SUPREME COURT OF QUEENSLAND

CITATION:	*R v Erasmus* [2006] QCA 245
PARTIES:	**R** **v** **ERASMUS, Clive William** (appellant/applicant)
FILE NO/S:	CA No 352 of 2005 SC No 25 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2006
JUDGES:	McMurdo P, Keane JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - CONSIDERATION OF GENERAL CONDUCT OF THE CASE - appellant convicted by jury of murder of his de facto spouse - appellant argued that learned trial judge failed to direct jury on an apparent inconsistency in one witness's evidence - the evidence concerned was relevant only to one aspect of the Crown's case of motive - appellant argued learned trial judge gave too much weight to evidence of doctor who conducted post-mortem examination - appellant argued learned trial judge's directions gave too much weight to telephone records - whether learned trial judge's directions were adequate CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - CONSIDERATION OF GENERAL CONDUCT OF THE CASE - learned trial judge admitted evidence of statements

made by deceased to a colleague - learned trial judge gave jury warning about use of such evidence - appellant complained learned trial judge's comments on this evidence were inadequate - whether this evidence should have been admitted and whether the warning and comment was adequate

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - CONSIDERATION OF GENERAL CONDUCT OF THE CASE - appellant sought to rely on alibi at trial and before this Court - appellant gave no notice of alibi to prosecution before he gave evidence at trial - learned trial judge gave directions on alibi and noted appellant's failure to give notice of alibi - whether the judge's directions were appropriate in the circumstances

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - FRESH EVIDENCE - GENERAL PRINCIPLES - appellant sought to adduce what was described as new evidence - new evidence was evidence contained in witness statements taken by police - witness statements made available to defence prior to trial - whether these statements cast doubt on the jury's verdict or demonstrate a miscarriage of justice

Criminal Code 1899 (Qld), s 305, s 590A
Evidence Act 1977 (Qld), s 93B, s 93C, s 132B

Ali v The Queen (2005) 79 ALJR 662, cited
De Gruchy v The Queen (2002) 190 ALR 441, cited
Domican v The Queen (1992) 173 CLR 555, applied
Gipp v The Queen (1998) 194 CLR 106, cited
KRM v The Queen (2001) 206 CLR 221, cited
Nudd v The Queen (2006) 80 ALJR 614, cited
O'Leary v The King (1946) 73 CLR 566, cited
TKWJ v The Queen (2002) 212 CLR 124, cited

COUNSEL: The appellant appeared on his own behalf
J A Greggery for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The appeal should be dismissed and the application for leave to appeal against sentence refused for the reasons given by Keane JA.

[2] **KEANE JA:** On 8 December 2005, the appellant was convicted upon the verdict of a jury of the murder of Samantha Mary Rooney ("the deceased") between 29 August and 3 September 2002. He was sentenced to life imprisonment.

[3] On 23 December 2005, the appellant filed an application by which he sought to appeal against his conviction and sentence. That application contained a number of grounds of appeal. The appellant subsequently discharged his lawyers and sought to agitate different grounds of appeal. The appellant prepared and delivered his own written submissions which address these other grounds of appeal. The appellant has also sought to adduce further evidence. The appellant seems also to wish to agitate a complaint relating to the sentence which was imposed on him. By his own choice, the appellant was not represented on the hearing of this appeal. The appellant displayed considerable self-confidence in his presentation of the argument whereby he sought to challenge his conviction. I shall return to the bases on which the appellant challenges his conviction after first summarising the course of the trial.

The Crown case at trial

[4] The Crown case at trial was that the deceased, who was the de facto spouse of the appellant, died between 29 August and 3 September 2002 at their home at Cassava Street, Holloways Beach. The deceased lived in this house with the appellant and her 10 year old son, J.

[5] On Monday, 2 September 2002, Mr Philip Bovey, a solicitor, telephoned police to advise them that the appellant was with him and that the body of the deceased was at the appellant's house.

[6] The body of the deceased was found in the bedroom of her home by police on 2 September 2002. She had been beaten and strangled. She had apparently suffered blows to the head with a torch and a piece of wood. Her body had been concealed under a mattress, inside a section of the bed.

[7] The Crown case was that the appellant was a person with the motive, means and opportunity to kill her, and that the evidence did not raise the rational possibility that some other person might have done so. The Crown also relied upon admissions made by the appellant.

[8] There was no evidence of forced entry into the house. There was no evidence that the deceased had been robbed. The house was not ransacked. There was no evidence that any property was stolen. The deceased and the appellant kept large dogs which guarded their house. When police sought to enter the house on 2 September 2002, they were obliged to subdue the dogs with capsicum spray.

[9] The head of the deceased had been covered with a sheet and garbage bags. The garbage bags were similar to bags which were kept in the kitchen of the house. There was a pool of blood under the bed; but there was no blood elsewhere in the room, and towels had been placed at the foot of the bed and under the door.

