

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Templeton* [2004] QCA 338

PARTIES: **R**  
**v**  
**TEMPLETON, Paul Thomas**  
(appellant)

FILE NO/S: CA No 135 of 2004  
SC No 414 of 2003

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Toowoomba

DELIVERED ON: 17 September 2004

DELIVERED AT: Brisbane

HEARING DATE: 27 August 2004

JUDGES: McPherson and Williams JJA and Holmes J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Appeal against conviction allowed**  
**2. Conviction quashed**  
**3. Acquittal entered**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE AND INSUPPORTABLE VERDICT – WHERE APPEAL ALLOWED – where the appellant was convicted of murdering his former partner – where the Crown’s case was circumstantial and consisted of evidence of opportunity, evidence of the past relationship, glass analysis evidence and evidence of conduct of the accused revealing a consciousness of guilt – whether the verdict was unsafe and unsatisfactory  
*M v The Queen* (1994) 181 CLR 487, applied

COUNSEL: J R Hunter for the appellant  
M R Byrne for the respondent

SOLICITORS: Legal Aid Queensland for the appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McPHERSON JA:** I agree with the reasons of Holmes J for allowing this appeal. The evidence at the trial, objectively considered, was not sufficient to warrant beyond reasonable doubt a verdict of guilty of murder.
- [2] The appeal against conviction should be allowed, and the verdict and conviction be set aside. Verdict and judgment of acquittal should be entered in favour of the appellant.
- [3] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Holmes J wherein there is a careful analysis of the relevant evidence given at trial and the issues raised by the appeal.
- [4] As is pointed out therein, despite the similarities between the Comfit picture of a male compiled with assistance from Mrs Moore and the appellant, the preponderance of evidence strongly suggests that the male person seen by Mrs Moore with the deceased outside her residence was not the appellant. In other words there was a strong suggestion on the evidence that the deceased was seen in the company of a male person, other than the appellant, very shortly before she met her death and not far from the place where she was killed.
- [5] Ultimately the only evidence reasonably capable of linking the appellant with the crime is the forensic evidence relating to glass fragments found in the appellant's room and at the scene.
- [6] During the period the appellant and the deceased were in a relationship the latter visited his room on a number of occasions. So much was established by the evidence of other residents of Mica Lodge. There is nothing in all the evidence indicating that the jar of foundation cream was broken on the night the deceased met her death. There was clear evidence that a cleaner vacuumed the appellant's room on a weekly basis and particularly between 31 March 2002 and the dates (19 July and 1 August 2002) on which police scientific officers and a forensic scientist collected a number of pieces of glass from various places in that room. If the fragments of the foundation cream jar survived that cleaning it is obvious that they could have been there from a time prior to 31 March. As the lid could still be screwed onto the jar it is not unlikely that the deceased, given her relatively impoverished state and lifestyle, would have continued to use it though it was damaged.
- [7] As Holmes J has pointed out the forensic evidence relating to glass fragments found in various locations and identified as coming from a Fourex beer bottle or bottles does not advance the prosecution case.
- [8] There seems no doubt that the window to the appellant's room at Mica Lodge was smashed on the night the deceased met her death. Because of that some significance was placed on fragments of glass recovered from the boots of the deceased which had a refractive index identical with that of the window glass; there was a piece of glass on the left boot and a further fragment of glass found on the part of the sole adjoining the heel of the deceased's right boot. The evidence was that the window was broken by being hit with an object from the outside. If it is accepted that the two glass fragments on the shoes came from the appellant's window (and that is by no means conclusively established) then it may well be that, in her inebriated and highly emotional state as described by witnesses such as Mrs Moore, the deceased went to Mica Lodge and was responsible for the window being broken, and thereby

picked up some fragments of glass from it on her boots. Such a scenario would, of course, not implicate the appellant.

