Murderpedia

Juan Ignacio Blanco

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Graham Stuart STAFFORD

Classification: **Murderer?**
Characteristics: **Torture - Mutilation**
Number of victims: **1 ?**
Date of murder: **September 23, 1991**
Date of birth: **1963**
Victim profile: **Leanne Sarah Holland, 12** (the younger sister of Stafford's former partner)
Method of murder: **Hitting with a hammer**
Location: **Redbank Plains, Ipswich, Queensland, Australia**
Status: **Sentenced to 15 years to life in prison on March 25, 1992. Released in June 2006. Conviction overturned on December 24, 2009**

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photo gallery

Supreme Court of Queensland

R v Stafford (2009) QCA 407

Graham Stuart Stafford was a sheet metal worker from Goodna, near Ipswich, Queensland who was convicted in 1992 of the murder of twelve-year-old Leanne Sarah Holland.

Leanne Holland, the younger sister of Stafford's former partner, Melissa Holland, was murdered in September 1991. Her viciously mutilated body was found three days after she was reported

missing in nearby Redbank Plains. It is possible she was also sexually interfered with and tortured with a cigarette lighter.

Stafford appealed to the Queensland Court of Appeal, but this appeal was rejected on August 25, 1992. In 1997, the Queensland Court of Appeal re-examined the case after Stafford lodged an application for pardon with the State Governor on the basis of evidence gathered by private detective, Graeme Crowley.

The Court of Appeal dismissed the appeal again by a two-to-one majority on the grounds that there was still enough evidence to convict. Two applications for special leave to the High Court of Australia subsequently failed.

Stafford was released in June 2006 after serving over 14 years in prison. Stafford, who was born in England and does not have Australian citizenship despite having migrated to Australia in 1969, faced deportation in November 2006.

Some people, including Professor Paul Wilson of Bond University believe that Stafford is a victim of a miscarriage of justice. The Queensland Attorney-General, Kerry Shine, has agreed to closely consider any request on Stafford's behalf concerning a petition to clear him of the murder conviction.

In April 2008, the Queensland Attorney-General referred the case to the Court of Appeal for a very rare second appeal for pardon.

On December 24, 2009 the Court of Appeal overturned Graham Stafford's conviction and ordered a retrial by a 2-1 majority. The dissenting judge wanted an immediate acquittal. On March 26, 2010 the Queensland Director of Public Prosecutions, Tony Moynihan SC announced there would be no new trial of Graham Stafford for the murder of Leanne Holland.

Evidence leading to conviction

The judgment in the 1992 appeal set out the following evidence relied on by the crown which led to the conviction.

- During the day on which the Crown claims Leanne was murdered, Leanne and Stafford were alone in the home they both lived in with Leanne's father and sister.
- Blood of a rare type was found on several items in the boot of Stafford's car. The blood type was shown to be of the same type as Leanne's.
- A strand of hair was also found in the car boot which was of similar length, colour and texture as Leanne's.
- A maggot of the same type and age to those found on Leanne's body was also found in the boot.
- Blood consistent with Leanne's was found in several places around the house.
- Car tracks of the same type as Stafford's car were found on the track leading to Leanne's body.
- A hammer usually kept at Stafford's bedside was missing. The hammer was consistent with an instrument which could have caused Leanne's injuries.
- Stafford lied during police interviews.
- A fold-up chair usually kept in the boot of Stafford's car was found inside the house.

New evidence presented at appeal

The following evidence was available and called to the court's attention in the 1997 appeal.

- Evidence demonstrating that Graham Stafford could not have committed the murder at the time when the Crown contended he had had the opportunity to do so was available to police at the time. This included transcripts of interviews with four separate witnesses and a shopping docket and car wash receipt showing incompatible times.
- Experts disputed that the blood evidence was consistent with the Crown's case due to the lack of a substantial amount of blood and the lack of a foul smell from the boot.
- The hair found on a sponge in Satfford's car boot was not found by the officer taking evidence. It was found during a laboratory examination after the sponge had been on the floor.
- The time of death based on the maggot's development was changed to Tuesday morning from the original Wednesday evening estimate due to an incorrect ambient temperature reading. Stafford was at work on the Tuesday.
- The trial judge referred to "large quantities of blood" around the house. This is inconsistent with the very small amount of blood found in the bathroom, which was consistent with ordinary household use.
- Several relevant pieces of information relating to the tyre tracks and the missing hammer were either not presented or were misrepresented during the trial. The type of tyre tracks found at the murder scene was also quite common.

Further developments

A Brisbane Sunday Mail examination of the police investigation revealed that an Ipswich computer store worker provided information to the police about a man who had entered the store on the same day as Leanne's body was dumped in nearby bushland. The worker claimed that the man had been behaving in a peculiar manner and had blood stains on his hands and trousers when he entered the store. Furthermore, reports of Leanne having been seen alive on the day after the police allege she was murdered were ignored. A report of a vehicle other than Stafford's being sighted near the body was also ignored.

Forensic scientist, Angela van Daal, gave evidence at trial that helped convict Stafford of the murder. She has since stated that the blood identified as Leanne's could have come from another family member. Although the frequency of the blood type matching anyone in the general population was only about one percent, the frequency among relatives is as high as 25 percent. Around the time of the murder, Leanne's brother Craig had slashed his hand in a pub fight and had bled freely in the family home.

It has also been revealed that another twelve-year-old girl was murdered less than one kilometre away from where Leanne Holland lived within thirteen days of Leanne's murder. The man who was charged with the second murder had been known to Leanne. Furthermore, daughters of a police informant in the Leanne Holland case have come forward claiming their father sexually abused them at the murder site, burnt them with cigarette lighters and showed them crime scene photographs of Leanne's body.

Wikipedia.org

Leanne Holland murder clues ignored

CourierMail.com.au

August 18, 2007

POLICE working on the Leanne Holland murder case in 1991 ignored a vital lead: a blood-stained man acting strangely not far from where her body was dumped.

The person who saw the man was never interviewed, and no attempt was made to find him.

A note on the crime investigation log two days later said the information was "no longer relevant", as Graham Stafford had been arrested for the schoolgirl's murder.

Stafford was convicted and sentenced to life in prison for the brutal sex slaying of his then-girlfriend's 12-year-old sister at Goodna in Ipswich.

Police zeroed in on Stafford almost from Day One of the investigation because they believed he was the last person to see her alive. But other suspects have since emerged.

Stafford, now 44, strenuously denied murdering Leanne. He was released from jail last year, four months short of the minimum 15-year term he was supposed to serve.

His legal team is about to present a petition containing new evidence to Queensland Governor Quentin Bryce seeking a pardon.

Stafford's battle to clear his name will feature in two episodes of the ABC's *Australian Story*, starting tomorrow night.

A new *Sunday Mail* examination of the 1991 police crime investigation log reveals what might have been a key clue to the murder mystery, which was inexplicably dismissed.

Leanne's battered body was dumped in bushland off busy Redbank Plains Rd on the morning of September 25, 1991. Police received information from an Ipswich computer store worker, who said that between 2pm and 3pm that day a man came into the shop and asked for $15.

"He is said to have bloodstains on his hands and on his trousers and acted in a peculiar manner," the crime investigation log said.

A detective sergeant directed that the witness be interviewed and a statement taken in relation to the incident. But that never happened.

A log entry on September 28 dismissed the lead. Stafford, who had lived in the Holland family home, was arrested that day and charged with murder.

The spot where Leanne's body was found was about halfway between her home and the store where the blood-covered man was seen.

Earlier investigations by *The Sunday Mail* and former Queensland policeman-turned-private eye Graeme Crowley, who wrote the 2005 book *Who Killed Leanne?*, found other leads that were ignored by police.

These included sightings of Leanne alive the day after police claimed Stafford murdered her, and a vehicle other than Stafford's near where the body was dumped.

Australian Story producer Caitlin Shea said Mr Crowley was among their interviewees.

IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND
C.A. No. 40 of 1997

Brisbane

Before Fitzgerald P.
Davies J.A.
McPherson J.A.

THE QUEEN

v.

GRAHAM STUART STAFFORD (Petitioner) Appellant

Judgment delivered 23 September 1997

Separate reasons for judgment by each member of the Court; Davies and McPherson JJ.A. concurring as to the order made, Fitzgerald P. dissenting.

APPEAL DISMISSED.

Hearing Date: 23 June 1997

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 23 September 1997

On 25 March 1992, the appellant was convicted of the murder of Leanne Mary Holland on or about 23 September 1991. An appeal to this Court was dismissed on 25 August 1992. An application for special leave to appeal to the High Court was dismissed on 4 March 1993. On 18 September 1996, a petition for a pardon was presented. Pursuant to the provisions of s. 672A of the Criminal Code, the Attorney-General has referred "the whole case" to this Court to "be heard and determined ... as in the case of an appeal ...".

In its previous judgment, this Court described the nature of the prosecution case against the appellant in the following terms:

"The Crown case against the appellant was a strong circumstantial one, the main features of which were:

(a) On 23 September 1991 the day on which, on the Crown case, the deceased girl was murdered, the deceased and the appellant had been left alone in the home in which they both lived with the deceased's father and sister, the latter of whom was living in a de facto relationship with the appellant.

(b) Blood was found on a number of items in the boot of the appellant's car; the blood was shown to be of the same type as the deceased's, a type which was found in only 1½% of the Australian population.

(c) Also found in the boot was a strand of hair similar in length, colour and texture to that of the deceased girl and a maggot of the type and age found on the deceased's body. Furthermore, swabs taken from inside the boot lid and lip had human blood on them which could not be grouped.

(d) Blood consistent with the deceased girl's was found in a number of places in the house.

(e) Car tracks of the same type as those of the appellant's car were found on the track which led to the body; however tyres with tracks of this kind were not uncommon.

(f) A hammer which was kept beside the appellant's bedside table was missing; such an instrument was consistent with having caused the injuries to the deceased's head.

(g) The appellant told lies to the interviewing police.

(h) A fold-up chair usually kept in the boot of the appellant's car was found in the spare room in the house, the appellant claiming that he had put it there after cleaning the car on 23 September.

There were other circumstantial facts of less importance and others in respect of which there was some doubt as to their accuracy, which it is unnecessary to mention here."

