SUPREME COURT OF QUEENSLAND

CITATION:	*R v Previte* [2005] QCA 95
PARTIES:	**R** **v** **PREVITE, Ian Douglas** (appellant)
FILE NO/S:	CA No 381 of 2004 SC No 21 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Bundaberg
DELIVERED ON:	8 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2005
JUDGES:	de Jersey CJ, McPherson JA and Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant submitted trial Judge erred in admitting handwriting evidence – where strong Crown case in no degree dependant on that evidence – where trial Judge gave directions to exclude risk of misuse of evidence – whether trial Judge erred in ruling the evidence admissible CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – where appellant submitted handwriting evidence was deficient – where trial Judge gave a direction to exclude risk of misuse of evidence – where appellant submitted trial Judge should have warned the jury it would be dangerous to proceed on the handwriting evidence – whether relevance of handwriting evidence was properly put before the jury CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where copies of letters written by the appellant, containing strongly prejudicial material, were used by a handwriting expert for the purpose of comparison, and therefore came before the jury – where other inoffensive material was available – where there was no objection made or direction sought by the defence – where appellant's character and criminal propensities otherwise emerged from the confessional material – where strong Crown case based on admissions – whether the conviction should be quashed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant drew on inconsistencies between admissions and factual circumstances – where jury instructed as to possible significance of these discrepancies – where central issue was the reliability of the appellant's taped confessions – where there was no evidence as to why appellant would falsely confess – where key aspects of the confession found support in other evidence – whether verdicts of the jury should be set aside as unsafe and unsatisfactory

EVIDENCE – ADMISSIONS AND DECLARATIONS – ADMISSIONS – WHAT ARE AND EXTENT OF ADMISSIONS – where appellant said that on the last occasion he had taken Serepax he had done something "bad" or "silly" – whether the statement was admissible as circumstantial evidence or an admission

Criminal Code 1899 (Qld), s 302(1)(a), s 302(1)(b), s 668E(1A)
Evidence Act 1977 (Qld), s 59(2)

Adami v R (1959) 108 CLR 605, cited
Burns and Collins (2001) 123 A Crim R 226, cited
Crofts v R (1996) 186 CLR 427, cited
M v R (1994) 181 CLR 487, cited
Medina (1990) 46 A Crim R 132, cited
R v O'Keefe [2000] 1 Qd R 564, cited
R v Wilson [1998] 2 Qd R 599, cited

COUNSEL: J R Hunter for the appellant
L J Clare for the respondent

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

[1] **de JERSEY CJ**: The appellant was convicted on 15 October 2004 of the robbery with personal violence, and murder, on 10 April 2002 at Bundaberg, of Ms Caroline Ann Stuttle.

[2] Ms Stuttle died in consequence of injuries sustained after she fell, on the Crown case having been flung by the appellant, from a bridge over the Burnett River to the riverbank beneath.

[3] The case was left to the jury on the basis the appellant caused her death with the requisite intent (s 302(1)(a) Criminal Code); or that he caused her death by flinging or swinging her about as, on the bridge, he attempted to rob her of her handbag, causing her to fly over the railing of the bridge to the ground beneath. The basis for that latter scenario was confessional material in the appellant's interviews with police officers at Rockhampton Police Station, which raised "felony murder" under s 302(1)(b): death caused by an act done in the prosecution of an unlawful purpose, the act being likely to endanger life.

[4] The issues of accident, and intoxication (by consumption of drugs), and the alternative verdicts of guilty of manslaughter or complete acquittal, were left to the jury.

[5] As to intoxication, in his statement to the police and one Lilburn (a onetime co-prisoner), the appellant spoke of substantial consumption or use, on the day of the event, of a variety of substances: marijuana, methadone, Serepax and morphine. There was evidence from which the jury could infer that the appellant had a well developed tolerance to drugs.

[6] Although the learned Judge presented the case to the jury as ultimately circumstantial in character, the case against the appellant, who did not give or call evidence, substantially depended on the reliability of comprehensive confessions he made to police officers and others, including Lilburn. He told both Lilburn and the police he had robbed and killed Ms Stuttle. In my view, the confessional material was powerfully and compellingly probative of guilt, virtually assuring it, for reasons I later express. The grounds of appeal fall to be assessed in that matrix.