- [9] There are of course other possible explanations, some of which would implicate the appellant in her death. But what is of greater significance in my view is that, as pointed out by Holmes J, there is no other evidence at all placing the appellant with the deceased at about the time she met her death, let alone evidence implicating him in her death. There is nothing indicating the appellant was present in Isabel Street where the deceased was killed. Though, for example, there were footprints in red mud at the scene, investigating police were unable to find any link between any of the appellant's footwear and the scene. One would also have thought that the killer would have got some of the deceased's blood on his clothing given the nature of the injuries. The police search of the appellant's room on 31 March did not locate any blood stained item of clothing which could be linked to the deceased.
- [10] I agree with all that has been said by Holmes J in her reasons. Having considered all the evidence, and applying the test laid down in *M v The Queen* (1994) 181 CLR 487 especially at 494-5, I have come to the conclusion that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of murdering the deceased. The appeal against conviction should be allowed, the conviction quashed and a verdict of acquittal entered.
- [11] **HOLMES J:** The appellant appeals against his conviction by a jury of the murder of Tarmara Smith, essentially on the ground that the verdict was unreasonable. Ms Smith's body was found at about 10am on Easter Sunday, 31 March 2002, on a vacant block of land in Isabel Street, Toowoomba. A strap, probably from her handbag, had been tied around her neck and used to suspend the upper part of her body from a tree; a plastic shopping bag had also been tied to her neck. The cause of death was strangulation. A deep wound had been inflicted to Ms Smith's left wrist by means of what the pathologist, Dr Naylor, described as a number of movements with a sharp object. Because the loss of blood was not great, it appeared that the wound might have been inflicted after death.

*Ms Smith's movements in the hours before her death*

- [12] There was evidence from a number of sources of Ms Smith's movements the preceding night. Some of the occupants of the caravan park where she lived had been drinking with her until close to midnight, when she left to go into town. The thrust of the evidence was that she left wearing a black dress, which to the recall of two of the witnesses was clean, with a black jacket, and two sets of footwear: one for walking, the other for dancing. She had with her a plastic bag containing stubbies of beer. A taxi-driver drove her to the vicinity of a hotel, leaving her there between 1:20 and 1:30am. Ms Smith told the taxi driver she had \$15 on her; on hearing that, the taxi driver charged her \$10 for the fare.
- [13] Ms Smith was seen over the next few hours by different witnesses, apparently in an advancing state of intoxication. At various stages she was talking to herself and singing, and generally not making much sense. At about 3:15am she tried to get into Rumours nightclub, near the corner of Ruthven and Piper Streets, using someone else's identification. When she was challenged she produced other forms of identification, including a birth certificate, but was, after some argument, refused entry. At a time which is not certain, except that it was some time after 3.20 am, she was seen by a group of young men at an ATM in Ruthven Street to walk eastward along Russell Street and turn right into Ruthven Street. They heard her

say, “I’m going to fucking kill you, cunt.” In response to a suggestion that she mind her language, she said that she was “pissed off”. At about 3.35 am she was noticed further south on Ruthven Street, heading for a Caltex Service Station on the corner of Ruthven and James Streets. She bought some food there, leaving shortly before 4 am. At about 4.10 am, she was seen making her way north along Clifford Street. A witness, Ms Meskin, said that she saw Ms Smith standing with a man near the Grand Central shopping centre. Ms Meskin described the man as having dark hair, wearing black dress pants and a white dress shirt; by which she meant a shirt with a collar and long sleeves.

- [14] At about 4:15am, Mrs Allen, who lived in Clifford Street opposite the Grand Central shopping centre, heard male and female voices. From the female she made out the words, “You all think we’re the same”. The rest of what was said seemed to be swear words. She heard the male voice say, “Do you want to fuck? Aren’t you interested? You want me to fuck you up the arse, don’t you want to be in it?” The speakers then seemed to be moving off in a northerly direction.
- [15] Mrs Moore also lived in a unit across from the shopping centre. She was woken by the sound of a female voice screaming. She noticed that it was 4:20am. Looking out of a window, she saw a woman, no longer screaming, at the driveway to the units. Mrs Moore described the woman as wearing dark clothes and a dark cardigan and carrying a white plastic bag, from which she could hear what sounded like stubbies rattling. It appears – and it is not disputed – that it was Ms Smith. With the woman was a man whom Mrs Moore described as tall, with light coloured hair. He was smartly dressed as though he had come from a wedding, wearing dark pants and a white shirt, the sleeves of which were rolled to his elbows. She noticed nothing unusual about his arms. She heard the woman say words to the effect of, “You didn’t look like a copper, you haven’t got a badge”, and also heard her refer to the man’s shoes as being very shiny. The male touched his breast pocket in a way suggesting that a badge might be in it. The female was aggressive in her language, while the male was calm. At some stage Mrs Moore heard the woman say, “I’ll show you who your father is, you’re not going to fuck me.” The pair was at the driveway for about five minutes. Then the male walked away in a northerly direction, followed by the woman. Some months later, Mrs Moore assisted police in preparing a Comfit picture of the male (a process by which facial features are chosen from photographs and assembled through a process of drafts into a complete picture). More will be said of that later.
- [16] Somewhere around 4:15 or 4:30am, Mr Lane, a resident in a unit block in Isabel Street, heard a muffled yell coming from the street. It sounded like a drunken girl calling someone, and he took no further notice. Another witness said that she had heard screams between 4:20 and 4:25am and again between 4:35 and 4:40am, emanating from somewhere in an area between the Grand Central shopping centre and Isabel Street. The size of the area nominated, and the distance of the witness’ unit from the Isabel Street site, suggest that what she heard may have been quite unconnected with the murder of Ms Smith. Later that day, at about 10 am, Mr Lane discovered the body of Ms Smith.