Although there was no submission by the appellant that the summing up involved error, it is necessary to quote from it at length because the prosecution argument in this Court on this occasion was founded on the premise, repeated at a number of points, that the appellant's conviction did not depend on proof of a "particular scenario" by the prosecution. In my opinion, the summing-up leaves no doubt but that the trial was fought on the basis of the "scenario" summarised in this Court's previous judgment, with some additional circumstances, such as somewhat equivocal evidence of sightings of a vehicle which might have been the appellant's car.

The trial judge correctly told the jury that they "must decide the facts upon the evidence". His Honour also correctly told the jury that they were entitled "... to draw inferences ...", which he described as conclusions which are not directly proved but drawn from facts of which there is evidence. He went on to exemplify the drawing of inferences, including the ultimate inference of guilt in a circumstantial case. I will come back to what was said at this point, which would have had a powerful effect on the minds of the jury. Before reference to his Honour's use of the facts to explain the concepts of an inference and a circumstantial case, it is useful to note what he said after he had undertaken that process. After telling the jury not to "... take a piece of evidence without looking to its place in respect of the whole of the evidence", he said:

"If you still feel that it is reasonably open - and you will recall that I pointed out to Mr Clark yesterday that it is not simply a question as to whether there is an hypothesis consistent with innocence open; it must be an hypothesis reasonably open consistent with innocence - if you feel that there is still such an hypothesis consistent with innocence reasonably open, then you must find that fact in favour of the accused and discard it from your further considerations. You only bring into account, in respect of the final bringing together of all these facts, those matters as to which you are finally satisfied about beyond reasonable doubt.

You see, the Crown asks you really to do this - and this is what circumstantial evidence is all about. Don't feel that circumstantial evidence or a circumstantial case is a weak case because it is circumstantial; it can be very strong, depending upon the particular case. And here the Crown says to you this: `Look, we don't have any admissions by the accused that he killed the girl and there are no eyewitnesses that he killed the girl.' The Crown asks you, however, to look at all the circumstances which it can prove beyond reasonable doubt and to bring all those circumstances together; and when you bring them all together, they have such a weight that you will have left in your mind no reasonable doubt but that he killed her. That is what a circumstantial case is.

Now, in respect of all the facts that you bring together in your mind to reach the conclusion of his guilt, in respect of each of those matters you must be satisfied of that fact beyond reasonable doubt; such as that it was that there was blood in the boot of the car; that it was Leanne's blood in the boot of the car on various objects, and so forth - although in respect of some of it, there is not

necessarily proof that it was Leanne's blood. But if you are satisfied in association with proof that there was Leanne's blood in the boot of the car, as well you might be satisfied that the other pieces of blood are hers, too. You see, you bring together all these facts; to the extent that you are satisfied of them beyond reasonable doubt, you bring them all together, but when you are bringing them together you use only the facts that you are satisfied about beyond reasonable doubt.

In respect of those essential facts, as I say, you must be satisfied of them beyond reasonable doubt, but that does not mean that every fact along the way towards reaching the conclusion of each of those essential facts must be proved beyond reasonable doubt. That does not mean that the Crown has to prove each small fact beyond reasonable doubt. It is the essential facts that you ultimately use to bring together to decide whether he is guilty or not that you must be satisfied of beyond reasonable doubt."

In explaining how inferences might be drawn and a circumstantial case proved, the trial judge directed the jury as follows:

"... The Crown in this case leads evidence of the blood of the deceased girl - assuming that you find that it was her blood - on various items in the boot of the car; of human blood, although not specifically identified as hers, also on parts of the inside of the car near the lock in the boot; and the maggot in the boot, a maggot which has been identified, not precisely, but of roughly the same age as the maggots found on the body, and identified as being identical in specie with the species of the maggots on the body.

Now, there are two facts. The Crown has brought to you evidence of the blood of the victim in the boot - assuming you find it is - and of a maggot which the Crown says is very similar in age and absolutely identical in kind with the maggots on the body. The Crown leads further evidence that the accused was the only person, except for the woman Melissa, who had a key to the boot. The car was kept locked at all relevant times, and he agrees that Melissa couldn't have done it. Now, the Crown says that they are a set of facts. It cannot lead evidence that the accused man put the body of the victim in the boot of the car, but it says to you that from those basic facts you should be able to draw the conclusion beyond reasonable doubt that the body of Melissa was in the boot of that car; that is the first fact. You see, they say from the blood and the maggot you should have no reasonable doubt whatever but that there was another fact, which nobody can directly show, that the body of Melissa was in the boot of the car.

JUROR: Excuse me, you are saying `Melissa'.

HIS HONOUR: The body of Leanne, thank you; that the body of Leanne was in the boot of the car. The Crown then says if you reach that fact by way of inference, that Leanne's body was in the boot of the car and he was really the only one who had access to that car at any time, then you draw the further inference that he is the man who must have put Leanne's body in the boot of the car. Then they ask you to draw the further inference that, although nobody saw him do it, if he was the man who put her dead body with that blood in the boot of the car, that he must have been the man who killed her. Now, there are a group of inferences, facts that you derive from other facts. That is how you draw inferences in the matter.

A jury is entitled to draw inferences of fact from other facts; but if there is an hypothesis - that is, an explanation - that is reasonably open consistent with innocence - notice that I said `reasonably open consistent with innocence' - then the jury must adopt the hypothesis that is consistent with innocence in respect of that inference. You see, the hypothesis consistent with guilt must not be only a reasonable conclusion; it must be the only reasonable conclusion that is open in respect of that hypothesis. Let me give you an example about that.

The Crown, you might think, has proved - this is, of course, entirely up to you ~ but you might think that the Crown has proved that the tyre marks found at the scene are tyre marks similar to two of the tyres upon the car of the accused person. If you are satisfied of that fact, what inference can you draw from that? Can you draw the inference that it was his car that made the tracks or left the tracks? The answer, of course, is no, you cannot do that, because of the number of tyres that are sold in South-East Queensland that would leave tracks like that. So from that fact alone of the identity of the tyre tracks, you could not draw the conclusion that it was the accused's car, because there is an hypothesis reasonably open on that, that it was another car with similar tyres. You see, in that respect you can't draw the inference beyond reasonable doubt that it was his car. So, you cannot proceed upon the fact that his car left those tracks.

That is not an end to it because you might be satisfied at least beyond reasonable doubt that there were a set of tracks there that were a combination of two tyres that were identical with his car; with the tracks of his car's tyres. You might say, `Well, at least that is a fact I can rely upon beyond reasonable doubt.'

Where does that leave you? You can't say from that fact alone that it was his car that left those tracks, but you are entitled to take into account that you are satisfied beyond reasonable doubt that there were at least tracks at the scene which were identical with the tracks of his car with the combination of those two tyres.

Where do you go from then? You are then entitled to take that fact, that is the similarity of the tyres, not that it was his car that left those tracks but at least the similarity of those tracks. If you are satisfied of that beyond reasonable doubt you are entitled to take that fact into account with all the other facts that you are satisfied of beyond reasonable doubt, such as the blood in the boot of the car; the maggot in the boot of car; if you are satisfied of the evidence of Mrs Mende, that there was a car, for example, of similar colour and a similar make and certain other similarities. If you are satisfied of her evidence in respect of some of those features beyond reasonable doubt you can take the similarity of the tyre tracks into account and bring them all together to see whether the bundle of all of these facts, so far as you are satisfied beyond reasonable doubt, ultimately leads you to the conclusion of his guilt beyond reasonable doubt.

So, you see, you must be careful before you accept these matters and before you draw inferences, but you must be careful before you reject them entirely. You are entitled to take them into account so far as you are satisfied about them beyond reasonable doubt even though that fact alone might not prove the guilt of an accused beyond reasonable doubt. This is an important matter that I ask you to take into account. It is laid down by the highest Court in our land that when ultimately deciding whether the accused is guilty or not in respect of circumstantial evidence the jury is entitled to bring together a body of facts which satisfies it beyond reasonable doubt as to his guilt

even though each individual fact considered alone would not show his guilt beyond reasonable doubt. If none of the facts alone showed his guilt beyond reasonable doubt, the jury could still convict him by taking into account the total of all those facts together if the jury was satisfied they are totally convinced of it beyond reasonable doubt.

You will understand what I am saying, for example, in respect of the example of tyre tracks. The tyre tracks alone might not convince you beyond reasonable doubt as to the guilt of the accused, because you could not say that the tyre tracks would prove that it was his vehicle because of the hypothesis that there might be another car with the same combination of tyres; but the fact that there is a combination of tyre tracks that were identical with his car a combination which the witness, the gentlemen who changed tyres, said is a fairly uncommon combination of tyre treads. That might say to you, `Well, I am not satisfied beyond reasonable doubt that I can exclude the existence of another car with similar tyres, but at least I can take into account the fact in conjunction with other facts that at least there were tyre tracks that were similar to those of the accused with a similar combination. If I am satisfied to that extent beyond reasonable doubt at least I can take that particular matter into account'.

I am giving you examples here in some depth to explain to you how you can use these things because it is slightly complex. Learned counsel have approached it in different ways and it is important that I correct it in your mind so that you know properly how you approach it.

Take, for example, the blood found in the house. Now, some of the blood was identified as that of Leanne, for example, the shavings from the step near the bottom of the steps. That was identified as her blood and nobody else's. There was other blood in the house, and you might think that the blood was found in fairly diverse and unusual spots, with one 2 m, about six and a half feet, above the ground near the shower rose and some on the shower curtain. So, that blood was not identified as Leanne's, but it was identified as blood that could have been Leanne's. It could have been other people's in that house.

Now, the blood at the foot of the stairs that was identified as Leanne's; what do you say about that in your mind? You do know that blood cannot be dated. It can be identified as being consistent with the blood grouping of Leanne's and you heard the fairly high ratio in the case of this blood that applies as to when there was another person who might have had the same blood. At least in respect of people normally living in that house you know that Leanne's blood was different from theirs and you know that the blood found at the foot of the stairs was similar to Leanne's and different from theirs. Well, there is the long shot that it might belong to some stranger and that you might feel that this is not something you need worry about in these circumstances. You have evidence she had cut her foot and come down the stairs and shown her father, and the best he could say was that she might have had a Band-Aid on. You might think that the Band-Aid might not have effectually kept in the flow of blood. If she came on to the front stairs to show him she could leave a spot of blood on the stairs. There is that hypothesis that that blood of Leanne's on the step might have been left by her on the previous occasion when she cut her foot.