[7] These grounds of appeal which were pursued are as follows:

> "2. The Learned Trial Judge erred in ruling admissible, evidence of a handwriting expert who purported to ascribe to the appellant 'likely' authorship of graffiti found on a table top in a public picnic area.
>
> 3. The learned Trial Judge erred in ruling admissible, evidence of witnesses Chandler and Ross as to conversations allegedly had with the appellant wherein he said he'd done something 'silly' the last occasion he consumed Serepax.
>
> …
>
> 5. The verdicts of the jury should be set aside as unsafe and unsatisfactory."

Ground 2: evidence of Mr Hettiarachchi

[8] Ground two concerned the evidence of a handwriting expert or forensic document examiner, Mr Hettiarachchi. His evidence concerned words apparently written with Nikko pen on a picnic table in a park nearby the appellant's residence at the relevant time (first noticed in June 2002):

> "I Throw
> The girl of
> The Brige
> I am sorry"

Mr Hettiarachchi's evidence was there were indications those words were likely to have been written by the appellant.

[9] Faced with a submission that Mr Hettiarachchi's evidence was "so lacking in conviction" that it should be excluded, the learned Judge acknowledged that any identification of authorship was for the jury (cf *Adami v R* (1959) 108 CLR 605, 616), with or without assistance from expert evidence, and allowed the evidence to be given, the assessment of its weight being a matter for them. See also s 59(2) *Evidence Act* 1977; *R v Burns and Collins* (2001) 123 A Crim R 226, 240-1; *Medina v R* (1990) 46 A Crim R 132, 134. As those authorities confirm, His Honour's approach was in principle correct.

[10] Accordingly, in the summing up, the learned Judge emphasized that it fell to the jury to reach its own view on whether it was the appellant who wrote the words on the wooden plank. He also made it clear that the role of the expert evidence was limited to raising possible approaches for the jury's assistance. It may fairly be acknowledged that His Honour circumscribed the possible operation of the evidence of Mr Hettiarachchi in particular. I set out the relevant parts of the summing up:

> "In the case of the plank…you must be satisfied that Mr Previte wrote the words on the plank. You've heard the evidence of Mr Marheine, the independent document examiner. He was unable to attribute the words on the plank to anyone because there (were) simply insufficient letters to make any useful comparison. He conceded that it was possible that the words may not even have been written by one author.
>
> Mr Marheine's evidence is to be contrasted with the evidence of the police document examiner, Mr Hettiarachchi. He said that there were indications that the words were in Mr Previte's handwriting. Remember the classifications of certainty given by Mr Marheine. He told you that he used a five tier system with certainty as to authorship at the top followed in descending order by highly probable, probable, possible and unable to form any view.
>
> Mr Hettiarachchi's system, on the other hand, used the three tier system. He had certainty and unable to form a view but he replaced 'highly probable', 'probable' and 'possible' with the one opinion which was 'indications'.

In a criminal trial where the standard of proof is beyond reasonable doubt, you could not act merely on indications as proving to the required standard that Mr Previte wrote the words. Something which is merely likely is not established beyond reasonable doubt.

You will recall that Mr Hettiarachchi told you that where there are dissimilarities between the sample writing and the unknown writing, he could try to come up with a possible explanation, and if he could, that dissimilarity would not amount to a difference. You might think it really depends on how many dissimilarities there are. One or two might be excusable but the more dissimilarities, the less likely the writing in question was likely to be that of the author of the sample handwriting.

You will recall Mr Lynch taking Mr Hettiarachchi through each letter on the plank. In the end, however, the ultimate decision as to whether or not Mr Previte wrote the relevant words is a question of fact for you. The experts have provided you with a basis for expressing your own view and have explained the sorts of things you need to look for but the final decision is yours.

You saw both handwriting men in the witness box. You must form your own view as to whose evidence you find the most helpful. The expert evidence itself does not provide a basis for finding Mr Previte wrote the words on the plank. If as a result of your own examination in the light of what the experts said, you are not satisfied beyond reasonable doubt that Mr Previte wrote the words on the plank, then despite the submissions of Mr Feeney yesterday, you cannot overcome those doubts by relying on the fact that the plank was relatively near to an area frequented by Mr Previte.