#### *The murder scene*

- [17] Isabel Street ends in a cul-de-sac. The vacant block on which the body was found was near the street’s end and was close to the road frontage, but hidden to some extent by shrubs and trees. The ground was muddy; there were smears of red mud

on the body, and there were signs of muddy shoe prints leading away from the site onto the footpath and in an easterly direction down the street. Ms Smith's body was unclothed, apart from her dress which was partially wrapped around it, and there were small amounts of blood, faeces and vomit on or near it. Everything pointed to her having been killed at that site. On the ground between her legs were found the broken remains of a beer bottle and an Avon brand makeup foundation bottle, the rim of which was broken, and which had some beer bottle fragments in it. Its lid was not far away. Her jacket was by her side entangled with her torn brassiere, while her torn underpants, boots and shoes were strewn around. The shoes had a good deal of red mud on them, the boots did not. Ms Smith's handbag was nearby, with personal items from it scattered around: sets of keys, a hairbrush and a birth certificate. A Fourex stubby bottle still in its wrapper was also found.

*The post-mortem*

- [18] On post-mortem examination, Ms Smith was found to have a blood alcohol concentration of 0.111 per cent. No other drugs were detected. There were bruises and abrasions on her lips, consistent with blunt trauma. Her right and left hips, at the iliac crest, bore minor bruises and abrasions which might have been inflicted before or after death. Pieces of glass which included the intact neck of a stubby bottle were found in her vagina. There were some bruises and cuts on the external structures of the vagina, which appeared to be due to blunt trauma; possibly, the pathologist said, the result of vigorous sexual intercourse in the 12 to 24 hours before death, or possibly due to the insertion of the bottle if it was not at that stage broken. There were no signs of trauma to the anus or rectum.
- [19] There was no sign of semen on the exterior of Ms Smith's body, but its presence was detected on swabs taken from high in the vagina. A DNA analysis showed that it came from a man who had had a brief affair with Ms Smith over the preceding fortnight. His evidence was that they had had intercourse a few days earlier. His semen was also located on her underwear. There were semen stains on Ms Smith's dress from which no DNA profile could be extracted. The nature of the stain reactions suggested a large quantity of semen or a relatively fresh stain.

*The appellant's relationship with Ms Smith*

- [20] The appellant had had a relationship of some sort with Ms Smith; when he was asked by police if he knew her, he responded "she used to be my girl". For about four months prior to Ms Smith's death he had lived in a room at Mica Lodge, hostel-type accommodation in Russell Street, a block north of Isabel Street. Other occupants of Mica Lodge had seen Ms Smith there visiting him. Similarly, residents of the caravan park where Ms Smith lived had seen the appellant there a couple of times. A couple of weeks before Ms Smith's death he had gone to the caravan park very drunk, carrying a case of beer and some rum, looking for an individual he asserted had been having sex with Ms Smith. On what was probably the same night, the managers of the caravan park were awoken by calls for help from Ms Smith's cabin, and went to her assistance. The appellant was in her cabin. He had a cut on his arm and Ms Smith had an injury to her face. It was obvious that both had been drinking. A taxi was called for the appellant and he left peaceably. He was seen again at the caravan park a couple of days later on what appeared to be on good terms with Ms Smith. It seems likely that the relationship with the appellant had come to an end before Ms Smith's death: she had spent the week up to 27 March staying with the other man she had briefly taken up with.