Well, where does that leave you in respect of that spot of blood that had been identified as hers? There is an hypothesis consistent with innocence, a very, very real hypothesis consistent with the innocence of the accused in respect of that spot of blood, that it was left there when she cut her foot on the previous occasion. Well, you are entitled to take into account, of course, in respect of that spot of blood that it was Leanne's; and you keep it in mind in respect of the rest of the evidence that you find in relation to all the other blood that had been located, including the blood in the boot. But in respect of that spot of blood on the stairs, taking into account that she cut her foot before and had gone down the stairs to her father, you might say, "Well, that hypothesis is that it was hers from a previous occasion", which is consistent with the innocence of the accused in respect of this piece of evidence, which is open. So, you can't really give it any weight in respect of this matter even in association with other pieces of evidence, in association with her blood being found in the boot. You might say it is just of no real value even in that respect, even in association with other pieces of evidence. So, you might reject that as having no evidentiary value at all, then. If you feel that this is the case then you should reject it and keep it out of your mind completely, even as part of the matter, of taking it into account in respect of the other pieces of evidence, such as I explained to you in respect of the tyre tracks.

What about the blood in the house? All of these things depend upon how you view it. I am only explaining how you can approach it; I am not urging you to approach it one way or the other, but I am explaining the logic behind it and how you can use the evidence, which is a matter of law. How you do apply it is a matter for you, because that is a judgment of fact. What about the other blood in the house? How you use it is a matter for you, but can I suggest to you how you can apply it if you wish? You can say, `None of that of any real value has been associated directly with Leanne's blood, because it can be associated with other people's blood as well; it could have been Leanne's, but it could have been other people's.' And you have heard the evidence as to the extent to which other people bled in that house.

Well, you can still take it into account. You cannot be satisfied beyond reasonable doubt that it necessarily was Leanne's blood, because there is an hypothesis that it might have been other people's blood because it can't be specifically identified as Leanne's. But you are entitled to take into account that there was blood in scattered and diverse positions and unusual positions. You might feel that that could have been Leanne's blood, and you can take into account the evidence as to which other people bled in that house. You can say, `Taking all of that evidence into account, taking into account the amount of blood that was found there and the places in which it was found and that it was consistent with Leanne's blood, while I am not satisfied beyond reasonable doubt that it was Leanne's blood, I can take into account, if I am satisfied, that there was blood that could have been Leanne's which is found in places which is very difficult to explain unless it came from Leanne in circumstances of violence; that there is no reasonable hypothesis consistent with innocence that would enable me to say it reasonably could have been somebody else's from some other occasion.'

You can take into account all these other pieces of evidence: the diversity of the places in which it is found, the amount of blood that is found in those other places. And you can then take the factor into account, if you feel that it is a justifiable one, where you can exclude beyond reasonable doubt the prospect that it came from these other innocent sources. You can take into account the fact that her blood was found in the boot of the car and that a maggot was found in the boot of the car, and that similar tracks to that of the accused were found at the scene and so forth.

So, you look to these matters to see how far you can find the fact beyond reasonable doubt. You might not be able to say beyond reasonable doubt that that blood was definitely identified as Leanne's, but you can find beyond reasonable doubt that there was such a quantity of blood, and that it could have been Leanne's because so far as it was identified it did conform with Leanne's blood. So you can say that there was blood that could have been hers, although it could have been other people's, but it was of such a quantity and in such scattered locations that there is no reasonable hypothesis consistent with innocence that it could have been other than hers. Then you are entitled to say, `Well, I am satisfied beyond reasonable doubt that the blood there was Leanne's in association with all the other pieces of evidence that have been found: that there was her blood in the boot of the accused's car which was at the house, and so forth."

Later, reference was made to a defence submission as follows:

"In regard to the way in which the body was lying with most of the injuries to the rear of the body and that sort of thing, he suggested there was a possibility that the child was killed there; that you would take these into account in association with the evidence that the Crown leads, such as the blood in the boot of car and the maggot in the boot of car and that sort of thing. You can take into account the propositions put up by the learned defence counsel to see whether they do offer reasonable explanations consistent with innocence. If, in all the circumstances, taking all the Crown's evidence together that it relies upon, it does not exclude a reasonable explanation, you are then entitled to say, `It is justifiable for the defence to put that up for us to consider. It not as speculation but as a reasonable explanation that we have to consider it. Then, if all the Crown evidence together excludes that explanation beyond reasonable doubt, then you discard it.

Now, that is the way you approach the matter. You do not approach the matter as the Crown has suggested, rejecting it as speculation. The learned Crown Prosecutor would have been better advised, and I say this to him with respect, not to call it speculation but to approach it in the manner I have mentioned to you. Then if he could, and I am not suggesting for one moment that he couldn't, he may explain to you how that explanation is excluded as a reasonable explanation if you take all the Crown evidence together, the blood in the car that belonged to the girl; the maggot; the blood inside the house, that is the distributed blood; the wheel tracks at the scene and things of that nature - how taking all those matters into account you must exclude the possibility the girl was killed there, for example, or that it was somebody else's car that. He could have said to you, `How could that fit in with the blood that was found in the accused's car, the maggot and that sort of thing?' That is the way that you approach it and you take into account all of the Crown case brought together to see whether these explanations are not speculations but explanations which the defence invites you to consider whether they are reasonably open.

Now, the defence does not have to convince you of these things. It only has to show ou [sic] that there is an explanation reasonably open and consistent with innocence. And if the Crown on all the evidence does not exclude that then the defence will have succeeded because the Crown will not have proved its case beyond reasonable doubt. ..."

His Honour subsequently told the jury that he was going to remind them what the prosecutor and defence counsel had said to them. He added:

"... It is not going to be a word-for-word, lengthy, detailed account of those things. I am going to in effect summarise it, so that when you go into the jury room you are reminded in broad terms as to the arguments of learned counsel. And because you have heard lengthy addresses in detail you might find it useful to have a summary of them; and I propose to go about it this way: I propose first of all to give you a summary as to just the bare bones of the various features that the prosecution relies upon. Some of them, they say, are very strong features; some of them are not strong at all, but they say you still take them into account as part of the whole picture. You take all of them into account together, and even the weaker ones, the Crown says, should be taken into account, because together they all add to the weight of the case. I will deal with those matters of the Crown first, then I will give you a summary as to what learned defence counsel says about those things and where learned defence counsel offers you explanations consistent with innocence. And then I will take you through the Crown case as to, in effect, the arguments concerning the defence propositions."

After telling the jury that the prosecution was not obliged to prove the date or the time when the deceased was killed, his Honour went on to say that the prosecutor had pointed out that he was not suggesting that the appellant had killed the deceased on the morning of 23 September 1991. On the prosecution case, the deceased had been seen at about lunchtime, and the prosecution case was that the appellant had until approximately 4.30 p.m., when the deceased's sister came home, to kill the deceased, clean up the house and hide her body in the boot of his car. Reference was made to a witness who claimed to have seen the deceased as late as 3.00 p.m., and his Honour said that the jury would have to be satisfied as to the "accuracy as to times [of that witness] to begin with, quite apart from whether he sighted [the deceased] or not to put any value upon that, but even if he were right and that it was shortly after 3 o'clock that he saw [the deceased], then that is not inconsistent with the Crown case". Nonetheless, it significantly reduced the appellant's opportunity to kill the deceased, clean up and hide her body.

A little later the trial judge added:

"You have to remember that the Crown does not have to prove to you every detail of the offence, not even the time that it took place. It has to convince you beyond reasonable doubt as to the guilt of the accused. And there are some of these matters where it says proof of the matter is just beyond it, but at least the proof that it has is sufficient. Whether it is or not is for you to decide."

After telling the jury that the "only real question in this case seems to be whether the accused did it or not", his Honour continued:

"Now, as I said to you, I am going to give you a very brief outline as to what I understand to be the matters upon which the Crown relies, all of those matters brought together. I am not going to explain each of them; I am sure that you will understand what I am referring to if I do not give them to you in detail. But I do repeat this: the Crown is asking you to be satisfied beyond reasonable doubt of the man's guilt by taking all of these matters into account."

Shortly afterwards, his Honour told the jury that the prosecutor was correct in his submission that the jury should not approach the matter by considering each matter relied upon by the prosecution

individually, but should "look at the combination of all of these matters together ...". It is necessary to set out what followed. His Honour said:

"These are the matters that the Crown relies upon: the opportunity that the accused had as being, in effect, the last person at home to see her, and where, if she were at home, he had the opportunity to do it; that the blood of Leanne was on certain items in the boot of the car; that there was other human blood which was consistent with that of Leanne on the piece of blue cloth and on parts of the lock mechanism of the boot of the car; that there was a maggot in the car which, although its age could not be precisely identified, was still consistent in age with the maggots found on the body of Leanne, and it was identical with the type of maggot that was found on Leanne; that it was only the accused and Melissa who had access to the car because it was kept locked, and Melissa could not have done it, on the evidence of the accused himself.

The Crown claims the benefit of Leanne's blood upon the stair and landing, and I have already referred to that. And they also claim reference to the quantity of blood in diverse and strange places, particularly in the bathroom. They refer to the car tracks at the scene which were comparable in design with the two different sorts of tyres on the car of the accused; that there was a car which the Crown asks you to find could be that of the accused seen in the general vicinity by Mr Spinaze at a time when it is known that the accused had driven in that direction - that is, at about 6.20 to 6.30 in the morning; that there was a similar car to that of the accused at the scene in the location where the body was found that was seen by Mrs Mende at 8.45 a.m. at a time when the Crown says that the accused had left work; and although Melissa says that he came home from work at 7.45 and didn't go out that day, the Crown asks you to find that she could be mistaken in that respect, particularly as they did go out to go to the police, for example.

The next item is that, on his own account, the accused had in fact driven that morning before going to work in the direction of Redbank Plains, where the body was found. In that respect, the Crown also asks you to draw a further conclusion that the account given by the accused man as to why he went in that direction is unacceptable. He said he went to see his friend Arthur, but did not give a satisfactory explanation as to why in fact he did not either telephone Arthur or in fact see him at that time. The Crown relies upon the proposition that there was a hammer missing from the bedroom in the house - the hammer, that is, with the silver head described by Melissa Holland. That was the one which was usually kept beside the bed. The Crown relies on the alleged lies which it says were told by the accused, which the Crown says reveal a recognition by him of his own guilt.