[10] When police arrived at the house on Monday 2 September, an odour of decomposition was noticed by Senior Constable Lowry as he approached the house. A post-mortem examination was carried out on the body of the deceased by Dr Lampe on Wednesday, 4 September. His evidence was that head injuries and strangulation had caused the death of the deceased. The head injuries, which included skull fractures, were consistent with blunt trauma and the application of a severe degree of force with items such as the torch or piece of wood found at the scene. At first, he considered that the fatal attack on the deceased may have occurred on Sunday, 1 September 2002; but at trial he was shown photographs of the deceased's body taken on Monday, 2 September, as a result of which he gave it

as his opinion that the fatal attack had most likely occurred on or before the morning of Saturday, 31 August.

[11] Mrs Patricia Crouch gave evidence that, while she was visiting a neighbour of the appellant on the night of Friday, 30 August 2002, she heard a male and female arguing at the appellant's residence. She said that the female said that she wanted the other person to leave.

[12] A neighbour, Mr Patrick O'Shane, was preparing to go to work at about 2.30 am to 3.00 am on Saturday, 31 August 2002. While he was in the shower, he heard a "number of sounds … which sounded like … a young woman in distress".

[13] Mr Graham Conroy, who lived directly opposite the appellant's house, heard a short argument coming from the appellant's house. He said that this was about nine or 10 o'clock in the morning. He heard a loud female voice, then, briefly, a male voice, and then nothing. In cross-examination, Mr Conroy admitted that, in his statement to police, he had said that this argument occurred between 1.30 pm and 2.00 pm on the Saturday.

[14] Mr Steven Iverach, a friend of the appellant, gave evidence that, at about 9.00 pm on Saturday, 31 August 2002, he saw the appellant, who was with another friend, Ian Brittin, at Mr Iverach's home. He described him as having "the shakes" at that time. The appellant asked him for a Serepax tablet.

[15] Mr Iverach visited the appellant in gaol about two or three weeks later. On that occasion, the appellant said to Mr Iverach that he, the appellant, "was the only one that knew what happened".

[16] Police interviewed J on 2 September and 5 September 2002. On the first occasion, the child said that he heard his mother being sick on the Friday night, but saw her in her bedroom on the Saturday morning and telephoned her at home later that morning when he was out of the house. At that time, she answered the phone. In his second statement, the child said that the appellant and the deceased had argued on the Friday night and that he did not see her again. He said that the appellant told him that his mother was sleeping in her room and the door was closed. He went out and spent the day playing with friends. When he returned at about 5.00 pm, the appellant told him that his mother had gone out to a bar, P J O'Brien's. That evening he went with the appellant to the home of Ian and Anne Brittin, friends of the appellant. The appellant and the child, J, slept at the Cassava Street home on the Saturday night. The appellant slept on a futon in the lounge room. On the Sunday, the appellant took the child to the home of the child's football coach. In pre-recorded evidence, J gave evidence of frequent physical assaults by the appellant on the deceased.

[17] There was evidence from Danielle Rooney, the sister of the deceased, who said that the deceased had told her that she wished to leave the appellant, and that the appellant had been making reference to a yellow motorcycle in the presence of the deceased.

[18] Annabelle Olsson, the deceased's employer at the time of her death, gave evidence that the deceased had told her that the appellant had been physically violent towards the deceased, and that, at night, the appellant would whisper in her ear: "How's it going to feel when I crush your skull? Think how it's going to feel when I bring a

heavy object … down and think how it's going to feel when that heavy … object crushes your skull." Ms Olsson also said that the deceased ceased work at about 6.15 pm to 6.30 pm on the Friday evening. She said that the appellant was due to work on the morning of Saturday, 31 August, but the appellant telephoned at some point around 9.00 am that morning to say that both he and the deceased did not feel well and that the deceased would not be coming in to work that day.

[19] Helen Calloway, a former workmate, gave evidence that the deceased had told her that, after the deceased had returned from a trip to Mount Isa in May 2002, the appellant had struck her. In mid August 2002, the deceased had told Ms Calloway that, when she and the appellant were in bed together, he would whisper to her: "I'm going to cave your skull in. How would that feel?" According to Ms Calloway, the deceased also said, after May 2002, that the appellant had held knives to her throat, and that she wanted to get out of the relationship and find somewhere else to live. The appellant's counsel applied to have the jury discharged after this evidence was given on the basis that this evidence was incurably prejudicial to the appellant. The trial judge refused that application.