The evidence you have here is that rumours and claims concerning the identity of the person who caused Ms Stuttle's death were rife among those involved in the street culture. Various people claimed responsibility within their own circles and you saw a couple of them and you heard about some others."

Then His Honour concluded in these terms:

"In truth, unless you can identify the author of the words on the plank from an examination of the handwriting itself, you cannot attribute authorship on the basis of any other evidence or combination of evidence in this case. It would be difficult to be satisfied beyond reasonable doubt that Mr Previte wrote the words in the light of the expert evidence. In the absence of proof of authorship, beyond reasonable doubt, you simply must ignore the plank.

Well, if, despite the reservation I've expressed, you are satisfied that Mr Previte did write the words on the plank, the prosecution submits that it is direct evidence not only of his involvement in the death but that it was caused by his having thrown her off the bridge."

[11] Counsel for the appellant submitted before us that the evidence of Mr Hettiarachchi was deficient to the point where it lacked any weight and amounted to no more than a distraction for the jury.

[12] In my view, however, the learned Judge's direction to the jury was justified, and was sufficient to exclude any risk of their misusing this evidence. That warning essentially emerges from the passages from the summing-up just quoted.

[13] I have read the evidence of Mr Hettiarachchi. I agree with the position taken by the learned Judge: it fell to the jury to assess its worth – it was not so vague, or hedged about with reservation, as to be completely valueless.

[14] As has been seen, the Crown led evidence from another handwriting expert Mr Marheine. His evidence, given at the trial before that of Mr Hettiarachchi, was that there was insufficient lettering on the wood from which he could reach a conclusion about authorship. The divergent view of Mr Hettiarachchi was explored in considerable detail, through examination in chief and cross-examination. Its quality is susceptible of substantial criticism, but in my view the Judge nevertheless rightly left its assessment to the jury.

[15] With hindsight, it would have been better had this fairly low-grade evidence (the handwriting experts' evidence and the plank itself) not been led. The Crown case, otherwise strong, in no degree depended on it. But it was led, and was I believe strictly admissible, and the only issue now is whether its possible relevance was properly put before the jury. I consider it was.

[16] Counsel for the appellant submitted the Judge should have warned the jury it would be dangerous to proceed on the basis the appellant wrote the words on the wood. Significantly, defence Counsel at the trial sought no such direction. The direction given by the Judge strongly favoured the defence. I do not consider the additional direction raised on appeal was necessary.

[17] Had this evidence been admitted wrongly, there would have been a strongly arguable case for the application of the proviso under s 668E(1A) of the Code, because of the very considerable strength of the confessional material, to which I will come later in relation to ground five. That material warrants assurance the appellant would have been convicted had this evidence been excluded (*Crofts v R* (1996) 186 CLR 427, 441; *R v Wilson* [1998] 2 Qd R 599, 652).

[18] I turn to a separate matter, raised for the first time at the hearing of the appeal. Mr Hettiarachchi used, as the basis for his analysis, copies of letters written by the appellant containing strongly prejudicial material, such as threats of violence couched in graphic terms, reference to his own imprisonment, etc. There was no objection raised to the tendering of that material. Neither was any direction sought from the Judge that the jury must not be prejudiced against the appellant by the character of that particular material. The jury must be taken to have appreciated the point of its being received. The Judge cautioned the jury generally about the need to bring an unprejudiced mind to bear.

[19] While very surprised that such material was presented, and without objection, I would not in these circumstances regard it as vitiating the convictions. The flawed character and criminal propensities of the appellant emerged with abundant clarity from the recorded confessional material. The only purpose of the tendering of these letters was to put before the jury the handwriting of the appellant used by Mr Hettiarachchi for the purposes of comparison. The jurors may or may not have taken the trouble to read them. They were not obliged to do so. But I doubt that the jurors, if they read these letters, would thereby have formed any significantly dimmer view of the appellant, with his seriously stained character, as I have said, being established so clearly by other material already. In any event, it should be assumed the members of the jury would have heeded the Judge's direction to them to eschew any prejudice. It may also be there was some forensic explanation, of which I am unaware, for the defence's tolerance at the trial of Mr Hettiarachchi's reliance on these letters and their admission into evidence. I note, finally, that this was not formally the subject of a ground of appeal.

[20] This aspect of the trial does not, in these circumstances, imperil the convictions.