The Crown relies upon the proposition that on that Monday the chair that was normally kept in the boot had been removed from it. The Crown invites you to come to the conclusion that that was done in order to accommodate the body. The Crown relies upon the injury to the arm of the accused man, and says that that is a matter consistent with his having been involved in some violence, and that his explanation, for a number of reasons, is totally unsatisfactory. The Crown refers to the plastic bag which was found at the scene which, although similar to many other plastic bags that would be on the market, was at least similar to plastic bags which were contained at the home. And the Crown also asks you to rely upon the fact that the rubbish bin was put out that night by the accused person, contrary to his habit in that household, the Crown of course claiming that he did that in some way in order to dispose of some articles and prevent anybody in the household from seeing what was in the rubbish bin.

Well, they seem to me to be the items on the catalogue that the Crown relies upon. You will see that some are much stronger than others. The blood and maggot in the boot of the car, for example, is obviously much stronger than the plastic bag that was found at the scene. ... "

A little further on, the trial judge summarised the defence case. Reference was made to a submission that the prosecution had not shown that the deceased returned to her home that day and that the appellant had an opportunity to kill her. His Honour then put the prosecution response.

"... Well, the Crown, of course, don't have to prove that she did return that day, though, in order to establish opportunity - if you felt that she did not return that day he would not have the opportunity. At least the Crown can prove that he was home at various times on that day and it asks you to take that into account to the extent of opportunity, so that if she did come home he could have been home to have had the opportunity. Moreover, the Crown points out that in respect of the matter of having changed her skirt from that which she wore when she went out that morning, that is a strong indicator that she must have come home at some time; and particularly that she came home at some time after having been seen by any witnesses who can be relied upon as seeing her later that day, in order to change it."

The defence submission that blood which was found on a step in the house might have been put there on an earlier occasion when the deceased cut her foot was referred to, and the trial judge continued:

"In respect of the other items of blood he pointed out that the blood was consistent with its being the blood of other people in the house because it wasn't specifically identified with that of Leanne. I have already spoken to you about that and that is, in fact, true. You can't say that the other blood in the house was Leanne's blood beyond reasonable doubt, but that does not stop you from saying there was that quantity of blood in those positions in the house that could have been Leanne's blood, if you are satisfied of that beyond reasonable doubt.

He spoke about the prospective potential for there being a large amount of bleeding from the deceased and the blood that must have been come from the body of the deceased when she was in fact injured so badly about the head. He points out that there is no evidence of the age of the blood that was found. And he spoke about the possibility of wrapping, and he really points out to you that nothing has been found or produced by the Crown in the way of wrapping of the body which would account for the blood that must have been lost by the body. You might think that is a reasonable proposition. Of course, the Crown does not have to prove it by producing the wrapping, but if the body did bleed very heavily, then, in those circumstances you might think that because there was not a huge quantity of blood found in the boot of the car to the extent of being all over the floor of it and so forth there might have been some wrapping.

Well, in those circumstances, as I understand the Crown case, it does not suggest that the body was not wrapped up. It only says that it can't produce the wrapping. In fact, as I understand the Crown case, the Crown case is that there probably was wrapping around the body when the

accused man carried it down the stairs in broad daylight to put it in the boot of his car. The Crown's proposition is that he probably did wrap it up in something in order to cover it so that anybody who might chance to be going by or past the house would not realise it was a body. And so in respect of the removal of the body from the house, to anticipate a later argument, the Crown proposition is that he probably wrapped it up and that he probably looked out and took the opportunity, when he could see that there was nobody around in the street or that he could see in the hotel, to take her downstairs. The choice of the moment of taking it downstairs to the car was his, and that he chose a moment when he felt that he could do it fairly safely, particularly with the cover provided by the tree.

Later, his Honour said:

"Now, there was blood on the items in the boot, and some of those items were shown to be, you might feel satisfied beyond reasonable doubt, the blood of Leanne. Other blood was found which was not specifically identified as Leanne's. It could have been Leanne's. So far as the factors could have been identified, they matched Leanne's. But they also matched some other people in the house. However, in respect of that, you are entitled to use that blood in association with the other blood found in the car, and to draw conclusions as to the probative effect of that blood which was also found on the fixtures in the car.

Now, learned defence counsel raised the proposition - and I will deal with it a little later - that the mere fact that there was blood on certain items in the car does not mean that the body was put in the car. He said the blood could have got on these other items and then those items have been put into the car separately without the body having gone in. He said there was no blood on any of the geographical features of the car. Well, that is not quite right. There was no blood that was identified as Leanne's on any of the geographical features, but there was human blood found around the lock mechanism both on the lid and on the part that was a fixture of the lock inside the boot. But even in respect of that, if these items had blood on them in the first instance, derived from Leanne's body outside the car, and these items were then put in the car, you might feel that it is possible that that amount of blood on the fixtures could have come from those particular items. It is a matter for you.

But, of course, the question then arises as to where that gets you. Does that raise a reasonable explanation consistent with innocence? Because, does it make any difference, taking into account that it was the accused man who had virtually total control of the boot at the relevant time - apart from Melissa, who could not have been involved? What difference would it make to the question of his guilt as to whether the body was put into the boot or whether the body bled on these items in some way and then these items were put in the boot? Who could have put the items with blood on them in the boot? How could they have been put in the boot with blood on them without the accused's participation in it?

No, the proposition that the blood on these items in the boot does not necessarily mean that the body was in the boot is a matter that you are entitled to take into account. But you mustn't stop there. You must consider further that if that were the case, what flows from it? Is there still a reasonable explanation consistent with innocence in that respect?

Now, you might feel that there is a reasonable explanation consistent with innocence, notwithstanding all the other features as well, notwithstanding the maggot and so forth - that is a matter for you. But simply because an explanation is offered as to how the body might not have been in the boot, that does not necessarily mean that the blood on these items in the boot must therefore be discarded. You will then say, well, if that were a reasonable possibility, how is it that these bloody items were put in the boot of his car? How could there be an hypothesis of his innocence consistent with that? That is what you have to consider. I don't offer an explanation one way or the other and I don't say to you for one moment that the question that I have raised for you is unanswerable. They are questions for you to consider. I only am trying to extend for your consideration propositions that are put up to you, so that you have the opportunity of considering these matters fully.

In respect of the blood on the step, I have already mentioned that to you as to the prospect that it could have come from the foot of Leanne at some earlier time when she had cut her foot and gone down to see her father. You might think that that is a very reasonable argument by the defence and that, really, that bloodstain on the step has such a reasonable explanation for it that, even though you read it in light of all the other blood in different places, it still has really no probative effect, even with the benefit of all those other features. That is a matter for you. Learned defence counsel also discussed the blood in the other places and the car."

The next matter to which attention was turned was a hair found in the boot of the appellant's car. The trial judge said:

"As to the head hair, learned defence counsel points out to you that the identification of hair is an imprecise exercise; that, unlike blood, scientists are not able to take factors from it which could give it precise identification. That is perfectly right. He points to the witness's acknowledgement that that is perfectly right. The witness, however, said that so far as length and texture and colour go, it was similar to Leanne's hair. She is not saying that it was Leanne's hair but she says that it was similar.

Now, in those circumstances, you are not entitled to say beyond reasonable doubt that it was Leanne's hair; learned defence counsel is right in that respect. But in respect of the total picture, including the matter of Leanne's blood in the car and the maggot and all those other features, you are entitled to say, `Well, there is a hair there in the car which, although I am not satisfied beyond reasonable doubt that it was Leanne's hair, was identical with Leanne's hair in those respects. I can at least use it with all the other items to that extent, if it means anything.' Now, the weight of what it means is a matter for you but, as I say, you must read that in association with the other features."

Another defence submission involved the lack of evidence of blood on the clothes of the accused. The trial judge said:

"He says that there is no evidence of blood shown to be on the clothes of the accused. Now, that is true. The Crown leads no evidence of blood on the clothes of the accused that it can produce. Now, there are possibilities about that. The learned Crown Prosecutor invites you to say that if there were blood on his clothes, he has got rid of it in some way, either by getting rid of the clothes or by

washing them, or something of that nature. Learned defence counsel says the absence of any proof of blood on the clothes of the accused or any suggestion that any of his clothes were missing can lead you to the conclusion that, really, there was no blood on his clothes, and that that raises an hypothesis consistent with innocence, in so far as if he killed the girl you would expect that there would be blood on his clothes. You heard what the doctor had to say. The doctor indicated that there would be no spurting of blood. Dr Ashby said there might be some blood spread by the movement of the instrument that was used to kill the girl as it was swung backwards and forwards, but you wouldn't expect a spurting of blood in that regard. Some blood obviously might drop down because of the quantity of it, but whether or not that is a factor that the defence has raised which means something in this total equation is for you to decide. Its weight is for you to decide. Certainly it is the case that no evidence of blood had been shown to be on his clothes.

In respect of the blood on the items and on the boot lid which defence counsel referred to, he pointed out there was no estimate of the time at which that blood was on those and, indeed, he pointed out to you in respect of the blanket and so forth, the location of the blood was not indicated."

After telling the jury to "act upon the basis that there is clear evidence that there was blood ... which matched [the deceased] on the Chux cloth and on the blanket ..." which were in the boot of the appellant's car, his Honour instructed the jury not to "go looking for the distribution of it" or, he had earlier said, the quantity. He then continued:

"I have already dealt with the item, that proposition by learned defence counsel that the blood might have got on these items inside the boot and these items have been put into the boot. Remember that we must be talking about a time when Leanne's blood got on these items; and these items then got into the boot. You see, we are talking about some earlier time. You must remember the many items in that boot that had blood on them: the blanket, the Chux cloth, the tool bag, and the blue piece of cloth which had Leanne's blood on it. They are not disputed as Leanne's or they could have been, and so forth. There you are. It's for you to consider the various factors in this respect."

The trial judge then told the jury that the prosecution relied very heavily in association with the blood "upon the matter of the maggot in the boot, which was identical with the type of maggot found on the body". This subject was discussed at considerable length, and only part will be quoted:

"... And the expert witness was able to say that its stage of development means it was approximately the same age, but couldn't say precisely, as the maggots found on the body. Incidentally, I think both witnesses in that respect said that you can't tell the age of maggots with great precision and, indeed, the witness Miss Morris spoke of the age of the maggots only by a reference to a minimum time of death. In other words, she was saying it wouldn't have been later than 5 o'clock on the Tuesday morning. She is not saying it was at 5 o'clock. As far as she is concerned, she was obviously saying it could have been the previous afternoon. She was only giving the latest time because that is the best she could do with any precision. In respect of the maggot in the boot she could only say it was the same age as the other maggots."

