COURT OF CRIMINAL APPEAL

MELBOURNE

BEFORE THEIR HONORS MR. JUSTICE GOWANS,
MR. JUSTICE GILLARD and MR. JUSTICE BARBER

THE QUEEN v. LEITH McDONALD RATTEN

J U D G M E N T

(Delivered 16th September, 1970.)

GOWANS, J. : The applicant, Leith McDonald Ratten, is seeking leave to appeal against his conviction for murder. He was tried at Shepparton before His Honor The Chief Justice and a jury in a hearing which took place between August 10 and August 20 1970. The person killed was his wife, Beverley Joan Ratten. The death took place on May 7 1970 at their home at 59 Mitchell Street, Echuca. Her death was caused by the discharge of a shotgun, which was at the time in the hands of the applicant. The fatal incident took place in the kitchen of the house about 1.15 o'clock in the afternoon. No-one else was present except the applicant and the deceased. The Crown case was that the circumstantial evidence showed that the applicant had deliberately fired the gun at his wife with intent to kill her. The defence case was that the gun had accidentally discharged in the course of its barrel being cleaned by the applicant.

In order to understand the background of the events leading up to the fatality, and to appreciate the setting of the grounds of appeal, some statement of events is necessary.

In 1964 the applicant and his wife and their young family were living in Echuca. They became friendly with another married couple, Mr. and Mrs. Kemp, who also lived in

the town and had a young family. The two husbands were both interested in shooting. Later the Kemps moved to Barmah, out of Echuca, but the friendship continued. In March or April 1969 an adulterous connection commenced between the applicant and Mrs. Kemp, and it continued until the fatality. It reached a stage where the two parties were discussing leaving their respective spouses and going off to live together. It had expressed itself in acts of intercourse up to the day before the shooting. It is unnecessary for immediate purposes to go further into the conduct associated with this matter.

The applicant had for many years been interested in and was the owner of game weapons. About 1967 he acquired the shotgun involved in the fatality. It was an old double-barrelled side by side shotgun. In March or April 1970, as a result of a discussion between Kemp and the applicant, this gun was taken by Kemp to a gunsmith in Shepparton either for sale or repair (it is not clear which) and in late March or early April it was returned to the applicant. It had not been repaired. It had some looseness in the locking mechanism, and the resistance of the safety catch could be overcome by putting sufficient pressure on the trigger, When it was returned, the gun was in an unloaded condition. The applicant kept it thereafter on a bench in his garage at his home. The garage also provided shelter for a canoe used in the applicant's shooting expeditions. Loose cartridges for ready use were kept in a plastic container on the floor of the canoe. From the time the gun came back from the gunsmith until the day of the fatality, the gun was not removed from the bench in the garage. There was no explanation from the applicant or anyone else as to how it came to be loaded. At some time on the fatal day the gun was brought into the kitchen of the house by the applicant. At the time of its discharge it was loaded in both barrels.

After the fatality the cartridge in the right hand barrel was still there and was found to have misfired. The cartridge in the left hand barrel had been fired and had caused the wound which killed the wife. Consideration of the evidence bearing on the cause of the gun discharging and on the position and attitude of the wife at the time may be put aside for the time being and attention directed to certain events at or about the time of the shooting, which featured in the evidence. The times at which these happenings took place are of importance.

At 1.9 p.m. a telephone connection was made from Melbourne to the house in Echuca at the instance of the applicant's father. During the 2.9 minutes that that call between the father and the applicant lasted the father heard the wife's voice in the background. Everything appeared to him to be normal. Shortly afterwards a telephone operator in the Echuca Telephone Exchange, Janet Lucille Flowers, took a call from the house. She says the time was then about 1.15 p.m. Her account was that a woman's voice, at first calm and then punctuated by sobs and becoming hysterical, and finishing in a yell, said to her - "Get me the police, please", and later added - "59 Mitchell Street". As the telephonist connected with the police station the caller hung up. This call to the exchange was later claimed by the applicant to have been made by him, but his version was that the shooting had then happened, and that it was an ambulance he had asked the exchange to get, not the police. According to Miss Flowers, as the caller had hung up the police had answered the 'phone, and after referring to her superior officer, she had then told the police they were wanted at 59 Mitchell Street. She noticed that the time given by the exchange clock was then 1.20 p.m. As a result of the message to the police station, which was confirmed by another witness to have taken place

