

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. 77 of 2004

BETWEEN:

ANDREW MARK MALLARD

Appellant

and

THE QUEEN.

Respondent

APPELLANT'S SUBMISSIONS

Part I: STATEMENT OF THE ISSUES PRESENTED BY THE APPEAL

1. There are 3 issues presented by this appeal:

- (a) Whether non-disclosure by the prosecution of exculpatory evidence resulted in the Appellant being deprived of a fair trial, or alternatively a fair chance of acquittal.
- (b) Whether the Court of Criminal Appeal ("CCA") erred in holding that on a reference of "the whole case" it should not consider or adjudicate on matters dealt with on an earlier appeal and that its jurisdiction was confined to fresh material.
- (c) Whether evidence that the Appellant suffered from a psychological illness, although not fresh, should have been considered by the CCA, because the non-disclosed evidence heightened the probability that he was theorising, not confessing, and put a different light on evidence of his psychiatric condition.

Part II: CONSIDERATION OF SECTION 78B JUDICIARY ACT 1903 (Cth)

2. Section 78B of the *Judiciary Act* 1903 (Cth) has been considered by the Appellant. The appeal does not raise any matter arising under the Constitution or

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involving its interpretation and notice has not been given to the Attorneys General of the States or the Attorney General of the Commonwealth.

Part III: REPORT OF DECISION OF THE COURT OF CRIMINAL APPEAL

3. The decision of the CCA from which special leave has been given to appeal to the High Court has been reported at (2003) 28 WAR 1 {7AB2509}.

Part IV: NARRATIVE STATEMENT OF FACTS

- 10 4. Mrs Pamela Lawrence conducted a jewellery making and jewellery shop business at a shop called "Flora Metallica" on the south side of Glyde Street, Mosman Park Western Australia, a short distance from the junction of Glyde Street with Stirling Highway.
5. One 23 May 1994 Mrs Lawrence spent most of the day working in a shed at the rear of the shop, used as a workshop. In the middle of the day she went shopping, returning at 2pm. At 2:20pm she went back to the shed. At 3pm Mrs Barsden, who worked in the shop, brought in an "A" frame (used for advertising) from outside and left the shop for the day, closing the door so that it could only be opened from the outside with a key. Mrs Lawrence found herself locked out, and called her husband, who came to the shop with a key, and opened it. He was there between 4pm and 4:20pm. [28], [46].
- 20 6. Miss Barsden, whose mother worked in Flora Metallica, gave evidence at trial that at 5:02-5:03pm (she had checked the time of the car clock) on the evening of 23 May 1994, her grandmother (who was driving her home from school) stopped at a point level with Flora Metallica in a line of traffic waiting for the traffic lights to change. She looked in the shop and saw a man "standing not where a customer would normally be". She said she kept staring, "and I felt the moment he saw me or we made eye contact he bobbed down and I kept looking for another 30 seconds and he didn't reappear". She said she didn't see Mrs Lawrence. The traffic lights then changed, and the car drove on. ([40]{7AB2520-2521}). The trial judge commented on the importance of this evidence and the precision with which Miss Barsden identified the time ([41]{7AB2521}). The car clock was
30 checked afterwards and found to be accurate ([44]{7AB2521}). This was described by the CCA as "significant evidence of opportunity" (for the Appellant to have committed the crime. ([45]{7AB2521}). The Crown case was that the man she saw in the shop was the Appellant.
7. When Miss Barsden arrived at home, a short time, later, she told her mother what she had seen, and at her mother's suggestion made sketches of the man she had seen, and some notes, the same evening
8. Mr Whitford, a Crown witness at trial, gave evidence that at 5:11pm (a time he checked on his clock when he was on the phone or shortly after) he was telephoned by a woman from Flora Metallica who spoke "cheerfully" to him
40 about salt and pepper shakers. As the CCA observed, Mr Whitford had checked

the accuracy of his clock with Telecom. The only person who could have made the call to him at that time was Mrs Lawrence ([47]{7AB2521}). The first CCA accepted [p.71] that his evidence was correct.

