Supreme Court
New South Wales
Court of Criminal Appeal

Case Title:	Wood v R
Medium Neutral Citation:	[2012] NSWCCA 21
Hearing Date(s):	22 August 2011
Decision Date:	24 February 2012
Jurisdiction:	
Before:	McClellan CJ at CL at [1] Latham J at [810] Rothman J at [820]
Decision:	1. Leave to appeal is granted and the appeal is upheld and the conviction is quashed. 2. Order the entry of a verdict of acquittal.
Catchwords:	CRIMINAL LAW – appeal – conviction – unreasonable verdict – unsupported by the evidence – circumstantial evidence – circumstantial evidence to be considered as a whole –reasonable doubt on independent assessment of the evidence – jury advantage in hearing evidence insufficient to resolve reasonable doubt. CRIMINAL LAW – appeal – conviction – identification evidence – probative value – "displacement effect" – appropriate directions – whether evidence of similar appearance is identification evidence. CRIMINAL LAW – appeal – conviction – expert evidence – identification and proof of assumptions by admissible evidence – qualification of expert – weight to be given to expert evidence. CRIMINAL LAW – appeal – conviction – expert evidence – breach of Expert Witness Code of Conduct – whether breach of Expert Witness Code of Conduct goes to admissibility or weight – discretionary

exclusion of evidence of expert who breaches Code of Conduct.
CRIMINAL LAW – appeal – conviction – evidence – admissibility – relevance.
CRIMINAL LAW – appeal – conviction – whether a conclusion of fact is an indispensable intermediate fact – need for a *Shepherd* direction – *Shepherd* direction not required.
CRIMINAL LAW – appeal – conviction – whether trial miscarried because of prejudice occasioned by the Crown prosecutor – prosecutor's duty of fairness – whether prosecutor breached trial judge's ruling – whether prosecutor invited jury to invert the onus of proof – whether prosecutor impermissibly gave personal opinions – whether prosecutor misrepresented evidence – whether prosecutor failed to adhere to case theory.
CRIMINAL LAW – appeal – conviction – joint criminal enterprise – need for evidence of enterprise and participation by the accused.
CRIMINAL LAW – evidence – lack of evidence to support motive – dangers of inviting speculation as to motive – whether unfair prejudice occasioned.
CRIMINAL LAW – new and fresh evidence – evidence not disclosed by prosecution at time of trial.

Legislation Cited:

Criminal Appeal Act 1912 (NSW)
Criminal Appeal Rules
Director of Public Prosecutions Act 1986 (NSW)
Evidence Act 1995 (NSW)
Legal Profession Act 2004 (NSW)
New South Wales Barristers' Rules
Supreme Court Rules 1970
Uniform Civil Procedure Rules 2005

Cases Cited:

Alexander v The Queen [1981] HCA 17; (1981) 135 CLR 395
Aslett v R [2009] NSWCCA 188
Australian Securities and Investments Commission v Rich (2005) 190 FLR 242; [2005] NSWSC 149

Australian Securities and Investments Commission v Rich (2005) 218 ALR 764; [2005] NSWCA 152
Azzopardi v The Queen [2001] HCA 25; (2001) 205 CLR 50
Barca v The Queen [1975] HCA 42; (1975) 133 CLR 82
Boucher v The Queen (1954) 110 CCC 263
Burrell v R [2009] NSWCCA 163
Causevic v R [2008] NSWCCA 238; 190 A Crim R 416
Chahine v R [2006] NSWCCA 179
Chamberlain [No 2] v The Queen[1984] HCA 7; (1984) 153 CLR 521
Cittadini v R [2009] NSWCCA 302
Commonwealth Development Bank of Australia Pty Ltd v Cassegrain [2002] NSWSC 980
Cooper v R [2011] NSWCCA 258
Cornwell v The Queen [2007] HCA 12; 231 CLR 260
Dasreef Pty Ltd v Hawchar [2011] HCA 21; (2011) 85 ALJR 694
Davies and Cody v The King [1937] HCA 27; [1937] 57 CLR 170
Domican v The Queen [1992] HCA 13; (1992) 173 CLR 555
Festa v The Queen[2001] HCA 72; (2001) 208 CLR 593
FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33
Gallagher v The Queen [1986] HCA 26; (1986) 160 CLR 392
GDD v R [2010] NSWCCA 62
Gonzales v R [2007] NSWCCA 321; 178 A Crim R 232
Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708
Halloway v Feeters (1950) 94 CLR 450
Haoui v R [2008] NSWCCA 209
HG v The Queen [1999] HCA 2; (1999) 197 CLR 414
HML v The Queen [2008] HCA 16; (2008) 235 CLR 344
James v Keogh (2008) 101 SASR 42
Kanaan v The Queen [2006] NSWCCA 109
Khoury v R [2011] NSWCCA 118
Knight v The Queen [1992] HCA 56; (1992) 175 CLR 495
Lawteal Finance v *Chrapacz* [2010] NSWSC

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Li v R (2003) 139 A Crim R 281; [2003] NSWCCA 290
Libke v The Queen [2007] HCA 30; (2007) 230 CLR 559
Livermore v R [2006] NSWCCA 334; (2006) 67 NSWLR 659
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305; (2001) 52 NSWLR 705
Mallard v The Queen [2005] HCA 68; (2005) 224 CLR 125
Martin v Osborne [1936] HCA 23; (1936) 55 CLR 367
Meadow v General Medical Council [2006] 2 WLR 286
Morgan v Babcock & Wilcox Ltd (1929) 43 CLR 163
National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68
Pan Pharmaceuticals Ltd (in liq) v Selim [2008] FCA 416
Paric v John Holland (Constructions) Pty Ltd [1985] HCA 58; (1985) 59 ALJR 844
Peacock v The King [1911] HCA 66; (1911) 13 CLR 619
Plomp v The Queen [1963] HCA 44; (1963) 110 CLR 234
R v Abou-Chabake (2004) 149 A Crim R 417; [2004] NSWCCA 356
R v Agkul (2002) 5 VR 537; [2002] VSCA 222
R v Ali (2001) 122 A Crim R 498; [2001] NSWCCA 218
R v Anderson (Hilton Bombing Case) (1991) 53 A Crim R 421
R v Blick [2000] NSWCCA 61; (2000) 111 A Crim R 326;
R v Carusi (1997) 92 A Crim R 52
R v DDR (1999) 99 A Crim R 327; [1998] 3 VR 580
R v Harris [2006] 1 Cr App R 5
R v Hillier [2007] HCA 13; [2007] 228 CLR 618
R v Hodge 2 Lewin C.C. 227
R v Kaldor [2004] NSWCCA 425; (2004) 150 A Crim R 271
R v Keenan [2009] HCA 1; (2009) 236 CLR 397
R v KNP [2006] NSWCCA 213; (2006) 67

NSWLR 227
R v Liristis [2004] NSWCCA 287; (2004) 146 A Crim R 547
R v McCullough (1982) 6 A Crim R 274; (1982) Tas R 43
R v Micallef [2002] NSWCCA 480; (2002) 136 A Crim R 127
R v Roulston [1976] 2 NZLR 644
R v Rugari [2001] NSWCCA 64; (2001) 122 A Crim R 1
R v *Skaf* [2004] NSWCCA 37
R v Taylor, Weaver and Donovan (1928) 21 Cr App R 20
R v Wood [2008] NSWSC 1273
Ramsay v Watson [1961] HCA 65; (1961) 108 CLR 642
Rasic v The Queen [2009] NSWCCA 202
Ratten v *The Queen* [1974] HCA 35; (1974) 131 CLR 510
Richardson v The Queen [1974] HCA 19; (1974) 131 CLR 116
RPS v The Queen [2000] HCA 3; (2000) 199 CLR 620
Sever v R [2010] NSWCCA 135
Shepherd v The Queen [1990] HCA 56; (1990) 170 CLR 573
SKA v The Queen [2011] HCA 13; (2011) 243 CLR 400
Stanton v Callaghan [2000] QB 75
Sydney South West Area Health Service v Stamoulis [2009] NSWCA 153
Tran v The Queen (2000) 105 FCR 182; [2000] FCA 1888
United Rural Enterprises Pty Ltd v Lopmand Pty Ltd [2003] NSWSC 870
Velevski v The Queen [2002] HCA 4; (2002) 76 ALJR 402
Whitehorn v The Queen [1983] HCA 42]; (1983) 152 CLR 657
Whitehouse v Jordan (1981) 1 WLR 246

Texts Cited: *Starkie on Evidence*, 3rd ed., published in 1842

Category: Principal judgment

Parties: Gordon Wood (Applicant)
Crown

Representation	
- Counsel:	T A Game SC/G A Bashir/J King (Applicant) W Abraham QC/J A Girdham/G Turner (Crown)
- Solicitors:	Marsdens Law Group (Applicant) Solicitor for Public Prosecutions (Crown)
File number(s):	2007/1675
Decision Under Appeal	
- Court / Tribunal:	Supreme Court of NSW
- Before:	Barr J
- Date of Decision:	4 December 2008
- Citation:	
- Court File Number(s)	
Publication Restriction:	

JUDGMENT

1 **McCLELLAN CJ at CL**: Ms Caroline Byrne died on the night of 7 June 1995. Her body was recovered from the rocks at the Gap at Watsons Bay in Sydney early the following morning. At the time the assumption was made that, like many others had done before her, she committed suicide by jumping from the cliff top. A coronial inquest was held in November 1997. The Coroner returned an open finding in February 1998.

2 Eleven years after Ms Byrne died, on 3 May 2006, Gordon Wood, who I shall refer to as the applicant, was charged and subsequently convicted of her murder. He had been living with Ms Byrne at the time of her death and was the first to raise the alarm concerning her wellbeing. Although suspicion attached to him, and some of his actions at the time caused

Caroline's father and other members of her family to have doubts as to whether he had been somehow involved in her death, the objective facts were apparently considered to be insufficient for the authorities to take any action.

3 However, controversy remained. The newspapers wrote articles about the case. The applicant was interviewed on the television program "Witness" in 1998 and the matter was raised in the State Parliament.

4 At the time of Ms Byrne's death, the applicant was employed by Mr Rene Rivkin. Rivkin was a person whose personal and professional life attracted publicity, not all of which was favourable. There were suggestions that a fire at a business in which he had an interest, the Offset Alpine Printing Company (Offset Alpine), may have been deliberately lit so that the insurance could be recovered. The rumours surrounding Offset Alpine linked Rivkin with Mr Graham Richardson, a former member of the Australian Parliament who was a person who attracted significant publicity.

5 There is some evidence which the Crown argued placed the applicant and Ms Byrne in Robertson Park, adjacent to the Gap, between 1 pm and 3 pm in the afternoon of 7 June 1995. There is further evidence (from Mr John Doherty – a local resident) which the prosecution suggests indicated, contrary to his account, that the applicant, with another man, was at the Gap with Ms Byrne during the evening when Ms Byrne died. It will be necessary to carefully consider the reliability of this evidence.

6 There is evidence which may be accepted that Ms Byrne fell to her death at about 11.30 pm. The applicant said he was at home at that time.

7 For a number of years the police were unable to establish with any confidence how Ms Byrne left the cliff top and got lodged in the rocks below. The location from which the body was retrieved was identified by Sgt Mark Powderly, who was the first person to locate her. He descended from the cliff top and was on the rock shelf alone for some time until he

was assisted by Snr Const Lisa Camwell to retrieve the body. There is controversy as to whether the location which Sgt Powderly originally identified in 1996 was the correct position or whether it was only in 2004 that the correct spot was identified.

8 There was no eyewitness to Ms Byrne's fall. The Crown prosecutor accepted at the trial that unless the prosecution could exclude the reasonable possibility that Ms Byrne had committed suicide, a prosecution for murder or even manslaughter could not be sustained. There is continuing controversy as to whether she could have jumped or been thrown to the location where her body was retrieved.

9 Doherty did not come forward until some three years after Ms Byrne's death. Although his evidence was important to the Crown case it is now apparent that it was because of the efforts of A/Prof Rod Cross, an engineer, that the police were able to make progress towards a prosecution. Coincident with the request from the police for A/Prof Cross to become involved in the investigation came a questioning of the location at which Ms Byrne's body was found. The position identified by Sgt Powderly in 2004 has been referred to as "the hole" or "hole A" and I shall use those terms. Hole A is located adjacent to a large pyramid-shaped rock at the base of the Gap. It has been referred to as "Pyramid Rock". The location – known as "hole B" - was the location originally identified by Sgt Powderly. He confirmed his identification of hole B as the position where Ms Byrne's body was found in a police video made for publicity purposes in 1996.

10 Although it would seem unusual, the police apparently took no photographs of the scene at the time of Ms Byrne's death and the spot where her body was located was not the subject of any contemporaneous record.

11 Although Sgt Powderly changed the location in which he believed the body was found, it is significant that he did not change his opinion as to the point from which Ms Byrne left the cliff top. He said that he identified that point

having regard to the orientation of Ms Byrne's body when looking from the rocks back up to the top of the cliff while he was waiting for assistance. He waited for approximately 45 minutes.

12 A/Prof Cross became intensely interested in the problem of how Ms Byrne met her death. Although it had been assumed that she committed suicide, he set about determining whether she could have been thrown from the cliff. Following the identification of hole A in 2004 he accepted that hole A was the correct position of the body and conducted a series of not particularly sophisticated experiments to establish whether Ms Byrne could have jumped or been thrown to that location. The experiments involved strong men throwing women into swimming pools and throwing dead weights, as well as fit and able-bodied young women jumping and diving into pools. A/Prof Cross was satisfied that a strong, fit man could have thrown a woman of Ms Byrne's weight from near the bend in the safety fence on what has become known as the "northern ledge" to hole A. A/Prof Cross also produced calculations from which he concluded that a person of Ms Byrne's assumed athletic ability could not have jumped, even with a running start, from the "northern ledge" to hole A with a run up of 4 metres, which was the run-up distance which was assumed to be available. However, he calculated that with the available run up it was possible for a strong man, using a "spear throw" technique to have thrown Ms Byrne to hole A without also falling off the cliff top as he threw her.

