

Barsden of the person she saw at 5:02) and behaving in a "somewhat unusual manner" was "irrelevant" [164]-[168]{7AB2545}. But the jury might have considered that this person was more likely to have been the murderer than the Appellant, who was not wearing a bandanna, and who was dropped one kilometre from the crime scene at about 5pm (the Crown case being that the murder occurred before 5:02pm).

(a) Tests concerning the murder weapon

- 10 80. The evidence concerning the wrench as the murder weapon is set out in paragraphs 38-46 above. The short point is that the Comprehensive Summary of Facts and the Running Sheets would have provided the defence with a fertile source for cross-examination or further inquiry of Dr Cooke. As Dr Cooke's evidence on appeal showed, a similar test he conducted (with a similar wrench to his first test) using a wrench which was very similar to that which the Appellant drew, produced wounds not consistent with the wounds of the deceased. Combined with the evidence of the police search and the many wrenches Dr Cooke examined, none of which anyone was ever satisfied could be the murder weapon, the defence plainly lost a real chance of acquittal, for the jury might have concluded that was yet another matter casting doubt on whether the Appellant was merely theorising (as he claimed) and not confessing to the murder.
- 20 81. The defence was deprived of the opportunity of putting to the jury the force of the combination of this inconsistency between his "confession" and the facts, combined with the following additional matters related to the wrench as the alleged murder weapon:
- 30 (a) First, the Appellant said in the video interview that "he" (referring not to himself but a third person) got a wrench from the shed at the back because Mrs Lawrence, a jeweller, "would have had" gas bottles for her work, and "would need" a wrench to loosen the cap. This is not only couched in the language of speculation, rather than fact, but again was not the fact. There were no gas bottles in the shed (See TS 565.A{2AB513}, Video of Scene-Trial Ex 37 and jury aid photos 58 and 59{2AB856, 857}).
- (b) Second, further evidence casting doubt upon whether the wrench was the murder weapon as the Appellant had "confessed" would also cause greater scrutiny of the evidence of Mr Lawrence (who had said for the first time that a wrench might be missing only hours after the Appellant had allegedly confessed to using a wrench as the murder weapon). Mr Lawrence initially said an expanding spanner "might" have been missing, and later agreed an expanding spanner is the same as a wrench (TS 103.A-C{AB78}).
- 40 (c) Third, why would the "perpetrator" take a wrench from the shed? The Appellant's confession (or theory) was that it was to open the back door, in case it was locked (it was not). But a wrench would be a most unlikely tool to take, to force open a locked door. The Appellant also said, in his interview with Brandham and Carter and in his video interview that he took the wrench (and Mrs Lawrence's handbag and purse) and threw them into

10 the river off Stirling Bridge (Video TS 22{2AB833} and TS 559.B{2AB507}). No wrench (or handbag or purse) were found, after full search by police divers, who would have found them, had they been there (TS 820.B{2AB619}). Malcolm CJ, in the first CCA, said the Appellant may have thrown them into "the sea" (see Reasons of Malcolm CJ at page 69 and page 71{3AB1050 and 1052}). This is quite inconsistent with the Appellant's statement that they were thrown off Stirling Bridge. The Chief Justice took the word "sea" out of the context in which it was used, by the Appellant, entirely ignoring the Appellant's statement that they were thrown from the bridge (which is over the river). Moreover, to actually get to "the sea" would have taken much longer. In any event, the fact that "the wrench" was clearly not thrown into the river off Stirling Bridge is yet another instance pointing to the Appellant giving his "theory", not recounting facts. And there is a Lewis Carroll quality about the suggestion that the wrench may have been thrown into the sea, not the river – contrary to the Appellant's "confession" – when we now know that a wrench was almost certainly not the murder weapon – contrary to the Appellant's "confession" – and that a wrench was therefore not thrown anywhere, sea or river, by the Appellant.

20 (d) Fourth, it is inherently and patently incredible, defying common sense, for the murderer to have left the scene with a bloodied wrench – or any weapon – and take it on foot, or bicycle, or maybe by train (as the Appellant theorised in his video interview (Video TS 23.B{2AB834})). Why not leave it at the scene? On the Appellant's theory/confession, the wrench was not his, and therefore could not be traced to him, and "the perpetrator" wore gloves, so no prints could be found. If the killer panicked, surely he would have thrown down the murder weapon and bolted! Why risk being seen with it?