about 1.20 p.m., and as the result of the immediate despatch of a police van to the house, a telephone call was made from the police station to the number from which the call to the exchange had come. According to Miss Flowers she saw this call being made through the exchange mechanism about two minutes after her own call to the police. Constable Bickerton, who made this last call to the house number, described how a voice answered the call, saying, immediately, before any enquiry could be made - "Help me, help me, for God's sake come quick, for God's sake come quick." In answer to an enquiry from the police, the address was given as 59 Mitchell Street. The voice was described by Constable Bickerton as urgent, hysterical, very quickly spoken and with a high inflexion. The applicant has said it was his voice, and no challenge was made at the trial to the contention that it was he who answered the 'phone. Within three minutes or so from the receipt of the first call at the police station the police had covered the journey of a mile or a mile and a half and had arrived at the house, and were there directed by the applicant to the kitchen, where the wife was lying dead on the floor. The gun was on the floor of a small den adjoining the kitchen. In answer to a question as to what had happened, the applicant said that the gun had gone off when he had had it, and he had killed his wife. He explained that he had been cleaning the gun in the kitchen, taking the rust off it. It appeared that his explanation was that he had been standing holding the gun in his right hand (being left handed) was rubbing the barrel with a steel wool pad in his left hand. His wife was standing at a shelf. Later that night about 7 p.m., in answer to a police enquiry as to who had rung the police station, the applicant claimed that he had, and said that he had rung the Exchange but had asked the operator to send an ambulance. Later again that night in an interview with the police, which was recorded,

he repeated that assertion, and said that he had not at any time asked for the police, and was certain he had asked for the ambulance. He said further that for an hour before the shooting, and at the time of its happening, and for a quarter of an hour thereafter, there was no woman in the house other than his wife.

This narrative does not include many incidental matters, but will suffice for immediate purposes.

The grounds of appeal are concerned with three subject matters. They may conveniently be considered in a different order from that in which they were set out in the notice of application and in which they were argued. The first which can be taken concerns an enquiry from the jury after they had retired to consider their verdict with respect to evidence of when the canoe had last been used, and the answer given by the learned trial judge. This is ground 5. The second concerns the evidence given by the telephone operator, Miss Flowers, as to the call from the house asking for the police. Its admissibility as evidence is the subject of ground 4, and the directions of the judge in relation thereto the subject of grounds 4(a) and 6. The third subject matter is the evidence as a whole. Its alleged insufficiency to justify the verdict is dealt with in grounds 1, 2 and 3.

The first of these subject matters can be dealt with shortly. After the jury had been out of court deliberating for four hours, they returned at 4.53 p.m., and, through their foreman, said that they "wanted to know if there was any evidence given as to when the last time the canoe was used prior to these proceedings." Prompted by the prosecutor, the learned judge read to them a passage from the cross-examination of the applicant. What he said appears from the transcript at page 57 of the charge.

"His Honour: Yes, Mr. Foreman. Just at the beginning of Mr. Howse's cross-examination it took place. Mr. Howse: 'Witness, you told us about the precautions that you took with your gun to make sure that they were unloaded in the house. Did you take any special precautions with your supply of ammunition whilst it was on the house premises?' A. 'No, I did not.' Q. 'And you have told us about your daughters quite often accompanying you on shooting expeditions, and I suppose it follows from that that there were many times when they saw you putting cartridges in your guns?' A. 'Yes.' Q. 'How long had the canoe been in the garage as it is shown in photograph 10 of Exhibit "B" - look at the photographs please? How long had it been there since the last time you used it?' A. 'It had been placed there on the Sunday prior to the accident.' I said, 'That is the canoe?' A. 'Yes, Your Honor.' Next question: 'If you look at photograph 11, the cartridge belt and the container of cartridges that we see there, they had been in the gun since the previous Sunday, had they, since the Sunday prior to the 7th May - been in the canoe, rather? As shown in photograph 11? They had been in that position since the previous Sunday, had they?' A. 'Yes, I hadn't touched them since last using the cartridges.' Is that what you had in mind?" Mr. Foreman: 'Yes, Your Honor'."

The court then adjourned for the dinner break until 8.30 p.m. The jury were brought in by the judge again at 8.32. What then occurred appears in the transcript at page 58 of the charge.

"His Honour: Mr. Foreman, you asked me a question just before we adjourned relating to was there any evidence as to how long it was since the canoe had been last used, and I read those questions and answers to you. It has been pointed out to me since that there may

be some ambiguity in that question and the answer, so I had better read it again to you. The question was: 'How long had the canoe been in the garage as it is shown in photograph 10 of Exhibit "A" - look at the photographs, please? How long had it been there since the last time you used it?' Answer: 'It had been placed there on the Sunday prior to the accident.' Then I said, 'That is the canoe?' A. 'Yes, Your Honour.' Do you see the ambiguity in that - 'How long had it been there?' that is the canoe, 'since the last time you used it?' A. 'It had been placed there on the Sunday prior to the accident.' That is a question for you to interpret what that means, but it is open to two meanings, that question, that is it may be 'How long it had been in the garage since you last used it', and it does not necessarily mean that it had been used on the Sunday. Or it may mean it the other way. So it is a rather ambiguous question and answer. I thought I had better read that to you and explain it to you in case you had not appreciated that."

The jury then retired at 8.34, returning a minute later to ask for an exhibit, "the little plastic container that was in the boat." They were given it. The jury continued their deliberations for a further unbroken period of two hours, and then returned their verdict at 10.40 p.m. No exception was taken in respect of this matter.

The ground in which this incident is relied on is as follows:

> "5. That subsequent to retiring the jury were misdirected in relation to a question as to 'when the canoe was last used', and subsequent correction was too late to be effective."