13 There was a debate at the trial as to whether, before they could convict the applicant, the jury had to be satisfied, beyond reasonable doubt, that the applicant used a "spear throw" and that Ms Byrne lodged on the rocks at hole A. It was submitted that without being satisfied of those facts suicide could not be excluded. The trial judge declined to give a *Shepherd* direction (namely, a direction that a particular fact was to be proved beyond reasonable doubt: *Shepherd v The Queen* [1990] HCA 56; (1990) 170 CLR 573 in relation to this and other issues.

14 The actions of and statements made by the applicant before Ms Byrne died, on the night of the tragedy and in later interviews, require careful consideration. It would seem that he lied about some matters. Certainly his behaviour was at times unusual. Nevertheless, the trial judge ruled that the Crown could not use any alleged lie as a consciousness of guilt lie, a ruling about which there is no controversy. There could be little doubt that the applicant's behaviour at the time would have been of considerable interest to the jury.

15 The applicant and Ms Byrne had lived together for some time. Their relationship had previously foundered, primarily because the applicant had been unable to secure significant employment. The relationship was renewed when the applicant found employment as a driver for Rivkin. He boasted of his future financial prospects because of his involvement in the Rivkin enterprise and the knowledge of the operation of "markets" which he would gain.

16 The evidence about the state of the relationship between Ms Byrne and the applicant at the time of Ms Byrne's death points in different directions. There was evidence which indicated that the relationship was close and happy. There was other evidence which suggested that Ms Byrne was unhappy and wished to terminate the relationship.

17 At the time, Rivkin was embroiled in the controversy surrounding the share dealings in Offset Alpine Printing. In the weeks before Ms Byrne's death, the applicant had travelled overseas with Rivkin to speak with bankers in Switzerland. On the day before Ms Byrne's death, the applicant gave evidence about the matter to an ASC inquiry.

18 There was evidence at the trial that Ms Byrne was suffering depression at the time she died. She consulted a doctor on the Monday before her death and was referred to a psychiatrist, the appointment being on the following Wednesday. She died that day without seeing the psychiatrist. She had previously attempted to commit suicide.

19 The prosecutor advanced a motive for the applicant to kill Ms Byrne. It was entirely speculative and internally inconsistent. The trial judge when sentencing made plain that he did not accept the Crown's theory. The prosecutor told the jury that the applicant may have killed Ms Byrne because she had told the applicant that she wanted to terminate their relationship. For this theory the Crown accepted that the applicant was in love with Ms Byrne and did not want this to happen. However, it was also suggested by the Crown that the applicant believed that Ms Byrne knew details about the "Offset Alpine Printing scandal" which she might disclose to an unnamed person and, if this happened, Rivkin would blame the applicant and he would then lose his job. In effect, the prosecution hypothesised that although it meant killing the person he loved, the applicant chose to do this rather than lose his job. There was no suggestion that the applicant had involved himself in suspect dealings in the shares but it was in effect suggested that he chose to kill Ms Byrne to protect Rivkin. The prosecution called evidence to suggest that, on the afternoon Ms Byrne died, Rivkin was seen in an agitated exchange with the applicant. The content of the conversation is not known but the suggestion by the prosecutor was that Rivkin wanted Ms Byrne neutralised in some manner.

20 The Crown hypothesised that on the afternoon of 7 June 1995 the applicant spent time at Watsons Bay trying to persuade Ms Byrne not to leave him. His entreaties were assumed to be unsuccessful and the prosecution suggested that they fell into argument and many hours later – but still at the Gap - he killed her. Why maintaining the relationship would satisfy Rivkin that Ms Byrne would not disclose any knowledge she had in relation to the Offset Alpine Printing issue was not explained. To my mind there was nothing in the evidence which justified the prosecution's speculation with respect to the applicant's motive.

21 One issue which may have coloured the evidence unfavourably for the applicant concerned the suggestion of a homosexual attraction between

Rivkin and the applicant. This issue was no doubt influenced by newspaper accounts of Rivkin's liking for the company of healthy young men. The Crown put into evidence through Ms Byrne's father a suggestion that the applicant and Rivkin shared a one-bedroom flat when staying in London. There was also evidence of rumour about a homosexual relationship between the two men.

22 There are a large number of persons referred to in this judgment. I have referred to the deceased as Ms Byrne and, so as to distinguish from his sons, to her father as Mr Byrne. I have otherwise given persons their full title when first referred to and then after referred only to their surname. I mean no disrespect to any of them.

The history of the investigation

23 The initial phase of the investigation into Ms Byrne's death was conducted by Sgt Craig Woods. It appears to have been cursory, no doubt explained by the fact that everyone assumed she had committed suicide. The applicant gave a statement to police on 12 June 1995 and was interviewed by Sgt Woods on 10 July 1995. Sgt Woods did not speak with Rivkin. He made unsuccessful attempts to find the fishermen who were known to have been present at the Gap on the night Ms Byrne died.

24 Inspector Brian Wyver first became involved in the investigation in May 1996. He interviewed the applicant on 14 June 1996. He asked A/Prof Cross to assist and, using his knowledge of physics, to express an opinion as to whether Ms Byrne may have been pushed off the cliff or jumped. The request was made towards the end of 1997. Dr Nick Linthorne was apparently asked the same question. They both expressed the conclusion that Ms Byrne may have jumped.

25 A Coronial Inquest commenced in November 1997. In February 1998 the Coroner returned an "open finding."

26 The third police investigation was headed by Det Insp Paul Jacob. He was given the job in June 1998.

27 In his book about the matter which was tendered and which I would admit as new evidence on the appeal, A/Prof Cross describes the circumstances under which it was recognised that hole A was in fact the "correct" landing spot of Ms Byrnes. He writes in the following terms:

> "I was not 100 per cent certain about the landing spot…I called [Detective Inspector] Jacob in December 2003 about both of my concerns. I asked him how he knew they picked the right landing spot way back in 1996. His answer surprised and alarmed me. He said he didn't know…Fortunately, Jacob immediately saw the importance of what I was saying and arranged for Mark Powderly and two other police rescue officers to visit the site on 6 January 2004…I remained up the top and chatted to Mark Powderly that day. After Mark directed the rescue guys [at the bottom of the cliff] to the right spot to take their photographs, I quizzed him about the morning Caroline Byrne was found."

28 It was submitted by the Crown that on 6 January 2004 Sgt Powderly directed the rescuers to hole A as the "correct" landing spot.

29 A/Prof Cross continued:

> "The day before we were to take the measurements [14 April 2004], Paul Jacob called me with some more distressing news. They were reviewing all their previous drawings and photographs and were comparing them with the photographs I had taken on 6 January 2004 when I visited The Gap with Powderly. The rocks surrounding the landing point in the 1999 photos were not the same rocks as those in the January 2004 photos. The landing point marked on the 1999 drawings and in the early photos had been marked incorrectly."

30 From these excerpts from the book it would appear that A/Prof Cross gave an incomplete account during his evidence at the trial. At the trial he only referred to the phone call between himself and Det Insp Jacob on 14 April 2004 and not that the January 2004 visit to the Gap was at his initiative.

31 Emails tendered to this Court as fresh evidence confirm that there was email communication between A/Prof Cross and Det Insp Jacob in December 2003 in which they discussed contacting Sgt Powderly. These emails are discussed further under the fresh evidence ground of appeal.

32 Sgt Powderly's evidence at the trial was that he realised the mistake in the identification of the hole from which Ms Byrne's body was retrieved when he watched the 1996 video which was played at the inquest. However, he said that he never told anyone about the inconsistency until he met with A/Prof Cross on 6 January 2004. Given the significance of the assumed landing spot to A/Prof Cross' calculations this is, to say the least, surprising. I would have expected that if he knew that the landing place had been misidentified he would have raised the issue when he first knew of the error.

33 Det Insp Jacob gave evidence at the trial that he became aware that there was some doubt about Ms Byrne's landing spot on 8 January 2004 when he was compiling a brief of evidence for the DPP. He said, "we received some images, electronic images, from Professor Rod Cross and Detective Michael Streatfield on the email system. Those arose from some work they had done at the Gap on 6 January. Those images were viewed by one of my colleagues, Bianca Comina, who raised concerns with me that they appeared different, the rock formation and the images appeared different."

34 As it happens the change in the landing position had significant implications for the prosecution case. The applicant submitted to this Court that this was an example of A/Prof Cross "actively participating in the making of evidence directed to traversing of the existing forensic evidence" which as a consequence caused the trial to miscarry.

35 Sgt Powderly gave evidence of his recollection of the location where he found Ms Byrne and the position of her body. He said:

> "On the southern side of the body, there was a large sloping boulder and budding [sic] up against that with a narrow 3-inch gap is a large pyramid rock with a sandy coloured point. At the eastern end of that, there is a hole in the rocks and that was where the body was protruding from…(the body was positioned) head down, shoulders down, down to just slightly above the waist. There was no-I couldn't see the arms or the head of the deceased at that time."

36 When Sgt Powderly first located Ms Byrne at the base of the Gap, he conducted an examination of her distal pulse and found no sign of life. He also detected a "considerable amount of rigor mortis." He examined down her legs to the hips but could not find any protrusions of bone or distortions under the skin to indicate fractures or serious injuries; there was no blood or bleeding from the hips to the feet.

37 Sgt Powderly said that his recollection was that in order to see the head area, he searched for a viewing point through the rocks. He said, "I had to crouch down to a very low point and I was able to look up through like a tunnel effect and I was able to see the left arm a very small portion of the head area." Due to the danger from the water surging in the area he said that he did not try to put his head into the tunnel. He said, "My decision not to go in there at that stage because I feared if I got in and got trapped, I had no way of communicating to anyone else."

38 Sgt Powderly said that when he worked with the Police Rescue Squad he had retrieved "closer to 10" bodies from the base of the Gap at Watsons Bay. It must also be remembered that he was giving evidence in 2008, 12 years had passed since the video was made. He first alerted anyone to the error in the video almost 9 years after the event. By the time he gave evidence he would no doubt have rehearsed the scene in his mind many times.

39 Sgt Powderly described the conditions as he waited for Snr Const Camwell to join him at the base of the Gap with extra equipment. He said:

> "At that hour of the morning and in the Winter, it was quite cold and I had some concerns about suffering hypothermia for myself. Prior to her coming down, I had gone and taken some shelter to try and keep dry. The water kept surging up in different areas. I don't know the size of the sea that day but I was conscious of it and that it was quite large, and that a lot of the holes around where – underneath where I was and where the body was, water kept surging up quite strongly."

40 He formed an opinion that "she had gone directly in, head first."

41 Sgt Powderly said that he waited with the body for about 40 to 45 minutes, leaning against the seaward rock as Snr Const Camwell made her way to the bottom of the cliff line with the equipment. Sgt Powderly said this retrieval was unusual. He had not seen a body which had gone into a hole before on any of his other rescues. He was surprised that there was no damage from her waist to her feet. The 40 to 45 minute delay allowed him time to observe the position and conditions. He said:

> "In my own mind, my thoughts at the time were that it was just like a spear…I was surprised there was no damage from the waist to the feet…In this instance it was just – to me, it was an amazing thing that I saw that the body had gone straight into that particular crevice. And leaning back against the rock and looking at where the legs were, particularly that they weren't injured, is where I started looking at – just observations as to where the possibility that the deceased had left the cliff top. And that's why I formed the opinion that it was from basically where the feet were pointing and the legs were pointing in a straight line, were pointing at the edge of the cliff right on the corner of that fence where I conducted the third view with the Mitrolux light."

42 Prof John Fryer is an expert in the field of surveying and photogrammetry. He made calculations of the possible dimensions of Ms Byrne's body from photographs and some of her personal belongings. He compared his calculations to the measurements of a mannequin who was used to model the scene where Ms Byrne was apparently found at the base of the Gap. Prof Fryer concluded that the shoulder width of the mannequin was 15mm wider than Ms Byrne's likely shoulder width, the total width was 20mm wider than Ms Byrne and the wrist circumference was 8mm larger than Ms Byrne. Prof Fryer concluded that Ms Byrne's shoulder width ranged from

342 mm to 353 mm, most probably 345 mm. However, the armpit-to-armpit measurement of the mannequin was apparently 20 mm smaller than Ms Byrne.

43 The evidence before this Court makes plain that A/Prof Cross placed considerable emphasis on his assumption as to the width of Ms Byrne's shoulders to conclude that she did not end up in hole B. In his fourth report into the murder, which was tendered on the appeal, A/Prof Cross concluded, "the incorrect cavity (hole B) is too narrow at the base and too wide at the top to allow for any wedging at all. The width of a female across the shoulders is typically about 40 to 43 cm, while the incorrect cavity is about 40 cm wide at the top and narrows to about 30cm at the bottom." A/Prof Cross's assumption was clearly wrong. It casts considerable doubt, at least on this aspect of A/Prof Cross's thesis. The problem was reinforced in the Crown's closing address. The prosecutor told the jury: "the mannequin was able to comfortably fit very snugly in hole A but was not able to go into hole B."