30 (e) Fifth, if the motive was robbery – "a robbery gone wrong", as the Crown put it – why didn't the killer, when going into the shed to select a tool to force entry, take any of the jewellery which was in the shed? (See scene video taken the next morning, Trial Ex37 and jury aid photos 58 and 59.{2AB856, 857})

(f) Sixth, how did Mrs Lawrence's blood get on the leaf (AppEx 39 {2463}, AppTS 934-935 (Shervill) {1555-1556}), shown in photographs of the interior of the shed?

(b) Sketches by the eye-witness Barsden

40 82. This matter is considered by the CCA at paras [108]-[117]{7AB2534-36}. The evidence is set out at paragraphs 8-11 and 14-16 above. Miss Barsden originally (the day after the murder) made a signed statement that when she arrived home that evening, at her mother's suggestion she drew sketches of the man she had seen in Flora Metallica. Her original statement referred to the sketches (signed by her and countersigned by a police officer) as exhibits (AppEx 53{6AB1981}). However, Detective Shervill excised this part of her statement (App TS

963{4AB1584}), which was not given to the Appellant's lawyers (see Item 4 of Minute of Agreed Facts{3AB1175}).

83. The reasons why accepting the evidence of Miss Barsden meant that it was practically impossible for it to have been the Appellant that she saw are set out in Appendix 2 ("Errors in the 15 points"). The significance of the non-disclosed statement and sketches of Miss Barsden is that they would have further added to the doubt that a jury would have had on a matter which the CCA described as "significant evidence of opportunity" (at [45]{7AB2521}), which had been relied upon heavily by the prosecution in closing (Closing TS 21{3AB906}) and which Ipp J in the first CCA described as a matter of which "none was more compelling and dramatic" (page 2{3AB1081}).
84. Some of the errors in the CCA's description of the facts are raised at para 16. The importance of Miss Barsden's sketches is that the sketches depict a person quite different in appearance from the Appellant that day, in that:
- (a) The Appellant had a large, clearly visible moustache, whilst the person Miss Barsden sketched had none (compare sketches at AppEx 53{6AB1983-1985} with AppEx 27{6AB1977} and AppEx 6{6AB1994}).
 - (b) The person Miss Barsden sketched had a beard, whereas the Appellant had none (compare sketches at AppEx 53{6AB1983-1985} with AppEx 27{6AB1977} and AppEx 6{6AB1994}).
 - (c) The person Miss Barsden sketched, and described, had a scarf, tied "like a gypsy" on his head, with no hair visible, whereas the taxi driver who dropped the Appellant at the Bel Air Flats (at about 5pm) described the Appellant's hair as fairly long and untidy (TS 158A{AB119}). Mr Peverall did not mention a hat, cap or any headgear in his description of the Appellant's clothing (TS 158B{AB119}). Even if the Appellant had got a cap before going to Flora Metallica, neither a cap nor a "gypsy type" scarf would have completely hidden his long hair.
 - (d) On her sketches, Miss Barsden described the person as of "medium build", meaning physique in general (AppTS 1201D{4AB1732}), whereas the taxi driver, Mr Peverall, described the Appellant's build as slim (TS 158A{AB119}).
 - (e) There is a significant difference in the height of the man described by Miss Barsden and the height of the Appellant. Miss Barsden agreed that the description of the height contained in the identikit sketch (App Ex 6{6AB1994}) of the man she saw was correct (AppTS 1201C{4AB1732}). The height recorded in the identikit sketch was approximately 183cm or 6 foot tall. The Appellant was 199cm (=6ft 6ins) (AppEx 27{6AB1977}). A difference in height of 6 inches is significant and readily apparent.