9. The telephone was located towards the back of the shop. The person speaking on that phone would have had a clear view of the entire shop from a large wall mirror (see Jury Aid photo 26{2AB839}), and would have been able to see anyone in the shop.
10. Peter Lawrence, Pamela's husband, gave evidence that he discovered her, badly injured and lying on the floor of the shop that evening at 6:20-6:25pm (TS 106{AB81}) (although he said in cross-examination that he might have got the time wrong, when he was told that his call to the ambulance was not logged until 6:37pm (TS 106{AB81}) He said he had gone to the shop from his home (2 minutes away by car) having telephoned at about 6:15pm and got no answer.
11. On the following morning, Miss Barsden made a handwritten statement to the police, which annexed the sketches and notes that she had made the previous evening. Miss Barsden's sketches depict a man with a light beard, no moustache, and wearing a scarf on his head tied "gypsy-style", with no hair showing. In the statement (App Ex 53{6AB1978}), and on one of the sketches, she described the scarf as having blue and green patterning, with white, silver and cream. She told the police artist that the man's height was 6 feet. The handwritten statement, after describing the man she saw, contains an unfinished sentence (crossed out) "we thought the person could have been". Barsden did not know the Appellant and did not identify him. She gave evidence to the CCA that she had thought it might have been someone playing a joke on Pam (App TS 1211{4AB1742}) but that it wasn't any of the girls that worked in the shop (App TS 1212{4AB1743}). Her handwritten statement was not disclosed to the defence (Item 4 of Minute of Agreed Facts).
12. On the afternoon of the murder, the Appellant was photographed at East Perth lockup where he had been held for a minor theft (App Ex 27{6AB1977}). The Appellant:
 - (a) had a very obvious moustache and no beard;
 - (b) was 199cm tall (approx 6ft 6" not 6 ft) (see App Ex 27{6AB1977}); and
 - (c) had very long hair, plainly impossible to completely fit under either a scarf or a cap (see App Ex 27{6AB1977}).
13. The CCA said that there were no "additional differences" between the sketches drawn by Barsden and the description which she gave at trial ([116]{7AB2535}). Other relevant evidence, however, was:
 - (a) Miss Barsden did not mention at trial whether the man she saw had a moustache.

- (b) There was no opportunity for the jury to compare the picture of the Appellant with her sketches of the man she saw in the shop – from which the differences would have been readily apparent.
- (c) Miss Barsden's description of the "gypsy style bandanna" in her non-disclosed statement was far more detailed than the description she gave at trial, and differed from that description. The Crown case was that the Appellant was wearing his cap (Trial Ex 27) backwards, and that this was taken by Miss Barsden to be a scarf, worn "gypsy style". But the cap had no blue, green, white or silver (as described in her undisclosed sketches). It had a red pattern on a mustard background, with a star on top.
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14. Following several interviews of the Appellant by the police (see later) he was charged with the wilful murder of Mrs Lawrence. The Crown case was that the Appellant had confessed to the murder and that some circumstantial evidence, concerning timing and the Appellant's known location, supported the Crown case ([34]{7AB2519}). (The CCA refused to consider the Appellant's submission that the evidence as to times of relevant events (see the Chronology) did not support the Crown case but, to the contrary, showed that the Appellant could not have committed the murder).
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15. On 15 November 1995, the Appellant was found guilty of the wilful murder of Mrs Lawrence ([1]{7AB2512}). He appealed to the Court of Criminal Appeal ("the first CCA") which dismissed his appeal on 11 September 1996. On 24 October 1997 he unsuccessfully applied for special leave to appeal to this Court. In 2002, following the discovery of information that had been in the possession of the police and the Director of Public Prosecutions but not disclosed to the defence at trial, the Attorney General referred the whole case to the CCA under section 140 of the *Sentencing Act* 1987 (WA). The CCA heard 5 weeks of evidence and argument between June and November 2003 and dismissed the appeal, 11 days after the conclusion of closing submissions, on 3 December 2003.