44 A/Prof Cross made a number of written reports during the course of his investigation. They were tendered to this Court. In his first report dated 19 November 2003, A/Prof Cross made calculations and assessments based on the landing spot of Ms Byrne's body as being hole B. His initial conclusion was that "the most likely cause of death was that Caroline Byrne ran over the edge of the cliff in the dark at a point 8m south of the safety fence. There is a 20 m long approach to this point from the west fence where the cliff top is flat and level and relatively free of obstructions." In his subsequent reports he concluded that Ms Byrne left the cliff top from a location referred to as the "northern ledge" and that hole A was the "correct" landing spot.

45 As I have previously indicated, A/Prof Cross carried out a number of experiments to assess whether or not Ms Byrne could have jumped to her death or been thrown. They were not sophisticated and I have considerable reservations about the assistance they can provide. He set

up experiments in which cooperative females were thrown by strong men into a swimming pool. His purpose was to measure the speed at which they were launched so that he could attempt to calculate how far out from the edge of the cliff they would have travelled before hitting the rocks below. His experiments were based upon the assumption that the person who threw Ms Byrne was able to take some forward steps before launching her, that Ms Byrne was conscious, not struggling and, furthermore, did not attempt to grab hold of the thrower or free herself from his or her grasp. Apart from the possibility that Ms Byrne was conscious, I do not believe that any of these assumptions are reasonable. Although in his experiments the thrower did not in most cases end up also falling into the pool, the risk of doing so on a dark night with a struggling victim over an uneven surface would have been very great. I doubt that someone would take that risk.

46 A/Prof Cross concluded that the only way that Ms Byrne could have ended up in hole A was if she was thrown by a “spear throw” from a very strong man. He said that he understood that the applicant could bench press 100 kilograms. He believed that under ideal conditions such a person would have been sufficiently strong to have thrown Ms Byrne the necessary distance.

47 Once A/Prof Cross had reached this conclusion, it was decided to prosecute the applicant for murder. The prosecution reasoned that this evidence, together with the evidence of Doherty, was sufficient to exclude the possibility that Ms Byrne committed suicide and to implicate the applicant in her murder.

48 Apart from Ground 1, which requires an examination of the entirety of the evidence, the other grounds raise discrete issues including the admissibility of fresh and new evidence and, if admitted, the consequence of that evidence. The grounds of appeal are:

Ground 1: The verdict is unreasonable and cannot be supported by the evidence.

Ground 2: A miscarriage of justice was occasioned by the directions given by the learned trial judge in relation to:

a. The positive identification evidence of Martin and Melbourne relied on as day time sightings of the applicant and Ms Byrne at Watsons Bay; and/or

b. The evidence of Mr Doherty and Miss Kingston relied on by the prosecution as night time sightings of the applicant and Miss Byrne.

Ground 3: The evidence and the opinions of A/Prof Cross caused the trial to miscarry.

Ground 4: His Honour erred in rejecting evidence showing rocks at the base of the Gap being covered in water, and movement of water over the rocks, as being irrelevant to the trial.

Ground 5: His Honour erred in law in declining to identify for the jury and direct as to the intermediate facts requiring proof beyond reasonable doubt in accordance with *Shepherd v The Queen* (1990) 170 CLR 573.

Ground 6: The trial miscarried by reason of the prejudice occasioned by the Crown Prosecutor.

Ground 7: The trial judge erred both in leaving murder on the basis of joint criminal enterprise to the jury and in failing to identify properly the basis upon which any such verdict should be reached.

Ground 8: The learned trial judge erred in allowing the Crown to present evidence and make submissions suggesting that the deceased's knowledge of details

relating to the Offset Alpine fire was a motive for the offence of murder.

Ground 9: There has been a miscarriage of justice in the trial of the applicant on account of fresh evidence and evidence undisclosed at the trial.

Ground 1: The verdict is unreasonable and cannot be supported by the evidence.

Preliminary matters

49 The *Criminal Appeal Act* 1912 provides an appeal to this Court as of right in relation to an appeal on a ground which involves a question of law alone: s 6. Otherwise the leave of the court is required including when it is submitted that the jury's verdict was unreasonable: *Rasic v R* [2009] NSWCCA 202 at [12]. The correct approach to the determination of whether a jury's verdict is unreasonable or cannot be supported has been discussed on many occasions. Most recently in *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 the High Court said at [11]-[14]:

> "It is agreed between the parties that the relevant function to be performed by the Court of Criminal Appeal in determining an appeal, such as that of the applicant, is as stated in *M v R* [(1994) 181 CLR 487 at 493] by Mason CJ, Deane, Dawson and Toohey JJ:
>
> > Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.
>
> This test has been restated to reflect the terms of s 6(1) of the *Criminal Appeal Act*. In *MFA v R* [(2002) 213 CLR 606 at [58]], McHugh, Gummow and Kirby JJ stated that the reference to 'unsafe or unsatisfactory' in *M* is to be taken as 'equivalent to the statutory formula referring to the impugned verdict as

> 'unreasonable' or such as 'cannot be supported, having regard to the evidence'.
>
> The starting point in the application of s 6(1) is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses. However, the joint judgment in *M* went on to say:
>
> > In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.
>
> …
>
> In determining an appeal pursuant to s 6(1) of the *Criminal Appeal Act*, by applying the test set down in *M* and restated in *MFA*, the Court is to make "an independent assessment of the evidence, both as to its sufficiency and its quality". In *M*, Mason CJ, Deane, Dawson and Toohey JJ stated [at 492-493]:
>
> > In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict. Questions of law are separately dealt with by s 6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand".

50 The case against the applicant was entirely circumstantial. That is to say, it relied solely upon evidence of facts from which the jury was asked to draw inferences, which in turn were said to provide the foundation for the ultimate fact in issue – namely, whether or not the accused killed Ms Byrne.

51 A case is not defective or bound to fail merely because it relies upon circumstantial evidence to the exclusion of direct evidence. The strength of circumstantial evidence lies in its ability to show that, "according to the common course of human affairs, the degree of probability that the

occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed": *Martin v Osborne* [1936] HCA 23; (1936) 55 CLR 367 at 375 (Dixon J). It has been said that "circumstantial evidence is very often the best [evidence]": *R v Taylor, Weaver and Donovan* (1928) 21 Cr App R 20 at 21 (Hewart LCJ).

52 When, as here, the case against the accused is entirely or substantially circumstantial, "the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused": *Barca v The Queen* [1975] HCA 42; (1975) 133 CLR 82 at 104 (Gibbs, Stephen and Mason JJ) citing *Peacock v The King* [1911] HCA 66; (1911) 13 CLR 619 at 634; see also *Plomp v The Queen* [1963] HCA 44; (1963) 110 CLR 234 at 252. That statement of principle is uncontroversial. It is really "no more than an amplification of the rule that the prosecution must prove its case beyond reasonable doubt": *Knight v The Queen* [1992] HCA 56; (1992) 175 CLR 495 at 502 (Mason CJ, Dawson and Toohey JJ) quoting *Shepherd* at 578 (Dawson J).

53 At the same time, the trier of fact must bear in mind that a circumstantial case is to be considered holistically: *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 at [48]-[49] (Gummow, Hayne and Crennan JJ). Putting to one side for the moment "indispensable" intermediate facts (as to which see Ground 5), it would be wrong for a jury to acquit an accused merely because it harbours reasonable doubts about some inculpatory evidence, though it ignores or unduly minimises other, more compelling evidence of the accused's guilt. As it is often the case that "one piece of evidence … resolves doubts as to another" (*Chamberlain v The Queen [No 2]* [1984] HCA 7; (1984) 153 CLR 521 at 535 (Gibbs CJ and Mason J)), it is necessary to weigh and consider the totality of the evidence: *Hillier* at [48]-[49]. In doing so, the finder of fact ought not stretch credulity or engage in tortuous reasoning in order to explain away each and every individual circumstance as being consistent with innocence: *R v Micallef* [2002]

NSWCCA 480; (2002) 136 A Crim R 127 at [42] (Dunford J); *Burrell v R* [2009] NSWCCA 193 at [55] (Giles JA).

54 The Crown argued that the applicant's submissions ignored the cumulative force of the evidence, contrary to the High Court's warning against doing so in *Hillier*. It was submitted that the applicant placed undue emphasis on the conflicting expert evidence to keep alive the possibility of suicide: "That is, [the applicant argued] if it was physically possible for Ms Byrne to do a running dive to wherever she landed, then the Applicant must necessarily be not guilty."

55 As the discussion below indicates, I do not accept this submission. The applicant pointed to a number of factors, which in his submission, established a reasonable hypothesis consistent with his innocence. Among these were the unreliability of the identification evidence; the deceased's depression and previously attempted suicide; the ambivalence of the expert evidence with respect to whether Ms Byrne could have jumped from the cliff top or been thrown from there to where she landed; the illogicality of the prosecution's argument that the applicant had "esoteric knowledge" of the circumstances surrounding Ms Byrne's death; and, finally, evidence which gave rise to the reasonable possibility that, if Ms Byrne was thrown to her death, the applicant was not the person responsible (either alone or jointly) for the act causing her death.

56 In the analysis that follows, I have resisted any temptation to consider the case against the accused in a piecemeal way. In my view, this is a case where doubts about each piece of circumstantial evidence are reinforced, rather than resolved, by the rest of the prosecution's case. I have also borne in mind the deference due by an appeal court to the combined experience and commonsense of a jury that convicts an accused person on the basis of circumstantial evidence alone: *Burrell* at [64]–[65] (Giles JA); *Chahine v R* [2006] NSWCCA 179 at [88] (Johnson J, McClellan CJ at CL and Hoeben J agreeing); *R v Kaldor* [2004] NSWCCA 425; (2004) 150 A Crim R 271 at [2] (Dunford J). However, my evaluation of the whole of

the evidence satisfies me that the jury's verdict cannot be supported. I am not satisfied beyond reasonable doubt of the applicant's guilt. Although the jury heard from various witnesses the applicant did not give evidence. I do not believe the jury's verdict can be explained by any advantage which they had which was not available to this Court.

57 The Crown case at trial was that at approximately 11.30 pm on the night of Wednesday, 7 June 1995, the applicant acting either alone, or jointly with a second man, threw the deceased off the Gap at Watsons Bay.

58 In his opening address the prosecutor proffered the applicant's motives. Although proof of motive is not essential to a prosecution case it bears upon whether an accused has committed the crime with which they are charged: *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 344 at [5]. The first motive was said to come from the applicant's concern about Ms Byrne's knowledge of Rivkin's dealings with Offset Alpine about which there were suspicions of dishonest dealings and in respect of which an inquiry had been initiated by the Australian Securities Commission. The Crown prosecutor hypothesised that Ms Byrne was "about to do untold harm" to the relationship between the applicant and his employer, Rivkin, thus putting the relationship between the applicant and Rivkin in jeopardy with the consequence that the applicant would lose bonuses and other financial windfalls that he expected to receive.

59 Between 7 and 27 May 1995 the applicant and Rivkin travelled to Zurich and London on business apparently related to Offset Alpine. By this time it had been announced that there would be an ASC inquiry into that issue and the matter had received some publicity which was not favourable to Rivkin. There was evidence that the applicant had suggested to various people that an investment in Offset Alpine (which was a publicly listed company) would bring substantial returns because the insurer was about to pay out on a claim for the destruction of the premises in a fire. Although the evidence indicated that the applicant encouraged others to invest, he did not himself acquire any shares.

60 The second motive advanced by the prosecutor, which was, as I understand it, not unconnected with the first, was that the relationship between the applicant and Ms Byrne had deteriorated to such an extent that Ms Byrne wanted to terminate it and, being distressed at the thought of losing her, the applicant chose to kill Ms Byrne.

61 These motives were significantly elaborated by the prosecutor in his closing address.

62 The admissibility of evidence with respect to Offset Alpine and the availability of a motive relating to Ms Byrne's knowledge of the circumstances surrounding its affairs were unsuccessfully challenged by defence counsel at the trial. The applicant challenges the trial judge's ruling which is discussed below in relation to Ground 8. The trial judge rejected the suggested motive when sentencing the applicant: *R v Wood* [2008] NSWSC 1273 at [15]-[19]. For reasons which I will explain I have come to the same conclusion. Barr J also rejected the proposition that the crime was premeditated. His Honour found that there was a heated argument on the night of 7 June 1995 resulting in Ms Byrne's death. This, as it happens, was the only finding which the evidence would allow consistent with the jury's verdict.

63 Although, if it be assumed that Ms Byrne was killed by the hand of another, the applicant was reasonably suspected of being involved, the evidence falls short of persuading me beyond reasonable doubt that he was present or participated in a criminal act. Furthermore, the Crown has not excluded as a reasonable possibility open on all the evidence that Ms Byrne did not commit suicide. There is considerable evidence which suggests that she was suffering significantly from depression at the time. The Crown prosecutor accepted that it was an essential element of the Crown case that the jury must exclude the possibility that Ms Byrne committed suicide.

64 There was evidence that Ms Byrne was suffering from depression at the time that she died. She was described by her general practitioner two days before she died as “very, very depressed.” The evidence indicated that she had previously suffered from an episode of depression for which she was prescribed medication to which she successfully responded. She had previously attempted to commit suicide and her mother died from her own act. The evidence indicated that the fact that Ms Byrne’s mother had previously committed suicide was not irrelevant to the possibility that Ms Byrne may have taken her own life.

The relationship between the applicant and Ms Byrne - evidence of problems

65 Ms Byrne and the applicant had known each other for some time. They met in 1991 at a gym where the applicant worked as a casual fitness instructor. Ms Byrne was then a full-time model. They lived together in a flat at Kings Cross for about 6 months but their relationship was troubled and Ms Byrne terminated it. She took this course because of her concern that the applicant did not have a job and his future prospects were uncertain. The relationship was renewed when the applicant obtained employment with Rivkin, working as a driver and performing other tasks. They again commenced living together in an apartment in Elizabeth Bay in early 1994.