(c) *The pages removed from the forensic report*

85. The reliability of the Appellant's "confession", that "he" had gone into the river near Stirling Bridge to wash the blood off his clothes (as distinct from his theory of what "the perpetrator did") would have been further brought into question by evidence of Lynch (which, at the request of the police, was removed from the report disclosed to the defence), and again was capable of raising a reasonable doubt as to whether he was confessing, or merely theorising.
- 10 86. The evidence of the lack of salt on the Appellant's clothing and shoes is set out at paragraphs 53-59 above. The CCA rejected the significance of this evidence because "it would be open to conclude that if the trousers bore no signs of immersion in river water, that was simply because they had not been worn at the time of the killing or that, if they had been worn, they had been under the jeans, so that only the jeans became spattered with blood and required washing" ([147]{7AB2542}). But it would have been equally open for the jury to conclude that this further inconsistency between the Appellant's "confession" and reality established that the Appellant was not confessing but theorising about the murder. This is particularly so given the evidence of the lack of salt on the Appellant's shoes and the drop of his blood which remained on his shoe from days earlier. At the very least it cannot be said that this non-disclosure did not deprive the Appellant of a fair chance of acquittal.
- 20 *(d) The sentences removed from Engelhardt's witness statement*
87. Ms Engelhardt was called at trial as a witness for the Crown. Her non-disclosed statement was plainly a "fertile source for cross-examination". If she had been asked by the defence and had given evidence (consistently with her non-disclosed statement) that the Appellant's cap was hanging on a hook behind the door at the time when, on the Crown case, it was being worn, back to front, by the Appellant, this was powerful evidence from which the jury might again have been left in reasonable doubt whether the Appellant was theorising, and not confessing.
- 30 88. Because of the significance in the "confession" of "locking eyes" with the girl in the car, the question must be asked: If the Appellant was not in the shop at that time, how could he know that a young girl had "locked eyes" with a man in the shop? The answer is simple:
- (a) The Appellant denied that he had made these statements in the verbal interviews (TS 1041{2AB802}). In the video interview he simply agreed with everything the police put to him and offered further suggestions as to how the murder might have been committed. He gave evidence that it was the *police officer*, Caporn, in the verbal interviews who "insisted that he had an eye witness who saw me and made eye contact..." (TS 946{2AB707}). The Appellant testified that he had thought "it must have been the day that I went in to sell that ring" (TS 946{2AB707}).
- 40 (b) The police told the Appellant that he had been seen in the shop by an eye witness, a girl in a car. They told him that the girl had said he was wearing a bandanna.

- (c) The Appellant thought this referred to the one time he had been in the shop, several days earlier (to try to sell the ring) (TS 378-380{AB327-329}). He said he did not wear a bandanna, but he could have been wearing his cap which, if turned back to front, might look like a bandanna! (TS 394.B{AB343} and Video TS 19{2AB830}).
89. The evidence of Ms Engelhardt was therefore crucial evidence for a jury to consider. It would have influenced a jury if it accepted that his cap was hanging on its hook at Ms Engelhardt's flat all that afternoon (AppTS 402.C{3AB1222}, 404.C-D{3AB1224}). It is plainly not inevitable that a jury would conclude that it was the Appellant that Miss Barsden saw at 5:02pm, especially since the Appellant was dropped off by a taxi at Bel Air flats at "about 5pm" 1 kilometre away, and was not then wearing a cap or bandanna (TS 158.B{AB119}). He would have had to rush to Ms Engelhardt's flat, without Ms Engelhardt seeing him, get his cap, get to Flora Metallica, go in the shed, get a wrench, go into the shop by the back door, speak to Mrs Lawrence when she surprised him, kill her, and be standing there when Miss Barsden looked into the window at 5:02!
90. The impossibility of this scenario is magnified by the following evidence:
- (a) Mrs Lawrence was still alive and chatting happily to Mr Whitford at 5:11pm (TS 89.A{AB64});
 - (b) while "fresh in her mind" Miss Barsden drew a sketch of the man she saw, which does not tally with the Appellant's photo, taken at the lockup that day (unlike the photo, the sketch was of a man no moustache, a medium beard, no long hair showing);
 - (c) Raine said she saw the Appellant at Bel Air in the lift at about 5:13-5:15pm – 2-3 minutes after Mrs Lawrence was talking to Mr Whitford (TS 274.B{AB233});
 - (d) the Appellant had severe myopia and could not possibly have seen, through the tinted windows of the car (which were up) that there was a girl in the car – much less "locked eyes" with her; and
 - (e) the use of the phrase "locked eyes" by Caporn in preparing Mr Winch's statement which Caporn drafted (see below) and later deleted.
91. If it be suggested (contrary to the Crown case at trial) that the Appellant was the man seen by Barsden at 5:02–5:03pm, but he had not murdered Mrs Lawrence until after 5:11pm and her phone discussion with Whitford, that too, is practically impossible:
- (a) He would have to be in the front of the shop, whilst Mrs Lawrence was, presumably, in the shed.

(b) But according to the Appellant's "confession" the "perpetrator" went first into the shed (to get a wrench) before entering the shop by the back door (TS 554.D{2AB502}).

(c) He would have had to remain in the shop from 5:02 (when seen by Miss Barsden) until after 5:11pm, after Mrs Lawrence has finished speaking to Whitford, and then surprised and killed her – a quite different sequence from his "confession". And why would he do that? Why not take the money and jewellery and leave?