If the original charge to the jury had contained a statement by the judge that the passage in the cross-examination of the

applicant contained evidence as to when the canoe had been last used, it could at the most have amounted to a misdirection of fact. But in substance the judge would have been expressing an opinion as to what the evidence amounted to. To express such an opinion would have been permissible so long as it was made clear that the jury were not debarred from finding the facts for themselves. That was made clear throughout the charge. The position can be no more favourable for the applicant because the interchange occurred after the charge had been completed, and in response to an enquiry by the jury during their deliberations. The only real result of that circumstance is that if there were any opinion by the judge involved in the reading of the evidence in answer to the jury's question, it could only be taken as an expression of an opinion of the mildest kind. The actual reading of the evidence to the jury put them in a position to interpret the evidence for themselves, and decide whether the construction placed on it was correct or not. Thus, if no review of that matter had ever been made by the judge, it could, according to well established principles, have afforded no ground for a new trial. But the later review of the matter by the judge, pointing out the doubt about the correctness of the earlier interpretation, owing to the ambiguity lurking in the evidence, and emphasising that the interpretation of the evidence was for the jury, makes the objection wholly untenable. If that had never been done at all it would not have provided a ground of appeal. When it was in fact done, and done two hours before the verdict was returned, the objection becomes clearly groundless. Ground 3 therefore must be rejected.

The second subject matter concerns the evidence given by the telephone operator, Janet Lucille Flowers. The points taken with respect to this require a more precise examination. They are the subject of grounds 4, 4(a) and 6.

These grounds read as follows:

> "4. The evidence of one Janet Lucille Flowers was wrongly admitted, and in particular her evidence of opinion to the effect that the voice was that of a female.
>
> 4a. The learned trial judge failed to direct the jury or to direct the jury adequately in relation to the statement claimed to have been heard by the witness Flowers and failed to direct the jury that the said statement was not evidence of the fact."
>
> "6. That the learned trial judge failed to direct the jury or to adequately direct the jury as to the inherent dangers of identification evidence as such in relation to the said witness."

No doubt if evidence of the witness had been confined to the facts that, at a specified time, a call had been received at the exchange from the house and it had been connected to the police station, and on the call being discontinued, a conversation had been had by her with the police, without the substance of any of these conversations being set out, or any statement being made as to the sex of the caller, the evidence could not, and would not, have been the subject of objection. The evidence given in that way would have been relevant and necessary to explain how and when the police came to be notified and make their enquiries. The matter that is objected to is the characterisation of the evidence as that of a woman, and the account of the substance of the utterance itself. It is however the former aspect of the evidence that is the more damaging to the applicant's case, for once it appeared that it was the voice of a woman that was heard on the call which led to the message to the police, the intimation would have been conveyed that the wife had made an appeal in some form or other for help or protection. Without identification of the caller as a woman, the subject of the utterance itself might have been

given without any harm to the applicant, except perhaps that it did not tally with the account he later gave of a call to the exchange by himself.

But the evidence, whether in respect to the classification of the voice alone, or in relation both to that and to what was said, tended to prove that there had been an appeal for help and that it was an appeal made by the wife. This in turn tended to prove that it was against her husband, the applicant, that she needed help. The evidence necessarily involved at the same time a denial of the applicant's story to the police that it was he who had been seeking help, and that he had made the call for that purpose.

The relevance of this material can hardly be denied. That was recognised by the learned trial judge when he was called upon to rule as to its admissibility at the opening of the trial. He admitted it as tending to rebut the account given by the accused to the interrogating police as to how he came to make a 'phone call for the purpose of summoning assistance for his wife after the shooting happened, conduct on his part inconsistent with criminal conduct of the kind charged against him by the Crown. The learned judge admitted the evidence also as tending to show the relations existing between the applicant and his wife at the relevant time. He later directed the jury that these were the two ways in which they could use the material.

A third basis on which the evidence was relevant was relied upon by the learned Prosecutor in his submission and accepted by the learned judge. That was that its subject matter was part and parcel of an inter-connected series of events which occurred over an exceedingly short period of time on the day in question, and that to exclude this portion of the evidence would tend to make the series of events unintelligible in the eyes of a jury, so that it

was relevant on the basis of the decision in O'Leary v. The King, 73 C.L.R. 366. This case was one concerned with an issue as to the identification of the assailant who had caused the death of the victim. In such a case the manner in which the evidence could be used for the purposes of identification would require a direction on the point in the charge to the jury. Thus a decision that the evidence was relevant and admissible in this case on the basis thus suggested would, if that were the only basis upon which it was admissible, shift the inquiry from the admissibility of the evidence to the appropriate nature of the direction to the jury. No direction associated with such a basis for admitting the evidence was however in fact given to the jury in the present case, and it may be presumed that the learned trial judge came to the conclusion that the only proper uses to which the material could be put were the two uses which he in fact directed the jury to consider. It is therefore not necessary to consider whether the evidence was relevant when regarded in the light of what was suggested in this third submission, if the evidence was relevant when regarded from the other two aspects. Attention may therefore be directed to them.