66 The applicant and Ms Byrne decided to buy an apartment but needed financial assistance to facilitate the purchase. It was originally intended that Ms Byrne’s father, Mr Tony Byrne, and Rivkin would assist with the financing. However, Mr Byrne only agreed to assist if he alone was on the title and his own solicitor did the conveyancing, conditions which Rivkin did not accept. As a consequence Mr Byrne withdrew his offer and Rivkin purchased the apartment in his own name. These events soured the relationship between the applicant and Mr Byrne, who also formed an unfavourable opinion of Rivkin. The applicant expressed confidence at the

time that his work with Rivkin would prove financially rewarding and he would soon be able to own the unit in his own right.

67 Ms Byrne and the applicant lived together in the apartment. The applicant was keen for them to be married although the evidence suggests that Ms Byrne was not ready for that level of commitment. In April 1995 Ms Byrne's sister Deanna left Australia for Japan. Before she left Ms Byrne told her sister that she and the applicant had argued because he was putting pressure on her to get married but Ms Byrne did not feel ready to take this step:

> "She told me that she – that Gordon was putting pressure on her to marry. And they had a little argument about it, because she said she's not ready for it, she was still too young."

68 Between the middle and end of April, Mr Tony Byrne said that he had a conversation with Ms Byrne, "She said that their relationship was being under a lot of strain because Gordon was putting pressure on her to marry him and she went on to say that, 'No, I love Gordon, and there's nobody else but as you know daddy, I'm quite – happy with my life at the moment. I love my work, I love the modelling and Gordon doesn't want me to work. He just wants me to stay at home and he'd just look after me. And it is putting a lot of stress and strain on our relationship because of this."

69 Ms Byrne's brother, Peter Byrne, gave evidence of similar conversations with Ms Byrne in mid-April 1995.

70 Deanna, Mr Robert Byrne (the other of Ms Byrne's brothers) and Ms Kylie Watson, a former student and good friend of Ms Byrne, gave evidence in which they suggested that the applicant bordered on being obsessive of Ms Byrne and that he wanted to know where she was at all times and who she was with.

71 Deanna Byrne also said that the applicant constantly called Ms Byrne whenever he was not with her. She said, "He was constantly calling her.

Just wanted to know where she was, who she was with. I found it a bit overbearing." However she did accept that "Caroline didn't seem to mind."

72 There was evidence from Watson that she thought that the amount of calls that the applicant made to Ms Byrne was "a little bit excessive but that being the age that I was, which was about 17, I think at the time I was still quite young and naïve…but in retrospect it was definitely a lot."

73 Ms Byrne's former boyfriend, Mr Andrew Blanchette, gave evidence that there was gossip around the City Gym that the applicant and Rivkin were in a gay relationship. Mr Byrne said he knew the rumours were having an effect on his daughter. The applicant, in an interview he gave to the "Witness" program on commercial television, acknowledged that there was gossip to that effect but stated that "I don't think she ever suspected that I was having an affair with Rene … [but] she probably didn't trust him [meaning Rivkin]."

74 In the week before her death, Ms Byrne and her father were in discussion about her employment situation. Mr Byrne said that this conversation was disrupted by a phone call that Ms Byrne received. After the call she said, "I'll have to go. That was Gordon. I have to go. He's in a shitty mood."

75 Ms Christine McVeigh, sales assistant at the City Gym, said she saw an argument between the applicant and Ms Byrne at the gym on 2 June 1995 (the Friday before she died) at about 8.30 pm. McVeigh said "I heard sobbing, I looked over and I saw Caroline in the corner…She was pulled back in the corner with her hands up and she was sobbing quite hysterically. Gordon was standing very close to her. I didn't take a great deal of notice of what was being said until I heard Gordon say something quite aggressively to her. " McVeigh said that the applicant said, "You're a fucking idiot Caroline." She described the applicant as "angry, confrontational, very, very close to Caroline - almost too close for comfort. He seemed to be dominating the situation completely." McVeigh said, "I didn't see any physical contact."

76 McVeigh was certain that there were two other people present during the argument, Mr Gary Redding and his girlfriend, Ms Arianne De Geus. McVeigh said that Redding "paid for casual entry" to the gym. She observed them for a few minutes and returned to the reception area and commented to Ms Glenda Williams about what she had seen. Williams confirmed that McVeigh had spoken to her about what she had just seen. Williams said, "She [McVeigh] said something – I'm not 100 per cent exactly but she said something about Gordon Wood having an argument with Caroline and he was being a bit rough with her." Williams recalled seeing "Caroline run out the gym crying" after having that conversation with McVeigh.

77 Following an earlier ruling disallowing other parts of De Geus' evidence, she was not called by the prosecutor in the trial although he later conceded in the absence of the jury that "If asked, she would give evidence that she witnessed no such event." Following an application under s 38 of the *Evidence Act* 1995, McVeigh was cross-examined by the prosecutor to establish De Geus was not there. However, McVeigh insisted she was present.

78 I have considerable reservation with respect to the reliability of McVeigh's recollection so many years after the event. I accept that such an event may have occurred at some time but doubt that, if it did occur, it was on this Friday evening.

79 Ms McVeigh's evidence was contradicted at the trial. Redding said it was not possible for there to have been an occasion in 1995 when he was present at the gym as he had not been there since 1994. He said that he only met Ms Byrne once, which was at Rivkin's home.

80 I discuss later Ms Byrne's movements on the Friday. She had worked that day and was unwell. Watson expressed concerns about her health to an

extent which made it unlikely that Ms Byrne would have gone to the gym on that evening.

81 Mr Angelo Georgio, Manager and part–owner of World Club of Fitness, gave evidence that over time he developed a friendship with Ms Byrne. Georgio said:

> "She did tell me she was having some problems in her relationship, because I would always ask her how Gordon was."

82 Georgio said that Ms Byrne had said to him that the applicant was "a bit possessive and a bit of jealousy there." He also indicated that "she was worried about his temper, he gets angry a lot, she was saying. He wasn't the Gordon she knew."

83 Georgio gave evidence of a conversation with Ms Byrne that took place in April or May 1995:

> "She was talking about jealousy again and how he's very possessive and I think she had sort of made up her mind that – well to my impression – that she was , the way she was saying it to me, that she was thinking about leaving him again…In that conversation I remember distinctly and again I took it as just a relationship problem, she said 'sometimes I fear for my life'. She said it like that."

84 In summary, it was the Crown case that by about March 1995 the relationship between the applicant and Ms Byrne was fracturing. The Crown submitted that Ms Byrne was tiring of the applicant's possessiveness and was concerned about his false promises of large bonuses and financial success from his connection with Rivkin. The Crown also asserted that she was concerned about the rumours surrounding the nature of Rivkin's relationship with various of his male associates including rumours that the applicant was in a homosexual relationship with Rivkin.

Evidence of a happy relationship

85 Although there was evidence that Ms Byrne may not have been happy in the relationship there was other evidence, which gave the opposite impression. The applicant returned from overseas on 27 May 1995. On that day Ms Byrne called her father who gave evidence that she said to him how wonderful it was that Gordon had come home that Saturday morning. She said, "it is wonderful. He's home. It's good to have him back home."

86 Miss June Dally-Watkins also saw Ms Byrne on that day. She said that although Ms Byrne had a cold she was "very excited because Gordon had returned, I think that very morning from overseas and she was very happy and very excited …" Other witnesses reported Ms Byrne's happiness that the applicant was coming home.

87 Peter Byrne said that he met with Ms Byrne for coffee before he went overseas in May 1995. He said, "She was her normal self. She seemed quite happy and relaxed…She [also] mentioned to me that Gordon was pressuring her to marry him. That when I questioned her about that, if that was any concern, she shrugged it off."

88 Mrs Natalie Butler (nee McCamley) considered herself to be Ms Byrne's best friend. She described her observations about the relationship between Ms Byrne and the applicant:

> "Caroline was very much – she was very happy. She seemed – you know, as a couple, they were very happy together; they seemed to be enjoying life. They did a lot. She didn't like it when Gordon went away for long periods of time. And before, just before her death, Gordon had been away for a while and she was getting frustrated because he was changing the day he was coming back…Generally they seemed very happy together and I never really saw them any other way. It was always quite normal and happy."

89 Watson said that her impression was "that he [Gordon] would often call Caroline on her mobile. So I knew that – or I assumed – that they were very very close." She said she thought they had a good relationship:

"Caroline didn't divulge too much information to me at the time about her relationship but it seemed to be okay."

90 The applicant's sister, Ms Michelle Wood, confirmed her statement dated 7 August 2001. In that statement she had said of Ms Byrne and the applicant's long-term plans:

> "They both communicated to me that they were getting married and having kids. They wanted children before Gordon was 35. My brother told me that she was the one and he was absolutely sure that she was the one."

91 Ms Wood also said, "I got the impression that she [Ms Byrne] was very much in love with Gordon as well."

Problems in Ms Byrne's career

92 Ms Byrne was an attractive and elegant woman who had ambition to be a successful fashion model. She was aged 24 at the time of her death. She had been working as a model through the Gordon Charles Management Modelling agency. She enjoyed the work but by the time of her death she was having difficulty defining her future career path.

93 Approximately 3 weeks prior to her death, Ms Byrne received an offer of full-time employment from the June Dally-Watkins agency. She had previously worked part time for June Dally-Watkins as a teacher. The offer was to work in marketing for the agency. She was troubled as to whether if she accepted the offer it would have an adverse impact upon her modelling career. She discussed these issues with Mr Gordon Donald of the Gordon Charles Modelling Agency, who was her agent seeking his views on what course she should take. Donald advised her that working with June Dally-Watkins would adversely impact on her modelling but that Miss Watkins might allow her to continue to perform some modelling work. She decided to accept the full-time job. After she had started with June

Dally-Watkins, Donald said they had a conversation in which Ms Byrne said that the job was “more difficult than she had anticipated.”

94 Ms Byrne commenced full-time employment with June Dally-Watkins on 29 May 1995. On Wednesday, 31 May she spoke with her father and told him “I miss the modelling. I miss the modelling very much … I do like modelling.” Mr Byrne said that he told his daughter that if she was going to be working full-time at June Dally-Watkins, “you have got to give up the modelling.” This was the conversation that was terminated when his daughter said that the applicant had called her and she said he was in a “shitty mood.”

95 Mr Byrne said that on Friday, 2 June his daughter had told him that she had spoken to Donald about her modelling and he had told her that “she would never be a top model, but that she still had several years of … work.” Her father described her mood on this occasion as “very, very happy. Very overjoyed at being told that she would never be a top model but that he … would be able to give her work for the years ahead.” She told her father that following this conversation she intended to cease working full-time for June Dally-Watkins but would work part-time with that enterprise and continue with her modelling.

96 On that Friday Ms Byrne had been working with Mr Hany Mohamed at premises on the northern beaches for June Dally-Watkins. Mr Mohamed gave evidence that he had given her a lift back to the city and that on the way home she had called the applicant. He said that “it seemed to be a happy conversation.”

97 Watson saw her outside the June Dally-Watkins agency on the Friday afternoon. She said that Ms Byrne had the flu and although in the past she had been an optimistic, vivacious and happy person, on that day “she seemed quite flat and fluey.” Watson said that she asked Ms Byrne if everything was okay and she responded that “she was just run down with the flu and stressed with work; that she couldn’t get to the gym so she was

feeling a bit down." Watson gave evidence that Ms Byrne "was really drained from work and seemed flat. She told me she had a promotion at work and that she didn't realise how hard it would be."

98 Watson and Ms Byrne caught a train together to Kings Cross and then went to a café near Ms Byrne's apartment. She said that Ms Byrne was "very vague and she seemed to be distracted … for some reason she was, I would say, not very engaging on that day." She said that Ms Byrne repeated that she had the flu and that she "felt like shit." Watson was sufficiently concerned about Ms Byrne's health to phone her at home that night. Although Ms Byrne said she was all right Watson said "I wasn't convinced." The available inference is that Ms Byrne was physically unwell and down about her work situation, an inference which is supported by the events which occurred early in the following week.

99 On Saturday, 3 June 1995 Ms Byrne spoke to a friend, Ms Narelle Cook. Cook gave evidence that Ms Byrne "was worrying a little bit about giving up some of her modelling and working full-time. She was also worrying about asking for a raise or asking for money … She really enjoyed the modelling and was just a bit apprehensive about having to maybe give some of that up, but was going to see if she could keep doing it."

100 On the same day Ms Byrne spoke to her sister Deanne in Japan who gave evidence that "everything seemed fine. She sounded tired and I think she had a cold. I could tell this from the tone of her voice." Ms Lisa Fraser, a part-time receptionist at the June Dally-Watkins agency, gave evidence that at the time Ms Byrne had a cold which she "was a little bit upset about."

101 Butler, a close friend of Ms Byrne, said that Ms Byrne was "sick and I thought, oh obviously, she hasn't been real well … and she was just a bit tired and someone with a cold really." She also said that Ms Byrne was "a little bit nervous about going to the Parklea markets the next week." However, she said that despite being nervous Ms Byrne was looking

forward to the work with June Dally-Watkins “even though it would be long days and quite hard work.”

102 Ms Byrne went to work on Sunday, 4 June. She apparently attended Narrabeen High School for a promotional event for June Dally-Watkins.