10 (d) If the murderer was in the shop at 5:02-5:03pm, seen by Miss Barsden, he must still have been there at 5:11pm when Mrs Lawrence was in the shop, talking happily to Mr Whitford. That would be highly unlikely. If he was an intruder Mrs Lawrence would have certainly seen or heard him; and he would have had ample time to take the money and bag and jewellery. The evidence strongly suggests that whoever was seen in the shop at 5:02pm, and killed Mrs Lawrence some time after 5:11pm, was not an intruder, was not there to steal, and was known to Mrs Lawrence, not as a customer (he stood where customers don't usually stand, according to Miss Barsden).

(e) The removal of the words "locked eyes" from the statement by Winch

92. This issue is dealt with by the CCA at paras [153]-[160]{7AB2543-44}.

20 93. The difficulties referred to in paragraphs 87-91 are further exacerbated by the peculiar phrase "locked eyes" that Caporn (TS 395{AB344}) said the Appellant used on 10 June 1994 (and which the Appellant denied saying (TS 1036D{2AB797})). This was a phrase used by Brandham in recording Mr Winch's witness statement on 13 June 1994 although this phrase was removed from the typed version provided to the defence. It was an agreed fact that the draft witness statement, which had the words "locked eyes" removed, was not provided to the defence (Minute of Agreed Facts Item 1{3AB1174}).

30 94. The Appellant's denial that he had said that he "locked eyes" with a girl passing by (and his suggestion that this was said by the police and something he simply agreed with) would have been supported by evidence of the police editing of the original statement of a witness, Winch, to remove the phrase "locked eyes", which the Appellant had allegedly used in his unrecorded "confessions". Mr Brandham conceded (to the CCA) that the phrase was his (para [159]{7AB2544}). From this it might have been inferred that it was the police and not the Appellant that used the phrase "locked eyes" in the Appellant's verbal interview.

40 95. The CCA considered that this would not have influenced the jury because the "gist of" Miss Barsden's evidence was not that she locked eyes with the Appellant ([156]-[157]{7AB2543-44}). But this is, again, to substitute its opinion of the evidence for that of the jury. Indeed, the conclusion reached by Ipp J, in the first CCA, and a key point urged by the prosecution in closing submissions, was that this was the "gist" of her evidence: "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 different points of view, one looking in and one looking out." (see TS Closing 23{3AB908}).

(f) Eyewitness statements

96. This issue is considered by the CCA at paragraphs [161]-[168]{7AB2544-45}.

97. Witness statements of two witnesses (Laurie and Phillips) described a man (who could not have been the Appellant) wearing a bandanna (as described by the eye-witness) and behaving erratically, within 3 kilometres from the scene of the murder, several hours before the murder.

10 98. The Appellant was incarcerated at the East Perth lockup at 3:45pm (TS 369.9{AB369}, 723.3{2AB590}) so he could not have been the person was seen wearing the bandanna in the area by Phillips. The fact that another person was in the vicinity, on the afternoon of the murder, meeting Miss Barsden's description, was clearly relevant. Ms Phillips' evidence (App TS 582-4{3AB1361-1363}) was that she saw a man about 5' 11" wearing a bandanna, average to heavy build (not thin) with "hair around the bottom part of his chin". Her description does not fit the Appellant, but it corresponds with the sketch and description by Miss Barsden of the man she saw in the shop (see above).

20 99. The CCA said that this evidence was "irrelevant" ([163]{7AB2545}) because "there was nothing to link [this person] to the offence. He was not able to be identified" ([167]{7AB2545}). Again, the CCA usurped the role of the jury. The jury might have been influenced by the strange behaviour of this man (who was not the Appellant) his proximity to the scene of the crime, and the fact that he matched the description given by Miss Barsden (which the Appellant did not).

B. The ambit of the jurisdiction of the CCA on a Reference

30 100. The Appellant submitted to the CCA that, contrary to the decision of the first CCA, each of the 15 "major things that only the killer could have known" were errors and patently inconsistent with the evidence, and that there were so many other inconsistencies in the Appellant's "confession" that it was wholly unreliable. The inconsistencies are set out in Appendix 2. The Court of Criminal Appeal refused to consider this submission.

101. The Appellant also submitted that the first CCA erred in its analysis of the timing. The CCA refused to consider this submission. If, as the first CCA accepted, the deceased was "alive and cheerful" at 5:11pm, then the Appellant's "confession", and the Crown case that he fled the shop after being seen at 5:02pm, cannot be correct. The sequence is shown in the Chronology.