[20] Peter Carr gave evidence that he met the deceased in Mount Isa in May 2002. When she returned to Townsville, they continued to communicate by telephone and e-mail. During these communications, she told him that she wished to separate from the appellant. Mr Carr said that he e-mailed to the deceased a photograph of himself standing in front of his yellow motorbike. In cross-examination, Mr Carr admitted that he had previously said that he had not sent this e-mail. In re-examination of Mr Carr, the Crown Prosecutor tendered an e-mail from the deceased to Mr Carr dated 27 August 2002. In that e-mail, she wrote:

> "I was worried that my ex had gone through my purse and found my e-mail address … the other day i heard him say he was 'setting a trap for someone with a yellow motorbike?' … if he thinks i'm seeing some one else i will be a very very sorry girl. he can't get it through his head that i want him to fuck off out of my life."

[21] The deceased's stepfather gave evidence that on 15 August 2002 the deceased had discussed with him her intention to leave the appellant. He deposited between $1,500 and $2,000 in her bank account to assist her in this regard. They had arranged to meet at Cairns Airport on Sunday, 1 September (Father's Day). The deceased did not keep that appointment.

[22] David Richardson had met the appellant in early 2002. He subsequently became reacquainted with the appellant while both were in prison. Mr Richardson gave evidence that the appellant told him that he had beaten and strangled the deceased. Mr Richardson was cross-examined on his prior criminal record which included offences of dishonesty.

[23] On Monday, 2 September 2002, the appellant and Mr Bovey attended the police station together. Detective David Miles said that Mr Bovey told him that the appellant had taken about 25 Normison tablets on the Sunday and would not be participating in an interview with police. While at the watch-house, the appellant said to Detective Miles that he should "get a statement from Ian Brittin as he had previously been a victim of an assault by the deceased with an ashtray". When police approached Mr Brittin, he refused to speak to them. Mr Brittin died in July 2005.

The appellant's case at trial

[24] The appellant denied that he had anything to do with the death of the deceased.

[25] The appellant said that, on Friday, 30 August 2002, he picked the deceased up from her place of work and they returned home together where he and the child organised the dinner. The appellant said that he and the deceased had a verbal altercation. He said that he and the deceased went out in the car, and the child, J, stayed home. She took some money out of an ATM at Sheridan Street, North Cairns. He dropped her back at their house, and then he went to visit his friend, Ian Brittin.

[26] At Ian Brittin's house, he and the appellant drank and sang karaoke until the early hours of the morning. He said that they visited Mr Iverach's house at about midnight, but Mr Iverach did not appear to be home. The appellant said that he left Mr Brittin's house and returned home at about 4.30 am on the Saturday. There he checked the pool, "did a bit of raking" and cleared away some palm fronds for about an hour. He then went inside and into the bedroom where he changed his clothes. The deceased was still in bed. He said that she told him that she "wasn't feeling the best" and did not want to go to work. Some of his workmates arrived, and he told them that he did not want to go to work. At about 9.00 am to 10.00 am, he drove to a phone box to telephone Ms Olsson to tell her that the deceased was unwell and would not be attending work that day.

[27] The appellant said that, at about midday, Ian Brittin "came around". At this stage, the deceased had dressed, and said that she was going to a friend's place. He gave her the keys to the car. She returned after about half an hour. Shortly after the deceased's return, Mr Brittin went home. The deceased told the appellant that she wanted to go to Dunwoody's. He said that he drove the child to the beach and the deceased to Dunwoody's, where he dropped her off.

[28] The appellant said that he returned home. The child returned home at about 5.00 pm. Eventually, the appellant and the child went to McDonald's for their evening meal. They then went to Ian Brittin's home. The appellant said that he and Ian Brittin went out for a short time, leaving the child with Anne Brittin, and later the appellant and Ian Brittin took the child to Mr Iverach's place for a short time. The appellant then dropped Ian Brittin off at his house, took the child home and then returned to Ian Brittin's place where they drank until the early hours of Sunday morning.

[29] The appellant gave evidence that, on the Sunday morning, he took the child with him to the house of Brett Emond, the child's football coach. The appellant said that he had a job to do there in the front yard. The Emonds were still in bed. The appellant said that the child wanted to play with the Emond children; the appellant asked Mr Emond's mother if the child could do so. Mr Emond's wife agreed to this; the appellant said that he then returned to Ian Brittin's place. Mr Brittin wanted some Normison tablets, and the appellant went to the day surgery and obtained some Normisons for Mr Brittin with a prescription which had been given to the appellant. The appellant said that he drank some beer and took some Normison tablets at about 11.00 am on the Sunday and went to bed at the Brittins' place where he slept until he was awakened by Mr Brittin on the Monday morning.

[30] The appellant and Mr Brittin then drove to the appellant's house. On their arrival they "could smell something terrible". He went into the bedroom where he could

see the "shape of a body" under a mattress. Mr Brittin suggested that they ring the police, and then suggested that they first go to Mr Bovey's office.

[31] At Mr Bovey's office, Mr Bovey instructed the appellant "not to say anything" to the police.