After referring to a dispute concerning whether the police officer who claimed to have found the maggot in the boot had done so, and if so when, his Honour continued:

"... Isn't the important thing that the maggot was found there. If you feel that, in fact, the real substance of the question was that the maggot was found there and it doesn't really matter when, then you could regard this question as to whether or not he took a note of it the day before as being something of a red herring. That is a question for you. I don't suggest that it is. It is for you to decide what the important issue is.

If you find there was also a maggot there that was identical in specie with the maggot found on the body and it was of the same age grouping, and there was nothing in the car, and had been nothing in the car, that would attract maggots, then that in association with the blood could also be a very powerful factor in your consideration. Whether it is or not is a question for you, but the implications are obvious. How could there be a reasonable explanation consistent with his innocence of the blood and the maggot being found in his car in a spot as to which virtually he only had access? Well, it is for you to decide whether or not any reasonable hypothesis consistent with innocence has been raised. Take into consideration, `Well, he can offer no explanation'. Take into consideration the possible explanations raised by learned defence counsel and see what they mean to you. If there is a reasonable explanation consistent with innocence in respect of these items and together with all the other items that the Crown relies upon that you accept, then you must acquit him. If you feel that the finding of these things in his car is very powerful indeed and they have all these other matters to support them, then you could be satisfied, as you can see, beyond reasonable doubt as to his guilt from those matters.

Well, I have just discussed with you the defence suggestion - its proposition as to the matter of the maggots. He pointed out that it is difficult to estimate how old they are, and as the evidence was not of any use, he pointed out that the witness agreed that she couldn't exclude beyond reasonable doubt that the maggots found on the body were consistent with the body 's having been put on the track some time before."

The next matter discussed was the evidence of two prosecution witnesses who gave evidence of observing, on separate occasions, a vehicle resembling the appellant's vehicle driving in a direction consistent with travel between the appellant's residence and the location where the deceased's body was found. Amongst the matters stated by the trial judge was that the prosecution did not have to prove that both sightings were of the appellant's vehicle. "It only has to prove in respect of this issue that the accused's vehicle was sighted there once. If there is a sighting of the [appellant's] vehicle there once, then you can use at least that to draw an inference with the other evidence that is involved in the case. What you make of that is a question for you".

One witness who spoke of sighting the appellant's vehicle on such a journey "spoke about the fact that her sighting was at 8.45 a.m., when Melissa Holland [the deceased's sister] had said that the [appellant] had come home at 7.45 a.m. and had stayed there all day and that the car had not moved". The trial judge reminded the jury that defence counsel had pointed out that that would make it impossible for the appellant to have gone to the site where the deceased's body was found at the time mentioned by the witness, and would also:

"... show that there was another car there at that particular time, ... a car that was up where the body was. And if you feel that there was another car up there where the body was, then the likelihood is that that car was the car of the killer or somebody associated with the killing. And if there was another car associated with the killing, that must raise in your mind a reasonable hypothesis that it wasn't the accused person. Well, what you make of that is a matter for you.

The learned Prosecutor says Melissa was wrong in saying that the car remained there all day, because they went to the police station. They did leave home that day, and whether the accused went out or not at that particular time, he says, is something that at that time might have escaped her attention. It might have been something that she didn't remark upon at the time. Now, that is a question for you. Of course, there is no evidence that she was mistaken or anything like that, but the Crown Prosecutor puts that up as a proposition as to how there can be an explanation of the matter, notwithstanding that conflict in the evidence led by the Crown. Well, it is certainly a question for you.

If in fact the accused was home at the time when [the witness] saw that vehicle there, it would be very difficult for the Crown case to succeed, because it would virtually mean that somebody else in another car was at the spot where the body was found or in very close vicinity. And in those circumstances you might feel that if he had a good alibi at that particular time the Crown would find it very hard to say that the matter was associated with him; although you still have to take into account the matters of the finding of the blood and the maggot in his car and all those other issues, of course.

You see, this is where you consider the whole of the evidence together. You consider the conflict between [the witness's] having seen the car there at 8.45 with the fact that Melissa said that he came home at 7. 45 and didn't go out. In respect of that conflict, you take into account all of the evidence, not just that little piece of evidence alone. And you look at all of the evidence, including the finding of the blood in his car and so forth, and see what you make of it. In the end, the Crown must satisfy you beyond reasonable doubt as to his guilt. ..."

Other matters were then discussed including tyre tracks, shoe prints, injuries to the appellant's arm, and so forth.

Reference was made to a defence submission "... about the unlikelihood that the [appellant] would have killed the girl in the house with such a lot of habitation in the immediate neighbourhood and a hotel across the road, where the noise of screams and blows and that sort of thing might have seriously attracted attention to his crime. He suggests that that is a very significant factor against the proposition that it would have been committed in the way in which the Crown suggests."

His Honour went on:

"Well, the Crown again says speculation, but indeed it is not speculation. It is a consideration for you to keep in mind. The Crown's real argument of the matter is that it is not alleging that it was a premeditated murder, and the Crown really does not know all the circumstances, it says. And it is not suggesting that it was a premeditated murder where the person would choose the best time and place to do it.

In fact, you might understand that some people go and commit murder in front of many witnesses, where they are seen clearly in broad daylight committing the murder. It all depends on the circumstances, of course. And the Crown raises the proposition that what was done in this case may have been done relatively on the spur of the moment, in anger or in some other passion, where the person concerned really lost control and really did not think of time and the prospects that people might hear it and that sort of thing. They are two matters for you to take into account. The proposition raised by the defence certainly is a matter that must come within your considerations, of course, but whether or not it is of such significance as to raise in your mind a reasonable doubt is a question for you.

Then, of course, he raised the question as to whether or not the accused man would carry her down in broad daylight in view of all the people at the hotel - that is assuming that he carried her down the front stairs. But the Crown's argument is that in those circumstances she was probably wrapped up, that he wouldn't expose the body. He would be trying to conceal it and would naturally wrap the body up in some way to conceal it; that he could choose the time when he could see that nobody was passing by or there was nobody in sight; and that would be the best thing that he could do. And in any case it would be a matter of desperation. If he had killed her in a manner of some violent outburst and wanted to try to hide the fact, he would be placed in the position of having to do it anyway, of having to carry the body down there in front of where witnesses might see him, but that he really had no choice once he had done it. That is the Crown argument."

Later, the trial judge continued:

"Learned counsel for the defence then referred to the matter of death on the site, the prospect that the girl was killed at the site where her body was found; and that she was killed in what you might call the foetal position, in which she was lying, which was consistent with the prospect of anal intercourse. And learned defence counsel says that this and all the injuries could have been inflicted from the back. Nobody said that they were inflicted from the back, but Dr Ashby agreed that some of them were consistent with being caused from behind. Learned defence counsel asks you to put all this together and consider the real possibility that the girl might have been killed at that site and her body left there.

Well, you must take that seriously into account. You have to take it into account in connection with the blood found in the boot and all those other things that the Crown relies upon."

In subsequent discussion of a defence submission, his Honour referred to what the prosecution, in effect, postulated; namely, that if the appellant killed the deceased "it must have been somewhere before 4 p.m." (The transcript, plainly erroneously, refers to "4 a.m.")

Finally, in dealing with the defence submissions, his Honour said that the defence contended:

" ... that the Crown's postulation is quite ridiculous that the man would put the girl Leanne into the boot of his car, knowing that Melissa had a key and might go and find her there. You must take that seriously into account. He said that is so ridiculous that you really couldn't contemplate it at all as being the action of any rational person. The Crown's answer to that is in the first instance that he

was desperate; he had to do something so he took the risk. And, in any case, why would Melissa go to the boot of his car? Was it such a serious risk?"

The only redirection which needs to be noted for present purposes is the following:

"The first is the blood on the piece of blue singlet that was found in the boot, and the blood that was on the lock of the boot. That blood was found to be human blood. It was not grouped. I thought I would make it quite clear to you that it was certainly consistent. It could have been the blood of Leanne, but it was not specifically identified as hers and it could have been the blood of anyone. That is the first thing. You might think that it makes no difference, taken into account with the rest of the blood which was so strongly identified as Leanne's. ..."

It is regrettable that it has been necessary to set out such lengthy extracts from what was a very comprehensive summing up. However, it is essential to a decision of the issues which are before this Court to understand the circumstances relied on to prove the appellant's guilt. At the very least, the prosecution submission "... that this case was not put to the jury on the basis that in order to prove the guilt of the appellant the prosecution had to establish a particular scenario" confuses the theoretical legal position with the actual manner in which the prosecution case against the appellant was conducted at his trial. The prosecution case involved the appellant killing the deceased at their residence on the afternoon of Monday, 23 September 1991, placing her body in his car, cleaning up the premises and subsequently disposing of her body in bushland. Emphasis is given to what is otherwise manifest by the prosecution argument in rebuttal of the defence suggestion that the deceased might have been killed where she was found; the pathologist called by the prosecution, Dr Ashby, gave evidence directly negativing that possibility.

Shortly stated, the appellant seeks to rely upon evidence which he submits was not available to him at the time of trial and could not with reasonable diligence on his part or the part of his legal representatives have been available at that time, together with other evidence which was not adduced at the trial.

The Court was asked to quash the appellant's conviction and order a verdict of acquittal. It is convenient to say immediately that, if the conviction is quashed, a retrial should be ordered. There is no doubt in my mind that, even with the additional evidence, there is ample evidence against the appellant upon which a reasonable jury, acting reasonably, could convict the appellant. The appellant's conviction of murder on the evidence adduced at his trial and the evidence now available would not be unsafe and unsatisfactory in the administration of justice. It is probable that he would have been, and if retried will be, convicted on all the evidence. Further, the prosecution case against the appellant would not be so different from the prosecution case upon which he was convicted as to warrant acquittal rather than a new trial on the basis of fairness.