Ground 3: evidence of Mr Chandler and Ms Ross

[21] The evidence of Mr Chandler and Ms Ross, referred to in ground three of the grounds of appeal, was that some short time after, but proximate to, the time of the death of Ms Stuttle, they offered the appellant Serepax, which he refused, saying that on the last occasion he had taken that drug, he had done something bad or silly. He refused to be drawn on what he had done, despite substantial questioning from them, including their raising whether he had robbed someone, or hurt someone. He exhibited some agitation when they questioned him. The appellant told the police he had taken Serepax on the night of the incident on the bridge.

[22] Arguing for the exclusion of the evidence, Counsel for the appellant at the trial submitted that it could be probative only if the jury were otherwise persuaded of the responsibility of the appellant for the death. The Crown Prosecutor drew an analogy with the admission of lies told out of court. The Judge admitted the evidence, "with some hesitation", as part of the overall circumstantial case.

[23] In his summing up, the Judge said, of this evidence:

> "If you accept it, the evidence of Ms Ross and Mr Chandler as to Mr Previte having done something silly the last time he took Serepax is not an admission of his having been involved in the death of Caroline Stuttle. It is, however, evidence which you may take into account in weighing up whether you are satisfied that Mr Previte was being truthful when he said to others that he caused the death.
>
> You may think that the combination of the timing of the statement to Ms Ross and Mr Chandler, the fact that Mr Previte says both to the police and to Mr Lilburn that he was on Serepax when he caused the death and the fact that he said he did something silly about which he would not speak provides some corroboration for Mr Previte when he confesses to causing the death."

[24] Counsel for the appellant submitted, in his written outline, that to regard the statements to these witnesses as confessional would involve undue speculation (what is "bad" or "silly" could encompass any number of things); or that to regard it as relevant evidence of the appellant's propensity, would ignore the test discussed in *R v O'Keefe* [2000] 1 Qd R 564.

[25] Mrs Clare, for the respondent, emphasized that there was no challenge to the occurrence of these conversations; there was no suggestion they preceded the death; and the issue concerned whether the Crown could establish a chronological connection between the death and the conversations, or whether the witnesses had simply engaged in a "stab in the dark reconstruction".

[26] The learned Judge appropriately directed the jury as to the use they might make of this evidence. It confirmed that the appellant was purchasing drugs at about the relevant time, and supported his recorded explanation for the robbery – that he needed money to buy drugs.

[27] In my view the evidence was properly left to the jury, additionally, as possibly establishing another circumstance which could support the truthfulness of the confessional material. As with lies told out of court, it could be used to reinforce a view of guilt otherwise held. The jury may reasonably have considered that the "bad" or "silly" thing the appellant had done must have been of considerable gravity to have had the effect of shocking him out of his persisting tendency towards Serepax, and they may have considered his unpreparedness to discuss this conduct, with unanswered queries as to whether he had robbed or hurt someone, as significant.

Ground 5: unsafe and unsatisfactory verdicts

[28] Ground five, that the convictions are unsafe and unsatisfactory, draws on inconsistencies between what the appellant told the police officers and others, and objectively established factual circumstances. Those inconsistencies were summarized in the outline of Counsel for the appellant as follows:

- "With respect to the handbag, he said:
  - (a) it was black (it was grey)
  - (b) it was made of imitation leather (it was made of nylon)
  - (c) it had two straps that were looped (it had a single shoulder strap)
  - (d) it was a normal handbag (it was a satchel)
  - (e) it had no brand (it was a "Diesel" brand)
  - (f) the straps had metal clips (they were plastic)
- The deceased's hair was brown (it was blonde)
- He claimed to have been smoking nearby using a can of coke as a smoking device (no can of coke was found)
- The deceased yelled at him using an accented voice (no-one heard anything apart from a scream)
- He identified the wrong area on the bridge where the incident occurred, and did not describe any kink in the railing
- The deceased was lying face down after the fall (she was face up)

- He retained possession of the strap and bag after she fell (the strap was beside the body – undamaged)
- He did not see anything in her hands (she may have been on the telephone)
- He could not correctly describe the contents of the bag (telephone, mini-disc player)
- He said that the bag contained a blue purse (no evidence that deceased owned such a purse)
- His description of the disposal of the bag did not coincide with where it was found."