[32] In the course of cross-examination, the appellant was taxed with his failure to comply with s 590A of the *Criminal Code 1899* (Qld) in relation to the giving of notice to the prosecution of his intention to rely upon an alibi. He denied any recollection of being informed of his obligations in this regard by the Magistrate at the preliminary hearing of the charge against him.

[33] The appellant denied that he was aware of Mr Carr's e-mails to the deceased. He also denied that he had told the child that his mother had gone to P J O'Brien's. He denied that he had made the admissions that Mr Richardson had testified about. He admitted that he was "sometimes paranoid" about the deceased "sleeping around".

The first ground of appeal: the inconsistent statements of Peter Carr

[34] The appellant's first ground of appeal is that the trial judge failed to direct the jury that they should disregard the evidence of Peter Carr that he had e-mailed to the deceased a picture of himself standing in front of his yellow motorbike. In this regard, the appellant relies upon Mr Carr's statement at the committal hearing on 15 July 2003 that he had not sent the deceased a photograph of himself on a yellow motorbike. The trial judge did not refer, in his address to the jury, to Mr Carr's previous statements. Indeed, as the appellant points out, the trial judge did not refer to Mr Carr's evidence in this regard at all.

[35] Mr Carr's honesty was not in issue. As far as his reliability was concerned, he acknowledged his earlier statements to the effect that he had not sent the deceased a photograph, but said that it was now his recollection that he had sent a photograph by e-mail. He explained his evidence at committal was affected by stress. He conceded that his recollection might be faulty. The deceased's e-mail to Mr Carr of 27 August 2002 provided support for Mr Carr's evidence, in that it referred to the deceased's concern that the appellant had obtained access to her e-mails and that the appellant said that he was "setting a trap for someone with a yellow motorbike".

[36] In *Domican v The Queen*,[1] six members of the High Court said that:

> "A trial judge is not bound to discuss all the evidence or to analyze all the conflicts in the evidence, and, by itself, the failure of a trial judge to do so does not mean that there has been any miscarriage of justice."

[37] In this case, Mr Carr's evidence as to the sending of the e-mail was relevant only to one aspect of the Crown's case of motive. The absence of specific mention by the judge of this evidence was not to the disadvantage of the appellant, in that the judge did not add the weight of his authority to this aspect of the Crown's theory as to the appellant's motivation. It is usually the case that a trial judge should be circumspect in his comments to the jury about the question of motive.[2] Not the least of the reasons for this circumspection is the risk of blurring the crucial distinction between

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1 (1992) 173 CLR 555 at 560 (internal citation omitted).

2 *De Gruchy v The Queen* (2002) 190 ALR 441 at [28] - [30], [53] - [59].

intention to kill, which is an element of the crime of murder, and motive to kill, which is not an element of the offence.

[38] In my view, this criticism of the judge's summing-up should be rejected.

The second ground of appeal: the judge's directions in relation to Dr Lampe's evidence as to the time of death

[39] This ground of appeal relates to Dr Lampe's evidence that, on the basis of the degree of decomposition depicted in photographs of the deceased taken on Monday, 2 September, the time of death would have been at least two days before the photographs were taken. The thrust of the appellant's complaint is that, in his direction to the jury, the trial judge gave too much weight to the evidence of Dr Lampe.

[40] It is true that the learned trial judge described the evidence of Dr Lampe's opinion as "crucial" to fixing the time when the fatal assault occurred. But that description was accurate. There was no other testimony which bore directly on when the fatal assault on the deceased occurred. There was a body of circumstantial evidence from which it might be inferred that death had occurred on the Friday, the Saturday or the Sunday. The expert evidence of Dr Lampe, which was not contradicted by other expert evidence, was directly to the effect that the fatal assault was most likely to have occurred before or on the Saturday morning. The trial judge did not suggest to the jury that they were bound to accept Dr Lampe's opinion in this regard. The trial judge directed the jury to the circumstance that Dr Lampe had changed his opinion. He had previously said that death could have occurred at least two days before the post-mortem examination, ie on the Sunday. His change of opinion was explained by reference to the photographs which he had not previously seen.

[41] There is no substance in this criticism of the trial judge's direction to the jury.

The third ground of appeal: the evidence of Ms Calloway

[42] This ground of appeal relates to the evidence of Helen Calloway which is said to have been erroneously admitted and inadequately commented upon by the trial judge.

[43] The evidence of statements made to Ms Calloway by the deceased was admissible because of s 93B of the *Evidence Act 1977* (Qld). Section 93C of the *Evidence Act* required that the jury must be warned that such evidence may be unreliable, and of the matters which may cause that evidence to be unreliable. The jury must be warned of the need for caution before accepting such evidence and the weight to be given to it.