*The police visit to the appellant's room on 31 March*

- [21] At about 8pm on the night of 31 March police officers went to the appellant's room at Mica Lodge. Sergeant Flynn, the senior officer, informed him that the police were investigating the murder of Tarmara Smith. According to Sergeant Flynn, the appellant showed no expression on hearing of Ms Smith's death. He said he had been in his room all the previous night watching television and then reading a book until going to bed at about 3:15am. The window to the room was broken and there was glass on the floor and bed. The evidence indicates that it had been broken from the outside. The flyscreen inside it was dented but intact, although fragments of glass had penetrated through it. The appellant said he did not know how the window had been broken; he had slept through and had found it in that condition, with glass lying on the floor, when he woke in the morning.
- [22] The appellant was asked what clothes he had worn the previous day and indicated a pair of blue denim jeans, singlet, underpants and deck shoes. Sergeant Flynn asked him whether he possessed a white shirt; he said he did not think he had ever owned one. The room was searched; the police took possession of the items indicated by the accused and a pair of black corduroy trousers, closer in cut to jeans than anything which could be described as "dress" trousers. No other black trousers, no white shirt or shiny shoes were located. A pair of boots with mud on the sole was seized. The appellant had been working for a landscaper; he said that the mud was probably from a work site. Sergeant Flynn also located a set of knives, one of which appeared to be much cleaner than the others. No link, however, was ever established between any of those knives and Ms Smith's injuries and there emerged no basis to suppose that the single knife was cleaner for any reason other than that it was more regularly used. Later that night, the appellant voluntarily provided a DNA sample to the police.

*The finding of the plastic shopping bag*

- [23] On 4 May 2002, a plastic shopping bag was found on the adjoining property near the fence separating it from Mica Lodge, at a point about level with the appellant's room. It had not been there when a search of the property was conducted on 1 April 2002. The bag contained items belonging to Ms Smith, including a learner's permit bearing her photograph and a note written by the appellant with the words, "Shall I have that greatest of all pleasures for me, that of having you in my arms Tarmara. Paul." There were two glass fragments in the bag, each less than 0.25mm in size.

*Searches and testing*

- [24] On 19 July and 1 August 2002, two police scientific officers and a forensic scientist examined the room occupied by the appellant at Mica Lodge and collected a number of pieces of glass. Fragments of window glass were taken from the windowsill, window runners and flyscreen. Later, that window glass and glass from two other sources – the broken Fourex beer bottle glass and the foundation jar from the murder scene – were compared with glass fragments from the room, from the appellant's clothing and boots, and from Ms Smith's clothing and boots. The comparison process involved checking the refractive indices (indicating the temperature at which glass has been heated and cooled) of the control samples against those of the fragments located about the room and the articles of clothing and footwear.

- [25] In the collection of material from the room at Mica Lodge, other fragments of glass were found in a chair near the window and in the bed frame near the wall. Another four fragments were found in a garden bed outside the window. Three small fragments, less than 0.25 mm across, of beer bottle glass with the same refractive index as the pieces of beer bottle at the murder scene, were collected from the mattress on the bed.
- [26] Of particular interest were a number of fragments which were tested and found to have same refractive index as the foundation jar found at the murder scene. A piece 10 mm x 5 mm was found under the carpet in the room near the chair adjacent the window. It was a physical fit with the damaged rim of the foundation jar, and testing revealed that it had not only the same refractive index but also the same elemental composition as the jar. Another fragment, 8.2 mm x 9.95 mm in dimension, was found between the wall and the floor slab in a corner near the window. Other, smaller pieces with the same refractive index as the jar were found: three fragments, less than 1 mm in size, on the chair; ten, as to the size of which there was no evidence, on a cushion on the floor near the window; two other fragments, respectively 5.4 mm x 6.94 mm in size and 3.9 mm x 4.2 mm in size, on the carpet under the bed. One had a substance on it which looked similar to the foundation found in the jar itself. Those fragments accounted for most of the glass missing from the jar's broken rim. Ms Panayiotou, the expert who performed the glass analysis, said that it was likely the foundation jar had been broken in the room. Some of the fragments – for example that which was 8.2 mm x 9.95 mm – were relatively large, and would not easily be transported, whereas smaller fragments, those not visible to the naked eye, could adhere to clothing or shoes for long periods.
- [27] The boots found with Ms Smith's body were examined. Two glass fragments less than 0.25 mm were recovered from the left boot. One of those fragments had a refractive index identical with that of the window glass. The other could not be identified. Four fragments were found on the right boot: one had a refractive index identical to that of the window glass and the remaining three a refractive index the same as that of the foundation jar. Ms Panayiotou was not able to say where on the boots the fragments came from, except for the window glass on the right boot, which was found on the part of the sole adjoining the heel. The other glass fragments on the boots were not visible when the boots were examined under a microscope; they were found only when the boots were brushed and shaken over blotting paper. Eight glass fragments, three of which shared a refractive index with the Fourex beer bottle glass, were found on Ms Smith's jacket; the remaining five fragments had refractive indices from two different origins which could not be identified. Two glass fragments less than 1 mm in size, again consistent with the beer bottle glass, were found on Ms Smith's dress.
- [28] The jeans taken from the appellant on 31 March were examined. Three glass fragments less than 1 mm in size, with a refractive index the same as that of the window glass were found on the exterior of the jeans. Eight glass fragments, again less than 1 mm in size, six of which had a refractive index consistent with that of the window glass and two an index consistent with the beer bottle glass from the murder scene, were found in the pockets of the jeans. Other testing of the jeans detected a small spot of the appellant's blood at the entrance to one of the pockets of the jeans.