It is a different question whether there has been a substantial miscarriage of justice, and hence should be a retrial. A conclusion of miscarriage of justice is not necessarily foreclosed by an appeal court's opinion that a convicted person is guilty. The question whether there has been a substantial miscarriage of justice is to be answered by determining whether an appellant lost a chance of acquittal which was fairly open to him. When an appellant seeks to demonstrate a miscarriage of justice by reference to evidence which was not adduced at his or her trial, the test is sometimes expressed to be whether the whole evidence to which reference is appropriate is such as to give rise to a significant possibility of a different verdict. However, the categories of miscarriage of justice are not closed.

The evidence of Leo Charles Freney, a forensic scientist employed by the Queensland Health Department at the John Tonge Centre for Forensic Sciences, is persuasive that the deceased was not attacked and killed in the house where she and the appellant resided. Mr Freney's evidence is also persuasive that the deceased's body had not been in the boot of the appellant's car, at least at the time suggested by the prosecution. Mr Freney also said that statements made to the appellant by police officers in the course of interrogating him were factually incorrect; the jury, which heard evidence of the police interviews of the appellant, would have thought otherwise. For example, contrary to the police questions, there was no evidence of human blood on the door or steering wheel of the appellant's vehicle.

Mr Freney also stated that there was nothing to link the deceased to traces of blood found on or in the vicinity of the boot locking mechanism and under the boot lid or on a knife found in the glove box or a hammer found in the tool kit in the boot of the appellant's vehicle, and the blood on the knife and hammer might not have been human blood. Further, Mr Freney stated that more advanced techniques allowed him to determine that the blood on a "blue rag" located in the vehicle boot had belonged to the appellant, not the deceased.

Blood which was almost certainly the deceased's blood, was present on items found in the boot of the appellant's vehicle, a black and red sports bag, a blanket and a green Chux cloth. Mr Freney's opinion was that the blood did not get onto the bag in the manner suggested by the prosecution, namely by blood dripping from the deceased's body onto the bag while both were in the vehicle boot or by contact between the body and the bag in that situation. Mr Freney was also of opinion that the quantity of blood found on the sports bag, the blanket and the green Chux cloth referred to in the prosecution evidence at the appellant's trial was insufficient to be explained by the presence of the deceased's body in the vehicle boot and there should have been other evidence of blood had the body been placed there in the period following her death as the prosecution contended. A sponge found underneath the blanket was examined and no blood was found.

Mr Freney expressed the further opinion that it was unlikely that the hair found in the boot of the appellant's vehicle belonged to the deceased.

Mr Freney's opinion regarding the improbability of the deceased's body having been in the boot of the appellant's vehicle was supported by Professor Anthony Joseph Ansford, a pathologist and the Director of the John Tonge Centre for Forensic Sciences, who gave evidence that, if, as the prosecution contended, the deceased's body had been in the boot of the appellant's vehicle there would have been more indications of blood found and, if the body had been in the boot for as long as the prosecution contended, from the afternoon of Monday, 23 September until the early morning of Wednesday, 25 September 1991, there would have been a detectable odour. Professor Ansford's opinion concerning the smell is less important than his evidence concerning the blood, especially because the matter was not explored with Dr Ashby who gave somewhat different evidence at the trial.

I have had the advantage of reading the reasons for judgment of Davies J.A. I agree with his Honour that, if accepted - and I can discern no reason not to do so - Mr Freney's evidence, together with the limited support which it received from Professor Ansford, makes it unlikely that the deceased was killed in the house and her body placed, and left for some days, in the boot of the appellant's car. I also agree with his Honour that, if accepted, the evidence of Mr Freney and Professor Ansford makes the "scenario" put to the jury by the prosecution unlikely to have been correct.

Further confirmation that the prosecution "scenario" was incorrect is to be found in the evidence of Ms Beryl Morris, an entomologist, who gave evidence at the trial. Ms Morris gave additional evidence in which she said that her opinion at the trial concerning the age of the maggots found on the deceased's body and in the boot of the appellant's vehicle was based on incorrect information, and that, although the estimation of age of maggots by reference to their state of development is imprecise, the maggots found indicated that it was more likely that the deceased died on the morning of Tuesday, 24 September than the afternoon of Monday, 23 September. The importance of this evidence for present purposes is that the reliance by the prosecution at trial on the evidence of Ms Morris to support its "scenario" is demonstrated to have been misplaced.

None of the other matters raised by the appellant would warrant a new trial if the evidence of Mr Freney, Professor Ansford and Ms Morris does not do so. While I have noted the criticisms which the appellant made of the prosecutor at the appellant's trial and the investigating police officers, there is insufficient to warrant a conclusion that, if a new trial is not otherwise called for, the preparation and presentation of the prosecution case, when taken with other matters, demonstrated a miscarriage of justice.

As I earlier stated, on all the evidence now available a jury, properly instructed, might and probably would, reasonably convict the appellant. However, the prosecution case against him will be deprived of considerable impact if the deceased was not killed at the time and place nominated by the prosecution "scenario".

In my opinion, the jury could not have properly convicted the appellant by a process of reasoning which was not referred to by the trial judge, the prosecutor or defence counsel, and involved a "scenario" quite different from that advanced by the appellant which the defence did not have an opportunity to meet or debate; for example, on the basis that the appellant killed the deceased at an unknown location, neither the residence nor the place where her body was found, and perhaps at a different time from the appellant's period of opportunity on the afternoon of 23 September 1991. Such a course would have involved an unfair trial and a miscarriage of justice. Contrary to the submission for the prosecution in this Court, the starting point is acceptance that the jury convicted the appellant on the basis upon which it was asked to do so by the prosecutor as revealed by the trial judge's summing up.

The foundation of the prosecution "scenario" has been substantially eroded by the evidence of Mr Freney, Professor Ansford and Ms Morris, and the scenario was wrong in critical respects . It seems to me impossible to avoid the conclusion that the jury convicted the appellant on the basis of evidence which presented a significantly mistaken version of events. The prosecution case against the appellant on all the evidence is not so strong as to make his conviction inevitable or to eliminate the possibility that the appellant lost a chance of being acquitted which was fairly open to him. It is unnecessary to consider whether there would, in any event, have been a miscarriage of justice because of the central importance, in the context of the prosecution case, of the circumstances which have been demonstrated to be unreliable.

I would allow the appeal, quash the conviction and order that the appellant be retried.

REASONS FOR JUDGMENT - DAVIES J.A.

This is a case referred to this Court, on consideration of a petition for pardon pursuant to s.672A(a) of the Criminal Code. The appellant was convicted of murder on 25 March 1992. An appeal against that conviction was dismissed by this Court on 25 August 1992 and an application for leave to appeal against that dismissal was refused by the High Court of Australia on 4 March 1993.

Leanne Mary Holland, a girl of 12 years of age, was murdered on or about 23 September 1991. Prior to her death she lived in a house in Goodna with her father Terry, her sister Melissa and the appellant who was living in a de facto relationship with Melissa. The case against the appellant was circumstantial. The main features of it were described by this Court in its judgment of 25 August 1992 (C.A. No. 122 of 1992) as:

(a) on 23 September 1991 the day on which, on the Crown case, the deceased girl was murdered, the deceased and the appellant had been left alone in the home in which they both lived with the deceased's father and sister, the latter of whom was living in a de facto relationship with the appellant.

(b) Blood was found on a number of items in the boot of the appellant's car; the blood was shown to be of the same type as the deceased's, a type which was found in only 1½% of the Australian population.

(c) Also found in the boot was a strand of hair similar in length, colour and texture to that of the deceased girl and a maggot of the type and age found on the deceased's body. Furthermore, swabs taken from inside the boot lid and lip had human blood on them which could not be grouped.

(d) Blood consistent with the deceased girl's was found in a number of places in the house.

(e) Car tracks of the same type as those of the appellant's car were found on the track which led to the body; however tyres with tracks of this kind were not uncommon.

(f) A hammer which was kept beside the appellant's bedside table was missing; such an instrument was consistent with having caused the injuries to the deceased's head.

(g) The appellant told lies to the interviewing police.

(h) A fold-up chair usually kept in the boot of the appellant's car was found in the spare room in the house, the appellant claiming that he had put it there after cleaning the car on 23 September.

To those features the Court could have added sightings of a car similar to that of the appellant on the morning of Wednesday 25 September in the vicinity of the area where the body was found together with evidence that, on that morning, the appellant had driven from the Redbank Plains area (consistently with returning from that vicinity) and had offered an explanation for this which the jury might reasonably have thought improbable.

Evidence was put before this Court on this reference, some of it described as fresh, the balance as new but not fresh evidence, which, it was submitted, contradicted or at least weakened some of those features. Initially this was by way of statutory declarations; in some cases the witnesses were, at the respondent's request, called by the appellant and cross-examined by the respondent. The Court considered all of this evidence without ruling on its admissibility. No further evidence was put with respect to those features described in paragraphs (a), (f), (g) or (h) or to the additional feature mentioned above and no further submissions were made with respect to these.

As to the blood found on items in the boot of the appellant's car, referred to in paragraph (b), the further evidence in one respect strengthened the Crown case against the appellant for, although it indicated that some of the blood found was more consistent with the appellant's than Leanne's it also established that blood found on the appellant's red and black sports bag in the boot was the same type as the deceased's but was shared by only .00005% of the Australian population. It was therefore accepted on the appellant's behalf before this Court that that blood was the deceased's. No credible explanation was advanced either at trial or on this appeal by the appellant or on his behalf as to how this blood could have been on the appellant's bag in the boot of the appellant's car, to which it appeared only he and Melissa had access, without the appellant's knowledge. The appellant accepted that Melissa could not have been involved in Leanne's killing. Nevertheless it was new but not fresh evidence about blood in the boot of the appellant's car, or more accurately, the absence of more than was found and the insufficiency of blood found in the house which together formed the strongest basis for a contention that the conviction should now be set aside.

Although, as I have said, the case against the appellant was a circumstantial one, those circumstances were presented to the jury by the prosecution, and by the learned trial Judge as the prosecution's contentions, as circumstances from which they could infer that the appellant had killed Leanne in the house, placed her body in the boot of his car and cleaned up the house, all on 23 September, and that, the body having remained in the boot of his car from that time until 25 September, he disposed of it in bushland early on 25 September. It was put to the appellant by the Crown prosecutor that on 23 September he attacked Leanne with a heavy instrument like a hammer, that he cleaned up the blood in the house and that he took her down the front stairs and put her in the boot of his vehicle. The Crown prosecutor accepts that he may have told the jury in his final address, as an explanation of possible scenarios, that a possibility was that the body may have been put in the boot after killing and kept there until disposal. It appears likely from his Honour's summing up to the jury that the Crown prosecutor also suggested as a possibility that the accused killed Leanne in the house, cleaned up the house and disposed of the body before Melissa came home; and that he did this by probably wrapping the body in some material, carrying it down the stairs in broad daylight and putting it in the boot of his car. And his Honour told the jury that it was the Crown's contention that from the presence in the boot of her blood and of a maggot of the same type and age as those later found on her body they should conclude beyond reasonable doubt that her body was in the boot of the car.