[29] Mrs Clare provided us with a schedule of responses from the Crown Prosecutor at the trial, Mr Feeney, which shows that some at least of those 'discrepancies' are of a rather grey or arguable complexion. There is no need to analyse them individually. That is because they relate to aspects of essentially peripheral detail. The central issue was the dynamics of the physical interaction between the appellant and the deceased on the bridge, which the appellant covered comprehensively and with clarity in the police interviews commencing 20 February 2003.

[30] In his summing up, the learned Judge referred to those inconsistencies, or a number of them, and offered this assistance to the jury:

> "Well, do you accept that these matters are inconsistencies or factual errors which bespeak a person with no first-hand knowledge of the event?
>
> In assessing Mr Lynch's submission you may have regard to the consumption of drugs, is it likely to have affected Mr Previte's memory? Mr Previte says he is trying to blot it all out. Is this an explanation? Were the inconsistencies just matters about which Mr Previte was not sufficiently interested to remember? Did the night conditions contribute to the error about the positioning of Ms Stuttle's body?
>
> You may have regard to Mr Previte's statement to Mr Lilburn about having the charge reduced to manslaughter. Do the admissions and inconsistencies evidence a lack of knowledge such as would be had by the actual perpetrator or just a lack of memory, or is it a deliberate ruse for self protection."

[31] Upon the appeal, Counsel for the appellant submitted that "the material inconsistencies between the appellant's admissions and the proven facts were so substantial that it was not open to the jury to have been satisfied beyond reasonable doubt of the guilt of the appellant".

[32] Again, the jury were appropriately instructed as to the possible significance of these discrepancies. The evidence of the appellant's consumption of drugs, and his claim to be endeavouring to block these events from his memory, would themselves have accounted sufficiently for the inconsistencies, in terms of the jury's otherwise being satisfied of his guilt. But in addition, there were the dark conditions on the riverbank that night (on some evidence, it was "pitch black"), and the fact that the events occurred over a very short period. The evidence suggests the appellant as a

person who would not ordinarily be concerned to notice and remember matters of fine detail.

[33] I have reviewed the evidence (*M v R* (1994) 181 CLR 487).

[34] The appellant's fundamental position emerged from this passage in the police interview on 20 February 2003:

> "Seen a chick with a handbag. I needed money to get on. Went up on to the bridge, followed her across, snatched it…she didn't want to let it go…struggled…she was yelling at me…don't know what she was saying…and yeah…then she went over."

[35] There was an obvious issue how a woman of the height of the deceased could accidentally have "fallen" over the railing of the bridge, bearing in mind its height. The appellant's answers to questions raised real doubt about any prospect of the fall's having been accidental. In other words, the jury could have relied on what came from the appellant himself to exclude a defence of accident beyond reasonable doubt. I have in mind the following passage from the police interview:

> "Batt: Okay, so you said you swung her around and…did you say that she…um…into the rail or over the rail?
>
> Previte: She run into it, then went over it.
>
> …
>
> Batt: So she was only a little bit higher than the rail? So, can you explain how, when you swung her into the rail, how did she…went over the rail?
>
> Previte: It happened too quick.
>
> …
>
> Batt: So, you're saying that by you swinging on the bag, was enough to make her go over the rail that's the same…just a bit higher…just a bit shorter than her?
>
> Previte: Yeah.
>
> Batt: How hard were you swinging her?
>
> Previte: Pretty hard"

[36] The essential and critical point for the jury was the reliability of the appellant's taped confessions. The learned Judge repeatedly emphasized this aspect, with reminders that there was no other evidence linking the appellant to the scene. In that context, it is also important to remember that there was no challenge to the authenticity of the recordings; there was no evidence from the appellant to explain why he would falsely confess; the appellant had opportunity to commit the offences, which occurred close to where he was living; and key aspects of his account found

support in other evidence – there was no evidence of any innocent explanation for such knowledge on his part.

[37] As examples of that last aspect, the appellant was able to identify the brand at least of the deceased's mobile telephone and gave an account of its destruction. That telephone had never been found. Further, he knew, as was the fact, that the deceased was carrying only a few dollars. Also, he said she spoke, or yelled, in English, but with a "foreign accent". (She was from Yorkshire.)