- [29] The appellant's boots were also examined. Five glass fragments less than 1 mm in size were obtained from the right boot. Two had a refractive index the same as that of the foundation jar, one had the same refractive index as the beer bottle pieces found at the murder scene, and the remaining two could not be identified. Soil samples were also taken from the boots the day after they were seized. It was thought initially that there was insufficient soil for testing as to its origin, and that exercise was not then attempted, but later the samples from each of the boots were subjected to X-ray analysis by a process designed to compare atomic structure. The conclusion reached was that the soil from the boots was very similar to that of a landscaping site on which the appellant had been working, but was dissimilar to, and contained components not found in, soil from the Isabel Street site. There were some clay minerals in the Isabel Street soil also present in the soil on the boots, so it was not possible to rule out the presence of soil from Isabel Street as a minor component of the soil on the boots.
- [30] The glass fragments from the plastic bag found near the fence were also examined. One had a refractive index consistent with the beer bottle glass from the murder scene, the other an index identical to that of the window glass. There was a small amount of water in the bag which was subjected to chemical analysis. It was not rain water; the ions in it suggested it was reticulated town water.
- [31] Lastly, the birth certificate belonging to Ms Smith, found at the murder scene, was tested. It had Ms Smith's blood on it, and six fingerprints whose maker could not be identified.

*The Crown case*

- [32] The Crown case was summarised by counsel as having 4 strands: evidence of the appellant's opportunity to kill Ms Smith; evidence of their past relationship; evidence of the appellant's conduct revealing a consciousness of guilt; and the evidence of analysis of the glass fragments. As to the first, Mica Lodge was relatively close to the murder site. Although the attack on Ms Smith appeared on first impression to be a sexual attack, it was submitted, there were no certain indicia of rape. The injuries to the external genitalia might have been caused by the insertion of the bottle after death rather than by intercourse. No seminal fluid was found on the body and there was no evidence as to when the seminal staining on the dress had occurred. Although there was bruising on Ms Smith's hips which might have been consistent with an attempt at penetration from behind, that was not necessarily the cause. The Crown urged the conclusion that she was not the victim of a random sexual attack, but rather that the scene was staged to make it seem so. Robbery was an unlikely motive: a five dollar note (probably the last of Ms Smith's funds) was found near the body, and her jewellery had not been taken. If violent sexual attack and robbery were ruled out, the class of person with any motive to kill her was limited, and included the appellant, who lived close to the murder site.
- [33] Ms Smith had had a reason to go to the appellant's room, to collect photo identification, given her unsuccessful attempt at getting into the nightclub. The learner's permit later found in the plastic bag would have sufficed, and it should be concluded that it was in the appellant's possession at the relevant time. The COMFIT picture bore a resemblance to the appellant, and it was likely that Ms Smith had gone up Clifford Street with a person she knew, rather than someone she believed to be a police officer; she was known to harbour a profound dislike of police.