Evidence of Motive

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16. The Crown case was that the murder was the result of "a robbery gone horribly wrong" (Opening TS 8-9{AB2-3}, Closing TS 23{3AB908}). Counsel for the Crown told the jury that the Appellant had a motive for robbery, as he was short of money (Closing TS 23-24 {3AB908-909}). There was evidence of his lack of money, but the trial judge directed the jury that this evidence did not carry the matter anywhere ([53]{7AB2523}).
17. Relevant to the alleged motive of robbery is the following evidence:
- (a) No jewellery was taken from the store (TS 99 (Lawrence){AB74}). Jewellery was prominently displayed throughout the store (see jury aid photos 25-31{2AB838-844}).
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- (b) There was cash under a display cabinet which was not disturbed (TS 99 (Lawrence){AB74}). Mrs Lawrence's purse was missing from her handbag,

and probably would have contained \$100-\$150 (TS 107 (Lawrence){AB82});

- (c) A jury aid photograph (number 56{2AB855}) shows a blue plastic container with money (including at least one \$50 note) in it. The handwritten notes of a police officer, Staples, not disclosed at trial, said that there was a bowl containing money in the counter section of the shop (AppTS 772.C-773.B{4AB1450-1451} (Staples XXN) and App Ex 33 at STS2{6AB2437});

10 18. The Crown argued that the reason the Appellant had not stolen anything (except, it alleged, the victim's purse) was that he had panicked and left after killing Mrs Lawrence (TS Opening 29{AB23}; Closing 23{3AB908}).

19. Also relevant to this alleged "state of panic" is the following evidence:

- (a) The evidence of the Crown witness Mr Whitford (which the first CCA accepted (p71{3AB1052}); the second CCA refused to revisit) which meant that the killer remained in the small shop, from 5:02 (when he was seen by Barsden) until at least 5:11pm (Whitford confirmed the time by checking on his clock when he was on the phone or shortly after) when Mrs Lawrence was on the phone speaking "cheerfully" with Whitford.
- 20 (b) The photograph of a large mirror on the side wall of the shop showing that there was a clear view of the entire shop from the back of the shop where the phone was located.
- (c) Mrs Lawrence's handbag, from which her purse was missing, was found on the shelf where it was normally kept (TS 101.A-C{AB76}) (although in the Appellant's "confession" he incorrectly theorised the bag would have been on the floor at the back of the shop (TS 558.A-B){2AB506}).
- (d) The victim's body had been dragged to the back of the shop where further blows were probably struck.

30 20. The Appellant was seen at a bookshop in Fremantle at 8:30pm that evening when, pretending to be a police officer, he was given two books, saying he would pay later: TS 653.C-D (Winch XN){2AB565}, TS 655.A-B (Winch XXN){2AB567}). No money was recorded as having been found on any of his belongings which were searched and confiscated (TS 325,327,339 (Caporn){AB274, 276, 288}) and he stole a wallet with approximately \$20 from the bag of a schoolgirl, Miss Chan, the following morning (TS 361.C{AB310}, TS399 (Caporn XN){AB348}, TS 568 (Brandham){2AB516}, TS 925 (Mallard XN){2AB686} and Ann "PSF1" of Fitzpatrick Affidavit of 20 December 2002 at page 49{5AB1894}). All of that makes it unlikely that he had stolen the purse, with money in it. The trial judge in summing up (at TS 1132{3AB952}) referred to the evidence of Winch as evidence of a lack on money after the event but posed the question "where did the money come from that was given to Englehardt on the following morning, the \$12.50 odd?" He did not mention the evidence that the

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Appellant had stolen a wallet from a school bag that morning, with approximately \$20 in it.