It was clear from what the applicant had told the police that it was part of his case that after the shooting he had telephoned the exchange to have an ambulance despatched, an act which, as has been said, is capable of being regarded as indicative of innocence. It was equally clear that evidence which tended to prove that it was not he who telephoned the exchange but his wife, and that the request was not for an ambulance but for the police, so that the inference was that the call took place before the shooting, would controvert the defence case in that respect. Evidence that it was a woman who rang and that the request was for the

police and not the ambulance was therefore relevant.

No question of hearsay evidence would arise if that were the only ground for the admissibility of the evidence. The evidence would relate to "verbal acts" (cf. McGregor v. Stokes, 1952 V.L.R. 347 at p. 350). The facts being proved and the only facts being proved, would be the sex of the person who spoke, and what was the subject matter of what was said. A direction as to this use of the evidence would be required but what direction would then be required may be looked at later.

It is necessary to deal first with another point, a narrower issue within this wider one first requires consideration. It is whether the fact that it was a woman who made the call could be proved by the statement of the hearer that it was a woman's voice. It is objected that this is opinion evidence which cannot be given by a witness, at all events one who has not been qualified to express an opinion.

It is true that where the subject matter of an inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without assistance from the opinions of witnesses possessing peculiar skill, the opinions of persons so qualified are admissible, and on the other hand, when the inquiry is into a subject matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it, the opinions of witnesses cannot be received - see notes to Carter v. Boehm 1 Smith L.C. 13th Ed. page 561. But that does not mean that witnesses may not describe what they see or hear, or state their impressions, according to ordinary human experience, of what they see or hear. Nearly all human observations of objects or happenings involve some element of interpretation, opinion or inference. Even to say that a car seen was blue, or that a person seen was a man, or

that a woman seen was old, involves some such element. In each case there is a conclusion based on common human experience. As is pointed out by Professor Cross in a section headed "Cases in which non-expert opinion is admissible" contained in his book on Evidence, 2nd Ed. page 366 - "there are numerous situations in which evidence of opinion is received as a matter of necessity;" and at page 365, "typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general."

It is objected that perceptions of hearing stand apart. Why this should be so it is impossible to discern. Identification by voice is familiar evidence - see R. v. Wright No. 2 1968 V.R. 174. It is also contended that any classification of a voice heard on a telephone stands apart. But it is commonplace to admit evidence of a telephone conversation after a voice has been identified as that of a particular person.

The evidence, therefore, was admissible; and, as has been pointed out, it was relevant, to prove that the call was from a woman, and that what she said was what was set out in that evidence and not what the applicant said was the case.

But if that were the only basis on which the evidence could be admitted, it would have been necessary to warn the jury that the evidence should not be regarded as tending to prove more than that, and that it should not be regarded as tending to prove anything that was happening in the house at the time of the call. Since the jury were told the evidence could be used to show the relations between the wife and the applicant in the house at the time, that is to say that the evidence could be used 'testimonially', it is necessary to consider whether it was admissible on that basis.

Insofar as it tended to show the relations existing between the couple at the time it was clearly relevant - Wilson v. The Queen, 44 A.L.J.R. page 221. The inference open to be drawn from the words uttered was that the speaker was in need of protection from the police, because she was in a state of apprehension in consequence of aggression from some other person, presumably the other person in the house.

The question that then arises is not so much as to the relevancy of the evidence so regarded, as to the medium of its proof. It is sought to prove the state of the relations between the couple, not by the evidence of witnesses who were present at quarrels, as was the case in Wilson v. The Queen (supra), or by the confessional statements of the accused himself, as was the case in R. v. Tsimopolous 1964 V.L.R. 676, but by the statement of the other party as related by a third. This is hearsay evidence. Notwithstanding that, it may be admitted if it is part of the res gestae. The statement of one person involved in a relevant event, which is contemporaneous with and directly concerns that event, may be related by another person who hears it. The principle is an exception to the hearsay rule - Teper v. The Queen (1952) A.C. 480. The statement of the wife that she was in a state of apprehension from her husband's aggressive conduct could be given in evidence by another who heard it, if the statement was made in a spontaneous utterance which was part of what was happening in the house so immediately before the shooting as to be part of that happening. The statement related by the telephone operator was clearly capable of being construed by the jury as a spontaneous call for help by the wife. If it took place in the manner and at the time related by the witness, it must have taken

place within a few minutes before the wife was shot. In those circumstances it is clearly capable of being related to the actions of the applicant in connection with the shooting.