- [34] As to the relationship between the appellant and Ms Smith, the evidence of the previous incidents at the caravan park, while not of much significance in showing hostility on the part of the appellant towards Ms Smith, did at least indicate that if there were a confrontation Ms Smith would fight back; and it was consistent with a scenario in which Ms Smith went to the appellant's room, and an argument ensued, on the night she was killed.
- [35] The appellant's conduct showed a consciousness of guilt: he had remained "expressionless" when told of the investigation into Ms Smith's murder. It was suggested that he had placed the plastic bag on the other side of the Mica Lodge fence; the fragment of window glass in it was consistent with its having come from his room, and the note found in it established a connection with him. The fragment of beer bottle glass suggested a handling of the bag's contents after recent contact with the broken beer bottle. The learner's permit could not have been in Ms Smith's possession on the night of her death, or she would not have needed to use someone else's identification to try and get into the nightclub. The inference was that the appellant had it, and the other personal items found in the bag. The abandonment of the bag should be construed as an attempt by the appellant to distance himself from its contents in the context of the murder investigation.
- [36] The finding of the piece of the foundation jar in the appellant's room made it likely that the jar had been broken in the room. It was improbable that Ms Smith would have kept the jar if it had been broken on some earlier occasion. The window glass on the deceased's boots indicated that she was present when the window broke or came into the room some time after it had broken. The beer bottle fragments in the appellant's room were, it was suggested, consistent with his having carried them on his shoes from the murder site. The presence of window glass and beer bottle glass on his jeans suggested recent contact with both types of glass, as did the small spot of blood at the entrance to one of the pockets. Similarly, the presence of foundation jar and beer bottle glass on the appellant's right boot suggested recent contact with both types of glass. The net effect of the glass analysis evidence was to make it extremely likely that the deceased was in the appellant's room shortly before her death and that the appellant was at the murder scene.

*Was a verdict of guilt reasonable?*

- [37] The major difficulty for the Crown is that a close examination of the evidence relating to the man seen with Ms Smith in Clifford Street points away from its being the appellant. The COMFIT picture provides little reassurance, when one considers the way it came into being. Mrs Moore was interviewed by the police on 1<sup>st</sup> April 2002. She then described the man she had seen as a male in his mid 20's with a pointy nose, wearing a white long-sleeved button up shirt with rolled up sleeves, dark long trousers and dark shoes. The police asked her at that stage whether she would do a COMFIT picture. She declined to do so, telling police that she had only ever seen the individual side on and felt unable to assist.
- [38] On 6 June that year, Mrs Moore was asked to look at a photo board containing 12 pictures of men, one of whom was the accused. Each of the males depicted in the photo board is Caucasian, fair-skinned and clean shaven, with light-coloured to blond hair; almost all have "mullet" hairstyles. The majority of those pictured appear to be in their 30's or 40's. The appellant was in fact 49 at the time of the murder; in the photograph on the photo board (taken on 3 April 2002), he has blond

hair with darker roots. Mrs Moore picked four photographs as a possibility, including one of the accused, but expressed her general uncertainty.

- [39] On 12 July, Mrs Moore took part in the COMFIT process. The COMFIT picture which was prepared does seem to bear a resemblance to the photograph of the appellant on the photo board. The individual depicted in the final result has light brown hair in a mullet style, a somewhat lined forehead with fair complexion and, in contrast with Mrs Moore's earlier perception that the man was in his mid 20's, is said to be in his early 30's. The shape of the eyes is similar to that of the appellant; but Mrs Moore said that she had not seen the eyes of the person she was looking at on the morning of 31 March 2002. The conclusion is inescapable that the COMFIT picture was heavily influenced by the pictures on the photo board she had seen a month earlier.
- [40] What is clear is that Mrs Moore's first description does not bear much resemblance to the appellant; rather than being in his mid-twenties he was closer to 50 at the relevant time. She had not observed any marks on the man's arms, but the appellant's forearms were described as having been "conspicuously" tattooed at the relevant time. Although when she came to do the COMFIT she described the man as having fair hair, Ms Meskin, who seems to have seen the same man, described him as having dark hair; the latter description would not fit with the appellant's appearance in the contemporary photo.
- [41] Both Ms Meskin and Mrs Moore referred to the black trousers and white, long-sleeved shirt. In the appellant's room were found only black corduroy trousers, more of the jeans type, and there was no white shirt. A number of witnesses connected with Mica Lodge – the manager, cleaner and other residents – were called. None gave evidence of his wearing a white long-sleeved shirt or black trousers; it seems he was more given to T-shirts, shorts and thongs. Certainly the blue denim jeans relied on by the Crown as having glass fragments and a spot of blood on them would not have met the description of the trousers given by the witnesses. Mrs Moore had heard the woman believed to be Ms Smith refer to the man's shiny shoes; no shoes of that sort were found in the appellant's room. And the tenor of the conversation overheard by Mrs Moore suggests that Ms Smith was with a stranger, not a man she knew.
- [42] That leaves one in the rather uncomfortable position of concluding that Ms Smith was with a man other than the appellant not long before her death. It seems improbable that she was killed much later than the period between 4.15 am and 4.30 am when Mr Lane heard noises in Isabel Street; once daylight had broken and people were stirring, it is unlikely that the murder could have occurred unnoticed. But on the strength of the glass analysis evidence the Crown advanced this scenario: that Ms Smith went to the appellant's room, and there was an argument there which somehow led to the two going to Isabel Street and Ms Smith's murder there. The strongest part of the evidence supporting that scenario was as to the foundation jar fragments found in the appellant's room, because the analysis showed that not only did those pieces share a refractive index in common with the foundation jar at the murder scene, but they were a physical fit with the broken rim of the jar and one of them had the same elemental composition. One could be satisfied, therefore, that the fragments did come from Ms Smith's jar and, given the relatively large size of some of the pieces, that the jar had been broken in the appellant's room.