103 Mr Adam Leigh was Ms Byrne’s booking agent at the Gordon Charles model agency. He said that 2 days before she died Ms Byrne had been to see him to ask his opinion as to whether she should continue modelling or accept a full-time position at June Dally-Watkins. He advised her that the job with June Dally-Watkins would be more stable but she should still be able to do some modelling part-time. He said that he was “basically saying to her that she wasn’t one of the top few models so if she was looking for that, if she was looking for a work load of one of the top few models I said to her that it probably wouldn’t be there” and that her work would be “nothing compared to the leading models.”

104 Leigh said that she appeared to take the news “okay.” He said that after he found out that Ms Byrne had died he felt guilty and at the memorial service was upset, saying “I was actually feeling really guilty about saying these things to her.”

The issue of depression

105 The prosecution led evidence from several witnesses who testified to their observations in relation to Ms Byrne’s mental state shortly before her death. Among them was Ms Michelle Whelan, who in early 1995 was a 14- or 15-year-old student of Ms Byrne’s at the June Dally-Watkins School.

106 Whelan and the deceased came to be friends. Whelan recalled that at Ms Byrne’s invitation, she accompanied Ms Byrne on a trip to the Gap in January 1995. Whelan said that they discussed general topics on this quick visit. Whelan recalled asking Ms Byrne how she knew about the

Gap, and that Ms Byrne told her "it was one of her and Gordon's favourite places to go alongside with Camp Cove and other places like that around the bay." Whelan said she then asked Ms Byrne "what he [the applicant] was like, but she didn't want to answer me. She just stopped talking and she stopped looking at me and turned towards the ocean and was just looking out."

107 Whelan says that shortly after this visit, in about January or February 1995, she called Ms Byrne and they arranged another trip to the Gap. Whelan's evidence was that she had recently written Ms Byrne a note in which Whelan confessed she did not feel worthy of a place in the Dally-Watkins course, to which Ms Byrne responded that Whelan did deserve the opportunity.

108 Whelan said that on the second visit to the Gap, she stood at the cliff fence and, looking down into the ocean, said words to the effect of "I wish I was dead sometimes." Whelan recalled that Ms Byrne asked her to come sit next to her, which she did. Whelan's evidence was that Ms Byrne then said: "If you are thinking what I think you're thinking, it's not the answer." Whelan said that Ms Byrne went on to explain that although she too sometimes felt depressed, "there's always someone you can talk to." Whelan recalled that Ms Byrne told her that "she loved her father [Tony Byrne] very much" and "wouldn't do that [commit suicide] to her family." Whelan agreed that Ms Byrne's words had cheered her up.

109 On Monday, 5 June 1995 Ms Byrne consulted a general practitioner, Dr Cindy Pan. Dr Pan gave the following evidence in chief about the consultation:

> "She had been feeling depressed for about a month. She had been feeling a bit low for about a month and depressed for the last week and she had recently started a new job in sales for June Dally Watkins, and her boyfriend had been away recently for about 3 weeks for work, and he was now back. And she couldn't put her finger on what she thought was making her feel down. She had felt depressed about 3 years previously, and she had counselling and

medication and it had helped and she got better. And she said nothing specific had happened to set her off feeling depressed, and I asked her specifically, if she had any thoughts of harming herself, not because I thought she would, but more because that's a routine question that you ask a person who is feeling depressed and she said definitely not. And because she said she had been depressed in the past, and that seeing a psychiatrist and taking anti-depressants helped, I referred her to – she couldn't remember the name of the previous psychiatrist, though I referred her to a psychiatrist that I knew and I rang to get her an appointment. And they actually offered an appointment for the following day, but she declined that appointment because she had a work commitment for June Dally Watkins … and she was very adamant that she wanted to attend this work commitment and – because I said 'well I could write you a medical certificate'. Mainly because sometimes it's hard to get appointments, and because this appointment was available I thought it would be good if she could take it. But as it was, they then offered her an appointment for the day after that, so Wednesday."

110 Dr Pan was of course giving evidence many years after the consultation. It would be expected that a doctor, who would see many patients in a year, would have little independent recall of an individual consultation. She referred to her notes when giving evidence and her letter of referral to the psychiatrist was tendered. The letter was in the following terms:

"Dr Cindy Pan 5/6/95

Dear Dr Sippe,

Many thanks for seeing 24 y Caroline Byrne who is feeling very very depressed recently for ~1/12 but much worse for the past 1/52. She cannot understand why because nothing has actually happened to act it …… that she can think of. She had the same thing ….3 yrs ago and saw a psychiatrist (? Who) and had medication which helped her out of it.

She has just started a new job doing sales for June Dally Watkins and one's not sure how she feels about it.

She feels she can't do anything, can't sleep, can't express herself. No thoughts of self harm.

Many thanks for your review and management.

Yours sincerely."

111 When the doctor was cross-examined she clarified her notes saying that they included the following comments:

> "Almost can't go to work. Just started a new job."

112 She also accepted that her notes included the following:

> "Feels very depressed. Very severe in the past week. Just started new job … sales for June Dally Watkins. Not sure what she would like to do.
>
> Can't express herself. Feels good for nothing… "

113 After Ms Byrne died Dr Pan wrote a note to the police on 8 June in which she observed, inter alia:

> "Dear sir, I am Cindy Pan and I have been in general practice for three years. I had been seeing Caroline Byrne for about two years on and off. Her most recent visit was the 5th of June 1995 when she described herself as feeling very depressed. We talked for a long time and she said she could not put her finger on just what she was unhappy about, but she had felt depressed for about one month, but more so in the past one week. She had recently started a new job in sales at Dally-Watkins, where she has worked for three years in a different position. She could not say whether she liked it or not. She felt as if she could not express herself or say what she wanted to do. She denied firmly any thought of self-harm, I encouraged her to see a psychiatrist, and she agreed to go. I rang the psychiatrist Dr Sippe's rooms and made her an appointment. They said they could not take her that same day, but gave her a time for the following day, Tuesday, 6 June 1995. She could not take it, she said, because of a work commitment. I encouraged her to take that time off work and go to Dr Sippe, saying she could easily have a medical certificate. She insisted that no-one else could replace her so I made her an appointment for Wednesday, 7 June at 4.30 pm. She accepted this and was keen to go."

114 When she gave evidence Dr Pan said that she did not believe that Ms Byrne was suicidal when she saw her but agreed that some people who commit suicide do not display any symptoms at all. She said that Ms Byrne had not told her that when she had felt depressed 3 years previously she had attempted to commit suicide by a drug overdose. Ms Byrne did not tell

Dr Pan that her mother had committed suicide. Dr Pan gave evidence that "when people are suicidal, there are usually some antecedents."

115 Dr Pan said she had asked Ms Byrne if she was feeling down about her work but she said, "it wasn't really that, no." The two changes that Dr Pan identified in Ms Byrne's life which may have altered her disposition were that the applicant had returned from overseas and the change in her work situation. However, Dr Pan said that she "didn't specifically say that either of those things were what was making her depressed."

116 On 5 June Ms Byrne took a phone call at 12.30 pm, scheduling a modelling booking for 4 pm the following day. The booking was later rescheduled to 5.15 pm. She also had lunch with friends, Ms Tanya Zaetta and Ms Tali Blumenfeld. Zaetta gave evidence that "Ms Byrne was a little bit confused about work." Zaetta also said that Ms Byrne told her that "Gordy and I are having a moment." Zaetta said that she took this to mean a "little tiff" in their relationship. Blumenfeld said she did not pay much attention to this discussion as "all couples argue. So I didn't think anything of it."

117 Zaetta also said "I know that Caroline had a lot on her mind, for example there was the whole June Dally-Watkins thing of whether Caroline should take the job at June Dally-Watkins or not." She said that Ms Byrne did not appear depressed and did not tell her about the appointment with Dr Pan.

118 Ms Byrne rang her father at 3 pm on Monday, 5 June. When he gave evidence he said that his daughter had told him that she and the applicant had a quiet weekend and she felt much better. He said she sounded happy and excited that she would still be modelling.

119 This evidence is at odds with a statement which Mr Byrne made on 3 January 1996, in which he said that Ms Byrne told him during this telephone call that she was feeling very down about work and was anxious about talking to Ms Carel Clifford at June Dally-Watkins:

> "I last spoke to Caroline on Monday, June 5. It was the day her brother Peter arrived home from an 8-week trip to Japan, not China. We spoke on three separate occasions. She had been to the doctors. Her last call to me was about 3 pm. She said she was going to an assignment to PLC Pymble that evening and tomorrow she was going to Parklea. She said she was going to take my advice and when she saw Carol [sic] Clifford from June Dally-Watkins, during the week, she was going to tell her she wanted to keep up your modelling career with Gordon Charles and go back to casual with June Dally-Watkins. She was feeling down about this decision and I felt she was suffering from a mild case of anxiety. She had an appointment on Wednesday afternoon with a counsellor which she did not keep…"

120 According to his evidence at trial, Ms Byrne did not mention visiting Dr Pan or the appointment with Dr Sippe.

121 In his police interview on 14 June 1996, the applicant described a conversation with Ms Byrne at around 7 pm on the Monday:

> "She rang me and asked where I was and I said 'Ill [sic] be home in a minute.' I thought she rang from home. I said, I'll be home in a minute. I'm just walking through Kings Cross, and she said, Well, I'm not at home yet; I'm visiting a friend in Bellevue Hill and she said, But I'll leave now and I'll see you at home soon."

122 The applicant explained that he knew Ms Byrne was not visiting a friend in Bellevue Hill for two reasons: "because I know she didn't have a friend in Bellevue Hill and secondly she never would have said to me I'm visiting a friend in Bellevue Hill; she'd say, I'm at so-and-so's."

123 The applicant said that when Ms Byrne returned home that evening "she didn't look her normal self but I put it down to the fact that she was unhappy with her work and that she'd had the flu and what have you". In the subsequent conversation Ms Byrne apparently acknowledged that she was not with a friend in Bellevue Hill and explained to the applicant that she had been to the doctor and "the doctor had said she was depressed."

124 The applicant said that he and Ms Byrne had a conversation in which Ms Byrne indicated that she was really unhappy with what she was doing at

work and she said “I think I’ve taken on something that I don’t like and I don’t think I can get out of it.” The applicant said that he tried to comfort her and tried to encourage her to speak to her father but she declined.

Tuesday, 6 June

125 On Tuesday, 6 June 1995 both the applicant and Rivkin were interviewed by the ASC (later known as ASIC) in relation to the affairs of the Offset Alpine Printing Group between 1 December 1994 and 28 February 1995. No charge resulted from the inquiry.

126 Mr Jamie Fawcett, a journalist, said that the applicant told him that the inquiry was difficult for Ms Byrne “because he couldn’t tell her or explain to her what was going on.”

127 During Tuesday, 6 June Ms Byrne twice rang the modelling agency. It seems that she withdrew from the job which had been scheduled for that day at 5.15 pm. The job was allocated to another model.

128 Ms Byrne worked on the Tuesday at Parklea markets and was seen to leave there at about 2.15 or 2.30 pm. She made a purchase from BP Rose Bay at 3.39 pm that afternoon.

129 That evening at 5.47 pm and again at 6.08 pm the applicant called his doctor, Dr Joseph Grech. He asked the doctor whether he could have a medical certificate to explain Ms Byrne’s prospective absence from work. Not surprisingly the doctor would not give him the certificate. The doctor said that his best memory was that the applicant had said he wanted to take Ms Byrne to the Blue Mountains as he had not been able to spend much time with her lately.

130 When the applicant was interviewed in 1996 he said that after returning home from work on Tuesday night, he and Ms Byrne continued the

conversation from the previous evening about Ms Byrne “wanting to go sick for a period of time.” The applicant described her as “like a very different person” and “she was very off about the whole thing”. Ms Byrne said, “I wanna go sick. You know, I cant [sic], I cant [sic] quit; I'm gonna have to fake an illness or something.” The applicant said he responded, “Well you know, you’ve got to come up with something really good but if you come up with an illness, like glandular fever…you cant go to the gym, you cant go out and see people. You're gonna have to lie low so that the word doesn’t get out that Caroline Byrne’s having a great time when you’re trying to get off work.” He said, “She asked me to ask my doctor, who is a friend, for a sick note to get her off work and I said, well, I would do that.” He also indicated that “she wouldn’t speak to...Carel Clifford – because she was kind of scared of Carel and she didn’t like Carel very much. So I said, well, look, I’ll ring up Carel and say you’re really sick and I’ll say I've picked you up from the doctors and you're sick and you cant come in for a while.”

131 The prosecution criticised the actions of the applicant. It was submitted that the applicant was attempting to provide an excuse so that he could take Ms Byrne away. It was submitted that their relationship was unravelling and that the applicant believed he needed to spend time with Ms Byrne alone to endeavour to retrieve it.

132 I have a different view. Contrary to the Crown’s submission, the applicant’s actions in relation to Ms Byrne at this point are at least equally consistent with those of a caring partner concerned that Ms Byrne was not coping with her new role with June Dally-Watkins. Although he was perhaps naïve, I believe it was just as likely that he was endeavouring to ensure that her employer did not learn of the reason for her difficulties and the fact that she was suffering from depression. Although his action in contacting his own doctor led to an inevitable rejection of his request, it is untenable that the only conclusion to be drawn was that the applicant was seeking to secrete Ms Byrne to serve his own ends rather than provide her with some time to restore her health.

133 The applicant called his home at 7 pm that evening. At 7.26 pm Ms Byrne used her mobile phone to try to call home. She then tried to call the applicant's mobile phone. The records show that the calls were sourced through a mobile phone tower described as "North Shore." There was evidence at the trial that mobile phone calls made at Watsons Bay and the Gap could be recorded as calls from "the North Shore." However, I do not believe this evidence is sufficient to enable any conclusion to be drawn as to the location from which the call was made.