His Honour made it clear to the jury, however, that, this being a circumstantial case, the Crown was not restricted to this scenario. First of all he said to them, generally:

"You have to remember that the Crown does not have to prove to you every detail of the offence, not even the time that it took place. It has to convince you beyond reasonable doubt as to the guilt of the accused. And there are some of these matters where it says proof of the matter is just beyond it, but at least the proof that it has is sufficient. Whether it is or not is for you to decide."

A little later his Honour dealt specifically with the proposition that the body may not have been placed in the boot of the car. His Honour then said:

"But, of course, the question then arises as to where that gets you. Does that raise a reasonable explanation consistent with innocence? Because, does it make any difference, taking into account that it was the accused man who had virtually total control of the boot at the relevant time - apart from Melissa, who could not have been involved? What difference would it make to the question of his guilt as to whether the body was put into the boot or whether the body bled on these items in some way and then these items were put in the boot? Who could have put the items with blood on them in the boot? How could they have been put in the boot with blood on them without the accused's participation in it?

So the proposition that the blood on these items in the boot does not necessarily mean that the body was in the boot is a matter that you are entitled to take into account. But you mustn't stop there. You must consider further that if that were the case, what flows from it? Is there still a reasonable explanation consistent with innocence in that respect?

Now, you might feel that there is a reasonable explanation consistent with innocence, notwithstanding all the other features as well, notwithstanding the maggot and so forth - that is a matter for you. But simply because an explanation is offered as to how the body might not have been in the boot, that does not necessarily mean that the blood on these items in the boot must therefore be discarded. You will then say, well, if that were a reasonable possibility how is it that these bloody items were put in the boot of his car? How could there be an hypothesis of his innocence consistent with that? That is what you have to consider. I don't offer an explanation one way or the other and I don't say to you for one moment that the question I have raised for you is unanswerable. They are questions for you to consider. I only am trying to extend for your consideration propositions that are put up to you, so that you have the opportunity of considering these matters fully."

New evidence by Mr. Freney, a forensic scientist who had not given evidence in the trial, was to the effect that if Leanne's body had been placed in the boot of the appellant's car after she had sustained injuries of the kind observed on postmortem examination, and it had remained there until 25 September, then, unless she had been expertly wrapped in a way which would have sealed off the wounded areas, especially her head, there would have been substantially more evidence of blood in the boot of the car than was detected on forensic examination. There was evidence at the trial that a plastic bag, of a kind found in the house but also in many households, was found under Leanne's body but no other evidence of wrapping was found.

None of the blood found in the house was capable of being identified positively as Leanne's. Its main concentration was in the bathroom and Mr. Freney directed his specific attention here. He concluded that it was unlikely that Leanne had been killed in the bathroom. Again given the extensive nature of her injuries, he said she would have bled profusely and, notwithstanding an attempt to clean the bathroom of any signs of blood, there would have been substantially more evidence of blood in such areas as the indentations between tiles on the floor, had she been killed there, than was in fact found on forensic examination. This conclusion applies even more strongly to other parts of the house, such as the stairway, where evidence of blood was found.

Mr. Freney's evidence stands uncontradicted. Curiously at the trial no questions were asked of the forensic biologist, Ms. Bentley, about what inferences, if any, could be drawn from the presence of blood, or the absence of more blood, in the bathroom or what inferences, if any, could be drawn as to the presence of Leanne's body in the boot of the appellant's car from the findings of blood, including that identified as hers, or the absence of more blood in the boot.

In one respect Mr. Freney's evidence was supported by evidence sought to be adduced from Dr. Ansford, a pathologist, who also did not give evidence in the trial, who said that if Leanne's body had remained in the boot of the appellant's car from 23 September to 25 September the boot would have emitted a strong odour when first opened and examined by police on Wednesday 25 September 1991. No evidence of odour had been given at the trial.

Mr. Freney's evidence, if accepted, together with the limited support which it received from the evidence of Dr. Ansford, makes it unlikely that Leanne was killed in the house and her body placed in, and left for some days, in the boot of the appellant's car. Of course that says little about whether the appellant killed Leanne; it goes only to whether he killed her in the house and placed and left her body in the boot of his car. No doubt there are other scenarios, consistent with the appellant's guilt, which would explain the presence of Leanne's blood on the bag in the boot of his car. He may have enticed her to go with him to a remote location, perhaps at or near where her body was found, and killed her there. Her blood on the bag and, perhaps, other items in the boot, may be explicable as coming, after her death, from his person or from the instrument which he used to kill her. He may later have returned to the scene to move the body to a more remote location. This may also explain the presence of the maggot and the hair in the boot.

Certainly the appellant was unable to explain either the presence of Leanne's blood on the bag in the boot of his car or the presence, also in the boot of his car, of a maggot of the same type and roughly the same age as those found on Leanne's body. Moreover it is difficult to think of a credible explanation for the presence of Leanne's blood in the boot of the appellant's car which is consistent with the appellant's innocence. The jury would have been entitled to conclude that although they were unable to say how or where the appellant killed Leanne the presence of this blood established to their satisfaction beyond reasonable doubt that he had done so. The importance of Mr. Freney's evidence, and to a lesser extent Dr. Ansford's, is only that, if accepted, the scenario put to the jury by the Crown is unlikely to have been correct.

Mr. Freney's evidence was not fresh evidence as the appellant conceded; it would have been available to the appellant at trial by the exercise of reasonable diligence in the preparation of his case. The appellant contended that Dr. Ansford's evidence was fresh evidence and I am prepared to accept that contention without considering it further. The question is whether this evidence, taken together with the other new evidence to which I shall shortly refer, shows that there has been a miscarriage of justice. Where fresh evidence is produced that requirement will be satisfied where there is a significant possibility that the jury, acting reasonably, would have acquitted the appellant if the fresh evidence had been before it at the trial. The test for miscarriage in the case of new but not fresh evidence is more onerous; it has been said that the Court must be satisfied that innocence is shown or that reasonable doubt is established. It is better to defer consideration of the application of these tests until the other evidence put before us has been considered.

There was evidence, which the appellant accepted was new but not fresh, from Ms. Morris, an entomologist, who had given evidence at the trial about the maggot found in the boot of the appellant's car. Her evidence at trial was, it appears, relevant in two ways. The first was that because the maggot was of the same age and species as those found on Leanne's body it could be inferred, especially when taken together with the presence of her blood, and hair consistent with hers in the boot, that it came from her body. The second was that its age, and that of the maggots found on her body, was consistent with the eggs having been laid in the afternoon of 23 September before 4.45 p.m. and that, because the laying of eggs generally coincided with death it could be inferred that death occurred then. This latter evidence supported the inference that death occurred at a time when the appellant had, or may have had, an opportunity to kill Leanne. However the evidence on the second aspect involved elements of speculation, depending on a large number of variables, as the learned trial Judge pointed out at the time and the witness readily accepted.

The new evidence from Ms. Morris was said to be relevant to this second aspect, the time of death. In it she expresses concern that too much importance may have been placed on her time estimates at trial; that it was important to understand that they were based on particular scenarios being considered; and that whilst egg laying and death usually coincide it is impossible to say whether this occurs in a particular case. Ms. Morris describes her estimates of time as "best guess" estimates and says in one of her reports that "nobody should be led to believe that forensic entomology is capable of such a fine level of accuracy". Another factor which she mentions as causing a variation is the number of maggots present which she describes as "critical" and of which she was not informed. However, using the same methodology and a number of possible scenarios she gives new time estimates based on new evidence of ambient temperatures at the relevant time taken nearer to the house and the place where Leanne's body was found than those upon which she relied for her evidence at trial. But these scenarios are based on the assumption, upon which Mr. Freney's evidence casted doubt, that Leanne's body had remained in the boot of the appellant's car from the time of death until 25 September. And the new evidence adds the factors of the car being left in the sun and the body in the boot being wrapped.

Ms. Morris' new evidence does not affect the first basis upon which her evidence was relevant at trial; that from the fact that a maggot of the same age and species as that found on Leanne's body was found in the locked boot of the appellant's car together with Leanne's blood, it could be inferred that it came from her deceased body. And as the second basis upon which it was relevant was always speculative, the further evidence adds little. Moreover if Mr. Freney's evidence is accepted it is based on an incorrect premise.

There was also evidence, which the appellant contended was fresh evidence from a Mr. Thomas and a Mr. Lee with respect to paragraph (e) above: the car tracks found on the track which led to the body. However in view of the facts that Mr. Thomas, the Queensland Manager of Bridgestone Tyres, gave evidence on the question at the trial and that Mr. Lee is Technical Field Service Manager of that company I cannot see any basis upon which it could be contended that the evidence of either of them was fresh evidence and Mr. Macgroarty for the appellant did not advance any. Before us Mr. Macgroarty sought mainly to rely on the evidence of Mr. Thomas but it is plain, as Mr. Macgroarty frankly acknowledged, that he defers to Mr. Lee as the expert and that consequently the effect, reliability and probity of this further evidence should be gauged by looking at the evidence of Mr. Lee. Mr. Thomas but not Mr. Lee gave evidence at the trial on this question as did Sergeant Crick, the police scientific officer. On the basis of their evidence the learned trial Judge told the jury that they might be satisfied beyond reasonable doubt that "car tracks at the scene were comparable in design with two different sets of tyres on the car of the accused" although they could not exclude the existence of another car with similar tyres.