- [43] The difficulty lies in how much more one can make of that evidence. It was demonstrated that the lid of the jar still fitted sufficiently to prevent leakage, notwithstanding the breaks to its rim. It was submitted by the Crown that Ms Smith would not have retained the jar had she broken it in the room on an earlier occasion, because of the risk of glass fragments in it. I am not so sure that that follows. Ms Smith was leading a relatively impoverished existence; it seems possible that since the jar could still be made to seal, she elected to keep it and use what was left of the foundation in it rather than throw it away. There is nothing to indicate precisely when the jar fragments first came to be in the room. They clearly were not such as to be rapidly dispersed; although the room was vacuumed weekly, relatively sizeable pieces were still to be found months later.
- [44] The Crown's hypothesis, on the other hand, entails a breaking of the jar in the room on the night in question. If that occurred in the course of an argument, it seems odd, although it is not impossible, that none of the other occupants heard anything and that the room the following day showed no sign of any struggle or fight. Then the Crown thesis depends on the jar somehow making its way, with lid, to the murder site. The prospect of its being retrieved by Ms Smith or the appellant in the context of an altercation and taken on to Isabel Street seems, if anything, less probable than that of Ms Smith at some earlier time breaking it, picking it up and, notwithstanding the damage, deciding to keep it and use it.
- [45] If the latter possibility exists, the existence of the fragments from it in the appellant's room assumes much less significance; they may have been left there on an earlier occasion. Although fragments of the jar were retrieved from one of Ms Smith's boots, it is not known where on the boot they were lodged, inside or out. Given that the fragments were too small for measurement, it may be that they were carried in or on the boot for some time. Assuming the jar was broken in the room, whether that night or earlier, the finding of fragments on the appellant's boots is unremarkable, since pieces of it remained about the floor to be trodden on.
- [46] The presence of what was said to be window glass on Ms Smith's boots is similarly capable of different interpretations. It is conceivable that it was Ms Smith who broke the appellant's window from the outside, without ever gaining entry to his room. It is remarkable but not impossible that the appellant could have slept through the breaking of the window; nothing is known as to his state of sobriety. Certainly any noise involved was not enough to wake the other occupants of Mica Lodge.
- [47] Ms Smith could well have broken the window after she was refused admission to Rumours nightclub. The nightclub is north and some blocks east of Mica Lodge, on the corner of Piper and Ruthven Streets. On the next sighting of Ms Smith by the group of young men at the ATM, she was then not coming down Ruthven Street on a path direct from the nightclub, but was emerging from Russell Street to the west of Ruthven Street; that is to say, from the direction of Mica Lodge; and she was angry and threatening to kill someone. It is feasible that, as the Crown suggests, she had gone to the appellant's room looking for some identification, having been refused entry to the nightclub, and had broken the appellant's window in an attempt to rouse him. That is at least a rational possibility consistent with the sighting of Ms Smith coming from the direction of Mica Lodge, and perhaps also with her aggressive language.
- [48] It should also be said about the glass from Ms Smith's boots identified as window glass, that its identification was not as convincing as that of the foundation jar. It

was identified as window glass on the basis of its refractive index only; no comparison of the elemental composition of the fragments was attempted. The common refractive index was not conclusive: it was conceded that the window glass taken from the appellant's room had the same refractive index as some glass used in motor vehicles. It also seems entirely possible that window glass from the same manufacturer and of the same vintage was common in Toowoomba.