It was objected that the factor of contemporaneity was not present. But in all the statements of the rule there are included not only declarations made at the time of the act being done, and immediately afterwards, but also declarations made immediately before. Furthermore, it was contended that the implications of the utterance had in some way to be curtailed so as to exclude any reflection on what the applicant might have been doing. But there can be no such artificial limitation imposed on the significance of the statement. If it can fairly import apprehension of the applicant's conduct, it is for the jury to decide what it involves. In the leading case of R. v. Beddingfield (1879) 14 Cox C.C. 341, the circumstances were that the accused man and the deceased woman were in a room together when both had their throats cut. The issue was whether the accused cut the throat of the woman and then his own, or whether the deceased woman cut his throat and then her own. The evidence was that the woman came out of the house with her throat cut and was heard to say, "See what Beddingfield has done to me." The statement was excluded as evidence by Cockburn C.J. as something stated after it was all over. However rigorous may have been the application in that case of the condition that the statement must be contemporaneous, it is, however, to be noted that it was remarked by the learned judge in that same case that if the woman's statement had been made at the time the act was being done, for example, if she had been heard to say something such as, "Don't, Harry," that would have been admissible. There is no significant difference

to be discerned between an expostulation of that kind and a call for help, whether broadcast generally or made over the telephone.

The illustration given in Beddingfield's case (supra) that the statement may be that of the victim and need not be that of the doer of the act, and this is supported by the dictum of Holt C.J. in Thompson v. Trevanion (1693) Skin. 402, said to be the first case from which the rule stems. It is also supported by R. v. Foster (1834) 6 C. & P. 325, where on a charge of manslaughter by running down the statement of the deceased as to what had knocked him down was held admissible as identifying the kind of vehicle involved.

It is further objected that the statement cannot be admitted as evidence of the fact it relates. This point has been the subject of much controversy in the discussions of textbook writers, and they have the support of a dictum of Lord Atkinson in The King v. Christie, 1914 A.C. 545 at p. 55 But as Starke, J. pointed out in Adelaide Chemical Fertilizers Company v. Carlyle, 64 C.L.R. 514 at p. 526 "unless this be true" (i.e. that the declaration may be used to prove what it imports and to supply new and otherwise unproved or insufficiently proved elements in the res gestae) "the celebrated controversy in connection with Beddingfield's case and the decision of R. v. Foster (supra), R. v. Lunny (1856) 6 Cox C.C. 477, and R. v. Goddard, (1882) 15 Cox C.C. 7 seem almost meaningless." He accordingly treated the declaration of the injured man in the instant case as evidence of the facts it related. Furthermore, if, as is said by the Privy Council in Teper v. R. (supra), the res gestae principle is an exception to the hearsay rule (and this extract from the judgment is repeated by the Privy Council in Sparks v. The Queen, 1964 A.C. 964) it must permit of the proof of fact

which the hearsay rule would exclude. A recent Australian decision in support of this proposition is that of the Full Court of Queensland in R. v. McIntosh, 1968 Q.R. 510. (See also the discussion in Cross on Evidence, 2nd Edition, pp. 459 and 464-5.) The facts which the statement tends to prove must include whatever the statement imports.

The evidence given by the witness Flowers was therefore not only relevant but admissible, and it tended to prove the state of the relations existing between the applicant and his wife at or about the time of the gun being discharged. There can be no question of a wrongful exercise of discretion by the judge in declining to exclude the evidence as being more prejudicial than probative.

Grounds 4 and 4(a) must therefore be rejected.

Ground 6 complains of the directions given as to what is called "identification evidence" in relation to the voice. In this connection the learned trial judge said this:

> "The other thing I want to mention to you at this stage is usable only in a like way. That is the evidence given by Miss Flowers of the telephone call that she says was made from the accused's home at about a quarter past one on 7th May, and made by a female voice. Now, you may think, and probably will think, although this again is a question of fact for you and not for me, that at that time there were only two people in that house, the accused and his wife. And a telephone call was made, and Miss Flowers said it was made by a female voice, and the female voice said, 'Get me the police please - (pause) - 59 Mitchell Street', then hung up. Well, it is a question of fact for you. You have to be very satisfied, to begin with, that Miss Flowers was right about that, but I will deal with that a little later on. But suppose you were satisfied about that, certain about it, that she was right. How is that admissible, how can you use that in this

case? Well, gentlemen, it can only be used, really, in one or both of two ways. If you were satisfied that Miss Flowers was right and it was the deceased woman who made the call for the police, then that would falsify or rebut the statement made by the accused man that it was he that made that call. In other words, you would be entitled to say, 'Well, he was lying to us when he said he made that call. We find that Miss Flowers was right and the deceased woman made that call, and that showed that he was lying to us when he said that he made the call and asked for the ambulance'."

Later the learned judge, when dealing with the Crown case, said, at p. 28:-

"Then secondly, gentlemen, the Crown say you should find that the phone call that was made to the Echuca exchange at a quarter past one, very shortly before this killing occurred on 7th May, was made by the deceased woman, Mrs. Ratten. The Crown say that is the evidence that was given by Miss Flowers, the telephonist. The Crown says she is not an inexperienced girl, she has been there for some two to two and a half years; they say what reason or motive on earth would Miss Flowers have to lie? The Crown says further than that you should find that she was not making a mistake, that she was accurate, she had been on that board, she saw the light flash, she picked up the thing, the voice said, 'Get me the police please, 59 Mitchell Street'. And what the Crown is saying is that she says that was a female voice. Well, she was not shaken, says the Crown. In this case she gave her evidence quite confidently and plainly. Mr. Lazarus cross-examined her up hill and down dale, but he was unable to shake her. That is what the Crown say, and therefore that you should say, 'Well, we accept Miss Flowers as a witness not only of the truth, but as an accurate and reliable witness.' And if that is

so, then the rest of the evidence in the case shows quite plainly, you may think - it is a matter for you - but it shows quite plainly that there were only two people in that house at the relevant time, that is the accused man and his wife, and if it was a female voice that made that call, then the Crown say it follows like night follows day that that was the wife ringing up for police assistance."