[38] As the trial developed, another potentially important issue related to evidence of the appellant's encounter with one Daly as he walked towards the body of the deceased. As the appellant went to check on Ms Stuttle, he saw a male person, near where Ms Stuttle's footwear was found, according to his account he gave to the police. Daly could not say that the appellant was the man he confronted, but there are possible explanations for that. The significant point was that the appellant placed himself at that location at a critical time, observed by someone else who gave evidence, that other person selecting a photo of the appellant as one of two photos (from a collection of 72) presented by the police, on the basis of similarity with the person he saw that night. The appellant's account to the police thereby gained support from an independent source.

[39] The confessions made in the videoed interviews by police officers are supplemented by the appellant's incriminating admissions covertly recorded by Lilburn on 18 February 2003. The appellant told Lilburn he had robbed Ms Stuttle; that all he got was her phone and "a couple of bucks"; that she had put up a bit of a fight; that despite substantial drug consumption, he "knew what was happening"; that it was a "good possibility" he would be sentenced to life imprisonment, but that he would rely on accident to "drop it down to…manslaughter".

[40] It is difficult to regard that unchallenged material as other than highly probative of guilt. There is no basis for thinking or suspecting it was an instance of prison bravado, and there is no doubt as to the voluntariness of the responses. Further, it sits comfortably with the content of the police interviews, their reliability enhanced by their having been videoed.

[41] The evidence discloses no reason why a jury, acting reasonably, should have rejected the appellant's confessions as implausible, or should have entertained a reasonable doubt as to their truth and accuracy. (Mr Hunter, for the appellant, referred to police pressure allegedly put on Symons, who went on to become a witness, and perhaps tentatively suggested the same may have occurred with the appellant, but that found no basis in the evidence, and was entirely speculative.) As said earlier, any discrepancies between what the appellant said, and otherwise established facts, are explicable by reference to a number of extraneous factors, including his being affected by the consumption of drugs, lighting conditions, the speed of the events, a wish to block the events from his memory, and so on.

[42] Overall, this was not a case where a reasonable jury should have entertained a reasonable doubt. The jury were entitled to act against the appellant on his confessions to the police and Lilburn. The confessional material was powerful and compelling. The jury were entitled, as they saw fit, to reinforce that assurance of guilt by reliance on the inscription on the picnic table (although it seems most

unlikely they would have taken that course), and the statements by the appellant to Mr Chandler and Ms Ross, and the circumstance of his unpreparedness to explain himself further to Mr Chandler and Ms Ross: my having said that, however, the very strong confessional material should virtually have assured convictions. The convictions are not unsafe or unsatisfactory in the relevant sense.

Conclusion

[43] In my view, none of those grounds of appeal against conviction which were pursued, has been established.

[44] I would order that the appeal against conviction be dismissed.

[45] **McPHERSON JA**: I have read and agree with the reasons of de Jersey CJ and Holmes J. There was evidence on which the jury was justified in finding that the appellant had admitted to killing the deceased, and that his admissions to that effect were reliable and might safely be acted upon.

[46] I agree with the strictures of Holmes J on the choice of the letters and their contents used by Mr Hettiarchchi as the basis for the comparison of the appellant's handwriting in his expert evidence; but although gratuitously prejudicial, I do not consider that, in the end, it calls for the verdict to be set aside in what was, in other respects, a strong Crown case against the appellant. I also agree with her Honour's assessment of the statement to Ross and Chandler as constituting an admission rather than as circumstantial evidence. It was their content, rather than the fact that they were said, that the prosecution was placing before the jury. But the precise legal basis for their admission in evidence cannot have affected the outcome in this case.

[47] The appeal against conviction should be dismissed.

[48] **HOLMES J**: I have had the advantage of reading the reasons for judgment of the Chief Justice. I agree with his ultimate conclusions on the grounds of appeal argued, and concur that the appeal should be dismissed; but I wish to add some comments on certain aspects of the evidence.

The "unsafe and unsatisfactory" ground

[49] I should say at the outset that I do not think the argument that the verdict was unsafe and unsatisfactory is tenable. I agree with the Chief Justice's description of the confessional material in the case as "powerfully and compellingly probative of guilt". There was a suggestion, but no evidence, that the confessions which emerged in the police interviews were the result of the appellant's will being overborne. But, in any case, those confessions were supported by his conversations with Lilburn at a time when there was no reason to suppose he was speaking other than freely. The discrepancies in detail between descriptions given by the appellant and other Crown evidence seem to me both minor and entirely explicable by the lapse of time between the events and the police interviews, taken with the effects of the appellant's regular drug use.