- [49] The evidence as to the beer bottle glass was even less conclusive. It was conceded that the manufacturer of Fourex stubbies was ACI, which also manufactured stubbies for other breweries; and that two stubbies made under the same manufacturing conditions would have the same refractive index. It was thus possible that the appellant had at some time broken a stubby bottle leaving pieces in his room and fragments on and in his jeans and boot, and that the connection with the beer bottle glass at the murder site was no more than the two bottles were manufactured under the same conditions. If, on the other hand, the glass was carried from the murder scene on the soles of the appellant's boots, it is surprising that the soil samples taken on 1 April did not obviously contain Isabel Street mud; or, alternatively, if the boots were cleaned to remove the layer of mud, it is surprising that the glass could still be found on them.
- [50] The appellant's jeans at the time they were seized by the police on 31 March had not been recently washed; yet they bore no sign of Ms Smith's blood nor any other indicia of his having been at the murder site such as vomit, faeces or mud. If he was the murderer, he seems to have been either unusually fortunate or unusually skilled in managing not to pick up any detritus from the murder scene; and again, skilled or fortunate in not leaving there any trace of himself, in the form of DNA or fingerprints. There were, of course, fingerprints found on the birth certificate; but they were an unknown person's.
- [51] The argument that the appellant demonstrated some consciousness of guilt is not compelling. The fact that he showed no expression when Sergeant Flynn referred to the murder of Ms Smith seems to me of little moment; one does not know whether he is of a phlegmatic temperament, or whether he was shocked into an impassive silence. If the suggestion that he disposed of the plastic bag containing the notes and personal items of Ms Smith is correct, it seems a curiously inept attempt at removing himself from suspicion to leave it over the fence of the adjoining property at a point in line with his own room, and with a note in his own handwriting in it. It is also of note that none of the items in the bag was found by the police in their search of the room on 31 March. In any event, as the trial judge pointed out to the jury, even if they could conclude that it was the appellant who left the bag there, guilt did not necessarily follow; he might have sought to get rid of the items merely because he was suspected, rather than because he was responsible for the death.
- [52] And it seems to me rather to contradict the notion that he had any acute consciousness of guilt that the appellant made no apparent attempt either before or after the initial police visit to clear up the pieces of glass in his room. The broken window glass was obvious to the police; one might have expected, if he regarded the breakage as having any connection with Ms Smith's last hours, the appellant would have done his best to conceal it. If the foundation jar was broken that night, the appellant had months to ensure that all vestiges of it were gone; but pieces of it remained visible in his room in July.

*Conclusion*

- [53] This was not a case, in my view, in which the verdict depended on the jury's assessment of any particular witness's credibility. The evidence is of a type which lends itself to objective assessment by this court. For each of the hypotheses advanced by the Crown there is, in my view, a reasonable alternative consistent with innocence; and even accepting the Crown hypotheses, there remains a large leap of imagination to be made between an argument at the appellant's room and Ms Smith's murder at Isabel Street. The Crown could not point to any evidence which might explain how or why the two got from the room to the vacant block. All it could say was that there was some sort of encounter at the room which led the appellant either to pursue or to accompany Ms Smith there. While it might make sense for Ms Smith to go to the Isabel Street block with a stranger, for want of alternative venues, there seems no reason for her to go there alone or with the appellant; if a romantic or sexual contact with him were contemplated, why leave the relative comfort of the room for a vacant block? If, on the other hand, she were forced or pursued there by the appellant, why was nothing of that heard by people along the way?
- [54] Those difficulties emerge against a background of evidence strongly suggesting that someone else altogether was with Ms Smith shortly prior to her death. I find myself concluding that there is a significant possibility that the appellant has been wrongly convicted. It was not, on the test formulated in *M v The Queen*<sup>1</sup>, open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.
- [55] The appellant's appeal against conviction should be allowed, his conviction quashed and a verdict of acquittal entered.

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<sup>1</sup> (1994) 181 CLR 487 in pages 494-495.