21. Counsel for the prosecution also said that the Appellant had a motive to kill Mrs Lawrence because she had allegedly said "Don't I know you" (Opening, TS 29{AB23}, 32{AB26}). This proposition was based on police evidence of unrecorded interviews of the Appellant (see below).
22. A police officer, Caporn, gave evidence that the Appellant told him on 26 May 1994 that he had only been into Flora Metallica once, "a couple of days before the murder", when he "spoke to a middle-aged woman, blonde hair, glasses. Not the woman that was killed and in the news." (TS 316{AB265}). This was correct. Mrs Lawrence had brown hair, not blonde (see autopsy report at App Ex 1 (Affidavit of Cooke at Annexure CTC1 p16{6AB2164}). Also, Mrs Lansell (43 years of age: TS 665{2AB570}), an assistant at Flora Metallica, gave evidence that on Tuesday 17 May 1994 a man (fitting the Appellant's description: TS 667{2AB572}) tried to sell her an opal ring (TS 666-667{2AB571-572}). The Appellant gave evidence at trial that he had gone into Flora Metallica and asked a shop assistant (not Mrs Lawrence) if she wanted to buy an opal ring (TS 888{2AB649}). He said that this was the only time he had been into Flora Metallica (TS 946{2AB707}).
23. Caporn gave further evidence that on 2 June 1994 the Appellant had told him he had gone into Flora Metallica "three or four days" before 23 May 1994, to try to sell an opal ring, and that the Appellant said that the woman who served him was Pamela Lawrence, whom he had recognised from her "blonde hair and glasses" (TS 328{AB277}). See also 366{AB315}). When confronted by this inconsistency, (that this was the description he had given, on 26 May, of the shop assistant, not Mrs Lawrence) the Appellant said to Caporn "well, maybe I was mistaken" and when asked if it was Mrs Lawrence who had seen him, he said "I don't know" (TS 379{AB328}). Brandham said that on 17 June 1994 the Appellant told him that he had killed Mrs Lawrence because she recognised him, but that Brandham had said to the Appellant "But that was not Pamela Lawrence you saw when you went into the shop the week before" (TS 555{2AB503}) to which the Appellant allegedly replied "Well, they must look the same. I thought it was her because I thought that's why she said she knew me" (TS 555-556{2AB503-504}). These statements allegedly made by the Appellant to the police were not recorded.

Alibi evidence

24. The CCA observed that the Crown also relied on evidence rebutting the Appellant's alibi allegedly given to the police (that he had knocked on various doors during the night in question looking for marijuana) from witnesses who said they heard no-one knocking on their doors ([32]{7AB2519}). The CCA did not mention the Appellant's evidence at trial that he was "confused" when being questioned, and had been told "no that's not right" by the police after telling them where he was (TS 938{2AB699}). The Appellant's evidence at trial was that he had left the taxi at Bel Air Apartments, without paying (telling the taxi driver he

10 was going inside to get some friends), shortly after 5pm, and while the taxi driver, Mr Peverall, waited, he entered the foyer of Bel Air and went through to Dover Court and then to the top floor of Dover Court, to see whether the taxi had left, all of which took about 20 minutes (TS 998-1000{2AB759-761}). Mr Peverall, in examination in chief, said that he dropped the Appellant off at Bel Air at about 4:45 to 5pm (TS 157{AB118}) and waited for about 20 minutes (TS 158{AB119}) before going straight back to the nearby taxi rank and accepting a radio call at 5:22pm (TS 159{AB120}). In cross-examination, after being shown evidence he had given at a previous hearing that it could have been just before or just after 5 o'clock, he said that it was "nearer to 5 o'clock" (TS 163-164{AB124-125}). Brandham gave evidence at trial that the time taken to walk from Bel Air flats to Flora Metallica was 5 minutes or, with a short cut, 2 minutes and 40 seconds. Both routes involved walking directly in front of Bel Air, where Mr Peverall was waiting for the Appellant (who had left without paying the fare) (TS 541-542{2AB489-490}).

20 25. The Appellant's evidence at trial was that he had then gone to Miss Englehardt's flat (where he was staying) at around 6pm (TS 913{2AB674}), (Buhagiar said it would have been closer to 5:30pm (TS 801.4{2AB608})) where he changed his clothing, went into the bathroom (which Engelhardt confirmed (TS918){2AB679}), then went out looking for marijuana with Mr Kostecky before returning to Engelhardt's flat, and then leaving to catch a train with Buhagiar at about 6:50 (TS 919-920{2AB680-681}). He was photographed on the train travelling between Mosman Park and Fremantle at 6:58pm. Engelhardt said at trial that he had returned to her flat at about 6:30pm and stayed until after 7pm.