Then at page 29:-

"The Crown say further you should find that Miss Flowers' account is supported, having regard to the account of that telephone conversation that the accused gave in the witness box. He said, you will recollect, that he went to the phone and he kept repeating, 'Get me the ambulance, for God's sake help me, get me the ambulance', and that he said it three times at least, maybe more. And the Crown say, 'Well, does not that show you Miss Flowers could not have been all that wrong, says the Crown, and even if there was a possibility that she may have been mistaken as to the voice, male or female, she could not have been mistaken - this is what the Crown say - as to the substance or the nature, so wrong as that, as to the substance or nature of that conversation. The Crown say it certainly was not a conversation of that kind, and that shows that the conversation she was giving you evidence about was not the one that the accused man was talking about at any rate.' Well, gentlemen, now all that is a matter for you. But that is the second factor that the Crown rely upon."

Then, when dealing with the defence case, the learned judge said this - pages 49 to 50:-

"First of all about the phone call to the Echuca Exchange. Now who made that call? I put the Crown case to you about that. What the accused is saying is, 'Well look, you should not by any means be satisfied to accept Miss Flowers as an accurate witness.' They are not suggesting that she is an unholy liar of course, but they say,

'Here is something that happens within a very short period of time, here is a girl who is sitting at the desk with a thing in front of her, another one unused beside her.' Remember what Miss Bennett said, the more experienced girl sitting beside her, the girl with the eight years' experience. She said, 'Oh yes, this becomes almost automatic, this business, you do not consciously ask yourself is it a male voice or is it a female voice, it is a sort of automatic thing.' The defence say, 'Obviously in this case Miss Flowers is incorrect, she was wrong in saying that this was a female voice. It was an emergency, it all happened in a very short period and with an issue of this importance at stake how on earth could you say you were so certain and satisfied that she had not made an error.' Then the defence say, 'As a matter of fact the accused's account is borne out about this because Miss Flowers said that the voice that she heard was urgent, hysterical and had a high inflection.' Now that is exactly what Constable Bickerton said of the voice that he heard on the phone when he rang through a few minutes later. He gave exactly the same description, a voice that was urgent, hysterical and high inflection. Now that call was obviously the accused speaking, I do not suppose you would have any doubt about that. It is a matter for you, but it is pretty obvious that when Bickerton rang back he got on to the accused. It is a strange thing says the defence, 'Well the description of the voice Bickerton gave tallied with the description of the voice that Miss Flowers gave.' Then, says Mr. Lazarus, and it is a matter of course for you, he says, 'Well, goodness me, surely if Miss Flowers was right and this was Mrs. Ratten putting in a call for police assistance to the police station, well surely to goodness the accused - he was there, it is only a small house, he must have heard what she was doing, surely to goodness he would not

turn round and shoot her while the police were coming around, would he? That would be a strange act of madness to indulge in.' And the defence says all that sort of consideration should induce you not to act or place any significance upon the telephone call to the Exchange as being a call made by the wife. Indeed, says the accused, you should be satisfied that it was a call made by the accused man himself and that corroborates that he was an innocent man, it was an accidental shooting, because immediately it happened he went straight off and called for assistance. So far from helping the Crown in the way they put it, on its true view, they say, this is exactly what you would expect an innocent man to do.

Then you will notice that in the record of interview the accused was asked about this call, and that is exactly what he said. He gives the same explanation on that night to Mr. Coates. He said, 'No, that was my call, I rang.' Coates put it to him, 'Your wife rang,' he said, 'No, I called, and I called for an ambulance.' And the defence says, well, surely that is still consistent with what he is saying today. And the accused man at the time he was being questioned, he would not have known then what Miss Flowers' version of the thing was, could not have known what her version of it was, and in ignorance of all that he was not trying to save himself or deny what she was saying, that was the answer he gave on that night. So, they say, well, that phone call to the Echuca Exchange is of no significance."