Mr. Lee's recent statutory declarations and affidavit indicate that his Honour may have put the matter too highly. However Sergeant Crick, who gave the evidence at trial, compared inked impressions of the tread on the appellant's vehicle with the actual tracks in the soil. When Mr. Lee came into the matter several years later he was able only to compare the inked impressions with photographs of the tracks in the soil and, as appears from one of his statements, the detail contained in those photographs was, as he described it, "insufficiently clear". He described one of them as "especially inconclusive in its detail". This made it difficult for him to conclude, one way or the other, that the patterns shown in the photographs were of tyres of the respective kinds made by the inked impressions. It is not surprising then that Mr. Lee, in successive statements, underwent a number of changes of opinion. In the first place he thought that, with respect to the front tyres, the tread patters in the photograph was not made by the type of tyres fitted to the appellant's car and, with respect to the back tyres there was a lack of identicality between the photograph and the inked impression of the tyres fitted to the appellant's car. On the second occasion, which was in May this year, he was much less certain. He said that he could not, on the photographs, distinguish the tread pattern in sufficient detail to conclude, one way or the other, in respect of either the front or the back tyres. And on the third occasion, which appears to be less than a month after the second, he appears to revert in part to his earlier, first, opinion.

This evidence, which is plainly not fresh evidence, lacks cogency. Mr. Lee lacked the advantage of making a direct comparison between the tyre tread and the impressions made at the scene. He was left to make a comparison based on unclear photographs. This may well explain the uncertainty arising from his different conclusions.

Finally there was evidence, some contended to be fresh evidence, some conceded to be new but not fresh, which added to evidence at the trial of people who thought they had seen Leanne at a time after the appellant would have had an opportunity to kill her. This additional evidence added little to that given at the trial because of its inherent unreliability.

Ms. Lawrence had been a bar attendant at a hotel at Redbank at which, some years after Leanne's death, Terry, her father, regularly drank. He did not regularly drink there prior to the time of her death and indeed he has sworn he did not ever drink there at all before then. Nevertheless Ms. Lawrence said she had seen Leanne with her father about half a dozen times at the hotel prior to her death. The time and circumstances of her purported identification of Leanne were as follows. On Tuesday 24 September 1991 at about 9.00 a.m. she parked in a parking bay at a shopping centre at Goodna. She saw a young girl in the passenger's seat of a car parked next to hers then and also on her return to the car, whom she looked at for about 30 to 60 seconds in total. It occurred to her that she recognized the girl though she could not place where she had last seen her. She "made the connection", as she put it, when she saw Leanne's photograph as a missing person in the Queensland Times of Thursday 26 September. That day at work everyone was talking about the girl being Terry Holland's daughter. Whilst this evidence would no doubt have been admissible at the trial it is, in my view, very unreliable having regard to her lack of familiarity with Leanne, the short time which she had to observe her and the incentive to recognize her as the missing girl from the combination of the photograph in the paper and her colleagues at work talking about it that day. It should also be noted that she assumed at one stage that she had been mistaken in thinking that she had seen her on that day.

The second witness in this category was a Mrs. Reimers who, the previous weekend, had picked up her own daughter Sarah and Leanne at a party and driven Leanne home. She had not met Leanne before and did not meet her after that occasion. The girls were in the back seat of the car, the journey took five to eight minutes, the girls chatted as they drove but Mrs. Reimers did not particularly notice what they were saying. Then on Tuesday 24 September she received a telephone call from a girl who asked for Sarah. She did not identify herself but that was not uncommon, Mrs. Reimers said, because most of Sarah's friends did not. She told the caller that Sarah was at the Coast but said that she could contact her if she wished. The girl simply replied "No, it's okay" and rang off. Initially Mrs. Reimers thought that the caller was Tracey MacKellar, another friend of Sarah's. However when she heard that Leanne was missing she inquired from Tracey whether Tracey had made the call and Tracey assured her that she had not. She then thought that the caller was Leanne because, as she put it, Leanne's voice was similar to Tracey's. It need hardly be said that the reliability of this evidence, based as it was merely on a similarity which Mrs. Reimers thought existed between Leanne's voice and Tracey's after hearing part of a conversation between her daughter and Leanne a week or so before, there being no suggestion of anything distinctive in their voices, is very low. Further, Mrs. Reimers accepted the possibility that the caller could have been another child altogether.

The third witness in this category was a Ms. Tymon a bank teller at the Commonwealth Bank at Goodna. Ms. Tymon gave evidence at the trial that on the afternoon of 23 September 1991, a person "very similar" to Leanne was served by her at the bank; and that she then searched the bank's records and found that, on that day, she had processed a withdrawal from the account of Herbert and Lorraine Holland, Leanne's uncle and aunt. However her evidence was, at trial, contradicted by that of Herbert Holland who said that he withdrew the amount personally that morning. She merely seeks to improve her evidence by contradicting one aspect of his: that he was served by a male teller. But nothing strengthens her account that it was the deceased who she served and not Herbert Holland.

None of the evidence of Ms. Lawrence, Mrs. Reimers or Ms. Tymon significantly improves the appellant's case.

Of the evidence considered above, only that of Dr. Ansford, Ms. Lawrence and Mrs. Reimers could be considered to be fresh evidence even if one were to extend the greatest latitude, in the application of the test for determining fresh evidence, to the evidence of Mr. Freney, Ms. Morris, Mr. Lee, Mr. Thomas and Ms. Tymon. It was rightly conceded that Mr. Freney's evidence was not fresh evidence. The forensic scientist who gave evidence at the trial, Ms. Bentley, was simply not asked about the matters now sought to be adduced in Mr. Freney's evidence and nothing was put before us, even now, to indicate what her view may have been about these matters. Moreover no attempt was made to explain Mr. Freney's absence at trial. It was also rightly conceded that the further evidence of Ms. Morris, who gave evidence at the trial, was not fresh evidence. It was plain from other material put before us that the temperature readings upon which her further evidence was based would have been readily available. It was contended that the evidence of Messrs. Lee and Thomas was fresh evidence but that contention was unsustainable for reasons to which I have already referred. Mr. Thomas was called and could have been asked about these matters; Mr. Lee was Mr. Thomas' expert in such matters.

However even if all of the evidence now sought to be adduced were viewed as fresh evidence I do not think that the appropriate test for a miscarriage of justice would be satisfied; that is I do not think that if the jury, acting reasonably, had had this evidence before it at the trial there would be a significant possibility that it would have acquitted the appellant. As appears from what I said earlier, the strongest basis for the appellant's contentions that either a verdict of acquittal should now be entered or that there should be a new trial is the evidence of Mr. Freney. However as I also said, it is difficult to think of a credible explanation for the presence of Leanne's blood in the boot of the appellant's car which is consistent with the appellant's innocence and none was advanced either below or before this Court. It is true that Mr. Freney's evidence, if accepted, makes the Crown's scenario put to the jury unlikely to have been correct. But, as the passage from his Honour's summing up set out above makes clear, that does not render it at all less likely that the appellant killed Leanne. The evidence of Leanne's blood in the boot of the appellant's car at the relevant time, to which boot only the appellant and Melissa (who it is accepted could not have been involved) had access, is, in my view overwhelming evidence of the appellant's guilt when taken together with the other features of this case, referred to earlier, to which no submissions were directed in this Court. Nor does any of the other evidence referred to render it significantly less likely that the appellant killed Leanne.

Apart from the unreliable evidence of sightings of Leanne on or after the afternoon of 23 September 1991 there remains no evidence casting doubt on the opportunity which the appellant had to kill Leanne on that afternoon. There is no credible explanation for Leanne's blood being on the appellant's bag in the locked boot of his car, to which only he and Melissa had access, other than that he killed Leanne. And the evidence of other blood not capable of being identified, the maggot and the hair also found in the boot, of the missing hammer, of the lies told to the police and of the car sightings near where Leanne's body was found add weight to this. Although the new evidence may make it unlikely that the appellant killed Leanne in the house and left her body in the boot of his car for two days I am satisfied that there is no significant possibility that a jury acting reasonably, even with that evidence before it, would have doubted that he killed her.

The test which should be applied in these circumstances is one which is more onerous than that which I have applied. It necessarily follows that on that more onerous test, however it is expressed, the appellant fails.

I would therefore dismiss the appeal.

REASONS FOR JUDGMENT - McPHERSON J.A.

I have read and agree with the reasons of Davies J.A. for dismissing this appeal.

As his Honour mentions in his reasons, counsel for the Crown in the course of his address to the jury at the trial suggested that the appellant might have killed the deceased girl in the house, and then placed her body in his car, where it was left for some time before being disposed of in the bush where it was later found. The evidence now before this Court suggests that such an explanation of what happened seems rather unlikely. But the question is not, and never has been, whether the hypothesis or explanation suggested by the prosecution at the trial was established beyond reasonable doubt. In a case like this where proof of guilt rests on circumstantial evidence, the question is and always was whether, to use a time-honoured formula, the proved circumstances are such "as to be inconsistent with any reasonable hypothesis other than the guilt of the accused": see *Peacock v. The King [1911] HCA 66;* (1911) 13 C.L.R. 619, 634; or, stated more simply, whether the only rational conclusion from all the evidence is that the accused is, beyond reasonable doubt, guilty of the offence charged. In other words, guilt must be "the only inference which is reasonably open upon the whole body of primary facts": see *Chamberlain v. The Queen (No. 2)* [1984] HCA 7; (1984) 153 C.L.R. 521, 599 (Brennan J.).

In the present case it is possible on the evidence before the jury at the trial and before this Court to arrive at more than one possible explanation or theory of how the appellant might have murdered the girl and disposed of her body. In reaching their verdict the jury may have been drawn to any one or more of such hypotheses. In the end, however, the question for them to decide was not whether any particular hypothesis was correct; but whether there was any reasonable possibility that on the evidence, and not the addresses of counsel, the appellant was not proved beyond reasonable doubt to have been guilty of this murder. As is demonstrated in the reasons of Davies J.A., there was evidence on which the jury were justified in reaching that conclusion.

For my part I agree that on the evidence now before the Court there is no reason to doubt that their verdict was correct, or to suppose there has been a miscarriage of justice. In those circumstances there is no justification for ordering a new trial, the more so as it is, I gather, the opinion of all members of this Court that on all the evidence now available a properly instructed jury would probably, and, it is accepted, reasonably, again find the appellant guilty of this offence of murder. Once that conclusion is reached, it ceases to be legitimate to speak of a "significant" possibility of acquittal whether by the trial jury in this case or by any other jury in the future. It is not, in my respectful opinion, the function of the criminal trial and appeal procedure to ensure that an accused person goes through a series of retrials on the off-chance of meeting a jury who arrive at a verdict of acquittal which is unreasonable: cf. *R. v. Gudgeon* (1995) 133 A.L.R. 379, 397.

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