40 102. In refusing to consider these submissions, the CCA quoted (at [9]{7AB2513}) and accepted the submission by the Respondent that "on a reference the jurisdiction of the Court was confined to fresh material brought before the Court and that it could not re-adjudicate a ground of appeal already heard and disposed of" by the first CCA (which, of course, did not have before it the evidence of undisclosed relevant information).

103. S140(1)(a) of the *Sentencing Act 1995* (WA) required "the whole case to be heard and determined as if it were an appeal by the offender against the conviction". There is nothing in the text of the *Sentencing Act* to justify the restrictive approach taken by the CCA.
104. The approach of the CCA is also inconsistent with the decision of *Ratten v The Queen* (1974) 131 CLR 510 in which Barwick CJ (with whom McTiernan, Stephen and Jacobs JJ agreed) at 514 said, in relation to a reference of 'the whole case' by the Attorney General of Victoria that 'As the Full Court was required to treat the reference to it under s584 as an appeal, it was bound in dealing with it to act upon legal principles appropriate to an appeal.'
105. The approach of the CCA is also contrary to the interests of justice and the fundamental rights of an individual (as to which see *Coco v The Queen* (1994) 179 CLR 427 at 436-438; *Al-Kateb v Godwin* (2004) 208 ALR 124 [30], [241]) because it means that in the cases of an incarcerated Appellant, even where there is manifest legal or factual error in the basis for the Appellant's incarceration decided by a previous appellate court, the second appeal court, although seized of jurisdiction, cannot reconsider the matter.
106. Appendices 1, 2 and 3 detail the submissions raised by the Appellant before the CCA, which it refused to consider: (1) the timing of events was such that the Appellant *could not have been present* at Flora Metallica when the girl saw the intruder at 5:02pm; (2) the "15 matters that only the murderer could have known" contained in the Appellant's "confession" and relied on as evidence of guilt are not correct, and cannot be relied on as evidence of guilt; (3) there are (at least) 25 discrepancies between the alleged confession, and the established facts.

C. Refusal to consider or take into account evidence of the Appellant's psychiatric illness

107. This issue is dealt with by the CCA at paragraphs [169]-[176]{7AB2545-2547}. It held that psychiatric evidence that the Appellant was suffering from bi-polarity or uni-polarity and was susceptible to suggestion and grandiosity, when on 10 June 1994 he was released from Graylands Mental Institution to court, and then taken from court by police for an interview, was not admissible because the material was not fresh (it had been given at a voir dire) and a forensic decision had been made not to lead the evidence at trial (at [173]{7AB2546}). The CCA speculated that there was "ample material" in any event to establish that the Appellant was not normal and that psychiatric evidence "could well have" strengthened a view that he was the type of person that might have reacted disproportionately during a robbery ([174]-[175]{7AB2546-2547}).
108. It is not to the point that the material was not fresh, nor was it appropriate for the CCA to speculate on what "could well have" been the response of the jury. Where there has been non-disclosure of relevant evidence which might have led to a different "forensic decision", a Court of Criminal Appeal should not exclude from consideration evidence which may have been adduced at trial, had the non-disclosed evidence been known to the defence.

109. The affidavit of Dr Steven Patchett (AppEx 29{6AB2073}) (which the CCA refused to admit) said that it is "generally accepted that the use of drugs such as marijuana, amphetamines and alcohol may exacerbate, perpetuate or even precipitate the onset of a manic episodes in people suffering from mental illnesses, like Mr Mallard" (para 34{6AB2089}) and for this reason "any confession given by Mr Mallard, whilst he was in such a manic state, should be treated with great scepticism." (para 35{6AB2090}).
110. The other non-disclosed evidence that showed significant errors in the Appellant's "confession" might well also have led to a different "forensic decision". The CCA, in refusing to consider this evidence, placed itself in the position of the jury.

Part VI: STATUTORY PROVISIONS

Sentencing Act 1995 (WA), section 140

(1) A petition for the exercise of the Royal Prerogative of Mercy in relation to an offender convicted on indictment, or to the sentence imposed on such an offender, may be referred by the Attorney General to the Court of Criminal Appeal either -

(a) for the whole case to be heard and determined as if it were an appeal by the offender against the conviction or against the sentence (as the case may be); or

(b) for an opinion on any specific matter relevant to determining the petition.

(2) The Court of Criminal Appeal must give effect to the referral.

Acts Amendment (Court of Appeal) Act 2004 (WA), section 21

s.140(1)	In each provision, delete "Court of Criminal Appeal" and insert
s.140(2)	instead -
	"Court of Appeal"

Part VII: CHRONOLOGY (APPENDIX 1)