The evidence which the witness gave was not concerned with a matter of identification in the sense in which that topic was involved in cases like R. v. Preston 1961 V.R. 761, and R. v. Wright (No. 2) 1968 V.R. 174, and the matter discussed in those cases have no application, although the language of the ground seems to have been borrowed from those cases. The considerations the jury would need to take

into account in various situations where the identity of the accused with the person involved in the crime is sought to be proved, had no place in the present case. It was a question of whether the witness could be relied upon in purporting to be able to distinguish a female voice from a male voice in the circumstances then existing. The considerations to be taken into account by the jury in deciding that question were not susceptible of much elaboration. They were appropriately pointed out by the judge in setting out the respective cases, particularly for the defence - that the operation then performed was one involving automatic reaction; that the time was short; that the occasion was an emergency; that the description of the voice given by the witness was in the same terms as the description accorded to the voice of the accused by another witness; and that the course of events favoured the defence version. All this appears to have followed the submissions already made by counsel in the course of their addresses to the jury, and appropriate emphasis would undoubtedly have been applied in their addresses. It is true that the observations were expressed as coming from counsel, but in effect the jury were being told by the learned judge to bear them in mind; and he told them that they had to be "very satisfied" about it, "certain" about it. No complaint was made about the inadequacy of the direction at the trial. In these circumstances it cannot be said that the attention of the jury was not appropriately drawn to the matters they would need to have in mind. Ground 6 cannot, therefore, be sustained.

That leaves the subject matters referred to in grounds one, two and three. They read as follows:-

> "1. That the learned trial judge should have directed the jury as a matter of law that there was insufficient evidence to support a conviction;

2. That the evidence was insufficient to support a conviction insofar as -

(a) the circumstances relied on by the Crown to prove intent were equivocal;

(b) the circumstances were only consistent with accident;

(c) the circumstances were as consistent with accident as with a deliberate act.

3. The verdict was against the evidence and the weight of the evidence, and was unreasonable or cannot be supported having regard to the evidence."

At the outset it is desirable to have in mind the function of an appellate court on an appeal on the ground of insufficient evidence, in a case such as this depending upon circumstantial evidence. It was laid down by the High Court in Plomp v. The Queen 110 C.L.R. 234 that the question on appeal is not whether the court of appeal thinks that the only rational hypothesis open on the evidence is that the accused is guilty, but whether the court of appeal thinks that upon the evidence it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the accused. There is, of course, too the power to set aside a verdict and conviction on the ground that it is against the weight of the evidence, as explained in Raspor v. The Queen, 99 C.L.R. 346.

The core of the argument is to be found in paragraphs (a) (b) and (c) of ground 2. Thus the primary question for this court on this part of the case is whether in its opinion it was open for the jury to be satisfied on the evidence beyond reasonable doubt that the circumstances were not consistent only with accident or equivocal so as to be as consistent with accident as with a deliberate act, but that they were such that the only inference that could rationally be drawn from them was that the death of the deceased was due to the deliberate act of the accused done with intent to kill and not due to accident.

We were given by Mr. Lazarus for the applicant the benefit of an elaborate and detailed examination of the evidence in order to show that it would have been possible to reach a conclusion consistent with accident. But the argument in the main took the form of isolating different sections of the evidence and examining them apart so as to establish the proposition that so regarded each section was capable of an explanation consistent with innocence.

Even if the exercise could be regarded as successful within its limits, the matter cannot be looked at in this fragmented way. The jury were entitled to, and, indeed, bound to consider the whole of the circumstances. This indeed was ultimately conceded, but perhaps only verbally.

However the effect of the applicant's case in this connection must be regarded as amounting to this - that when all the circumstances which the jury could have taken to be proved are taken into account, no reasonable jury could have reached the conclusion that the circumstances were more than equivocal.

It was, of course, not in dispute that the fatal shot came from a gun held in the hand of the applicant.

It may be conceded that the evidence to the effect that the applicant and his wife had maintained a reasonably equable relationship, at all events until the day before the death, and that it was not noticeably hostile thereafter - that the wife was due to bear the applicant's child in a week or so; that the illicit relationship between the applicant and Mrs. Kemp did not necessarily demand a solution in the form of the death of the wife; that there were found after the shooting indications in the house, and on the weapon, that the applicant had actually been engaged in cleaning guns in the house; that the shot which killed the wife

struck the side of her body and not the vital parts of the chest or the head; that the shooting took place when a child of the parties was at home; that in his very first explanation to the police the applicant contended there had been an accident when cleaning the gun, and that this was repeated later that day in his interview with the police and repeated in evidence in the witness box - all this, combined with the possibility of Miss Flowers making a mistake about the voice on the telephone, afforded some support for the view that the killing was an innocent one.

But these only constitute part of the circumstances which the jury could have found to exist. They could have taken others into account.

The gun was loaded. It had been unloaded when returned to the control of the applicant in February or March, and at some point of time shortly thereafter, early in March, when there was a discussion between Kemp and the applicant. There was nothing to suggest that the gun had been under anyone else's control, and the suggestion that it might have been loaded by the applicant's children received no support from him. He had no suggestion to make as to who, other than himself, could have loaded the gun. The cartridges found in it were similar in make and appearance to those found in his canoe. According to the evidence of the gunsmith, who was familiar with the gun, and according to the evidence of a police ballistic expert who had tested it, although its locking device was loose so as to present some danger to the firer, it could not be discharged by dropping it or knocking it. It was clearly open to the jury to find , (and this was not contested) that the gun was discharged by a pull of the trigger. The evidence was that it required a pull of 3 lbs. on the trigger for the right hand barrel where the misfire took place, and a pull of 7 lbs.