[44] The trial judge gave the jury the warnings required by s 93C of the *Evidence Act*. His Honour said:

> "Another specific area of your assessment of evidence that I must direct your mind to is the evidence that relates to the statements made by [the deceased], the e-mails and certain other pieces of evidence which are described as hearsay evidence. You have probably used that term yourself, hearsay evidence, in argument. If your view is not being accepted you might say, 'Well, that's only hearsay.'
>
> Evidence is admitted in this case because of a special provision permitting the statements of deceased persons or missing persons to

> be used. That same provision in our law requires that I warn you that hearsay evidence may be unreliable. Hearsay evidence can be unreliable because the hearer may mishear or misconstrue what was in fact said; may give unintended emphasis to parts of the conversation and then not accurately recall what was said when repeating it. Again, you must use your commonsense about these matters.
>
> But there is a need for caution in deciding whether to accept hearsay evidence, and particularly what weight you should give it. For example, Ms Olsson and Ms Calloway, the veterinarian and the vet nurse, gave evidence of what [the deceased] said about the defendant's conduct towards her, particularly the whispering in the ear and the threat, 'When I crush your skull.' The evidence also about how she came by the injury to her eye and her lip on her journey back from Townsville, those were some examples. There were other examples. The descriptions of the injuries from Mount Isa, the e-mails and any other statement really not made in the presence of the defendant.
>
> You need to keep in mind that because the statements were not made in his presence, he therefore has a very limited opportunity to test by way of cross-examination of the witnesses whether the statements were in fact made by [the deceased], or what were the precise terms that she used to the hearer. You also need to scrutinise very closely the circumstances in which the statements were made. Whether the facts alleged are likely to be accurate or exaggerated. Or whether, if tested by cross-examination, they may have ended up with a different complexion or interpretation. So these are the directions that I am required to give you. But you consider the evidence, taking into account those cautionary remarks, and then give the statements what weight you think they deserve."

[45] The evidence of Ms Calloway was admissible under s 93B of the *Evidence Act*. This warning was in conformity with the requirements of s 93C.

[46] The appellant also complains, under this heading, that the trial judge did not refer the jury to the detail of Ms Calloway's evidence and, in particular, the use of knives to threaten the deceased. Because the deceased was not killed with a knife, the appellant contends that this evidence of his use of knives to threaten the deceased would have been to his advantage. But the evidence suggests that instruments of some kind were used to strike the deceased's head. The point of distinction which the appellant seeks to make was not one which was likely to improve his prospects of acquittal. In truth, the appellant was not disadvantaged by the course taken by his Honour in refraining from reminding the jury of the appellant's threats to the deceased.

[47] It may also be noted that the crime of murder is defined in Chapter 28 of the *Criminal Code*. Section 132B of the *Evidence Act* provides that in criminal proceedings against a person for an offence defined in Chapters 28 and 30 of the *Criminal Code* "[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding".

[48] The evidence of the history of physical violence and threats by the appellant to the deceased was relevant to provide an understanding of the relationship between the appellant and the deceased. It served to explain and render credible what might otherwise appear to be an act of inexplicable and incredible brutality.[3] The learned trial judge made "special reference" to this evidence, warning the jury of the limited purpose of this evidence. The trial judge specifically warned the jury against using this evidence to reason that, because the appellant had previously assaulted the deceased, it is likely that he bashed and strangled her on the occasion which led to her death.[4]

[49] This ground of challenge to the appellant's conviction must be rejected.

The fourth and fifth grounds of appeal: the trial judge's directions in relation to alibi

[50] These two grounds of appeal relate to the comments made by the trial judge in relation to the defence of alibi which the accused sought to raise on the basis of his evidence that he was with Mr Brittin for most of the time when the fatal assault on the deceased occurred.

[51] The appellant had not given any notice of his alibi to the prosecution before he gave his evidence at trial. In this regard, the appellant had failed to comply with s 590A of the *Criminal Code* which required that he give notice of alibi within 14 days of the committal proceedings. The appellant asserted in the course of argument of the appeal that he gave his solicitors instructions in relation to his alibi prior to the trial, but at a time well after he was required to give notice to the prosecution under s 590A of the *Criminal Code*.

[52] In his initial charge to the jury, the trial judge said:

> "It is necessary that I direct you that a person has the right to be silent in such circumstances, and you have heard that that right is commonly exercised. The defendant's silence is not evidence against him. In fact you are probably aware that police warnings before interviewing people expressly identifies the person to be interviewed has the right to remain silent. So it would be quite wrong to reason that because he was silent or refused to answer questions that he must have something to hide or be guilty of some offence. Therefore you cannot use against him the fact that he chose to remain silent.
>
> However, he did not remain completely silent in so far as he agreed that he did suggest to Detective Miles that he should take a statement from Mr Brittin because he might know something about an occasion when [the deceased] hit Mr Brittin with an ashtray.
>
> The right to remain silent which I have just outlined to you is an important right and it is important that you do not use the silence at the time of the police investigation against him.
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> When the matter comes to Court then obligations sometime arise where there is a need for a person who is charged to disclose information to the Court and to the prosecution. This applies if a defendant intends to rely upon alibi evidence. That is evidence of

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3 Cf *O'Leary v The King* (1946) 73 CLR 566 at 577; *KRM v The Queen* (2001) 206 CLR 221 at 264 [134].