134 At the trial the defence sought to make use of this evidence to support an inference that Ms Byrne may have been at the Gap on the Tuesday evening of 6 June, but was not then in the company of the applicant. Although she may not have been with the applicant I do not believe her whereabouts can be established. Although it is possible that she was at the Gap there are many other locations from which her phone may have registered as making contact with "North Shore."

135 Ms Byrne called her home again at 7.49 pm. On this occasion the call was recorded as coming from "Sydney City." This was the last call Ms Byrne made from her mobile telephone.

136 Between 8.30 and 8.50 pm that night the applicant rang Clifford (at the Dally-Watkins office). He left a message on the answering machine in the following terms:

> "Carel, it's Gordon Wood, Caroline's boyfriend, ahmm, I'm not sure what the time is, I've just got a phone call from her doctor. She's been over there since she finished work and apparently she's undergoing some tests. She's pretty sick. Apparently she hasn't got over this thing and the doctors all they've told me so far is that she won't be working for a while which is a problem for you guys ahmm so because she's got all the stuff out at wherever this career show is so ahmm if you want to give me a call at home tonight until about 9.30 on 368 1010, failing that I'll give you a call at work tomorrow to let you know exactly what the status is but ahmm its not good at the moment so ahmm but I'm told not to

> worry so don't worry and I'll let you know more as I know more okay, so I'm sorry about that, Bye."

137 Within a short period of time Clifford rang the applicant back and he told her that Ms Byrne would not be returning to work. She said the impression she received was that Ms Byrne was not coming back at all. However, Clifford made notes of the conversation and I am satisfied that they are likely to give a more accurate impression of the exchange. In those notes she said that Ms Byrne would be off sick for two days: "sick 7 and 8/6 flu last week. In bed on weekend. Doctor tonight and tomorrow evening. Tests and a specialist. 8.30 picked her up from doctor ??????." Clifford said that during the phone call the applicant appeared concerned for Ms Byrne's wellbeing.

138 The applicant said that after making those phone calls, "Caroline seemed relieved that I had made the phone call." He suggested to Ms Byrne that they go away for a short break to the Blue Mountains to get away and discuss what she really wanted to do. He described the arrangement when the two of them went to bed on Tuesday night as being that Ms Byrne would "keep her phone off with the machine on, turn your mobile off so don't take any calls and if I call you then you can edit the calls and pick it up, so Carel can't ring you and I'll speak to her."

139 Telephone records indicate that no calls were made on Ms Byrne's mobile phone on 7 June 1995. No voice mail diversions were recorded on her phone.

140 The applicant was interviewed by Insp Wyver on 14 June 1996. He told Inspector Wyver that on the Tuesday evening of 7 June Ms Byrne was "very clingy and hugging me a lot … ." He said they had agreed that she would stay home and rest the next day and keep her mobile phone off and the answering machine on so that phone calls could be screened. In a later interview with Det Sgt Jubelin on 23 July 2001 the applicant said that

he and Ms Byrne were up until late on the Tuesday night talking about her situation.

141 The Crown asked the jury to infer an ulterior motive in the applicant in relation to the turning off of Ms Byrne's mobile. The suggestion was that he wished to isolate her from her family and friends. There is nothing in the evidence to support this speculative assumption. It would be equally possible, and I believe more likely, that Ms Byrne turned it off because in her depressed mood she did not wish to have contact with other people.

142 After her death, the applicant asserted that Ms Byrne had told him that she was at the Gap on the Tuesday night. He told her brother that Ms Byrne had been late home that night and when she arrived home she said she had been out at the Gap thinking about things. As I have indicated, the telephone record is not inconsistent with Ms Byrne having been at the Gap.

143 On 10 June 1995 the applicant apparently told Ms Cook, Ms Byrne's childhood friend, that he did not know where Ms Byrne was on the Tuesday evening. On the same day he told Mr Peter Cameron that Ms Byrne had been at the Gap two nights before she died. He apparently told Dally-Watkins on the weekend after Ms Byrne's death that she had gone missing for 5 hours on Tuesday night and he thought she was at the Gap contemplating jumping at that time.

144 The Crown emphasised that no mention of these matters was made in any statements or interviews with the police. In an interview in July 2001 the applicant asserted that the police officer that conducted his 1996 interview, Insp Wyver, had told him that Ms Byrne had called his (the applicant's) cell phone from the Gap and that "that would be my only knowledge of her having been at the Gap." When asked if he had any evidence that suggested that she was at the Gap during the day leading up to her death he said that "I have no reason to believe that she was there other than the police told me she was."

Wednesday afternoon – the evidence of Martin and Melbourne

145 The movements of Ms Byrne on the Wednesday are difficult to establish with any confidence. Two people, Mr Lance Melbourne and Mr Craig Martin, operators of the Bad Dog Cafe in Watsons Bay, alleged that they saw her, or someone who looked like her, with two men in the Park near the Gap known as Robertson Park. It was the prosecution case that Martin and Melbourne had seen Ms Byrne and the applicant with another person at approximately 1 pm and that Melbourne saw them again at approximately 3 pm in the Park. However, Martin and Melbourne could not say with any certainty what day it was that they saw the three people in the Park. The evidence from Martin was that on either a Tuesday or Wednesday in June 1995, between 11 am and1 pm, he saw three people. He said that the woman was stunning. The evidence was that the persons who were seen were happy. There was no suggestion of any animosity between them at that time.

146 I have discussed the problems with this evidence in relation to Ground 2. A summary of relevant matters is all that is presently required.

147 There are other difficulties with the evidence of Melbourne and Martin. They were first asked to identify the applicant and Ms Byrne from photographs which they were shown by Miss Dally-Watkins some days after Ms Byrne died. It has long been accepted that people have difficulty in identifying a person they may have seen in a collection of photographs which they are later shown. However, when the witness is shown only one photograph the opportunity for misidentification is significantly enhanced. I am not satisfied that the evidence is capable of establishing that Ms Byrne or the applicant were present in Robertson Park in the afternoon. The evidence was that the persons who were seen were happy. There was no suggestion of any animosity between them at that time.

148 The evidence indicates that at 3.32 pm Ms Byrne's debit card was used to purchase petrol and chocolate at a Caltex outlet in Paddington and her debit card was used to withdraw $50 from a bank in Vaucluse. These latter transactions took place at 3.47 pm. There is nothing to suggest that Ms Byrne did not make these purchases. Vaucluse is closer to the Gap than Paddington with the consequence that her movements are consistent with her driving from her home through Paddington and then to Vaucluse before going to the Gap. This evidence does not sit comfortably, although it is not necessarily inconsistent with, the suggestion that she was in Robertson Park. Nor is it inconsistent with the applicant's version of the events.

149 The Gap and its surrounds are visited by many people every day. Many of those persons will be well-dressed, younger people enjoying the surroundings including the park. It would be likely that persons of similar general appearance to the applicant and Ms Byrne would be present from time to time.

150 Martin said that it was about a week after he saw the three people that Dally-Watkins approached him with photographs of Ms Byrne and the applicant. He said that he also saw a white Vitara motor car (Ms Byrne and the applicant owned such a car) there at 8-9 pm the night after he had seen the people there during the day, and saw the car again the next day. He did not notice any police around the next day. He said that he saw a green Bentley the same day he saw the people, he thinks after he saw them. He described this car in detail. Although there was a suggestion that the Bentley was one owned by Rivkin I am satisfied that this was not his car.

151 Melbourne said that they saw the three people one to two weeks before Dally-Watkins came to the cafe. He saw them around the middle of the week at around 1 pm. He said that he saw a Vitara the same day in the afternoon at about 4-5 pm, at 11 pm that night and the next morning at 8 am. He also described seeing a two-door Bentley that day. He did not

know the exact date. He did not see any police or Rescue Squad or police ropings the next day. He said he was not sure of the date of these events.

152 Ms Sandra Munro, Melbourne's partner, recalled seeing a Suzuki Vitara vehicle one day outside the Bad Dog Cafe three times, in an afternoon about lunch time, that night and the next morning. She said that the occasion was a few days before Dally-Watkins came to the cafe to ask about the events of 7 June. (Dally-Watkins first went to the cafe on 10 June). Munro said she saw a wallet or some keys in the Vitara the next morning. She said that she also saw a green Bentley a few days before or a few days after she saw the Vitara but before Dally-Watkins came into the cafe.

153 As I have indicated, there are significant issues in relation to the reliability of the evidence of Martin and Melbourne. I have discussed them in detail in relation to Ground 2. However, they include a mistaken positive identification of Leigh as one of the two men in the Park that afternoon. The Crown accepts that Leigh was not there. The Bentley was most likely owned by Mr John Singleton. Apart from these difficulties, the manner in which they were first asked to identify Ms Byrne and the applicant from photographs causes me to doubt the reliability of their evidence. There evidence does not justify a finding that either the applicant or Ms Byrne were at the Park that afternoon.

Wednesday evening – the evidence of Doherty

154 Doherty lived in an apartment above shop premises on Military Road in Watsons Bay, a short distance from the Gap. His studio overlooked Military Road. I have discussed his evidence in greater detail in relation to Ground 2. In 1998 Doherty came forward with evidence that he had heard a helicopter some time after midnight, around 1.30 to 2 am on 8 June 1995. He said that earlier in the evening, before 8 pm, "I heard a young girl

outside who was sort of slurring her words and moaning." He described the scene in the following terms:

> "I saw the young girl with her head in her hands sitting on the kerb at the bottom of the light post on the far side of the road from my studio. She was moaning and slurring her words and in conversation with another person, who was standing underneath the awning of the building I was in. I couldn't see him. I could hear the voice but I couldn't see the person. And there was another smaller man – another man sitting on the wall just up from where the girl was sitting. And he wasn't – he was just sitting. And occasionally he would get up and walk in and out of the shadows between where he was sitting and the pizza bar, that's the pizza bar in Watson's Bay. That was my initial look and I thought they were having an argument and they were coming from the pub. On many occasions there's arguments and sort of merry drunk arguments between people on the way home."

155 As they continued arguing, Doherty said he "looked out once more and the three people were together on the far side of the road … the girl was in the middle of the two men and they were walking north towards the Gap park … they just became shadows as they walked up the road."

156 Doherty was of the view that the woman was under the influence of drugs or alcohol. He also said, "she was not carrying on normally. She was being combative. She wasn't making any sense and she was moaning and slurring her words."

157 Doherty gave a description of the man who was initially under the awning as "a tall man probably around 6 feet tall. He had dark clothes on. I thought it was a leather jacket, a dark leather jacket, probably black and it was like a three-quarter length down to, you know, the thigh below the bottom and he had short cropped blonde hair." The other man was "dressed in dark clothes … he was small … about 5 foot 6 inches and I thought he had something on his head like a beanie." The girl had "dark clothes on … and I have a feeling that she had denim on. I don't know whether it was a denim jacket or denim jeans or something." Doherty did not see the face of the girl and could not describe her hair. He said he could not tell whether she had long hair "because she had her hands on her head."

158 At about “10.30ish… for about an hour” Doherty described hearing another argument “coming from near the pathway where the Simon University meets the Gap lookout and I recognised the argument as a continuation of the argument I’d heard below me, even though it was further away.” He was unable to make out any words of the argument but he did say, “there seemed to be a girl’s voice and two men’s voices.”

159 Doherty said that “about 11.30 or 12 I heard a [female] scream, a short scream and that was it.” The following day, on 8 June 1995, Doherty spoke with his neighbour Ms Fairlie Kingston and told her that he had heard a scream the previous evening in the context of “somebody going off the Gap.”

160 Doherty had been travelling extensively between June 1995 and early 1998. Upon his return in 1998 Kingston showed Doherty a newspaper article which contained photographs of the applicant and Ms Byrne. Ten days later he again spoke to Kingston and told her of his full recollection of 7 June 1995.

161 A short time after his discussion with Kingston, the “Witness” television program was broadcast. Doherty viewed the program. He said that it was the first opportunity he had had to have a closer look at what the applicant looked like. In his evidence at trial Doherty described the taller man that he had seen under the awning as having a “similar stature,” “looks similar,” “he was the same slim build,” “hair was similar,” and a similar head shape to the applicant. He made a statement to the police in April 1998.

162 The evidence from Ms Byrne’s family and friends as to Ms Byrne’s usual demeanour was entirely at odds with her being “drunk” or “stoned” and sitting in the gutter arguing and shouting at people. Her sister Deanna said that she had never seen Ms Byrne drunk and her friend Zaetta said that the description given by Doherty would be “absolutely absurd” if applied to Ms Byrne.

163 Doherty's description of the taller man, which the Crown submitted was likely to be the applicant, was not consistent with his appearance at the time. Photographs of the applicant taken in 10 June 1995 by Dally-Watkins and Mr Brett Cochrane (also known as Basquali) do not show him to have very short hair. Mr Byrne also gave evidence that at the time the applicant "certainly did not have short back and sides."

164 Doherty described the person he saw as having "short cropped blonde hair" and that his hair was "very, very short." He was emphatic that the man he saw did not have long blonde hair. He said that you could "see the shape of the head very clearly."

165 This raises one of the common issues in relation to identification evidence. I deal with it comprehensively under Ground 2. When the applicant appeared on the "Witness" program he did have short hair. There is every chance that Doherty's memory has been influenced by the images he saw of the applicant well after 1995.

166 At Watsons Bay there is a licensed hotel and a tavern. It would not be unusual to find people in the streets in the evening, some of whom may be influenced by alcohol, and no doubt from time to time people had arguments.