on the trigger for the left hand barrel, where the shot was fired. There was no circumstance related by the applicant to account for the triggers being pulled other that that they were pulled by his hand. The jury were clearly entitled to find, (and this again was not contested) that it was his hand that used the necessary force to release the triggers. In addition, the safety catch was either off or it was forced by pressure additional to that ordinarily required to release the trigger. If the triggers were pulled one after the other, the inference that the second pulling was deliberate would be clearly open, notwithstanding the applicant's afterthought that he had remembered a click which might have accounted for the misfire. If the triggers were pulled simultaneously, involving either two fingers or two distinct movements with one finger, the inference that the effort involved would be the product of a conscious and deliberate act was at least clearly open. The occurrence of a discharge from the gun so as to kill the wife in an accidental manner would appear to require a combination of firstly the fortuitous loading of the gun from some unexplained source, secondly, the undesigned pulling of both triggers by the applicant's hand in some unexplained way, and thirdly the alignment of the barrel of the gun at that particular moment of time with the body of the victim. The jury were entitled to consider whether this concatenation of circumstances was a likely one, or whether, on the other hand, the loaded condition of the gun, its discharge by the hand of the applicant, and the striking of his wife by the shot, when considered in the light of other circumstances related in the evidence, did not reasonably compel the conclusion that it was not an accident.

Among the other circumstances they were invited to take into account were those related in the evidence as to

[illegible] with Mrs. Kemp. This was to the effect that in April or May a critical position had been reached in the relationship; that Mrs. Kemp was anxious to leave her husband, and had told the applicant that was the case; that the applicant and she has sought legal advice as to obtaining the custody of her children and maintenance for them, and a share of her matrimonial home for herself, and as to the possibility of either obtaining a divorce from the relationship; that she had, two days before the fatality, broken with her husband, who was willing to divorce her, and she had informed the applicant of that fact; that she had said [illegible] to the applicant that he should tell his wife that he was going to leave her as soon as the baby was born; that on the very day of the shooting, she, Mrs. Kemp, had placed her home on the market with her husband's concurrence. The effect of this could have been taken to be that the applicant was faced with a situation requiring a decision as to what he was going to do. Both he and Mrs. Kemp were, according to the evidence, under the impression from the legal advice that they had obtained that a divorce could not be obtained by him to resolve his marital problem. There was evidence that the night before the shooting the applicant had spoken to his wife about leaving the home, and, if Mrs. Kemp were to be believed, that the wife had been informed that the applicant would be leaving his wife for her as soon as the baby was born. The applicant himself said that, contrary to the usual practice, he had slept apart from his wife that night. There was evidence that next day she appeared to be upset.

These circumstances were such that they might have provided a basis for the view that the life of the wife presented a barrier to the applicant marrying Mrs. Kemp or [illegible] sure of some respectability, appealing to the conventions in

purported to observe, and that, if marriage were out of the question, it presented him at all events with the prospect of having to carry the burden of supporting a deserted wife. In this situation, and its incidence, the jury might reasonably have found a motive which might have appealed to the applicant for the killing of his wife, whether or not it might have appealed as a solution of the problem to other minds.

The jury were also entitled to regard the cleaning of the guns in the kitchen at that time on a working day, and without any precautions being taken to check them for loading by a person as experienced with firearms as the applicant was, as placing some colour on the circumstances. And especially they were entitled, if they chose, to accept the evidence of the telephone operator as reliable, and to find the call to have been made by the wife by way of an appeal for protection from some threat by the applicant. They were entitled to draw the inference from the angle of the wound, showing a course of 45 degrees downwards, that the applicant was not relating the true story when he described the attitude of himself standing at the sink with the gun at his hip, and that of his wife standing in an upright position at the shelf. They were entitled, if they chose, to attach some significance to the false denials made by the accused to the police as to the existence of any connection between his illicit activities and his domestic situation.

Considering all these matters it was in our opinion open to the jury to be satisfied on the evidence beyond reasonable doubt, notwithstanding the explanations put forward by the applicant that the circumstances were not consistent only with innocence or consistent equally with accident as with intent, but were such that the only inference

that could reasonably be drawn was that it was a deliberate act of the applicant that caused his wife's death, and that his intention was to kill her. That being so, the learned trial judge was under no duty to withdraw the case from the jury when he was asked to do so. In fact he refused to do so. In our opinion the verdict was not unsupported by the evidence, nor was it unreasonable.

We were urged to say that the verdict was against the weight of the evidence, and unsatisfactory for that reason, and that the conviction was therefore unsafe. After a most careful consideration of the evidence we are unable to come to any such conclusion.

This is simply a case where it was the function of the jury to assess the value and significance of circumstantial evidence. In our opinion their verdict was arrived at on evidence and in circumstances which do not enable it to be challenged. Grounds 1, 2 and 3 must therefore be rejected.

For these reasons the application for leave to appeal will be dismissed.

The order of the court is that the application for leave to appeal is dismissed.

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