4 Cf *Gipp v The Queen* (1998) 194 CLR 106 at 132 - 133 [77] - [78].

other persons to the effect that the defendant was not at the place where the crime was committed.

You will note from the defendant's evidence about his movements that Mr Brittin was such an alibi evidence. You have heard that throughout the whole of that period of time that we are concerned about - Friday night, Saturday, Sunday - the defendant says he was virtually in Mr Brittin's company. You have heard the Prosecutor put to Mr Erasmus that he was told of his obligation to give notice of alibi evidence within 14 days of the committal proceedings. Indeed it was a matter of record that was read out to him. The defendant says he did not recall that.

You have heard that at the committal proceedings the defendant was represented by his solicitors who instructed Mr Henry of counsel. The obligation to give notice of alibi, and the importance of doing so, would not have escaped the lawyers of their experience. The importance of giving notice of alibi of course is to allow a check to be made of the claim. Because no such statement was made here there was no check on the defendant's movements.

Had a statement been taken from Mr Brittin before he died of course it could have been placed before you in exactly the same way as [the deceased's] statements have been placed before you. You are entitled to have regard to this failure in obligation to the Court and to the prosecution when assessing the defendant's evidence."

[53] The jury subsequently requested assistance in relation to the following written question which they posed to the trial judge: "Is it possible to confirm Erasmus was with Ian Brittin, such as testimony from Anne Brittin?" His Honour responded to this inquiry as follows:

"HIS HONOUR: Ladies and gentlemen, you have raised with the court a question of, is it possible to confirm Erasmus was with Ian Brittin, such as testimony from Anne Brittin. The answer, the short answer to that is, no, and I will give you the reason.

You will recall my mentioning that there is an obligation on a person who has been charged to give notice of alibi. That notice is really to be given within a short time after the person is committed for trial. In Mr Erasmus's case, that was some years ago. Now, had he fulfilled that obligation and given notice of alibi, then inquiries would have been made and, in those circumstances, had he wished, he would have been able to call Anne Brittin if her evidence was going to be helpful to him. But the obligation is expressed in this way:

> 'An accused person shall not upon the person's trial on indictment, without the leave of the court, adduce evidence in support of an alibi unless before the expiration of the prescribed period the person gives notice of particulars of the alibi.'

So no such notice has been received. In fact, no such notice was received in respect of Mr Ian Brittin, and so it would not have been possible for Mr Ian Brittin, if he had been alive, to give evidence either, unless with leave of the court. Such leave might have been given to address the opportunity to address such inquiries, but you

> will recall Detective Miles did approach Mr Ian Brittin and he refused to give a statement. I am right in that, gentlemen?
> MR EDWARDS: Yes, your Honour.
> HIS HONOUR: And he refused to give a statement, so there is nothing the court can do about that. And it is important, then, that you do not speculate as to what Mrs Anne Brittin might have said, it just has to be ignored. So the obligation not having been fulfilled by Mr Erasmus, you cannot speculate what the evidence would have been. It might have been favourable, it might have been unfavourable under any circumstance, we do not know. There is nothing we can do about it, except make your decision on the evidence before you without speculating on whether Anne Brittin may have supported his claim or in fact rejected it. Thank you, would you like to retire again, please?"

[54] The appellant's contention is that these comments should not have been made, particularly as the prosecution might have sought, but did not seek, an adjournment to investigate the appellant's alibi, and in particular, in this regard might have called Anne Brittin to give evidence. This contention assumes that Anne Brittin was available to give evidence. That proposition was not established at the trial. While there was no onus on the appellant to prove his innocence, the contention that the trial judge's comment was an excessive response to the appellant's egregious failure to comply with s 590A of the *Criminal Code* depends on the demonstrated availability of Anne Brittin to give evidence. Her availability was not demonstrated. The point was raised by the jury late in the trial, and, indeed, after the jury had begun to consider their verdict. Further, the appellant's contention fails to recognise that the defence made no application for leave to call evidence of alibi from Anne Brittin, or for any adjournment necessary to enable Anne Brittin's availability to be established.

[55] It is to be emphasised here that the appellant was not prevented from giving evidence himself in support of his alibi, notwithstanding his failure to give notice as required by s 590A of the *Criminal Code*. He did not seek or obtain leave to give that evidence as required by that section. The appellant had, by his disregard of s 590A, sought to obtain a forensic advantage to which he was not entitled as a matter of law. The trial judge's comments were apt to ensure that the appellant did not retain that advantage, and that a balance of fairness was restored to the trial. The comments made by the trial judge were no more than what was reasonably necessary to ensure a fair trial according to law.

[56] This ground of appeal cannot be sustained.