The "confessions" of the Appellant

26. As the CCA observed, the "central issue at the trial" was whether the Appellant had actually confessed (as distinct from, as the Appellant asserted, giving his "theories") and, if so, whether his confession was reliable ([59]{7AB2524}).
- 30 27. The Appellant's "confessions" consisted of an unrecorded interview by Caporn on 10 June 1994, a further unrecorded interview by Brandham on 17 June 1994 and a short videotaped interview after the unrecorded interview of 17 June 1994.
- 40 28. On the morning of 10 June 1994 the Appellant was released from Graylands Mental Hospital to attend the Central Law Courts (TS 341.9{AB290}). At 12:50 pm the Appellant was taken by police from the Central Law Courts and interviewed over a period of 8 hour and 20 minutes with 7 breaks (Caporn TS 313.3{AB262}, 341-343{AB290-292}). The Appellant's evidence at trial was that in the 10 June 1994 interview he "was in total confusion to the point where anything that he [Caporn] suggested to me I would adopt." (TS 938{2AB699}) Although the Appellant allegedly confessed in this interview, he was not arrested cautioned, or charged (Caporn (XN) TS 344.3{AB293}).

29. The 17 June 1994 unrecorded 3 hour interview was (to the knowledge of the police) after the Appellant had been at a nightclub most of the previous night, had been beaten up, and had had little sleep.
30. After the unrecorded interview of 17 June 1994 there was a video-taped interview of less than 30 minutes, aptly described by the CCA as of "a very unusual nature" ([74]{7AB2526}). The Appellant's opening words were "I want to be video recorded so that I can be cleared". His closing words were that what he had said was "my version, my conjecture, of the scene of the crime." In this interview he often spoke in the third person (eg "I think that she would have done this"), and several times was cut off by the police interviewers (eg when he said "judging by the damage that was shown to me in photographs"...); and he offered further suggestions as to details relating to the murder eg "she would have had a matching handbag and a matching purse. As a last resort, I would have gone for a Glomesh bag"; "That is where the eye witness saw the perpetrator either clearing the rest of the jewellery before he bucked off".
31. The CCA described the circumstances in which the Appellant's "confessions" were made as "peculiar" ([59]{7AB2524}) and observed that the Appellant "said a number of things which were, to say the least, odd" ([69]{7AB2525}), but concluded that the Appellant was "persisting in a pattern of grudging confession as his untrue accounts were rejected, together with a continuing attempt to mislead where possible" ([73]{7AB2526}).
32. One peculiar aspect of the Appellant's alleged "confessions" which the CCA referred to was his use of the third person in referring to the killer. For example, in the 10 June 1994 interview he spoke of the "evil person" that killed Mrs Lawrence and the emotions this person would be feeling and saying "it's murder and that's not me" ([70]{7AB2525-2526}).
33. Another peculiar aspect was that in the unrecorded 17 June 1994 interview when he allegedly "confessed" in the first person, afterwards he allegedly retracted the confession and said that he "got inside the killer's head" ([73]{7AB2526}).
- 30 34. Some of the other "peculiar" aspects of the Appellant's confession, not referred to by the CCA, were:
 - (a) On various occasions during the two unrecorded interviews, the Appellant denied that he had killed Mrs Lawrence (TS 316{AB265}, 325{AB274}, 389{AB338}, 404{AB353}, 412{AB361}, 488 (Caporn){AB437}, TS 527 (Emmett){2AB475}, TS 565{2AB513} and 566 (Brandham){2AB514}). Further, he gave a blood sample saying "This will clear me" (TS 339{AB288}). His opening words in the video recorded interview were "I want to be video recorded so that I can be cleared" (Video TS 2{2AB813}).
 - 40 (b) During the unrecorded interviews in which the "confessions" allegedly occurred the Appellant also allegedly said that he studied metaphysics (TS 337{AB286}), spoke 6 languages (French, German, Japanese, Swedish,

Italian and Spanish) (TS 337{AB286}) and forgot nothing, and learned everything about people, and that this ability stems from martial arts and concentration with kung fu that he did (TS 346{AB295}). All of this was fanciful.

- (c) Many aspects of the Appellant's "confessions" were inconsistent with known facts. On appeal to the CCA it was submitted that every one of the 15 facts he allegedly stated in his interview, which the Crown had argued only the killer could have known, was inconsistent with known facts (see Appendix 2). The CCA refused to consider this submission. For example:

- 10 (i) The police diving supervisor, Tattersall, gave evidence at trial that if the murder weapon or the purse had been thrown into the river off the bridge, as stated by the Appellant in his "confession", "we would have been able to locate them" (TS 820{2AB619}). They were not located.
- 20 (ii) The Appellant allegedly confessed that after he left Flora Metallica he went to the river with the bloody weapon and washed the blood off his clothes in the salt water. This is inconsistent with the evidence of Raine, who said she saw him at 5:13-5:15 with a choc milk and an iron bar in the lift at Bel Air, the place where the taxi driver had dropped him off at around 5pm and had waited at the front for approximately 20 minutes. Raine described him as not wet (it was the night of a big storm) and not having any blood on him or the iron bar. The CCA also observed that the possession of a choc milk by the Appellant did not tie in with other evidence ([36]{7AB2520}, TS 276{AB235}, TS 285{AB244}), and (incorrectly) said that if Raine's evidence was accepted, she saw the Appellant between 5:15 and 5:25pm ([36]{7AB2520}). The correct sequence is set out in the Chronology.
- 30 (iii) Dr Cooke's report to police stated that there were 12 injuries to the deceased's head. The Appellant had allegedly "confessed" to hitting Mrs Lawrence 12 times (TS 556 (Brandham){2AB504}). The police had Dr. Cooke's report at the time of that interview. However, in his evidence to the CCA, Dr Cooke explained that some of the 12 injuries were "complex" and at least 15 blows had been struck (App TS 221-222{3AB1211-1212}).

An analysis of the many other inconsistencies between the Appellant's "confession" and the known facts is set out in Appendix 3 ("Comparison Between Alleged Confession and Known Facts").

35. The prosecution case was that the statements made by the Appellant in the unrecorded interviews and the videotaped interview were of a confessional nature, because he had said things that only the murderer could have known (TS 11 Opening{AB5}). In his closing address, counsel for the prosecution referred to 15 "major things that only the killer would have known" (TS 20 Closing{3AB905}).
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The CCA refused to consider the Appellant's submission (see Appendix 2) that all of these "15 major things" were factually incorrect and pure speculation.

36. A part of the Appellant's alleged "confession" which was heavily relied upon by the Crown was that he said that he was seen by a girl in a car passing by. In closing, counsel referred to the Appellant's "confession" and said "when the accused man on the video speaks about locking eyes and Katherine Barsden speaks about locking eyes, it is almost like they are telling the same thing from their different points of view" (TS Closing 21D-B{3AB906}).
- 10 37. The Appellant's case was that the "confessions" were merely theories that he developed with the assistance of the police. The Appellant denied having said most of what the police alleged that he said in the first two verbal interviews (10 and 17 June 1994), and said that during the videotaped interview he was confused, thought Brandham was talking about "our theory" as to what had happened, and did not appreciate that the questions were being put on the basis that he, the Appellant, was the murderer.

Evidence concerning the murder weapon

38. On 8 June 1994 Peter Lawrence told police that he "could not offer any missing objects or other weapon." (App TS 945{4AB1566}).
- 20 39. On 10 June 1994, the Appellant allegedly confessed to killing the victim with a wrench. At 5:30pm that day Detective Shervill had a conversation with Peter Lawrence in which Peter Lawrence told him that a 10 inch Sidchrome wrench "might" have been missing (see AppEx 50: Note of conversation{6AB2011}). This evidence was given to the CCA in cross-examination after Detective Shervill was referred to Running Sheets of the investigation which had not been disclosed to the defence at trial (App TS 945{4AB1566}). Detective Shervill had not disclosed the note of his conversation prior to his cross-examination, he said that he was not aware that it was covered by a subpoena issued by the Appellant (App TS 958{4AB1579}).
- 30 40. The Crown case was that the Appellant "confessed" that he had gone to the back of Flora Metallica to commit a robbery, obtained a wrench from the rear shed, went up the back steps but found the door open and entered carrying the wrench in his hand (TS Opening 8{AB2}). When he entered the shop he was seen by the deceased. She became hysterical and, because she knew him from a previous visit to her shop (TS 29 Opening{AB23}), the Appellant "brutally and savagely hit her over the head with the wrench that he was carrying" (TS Opening 9{AB3}). She fell to the floor and he then dragged her to the back of the shop and he left thinking she was dead, after taking the purse out of her handbag (TS 30 Opening{AB24}).
- 40 41. The Appellant said that he drew the wrench as the murder weapon at the interview of 17 June 1994 as part of "our theory" of what she was killed with (TS 939{2AB700}).