to tell the police that the appellant threatened to blow Tapley's head off, there is no suggestion that they remained as threats by the time she came to give evidence when she gave what she now says is perjured evidence. She had nothing to fear from the prosecution. She had plenty of opportunity to correct the statement when she was away from the police and when she saw prosecuting counsel. I find that she was scared about the fact she had given the statement not that she was scared into giving a false statement. Boronia's evidence was almost incomprehensible at times but it reveals that Ms Goodlet regretted giving her statement to the police. The reasons given by Wheeler JA concerning their evidence summarise in general terms my concerns about their evidence. I am of the view that the evidence is not such that the jury could accept that Ms Goodlet had been so frightened by the police as to give perjured evidence.

227 However, having said that, I will proceed further on the assumption that the evidence of those two witnesses is capable of acceptance by a

reasonable jury and that the evidence now that her evidence at trial was false was capable of acceptance by a jury.

228 If a reasonable jury accepted the evidence as truthful, it is still necessary to consider the fresh evidence in the context of the other prosecution evidence: *Mickelberg v The Queen* (2004) 29 WAR 13 at [429].

229 While a statement by an accused that may be construed as indicating an intention to kill a victim may be of critical importance in some cases, what has to be borne in mind is that this was not a case where the real issue was about whether or not the accused had an intention to kill. The issue in this case was whether the accused killed Tapley.

230 The prosecution evidence that the appellant killed Tapley consisted of an eye witness account of the killing (Reid's evidence), DNA evidence consistent with Reid's evidence, evidence of human bone fragments on a property visited by the accused, evidence about anger displayed by the accused towards the victim (even on Ms Goodlet's new version of what the accused said about Tapley), other evidence of antipathy between the victim and the accused and evidence that the victim disappeared at a time which is consistent with the eye witness account of his killing. The evidence of Reid clearly indicated that the appellant intended to kill Tapley. The evidence of his intention sometime earlier is not significant in the light of the strong prosecution case.

231 In my opinion, the fresh evidence does not lead to the conclusion that a reasonable jury might have entertained a reasonable doubt about the accused's guilt. The other evidence was overwhelmingly strong and it established the appellant's guilt. In my opinion it would not have been significantly diminished by the lack of evidence that the appellant had said he would blow Tapley's head off if money was not paid to the appellant, or alternatively by contradictory evidence of Ms Goodlet about what the appellant said. See *Mickelberg v The Queen* (2004) 29 WAR 13 at [433]. So even if Ms Goodlet's recanting evidence is accepted, there was no substantial miscarriage of justice in this case.