The sixth ground of appeal: the telephone records

[57] The appellant contends that the trial judge misdirected the jury by giving too much weight to the records of telephone calls. In particular, the appellant asserted in argument that the trial judge referred to the circumstance that J's second statement to the police was more likely to be accurate than his first statement to the police because the Saturday morning telephone call to his mother, which he said he made in the first statement, was not shown in the telephone records.

[58] In truth, in the course of giving directions related to the conflict between J's two statements, the trial judge noted that J had said in evidence that "his second

interview was the more accurate". The learned trial judge went on to consider J's claim, in his first statement, that he had phoned home on the Saturday. In the course of this consideration, the trial judge noted that "that call, if it was made, does not show in the records".

[59] Further in this regard, there was no challenge to the accuracy of the telephone records. Indeed, the appellant, through his counsel, made a formal admission as to the accuracy of the telephone records.

[60] The point which was made by the trial judge was an accurate comment upon the evidence. It may have assisted the jury in their deliberations or it may not. The jury would have well understood that the extent of the assistance which they might derive from his Honour's comments was a matter entirely for them.

[61] This ground of appeal should be rejected.

The seventh and subsequent grounds of appeal: new evidence

[62] The appellant sought to adduce "new evidence" in the form of witness statements given by Ms Johnstone, Ms Olsson, Constable Paul Browne, Mr Robert Edward Collison, Ms Raylene Ware, Ms Tracy-Lee Richardson, Ms Judith Turner and Dr Baden Ian Bennett.

[63] The evidence which the appellant seeks to adduce from these witnesses is derived from statements taken by the police. The evidence of Detective Miles was that these statements were made available to the defence prior to trial. The appellant's complaint is that "The Crown and defence failed to disclose this evidence to the court and jury during the trial." Thus, to the extent that the appellant seeks to rely upon asserted breaches by the Crown of its obligations of disclosure under s 590AB to s 590AX of the *Criminal Code*, the appellant's application is plainly misconceived. These obligations of disclosure are concerned with disclosure by the Crown to the accused prior to trial, not with the leading of evidence at trial. These obligations were plainly met by the Crown in making the statements available to defence counsel, even if the appellant claims not to have seen them himself. In any event, the new material is not apt to cast doubt on the jury's verdict.

[64] Ms Johnstone and Ms Olsson were called by the prosecution and were cross-examined at the trial. The evidence of Dr Bennett was the subject of a formal admission by the appellant. This evidence related to the absence of facial or arm injuries on the appellant when he was examined by Dr Bennett on 2 September 2002. It also appears that Dr Bennett took a sample of the appellant's blood, but there was no evidence of this. Nor was there any suggestion at trial that a DNA profile had been obtained from this blood and was being withheld from the court. The other persons referred to in paragraph [62] were not called as witnesses by the prosecution. No complaint was made about this by counsel for the defence at trial, and no attempt was made at trial to call these witnesses on behalf of the appellant.

[65] Ms Johnstone, a forensic biologist, gave evidence confirming that the blood on the bed in the appellant's bedroom was that of the deceased. In the statement which Ms Johnstone had given police, she suggested that there was blood from a male person on the T-shirt found in a washing basket in the hallway at the crime scene. This washing basket also contained a sarong with semen stains on it. There was no evidence as to whose blood or semen was on these items of clothing. Counsel for the appellant at the trial did not seek to suggest that this blood and semen might be

the blood and semen of some man other than the appellant. The defence did not seek to adduce any evidence of a DNA comparison between the blood and semen and the appellant's blood. It is not profitable to speculate as to the thinking which informed the preparation and presentation of the appellant's case, but one possible reason why the defence might not have pressed for a DNA comparison of the blood on the T-shirt and the semen on the sarong and the appellant's blood would be a concern, that that testing might have revealed that it was the appellant's blood on the T-shirt and his semen on the sarong, and that such evidence may have been to the appellant's disadvantage.

[66] The appellant seeks to argue that the statements by Ms Olsson and Constable Browne establish that the deceased attended her place of work on Sunday, 1 September 2002 and was, therefore, alive on that date. The appellant seeks to mount this argument on the basis of a suggestion in Ms Olsson's statement to police that someone had attended her office on the Sunday between 9.00 am and 11.00 am. The only key not accounted for by Ms Olsson belonged to the deceased, which, according to Constable Browne, was found in the deceased's purse with a tag labelled "punch in code 2347". At the best for the appellant, these statements suggest that someone in possession of the deceased's key and "punch in code" attended at her place of work on the Sunday. It does not tend to prove that she was alive on the Sunday.

[67] The statement of Robert Collison refers to two men entering the office of Phillip Bovey at about 8.45 am on Monday, 2 September 2002. It was indeed common ground at trial that the appellant attended Mr Bovey's office in company with Mr Brittin. But the fact that the appellant was in company with Brittin at that time does not support an inference that he was previously with Brittin for the extended periods from Friday to Sunday as claimed by the appellant.