167 The Crown case relied on Doherty's evidence. The jury were directed that his evidence did not purport to identify the applicant or the deceased. They were also directed that they could not conclude on the evidence that Redding, an acquaintance of the applicant, was the second man. They were directed that "at best the evidence is of people, including two persons whose appearance was consistent with their being the accused and the deceased."

168 Doherty's evidence of hearing the same persons arguing later that night around Simon University just before a scream, was contrary to the

evidence of Mr Norman Wano and Mr Domenico Brunetta (the fishermen who were present at the time). They said that the scream they heard was isolated. Neither Martin nor Melbourne gave evidence of hearing an argument that night, although Martin said that he saw the Vitara at about the same time as the argument is said to have occurred.

169 Even if one accepted that the woman that Doherty saw was the deceased, that did not prove or necessarily support an inference that the applicant was with her. The jury were earlier told by the trial judge that the Crown would submit "that if the deceased were there, then the accused her partner, was more likely to be there as well. So you can use the evidence in that way as well." This reasoning was dangerous and the jury should have been warned against it, particularly in a trial where this was a central and contested issue.

170 I am not persuaded that Doherty's evidence establishes that he saw either Ms Byrne or the applicant that evening.

The fishermen

171 Wano and Brunetta went fishing at the Gap on the night of 7 June 1995. Wano gave evidence that he heard a female scream which went for "a couple of seconds I reckon" after 10.30 pm. He described it as a scared scream which he said was "very loud at first and then it got fainter towards the end." He said the scream emanated from a point approximately 100 m to the left of the flat rock near the Dunbar anchor.

172 Brunetta also said that he heard a woman scream which lasted "a couple of seconds." He said it was like someone who was "[in] panic, scared, I don't know something like that." He said it was one voice and loud and was a continuous scream. He said it was like a female who was panicking as if she was in trouble. He said that after the scream the whole area went "dead silent." Brunetta could not pinpoint where the scream came from,

indicating that it could have come from any part of the northern section of the Gap.

173 Wano said that the evening was “pretty-very dark” and that you could not really see things at the bottom of the rocks when it was dark. He also said that it was windy.

174 Brunetta also said that the night was dark and quiet. He said that apart from the scream he heard no other voices around the area of the Gap.

175 Approximately 1 hour after he heard the scream Brunetta said he saw the applicant calling “Caroline, Caroline” from a position close to the Dunbar anchor. The applicant saw him and asked whether he had seen a blonde girl. Brunetta indicated that he had seen no-one but did not mention the scream that he had heard. He said that when the applicant came back sometime later with two other men he told them about the scream. He said that at that point the applicant asked to borrow his torch and used it to look over the edge. When the applicant came back he asked him whether he had found his friend and the man replied “no.” Ms Byrne’s body was later found in a position, which was consistent with the point on the top of the cliff from where Brunetta reported the scream to have come.

176 Wano saw the applicant shining the torch towards the water but in his opinion its beam was not strong enough to see to the bottom of the cliff. He said Ms Byrne’s body was later found in the area where the torch was shining although he did say that the beam of light was “going everywhere, like when you are searching for something.”

The applicant’s movements on the Wednesday

177 The applicant gave several accounts of his movements on Wednesday, 7 June 1995: in his statement dated 12 June 1995; in an interview with the police on 14 June 1996; on the “Witness” program on 12 April 1998; and in

his interview with the police in London on 23 July 2001. These accounts are largely consistent.

178 When interviewed on 14 June 1996, the applicant said, “normally of a morning Caroline was an early riser like me; she’d get up really early and we’d go and exercise and what have you. But she hadn’t been doing that obviously while she’d been sick and while she was depressed and she stayed in bed in the mornings. She found it really hard to get up, which is unlike her.” He explained that all week “she had real trouble getting up, getting to work.”

179 He said that on the Wednesday he got ready for work, kissed Ms Byrne goodbye and said to her “‘I’ll see you at lunchtime’ and she sort of nodded.”

180 The applicant said that he came home between 12.45 and 1 pm after dropping Rivkin off to his lunch engagement at Alife restaurant. It was the applicant’s recollection that Rivkin had lunched with Richardson that day.

181 The applicant said when he arrived home “I went in to get her and she was still in bed”. He said that he went to wake Ms Byrne and she stirred and smiled. He asked her if she wanted to get up and come and have lunch and she “said no or she shook her head.” When asked if she wanted to stay in bed, she nodded. He said he felt that “this was not normal Caroline behaviour.” He said that he entered the bathroom and opened the cupboard to find “3 or 4 Rohypnol sleeping tablets in a little cut-off piece of silver foil.” He said that the tablets were left over from his recent trip with Rivkin. The applicant said that he returned to the bedroom and asked Ms Byrne if she had taken the Rohypnol. She said, “Yes, I've had some for the last few nights ‘cause I haven’t been able to sleep.”

182 As it happens the autopsy report does show “past ingestion of Rohypnol as metabolite was detected in the urine, but no active drug or metabolite was detected in the blood. Blood alcohol was nil.”

183 He said that he left her in bed to rest and joined his two friends Cochrane and Mr Nick Samartis at Dittos on Victoria Street, Darlinghurst. He said that his friends had already eaten. He ordered some food but said that before it arrived “Rene then called me to pick Graham Richardson up from the restaurant” so he left before he ate his lunch and drove down to the restaurant in East Sydney.

184 Cochrane agreed that the three friends had met for lunch at Dittos. He indicated that the applicant did not mention that he had a prior lunch arrangement with Ms Byrne. Cochrane recalled the phone conversation that the applicant took and said that after that call the applicant immediately left and went without waiting for his lunch. Samartis said that the applicant appeared to be his usual self on that day.

185 Mr Michael Jaggard was the owner of the Alife restaurant in East Sydney in 1995. He gave his first statement to police almost 9 years after the event. He said that Rene Rivkin did dine at his restaurant on Wednesday 7 June 1995. Jaggard said that the applicant dropped Rivkin off in “one of the Bentleys… I think it was a convertible.” He also said that he was a “car fanatic.” I doubt whether his recollection is correct. When it was suggested to him that the convertible Bentley he described was not owned by Rivkin until 23 October 1995 he responded, “I thought that’s what I saw.”

186 Jaggard said that when the applicant returned to the restaurant to collect Rivkin at around 3 pm, “Gary” accompanied him, meaning Redding. Redding came to know the applicant through Rivkin. Jaggard said he saw that “Gordon had a brief conversation with Rene. Gary was sort of standing back a little bit. The discussion looked a little bit heated.” Redding could not recall whether he had been at the Alife restaurant that afternoon.

187 Jaggard also gave evidence that in a conversation with the applicant, a few months after the death of Ms Byrne, the applicant said to him on two occasions, “don’t tell anybody that you saw me at your restaurant that day

or kind of, you know, or else." Jaggard described the applicant as "red-faced angry" when he approached him. Jaggard suggested that the applicant had offered him shares in the UK to "keep quiet." Jaggard said that he was fearful of the situation.

188 Mr Graham Richardson gave evidence that the police approached him in 2000 regarding his lunch arrangements on 7 June 1995. Richardson said that his diary entry for lunchtime on 7 June 1995 read "1.30 pm San Fran Grill Peter Moore" with two telephone numbers. Rothfield, a journalist with the Daily Telegraph and Sunday Telegraph newspapers, gave evidence that he wrote an article, "Super Deal in Moore's lunch pack," for his column on 11 June 1995. The article concerned the lunch on 7 June 1995 at the San Francisco Grill at the Hilton Hotel between Mr Peter Moore and Richardson. Richardson accepted that he regularly met with Rivkin, that he often arranged ad hoc meetings and that he could not rule out that he had lunch or coffee with Rivkin the day before or after 7 June 1995 or even the morning of 7 June 1995.

189 During the day, Ms Byrne's family and friends had unsuccessfully attempted to contact her. When they telephoned her mobile telephone they were greeted with the standard Telstra message indicating that the telephone was switched off or out of range.

190 Blumenfeld and Butler also telephoned the apartment at noon and 3.30 pm respectively. There was no answer and each left a message on the answering machine. Ms Byrne's brother also telephoned the apartment at about 4 pm indicating that he had arrived home from overseas. They had previously arranged to meet up at Mr Byrne's home on the Wednesday night.

191 Mr Byrne telephoned his daughter's mobile phone between 5.30 and 8 pm but there was no answer. He telephoned the landline between 6.30 and 7 pm and again there was no answer. Mr Byrne also telephoned the applicant's mobile telephone before 8 pm but it was not answered.

192 Rivkin left two pager messages with the applicant at 7.38 and 8.33 pm telling him to turn on his telephone. However, the applicant did not respond, which may be consistent with his claim that he had fallen asleep.

193 The applicant said that he recalled dropping Richardson off after lunch between 2 and 2.30 pm to "either the Packer Building, AC, ACP or the Rugby League Building 'cause he was working on the Rugby League thing." By that stage, as he had not eaten, he said that he went down to the Lamrock Cafe in Bondi, which a friend operated, to eat a burger. After that he said "I probably ran a few errands." Between 3 and 4 pm the applicant said he went home to see how Ms Byrne was but she was not there. He said "I figured she'd done one of the things I suggested, like going and see her dad or maybe she'd gone to meet Natalie or maybe she'd gone to the psychiatrist or the doctor or Carel." He said that he went back to work and returned home around 6.45 or 7 pm. Ms Byrne was not home when he arrived.

194 The applicant always maintained that he had not been at Watsons Bay at 1 pm or around 3 pm. The applicant's phone records indicate that he made calls for work at around midday and telephoned Cochrane at 1.18 pm. From 3 to 4 pm the applicant made three work-related calls when his user location was identified as "Eastern Suburbs."

The applicant's account of his movements on the Wednesday evening

195 The applicant gave a detailed account of his movements in his interview with police on 14 June 1996. The applicant said that he arrived home just as the ABC news on television was starting. He said that he "fell asleep instantly" on the couch and woke up "some time around elevenish, eleven-thirtyish." In an earlier statement the applicant indicated that he woke up at "12.40am." He said "Caroline wasn't home and there was something seriously amiss." He knew something was wrong because "she would

never ever ever ever ever go out without telling me where she was going." He tried to ring her but said that her phone did not answer and he realised he had told her to turn her phone off. He said that he left a scribbled note at home saying "If you come home, call me on mobile." He said that he then went down to the car park where they usually parked their car. When he could not find the car he said that he ran down to Crown Street and took one of Rivkin's cars, an F100 utility, which he used on occasion.

196 The applicant said he went to Ms Byrne's father's apartment to see if Ms Byrne's car was parked there. He drove around the outside of the building and did not see the car. He did not go into the internal car park of the building although it was suggested to him that he would have known that she parked there when visiting her father. He said that he then went up Oxford Street and then to Bondi, "once up to South Bondi round the cafes and once back." He said that he then went to Camp Cove, which he described as "where we used to go for our picnics." He did not locate Ms Byrne. He said that he then drove back through Watsons Bay and saw Ms Byrne's car in Gap Lane. He could not remember whether he went up the lane or not. He said that he saw her car parked at the bottom of the steps and said "at that point I felt sick and I thought, 'Well, she's jumped off the Gap."

197 When asked how he knew to go to the area of the Gap in his interview on 14 June 1996, the applicant said, "I can't tell you exactly why I went to the Gap. I mean, it was the last place I went to of the places I did go to. I think I went primarily to Camp Cove…I think on the way back from Camp Cove I suppose maybe subconsciously or instinctively I picked up that Caroline wasn't her normal self for the last few days…"

198 In the same interview, when asked how he found Ms Byrne's car he said he "just had a feeling…I believe in spirituality and all that and I think the kind of connection Carol and I had was very strong…I think there was some kind of spiritual communication to me that was occurring to me subliminally to go there."

199 At the trial, and before this Court, the Crown argued that the applicant could not possibly have seen Ms Byrne's vehicle parked on Gap Road from Military Road, as he claimed in his various statements to the police. According to the Crown, as Ms Byrne's white Suzuki Vitara was not visible from Military Road, it followed that the only way the applicant could have known about its location was if he had killed her. It was submitted that this was yet another example of "esoteric knowledge" which the applicant had about the circumstances surrounding Ms Byrne's death.

200 There are difficulties with the Crown submission. The first is that there is no basis in the evidence from which it could be concluded that Ms Byrne's vehicle, which was beneath a streetlight, would not have been visible from Military Road. The prosecutor attempted to elicit evidence to this effect from one of the fishermen, Wano, but the trial judge disallowed the question. The point was not pressed again until the Crown's closing address, in which the prosecutor submitted "that you would not have been able to see the Vitara up that laneway with the fishermen's car parked behind it." However, the evidence from Wano and Brunetta was to the effect that Brunetta parked his blue Holden Torana – a vehicle lesser in height than Ms Byrne's four-wheel drive – one to two metres behind Ms Byrne's car.

201 The second problem with the Crown's theory is that the applicant's own words do not support it. When interviewed a second time by the police on 14 June 1996, the applicant said he could not recall whether or not he only saw Ms Byrne's vehicle when he passed through Gap Road. The applicant's account of the events on the "Witness" program does not contradict this account. When interviewed a third time by police in 2001, the applicant elaborated on the issue:

> "Well, this [question about the point from which the applicant saw Ms Byrne's car at the Gap] is where it's very loose, and I seem to be uncertain. Why would I drive up that lane? I can assume I went up the lane because I saw her car … maybe, hang on, maybe I

> went up the lane because I was scared that she, you know, had done something stupid … Because it's after all in the middle of the night, and she's not around and her car isn't around. And maybe at this stage I am beginning to get scared she's done something. I don't know Gary. But I don't, I would imagine 6 years later, logically, that I went up the lane 'cause I saw her car.
>
> …
>
> I cannot tell you definitively if I saw her car and then went down the lane or that I went down the lane because of instinct, or whether I went down the lane because I'd done that road and not that road. I can't tell you" (emphasis added).