The handwriting evidence

[50] Mr Marheine gave evidence that the handwriting on the plank (which consisted of 10 simple words, using 16 letters, with 31 letter formations) was an insufficient sample for comparison with handwriting of the appellant. The writing itself he described as "very simple, childish handwriting", typical of graffiti, with conceivably, an attempt at disguise of some letters. It was not even possible, in his view, to say that all of the questioned handwriting was by the same person.

[51] Mr Hettiarachchi, on the other hand, was willing to embark on a comparison of the handwriting on the plank with photocopies, not originals, of correspondence written by the appellant. He conceded that there were dissimilarities between each of the letters in the plank handwriting and the handwriting samples, but attributed each instance either to the broad tipped pen used in writing on the plank or to variations in the writer's style. When challenged about an obvious feature of the plank handwriting, the three instances of the upper case letter "T" being used in the words "throw" and "the", although none commenced a sentence, he pointed out that a similar habit could be observed in the sample handwriting: the appellant had commenced his Christian name and surname with a capital letter and had also commenced the word "Court" with a capital "C". That was not a very plausible comparison.

[52] Mr Hettiarachchi was asked whether the writing on the plank might be the work of more than one author. It was quite impossible for him to say, he said; not for the reason given by Mr Marheine, that the sample was inadequate, but because the police had only given him one person's specimen writing. He had no procedure by which he could reach such a conclusion without being given the specimen handwriting of another person. The worrying implication is that Mr Hettiarachchi approached his task with a view to demonstrating that whatever was provided to him by way of sample handwriting had points in common with what was on the table; not by starting with the questioned material and first asking what, if anything, could be made of it.

[53] Mr Hunter argued, as had counsel at the trial, that the evidence of Mr Hettiarachchi was so flawed that, particularly in the light of Mr Marheine's contrary evidence, it could not be probative. At best, Mr Hunter said, it amounted to no more than an opinion that it was likely the appellant was the author of the writing on the table; and that could not achieve the degree of certainty required. Those submissions, in my view, overlook the fact that the jury's function was not merely to decide whether it accepted the evidence of one or other of the experts. It was entitled, as the trier of fact in the case, to look at the disputed handwriting against the samples and to form its own conclusions. It could, at least in theory, be satisfied of common authorship even if the expert evidence was unsatisfactory, or did not go so far. The jury was, of course, entitled to the assistance of expert opinion: handwriting is well established as a field in which expert evidence may be received, and both Mr Marheine and Mr Hettiarachchi possessed the formal qualifications to entitle them to be regarded as experts. The weight to be attached to Mr Hettiarachchi's evidence might well be questioned, but it was properly admitted, and the jury were appropriately cautioned about its use.

[54] It is worth noting too, that the handwriting on the table was either a brief admission expressed in innocuous terms, or it was nothing. If the jury took the view that it was not the former, they would have had no difficulty in dismissing it from their minds; there was nothing in its content which carried any residual risk of prejudice to the appellant. But the same could not be said of the sample handwriting relied on by Mr Hettiarachchi. It consisted of photocopies of three of the appellant's letters from jail, intercepted by the authorities and copied. The first of the three letters is written to the appellant's father. It requests funds towards paying a solicitor and contains the appellant's view of his prospects:

> "If I do get found Guilty, I should be able to get the Murder dropped down to Manslaughter if not get a full Acquittal. As for the Robbery with actual Violence I'm not sure how that will go."

The content of that letter was raised with the trial judge by the prosecutor, who suggested that the statement might amount to an admission. The learned trial judge, correctly in my view, rejected that proposition, describing the statement instead as "an acknowledgement of the risk that he runs by virtue of being on trial". In any event, any adverse effect of the appellant's observations in that letter dwindles to insignificance in light of his recorded statement to Lilburn (which was relied on as confessional) that he would claim that the death was accidental and seek reduction of the charge to manslaughter.