[68] The statement by Raylene Ware contained a reference to Ms Ware's being told by a friend's nephew that J "got picked up by his mum" from the beach on the afternoon of Saturday, 31 August 2002. This statement was inadmissible hearsay. J did not give evidence that he had been picked up from the beach by his mother on the Saturday afternoon.

[69] The statement of Tracy-Lee Richardson to which the appellant refers appears to suggest that the deceased may have had affairs with other men during her relationship with the deceased. The appellant seems to contend that this statement supports his attempt to rebut suggestions that he was "paranoid" about the deceased's infidelity, by showing that his suspicions were well-founded. In truth, the circumstance that the appellant had good reason to suspect the deceased of infidelity would not have improved his prospects in relation to the question which the jury were required to determine.

[70] The statement of Judith Turner is said by the appellant to support the appellant's evidence that Brittin was present at the appellant's house early in the afternoon when the vehicle driven by the deceased was absent. It is not clear from Ms Turner's statement whether she is referring to the early afternoon of the Friday or the Saturday. It may be accepted, as the appellant urges, that the deceased was at work in "the early afternoon" of the Friday and that the deceased's car was absent from her residence. What is not established by evidence is that the appellant was at work in "the early afternoon" of the Friday. The appellant's evidence was that he

picked the deceased up from work at about 6.15 pm. He said only that he had "finished work earlier". It is entirely possible, therefore, that Ms Turner saw the appellant and Mr Brittin at the appellant's home on the Friday afternoon.

[71] None of the statements upon which the appellant now seeks to rely casts doubt on the correctness of the jury's verdict.

[72] Furthermore, because the "new evidence" upon which the appellant seeks to rely was available to the defence at trial, the appellant's complaint is, in substance, a complaint as to the conduct of the trial by his own counsel. It is now well established that an appellant cannot hope to demonstrate that a miscarriage of justice has occurred by reason of the manner in which defence counsel has conducted a trial unless the course taken by counsel is not explicable as having a reasonable forensic basis.[5] The appellant has not demonstrated that there is no reasonable basis on which the failure by trial counsel to use this material to make the points which he now seeks to make is explicable. It may be that, to the extent that these statements identified potentially useful lines of inquiry, further investigation by the appellant's counsel at trial showed them to be "dry gullies". This Court does not know whether or not this is so; but an appellant does not cast doubt on the verdict of a jury, much less demonstrate a miscarriage of justice, merely by informing this Court of avenues of inquiry which may or may not have been run down by his lawyers at trial.

[73] The appellant's attempt to rely upon these statements to obtain a new trial cannot be sustained.

Further points

[74] In the course of oral argument on the hearing of the appeal, the appellant raised a number of points for the first time.

[75] One of these points was that he had not been given the Crown brief with the witness statements upon which the Crown intended to rely until 6 February 2006. He also complained that he had not been furnished with the depositions from the committal hearing prior to the trial. It is to be emphasised that it is not suggested that these documents were not made available to the lawyers representing him at trial. Those lawyers did not suggest at trial that the appellant was not ready for trial. The appellant, when asked how he had been prejudiced because these documents had not been given to him personally (rather than made available to him through his lawyers), was not able to identify any specific step which should have been taken in order to improve the presentation of his case but which was not taken because of his inability to direct the preparation and prosecution of the case for the defence more closely. There is no substance in this point.

[76] The second point which the appellant raised for the first time in oral argument involved his assertion that the deceased had a Westpac Keycard which was not found with her possessions. His assertion was that the deceased's financial records should show that someone, presumably the deceased's killer, used the Keycard to make withdrawals from her account. There was no evidence at trial which afforded any support for this assertion. It is not open to the appellant now to cast doubt on the verdict of the jury or to claim a retrial by these speculative assertions.

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5 *TKWJ v The Queen* (2002) 212 CLR 124 at [16], [26] - [27], [95], [107]; *Ali v The Queen* (2005) 79 ALJR 662; *Nudd v The Queen* (2006) 80 ALJR 614 at [9], [24] - [27], [157] - [160].

[77] The third point which the appellant made for the first time in oral argument was that his lawyers failed to heed his directions to them as to the conduct of his case. The appellant did not identify any particular instructions to his lawyers which were not followed by them. There is, therefore, no reason to accept the contention that the appellant's prospects at trial were adversely affected by the failure of his lawyers to follow his instructions.

Sentence

[78] Under s 305 of the *Criminal Code*, any person convicted of murder is liable to a mandatory life sentence. This Court cannot disturb the sentence imposed by the learned trial judge in this regard.

Conclusion and order

[79] The appeal should be dismissed and the application for leave to appeal against sentence refused.

[80] **CULLINANE J:** I agree with the reasons of Keane JA and the orders proposed by him in this matter.