[55] But nothing was raised by either counsel as to the content of the second and third letters. The second letter, to the appellant's biological mother, contains a good deal of bad language and expresses in forthright terms his views on police officers. More troubling is this passage:

> "What the fuck is that little prick Matt doin. He should know better. I'll make sure he learns the hard way when he comes inside. Doesn't matter what jail he goes to coz i know people in every jail in QLD. That goes for Main & P. All it takes is a letter. People owe me favours for doing stuff for them."

[56] The third letter appears to be addressed to the appellant's biological grandfather (who was, it seems, a stranger to him) and makes various allegations about his treatment of his daughter. It contains these lines:

> "How would ya like to get tied up & bashed senseless? Ya wouldn't would ya? Well, fuck you, it just might happen one day ... if ya died tomoro you'd be doin me a favour ya fucken scum. ... You deserve everything ya get. Otherwise things might come back on to you twice as bad ya fucken scum cunt. Death is only natural. Some sooner than others hey Harry"

[57] On any view, those letters were deeply prejudicial. They portrayed the appellant, rightly or wrongly, as a hardened criminal with a capacity and liking for violence. Something of that flavour had emerged from the conversations with Lilburn, in one of which the appellant claimed to have shot and stabbed people, without going into detail. But the letters were much more graphic. The last, particularly, went well beyond anything which might be explained away as prison braggadocio; it was a threat in vicious terms.

[58] No satisfactory explanation was offered for why those particular pieces of correspondence were provided to Mr Hettiarachchi for comparison. Mr Marheine had not found it necessary to rely on them. He had provided to him, by way of specimen writing, five pages of original handwriting taken from a pad seized from the appellant's prison belongings, as well as a rental application form completed by the appellant. Mr Marheine described that material, which contained nothing significantly adverse to the appellant, as "an abundance of specimen handwritings". In answer to questions as to why the same material was not used by Mr Hettiarachchi, Mrs Clare suggested that Mr Marheine's examination of it might have somehow prevented it being available to Mr Hettiarachchi, but that seems unlikely; in any event, Mr Hettiarachchi had no qualms about using photocopies. It is, in my view, a matter of very grave concern that the Crown should choose to use material of the order of prejudice of that which was contained in the letters, when other inoffensive material was available; and even more concerning that in that way it should come before the jury.

[59] The letters were not the subject of any objection. It is difficult to identify a rationale for defence counsel's desistence; perhaps he thought that objection would come too late, given that Mr Hettiarachchi had based his opinion on them. Whatever the reason, I would consider the prejudice created by them sufficiently serious to warrant quashing the conviction, were it not for the strength of the Crown case otherwise, in the form of the recorded confessions both in the police interviews and in the appellant's conversation with Mr Lilburn. In the light of that evidence I do not think it can be said that the appellant lost a real chance of acquittal by reason of the letters being before the jury.

The statements to Ross & Chandler

[60] The final matter raised was the evidence of Mr Chandler and Ms Ross, the effect of which has been described in the Chief Justice's reasons. The learned trial judge admitted it

> "on the basis not that it's confessional evidence but that it's part of the circumstantial evidence as to behaviour of the accused while under the influence of Methadone and Serepax both of which drugs there is evidence he had taken on the relevant night."

Consistently with that ruling, he directed the jury that the statements to Ross and Chandler were not an admission, but could be used as corroboration of the confessions to the police.

[61] For my part, I have some difficulty in understanding how the evidence was admissible if not as an admission. It could hardly be regarded as evidence of some sort of propensity to commit violence under the influence of Serepax. It is undoubtedly the case that, taken in isolation, the statements to Ross and Chandler were too equivocal to constitute an acknowledgment of guilt; but the jury was entitled to consider them, not in isolation but in context with the appellant's admissions, in his interviews, of Serepax use and the attack on Ms Stuttle that night. If those statements to Ross and Chandler were accepted as acknowledging guilt, albeit rather cryptically, their importance was as evidence independent of the interviewing police officers, which could support the reliability of the appellant's admissions in the interviews, even though the force of the statements derived

largely from being taken in context with what was said in the interviews. The jury was entitled to regard the statements to Ross and Chandler and the interview admissions as mutually reinforcing, given that the evidence as to them came from unrelated sources. There were certainly criticisms to be made as to the timing of Ross' and Chandler's recollections, and inconsistencies in what they said; but those were matters going to the weight of the evidence, not its admissibility.

[62] I agree that the appeal against conviction should be dismissed.