202 In light of the applicant's statements, which were not contradicted by evidence from the Crown, the question whether Ms Byrne's car was visible from Military Road is of no moment. There remains the reasonable possibility that the applicant saw Ms Byrne's vehicle from Military Road, or that the applicant travelled down Gap Road and only saw Ms Byrne's car at that point.

203 The applicant said that he ran up the stairs towards the Gap in the pitch black and saw two fishermen. He asked them if they had seen a girl and they said no. After searching for a while and shouting out to Ms Byrne the whole time, he said he called Ms Byrne's father and brother from a local phone booth as his phone battery had died. Peter Byrne put this phone call at around 12.30 am.

204 The applicant then went and picked up Mr Byrne and Peter and they returned to the Gap. Peter described the applicant as "frantic," "emotional, speaking quickly" and "driving way too fast." When Peter asked the applicant how he knew where to find Ms Byrne, the applicant apparently said, "I don't know, Pete. I don't know. I just had this feeling." Peter said that when they arrived in Gap Lane, "he appeared to be opening the door [of the Suzuki Vitara] with a key…he bent down into the car…and when he came back up he had Caroline's wallet in his hand." Peter said that he opened the wallet and noticed some paper money and handed the wallet to Mr Byrne. Peter was not certain what happened to the wallet after that.

205 When they moved away from the streetlight Mr Byrne said, “it became so dark and so black that I could not see the ground in front of me.” They found the fishermen at Dunbar anchor who reluctantly lent them a torch.

206 On returning with the Byrnes to the Gap the applicant said in his 1996 interview that the following occurred:

> “This time they lent us the torch, and we walked around flashing the torch everywhere. Tony sort of stayed roughly in that area. Pete and I went with the torch, and Pete was holding the torch and flicking it over the side and at one point - it must be near where the path ducks into the edge of The Gap - he was holding the torch and I said, What's that, what's that down there? Is that - looks like sneakers or something. And he shone the torch and at the time in the dark it looked like it was a ledge only like 10 or 15 feet down, 'cause it wasn't a very powerful torch, and I thought I could see something that looked like a sneaker. He said to me, No, no, it isn't. So I naturally wanted to believe that. And so we then went off and her father said, No, it's over, let's get the police. She's gone. She's gone, Gordon, that's it. She's gone. He said - he kept saying that and I remember shouting at him, saying, No she hasn't, no she hasn't, and then I said, Pete, there's one other place we can look, and we ran up the other end of The Gap, the south end, and I don't know whether you know but over the fence there's a, there's a ledge with a little hole in the rock and I remember when we walked down – the time Caroline and I walked down I told her about this little hole where you climb through it and there's a ledge under there. When I was at university we used to sit - go up there and sit and watch the sun rise sort of thing. So I said, Let's go and look in there and I got the torch and went down and looked there and she wasn't there obviously. So then we came back and the three of us - and her father was calling us from the car, 'cause I remember thinking, He's found her, so we went back to the car and he hadn't. He said, We've gotta tell the police she's gone, that's it. So we went and reported it to the police and they filled out a form and everything and then Tony said he wanted to go home and he said, Come on, let's go home, Pete, we've just gotta go home, so I took Tony and Pete home and they stayed at - back at the Connaught. I went - I forgot; at some point when I, either when I went to got - get them in the first place or when I took them home - I think when I took them home - I went home to get another battery for my phone, rang my mum and my sister, went back to The Gap. By the time I got back to The Gap - missed out a bit, sorry.”

207 The evidence at the trial satisfies me beyond any doubt that no one would have been able to identify Ms Byrne’s body from the top of the cliff.

208 Peter Byrne said that the applicant pointed down towards the rocks and said, “Look Pete, down there. I can see legs and a body. It looks like legs and a body.” Peter responded, “I can’t see anything down there, I can’t make out anything.” Peter also gave evidence of a phone call from the applicant on 8 June 1995 after Ms Byrne’s body was recovered. The applicant said “It was where we were looking Pete, it was the spot where we were looking. That’s where they found her.” In 2003, in a walk-through interview with police, eight years after the event, Peter said that the applicant was pointing in the direction of Pyramid Rock. That evidence is somewhat troubling. If as all the evidence indicates it was a “pitch black” night and the rocks could not be seen from the cliff top it would have been difficult, if not impossible, to determine that the applicant was pointing to pyramid rock.

209 Sgt Paul Griffiths of Rose Bay Police Station said that in the early hours of 8 June 1995 the applicant came into the police station and said to him, “I'm pretty sure my girlfriend has jumped off the Gap…I’m pretty sure I know where she is.”

210 In his first statement to police on 12 June 1995, he said “I saw what I thought was shoes at the base for [sic] the cliff however Peter said that he didn’t believe they looked like shoes.”

211 In his interview with police on 14 June 1996 he gave another account of whether he could see Ms Byrne from the cliff top. He said:

> “Well I don’t think I could see her with that torch. When I – when Pete was holding the torch over the edge, I said to him, I think there’s something there, and he held the torch and between he and I we decided it wasn’t anything. And that, because of the weak torch and, as I said to you earlier, that to me seemed like it was like on the ledge 10 or 15 feet down at the tops, like this – you know, the height of this ceiling. Because I remember saying No it cant be or he said, It cant be – I think he said, It can’t be because its too big for a foot to be at the bottom of the Gap. It’s, you know – he dismissed it like that. So I don’t think I did see her with the weak torch but I certainly did see her legs with the powerful torch which was – but I – where we were looking with our little torch was

> like right against the cliff face but where she was was like substantially away from where I thought we were looking."

212 When asked whether it was actually in a different area, the applicant responded:

> "No question of that, yeah. I mean we, we were looking along the edge of the rock – as you stand on the top…there's only one point you can lean over and kind of get close to the edge and that's that point where the path comes to the edge of the Gap."

213 This issue was also discussed on the "Witness" program in 1998. The applicant said:

> "I think it was probably around this point where you can sort of get close enough to the railing to see some of it down there, but then we only had a handheld torch so I mean I would imagine we would be looking at the rocks just a metre or so below us, because you couldn't see down there and I don't know, I really don't know, I think we just really wanted to see her, to find her y'know."

214 Friends of the applicant and Ms Byrne also gave evidence of conversations with the applicant after Ms Byrne's death about him seeing her from the top of the cliff.

215 Cameron said that he met the applicant and Cochrane on 10 June 1995 at Bondi and they drove to the Gap where the applicant pointed to the spot where Ms Byrne's body landed. During Cameron's evidence in chief, the prosecutor read out part of Cameron's interview to police in May 2001. Cameron said, "he [the applicant] got the torch, he shone it around, he showed it around. He told us that he saw her ankle from the spot that he was, that he could see her shoe, her ankle skin and some portion of the lower leg of the trouser."

216 Cook gave evidence of a conversation she had with the applicant on 10 June 1995 in which he told her his movements on the night of Ms Byrne's death. She said, "He said he went and looked – he looked over the Gap and he could see her or he could see her shoes…and he was very

adamant that he - he kept telling me that he had found her; that he was the one that found her and that he could see her shoes." Butler also said that from a conversation with the applicant, "he could see her shoes". Watson said that she had a similar recollection.

217 After a time Mr Byrne suggested they call police and Mr Byrne said he wanted to go home. The applicant took Mr Byrne and Peter back to their home. Mr Byrne described the applicant as "agitated," "upset" and "nervous." Once he had dropped the Byrnes' off, the applicant returned to his apartment to replace his phone battery. He also said that he checked for clothes that were missing from Ms Byrne's cupboard. He rang his mother and sister and returned to the Gap where he met them at approximately 5.30am.

218 The police initially came to the Gap with only hand-held torches. They searched the car. The applicant said it was either at this point or earlier in the night that he found Ms Byrne's wallet on the floor of the car. The Police Rescue Squad then arrived together with a helicopter and a patrol boat. The applicant said that he remembered thinking "that's ridiculous, you're in the wrong area. And I said to one – they had these big torches that threw a square of light and I remember saying to one of the cops holding that, I said, 'Have a look down there'…And he shone the torch in the general direction and it lit up most of the rocks down there and I could see her legs."

219 Sgt Powderly said that as he swept across the rocks at the base of the Gap with the Mitrolux light, he heard a male voice say: "That's her. That's the clothes she was wearing." The applicant was asked by the interviewer on the "Witness" program how he knew that she was wearing those clothes and he responded that he "went back to the apartment to find out when I got my mobile phone after I dropped her father and brother back I went to the apartment specifically to find out what she was wearing." He said it was easy to work out what she was wearing because Ms Byrne

"only owned one denim jacket, she owned one pair of runners and she had two pairs of black tights. Simple."

220 This statement was challenged by the prosecution and asserted to be a lie. However it was excluded by the trial judge as a lie evidencing guilt.

221 In making that challenge the prosecution emphasised the evidence of Natalie Butler and Deanna Byrne.

222 In her statement Butler, who was a friend of Ms Byrne, said that the applicant and Ms Byrne had gone on a $1,000 shopping spree for clothes.

223 Ms Byrne's sister, Deanna, said that at some stage after arriving back in Australia she went with the applicant and Ms Butler to go through Ms Byrne's belongings. She indicated that Ms Byrne "had so many clothes. I mean, she loved shopping for one, and plus she was a model." She could not say how many tights Ms Byrne had but she said "she would have had numerous amounts because she went to the gym."

224 The police said to the applicant that they would probably get him to identify Ms Byrne's body at the top of the cliff if she was not too badly injured. However, as it happened she was considered too badly damaged "so I would go to the morgue and they'd clean her up and I'd view her at the morgue and identify her." The applicant returned with the police to the police station before attending the morgue. Ms Wood, the sister of the applicant, said that they were at the police station for "30 minutes."

225 Peter Byrne said that the applicant called the Byrne family home at 5am to say the police had recovered the body of Ms Byrne. According to Peter, the applicant also said "It was where we were looking Pete, it was the spot where we were looking. That's where they found her."

The next day

226 Rivkin was curious to know what had happened. The applicant met him at the Lamrock Cafe at Bondi in the morning. Rivkin wanted to tell his wife but Mr Byrne had said to the applicant, “I don’t want anybody to know that she committed suicide,” so he [the applicant] asked Rivkin if he would tell his wife that she was killed in a car accident. The applicant said that: “for a period of time I told people that she got knocked over by a car but then – I told Natalie that on the Thursday and I then I think the next day I told her the truth and then I told her agent Gordon.”

227 In the “Witness” interview in 1998 the applicant referred to the fact that Ms Byrne’s mother had committed suicide and said that Ms Byrne had made two attempts on her life (in fact she made only one attempt), which occurred shortly after her mother’s death. However, he said that it never occurred to him before she died that Ms Byrne was suicidal. He said he knew she was not herself and was depressed but did not anticipate her committing suicide.

228 Ms Byrne’s mobile phone was not seen by anyone on the night of Ms Byrne’s death nor in the days following. It was used again on 9 June 1995 when the diversion was switched back on.

229 There was some controversy about receipts for the purchases made by Ms Byrne. At about 3.00 pm on the 8 June 1995 the applicant went to Mr Byrne’s apartment and said, “the police have found receipts in Caroline’s wallet which show - the receipts show that she was out there that day and the day before, and the receipts show that she had left a trail.” Mr Byrne gave evidence that when the applicant recovered Ms Byrne’s wallet on the previous night, he did not notice the presence of any receipts.

230 The next day the applicant told Mr Byrne that he had traced Ms Byrne’s steps which included: “After I left her at lunchtime she would have got up out of bed not long after I had left to go back to work. She’s got dressed, gone over and got the car, and then she’s virtually left a trail. She’s used

her card at Paddington and then she has used her card again at Vaucluse, virtually leaving a trail. She's then hung around out at around Watsons Bay and then at about 6.00 pm, she's taken her own life."

231 Included in the three receipts was a paper-free withdrawal slip which did not indicate on its face that the withdrawal was made from the Vaucluse branch. The Crown case was that the applicant must have had this knowledge by reason of the fact that he was either with Ms Byrne or she had told him about the withdrawal.

Applicant returns to Kings Cross car park

232 At the trial, Mr Donald Macmillan, the proprietor of the Kings Cross car park, gave evidence that the applicant told him on the Monday following Ms Byrne's death that he had obtained a copy of the movements of the Vitara from the manager, Mr Warwick White, as they required it for the Coroner. Macmillan told White that he was not to provide any further information to the applicant. According to the evidence of White, in response to the initial request he gave the applicant the print out and highlighted the movements of the car but he could not recall what the records showed.

233 Macmillan said that he made a print out of the records within weeks of the initial request and placed them in a sealed envelope before it was collected by the police within a month of Ms Byrne's death. However, Sgt Woods who was leading the investigation at the time said that he did not obtain any records from the car park. Sgt Tony Deas confirmed that any material he obtained would have been filed with the investigating documents.

234 Both Macmillan and White gave evidence that old files in their computer system were corrupted when the system was upgraded. As a result, police were not able to obtain a copy of the records.

235 In his closing address, the prosecutor made submissions in relation to the decision by the applicant to visit the car park to obtain records of when her car may have left the complex. He said:

> "Within hours of Caroline's death, the accused has the presence of mind to go to Mr White, who worked at the Kings Cross Car Park, to ask Mr White for the car park records for the Suzuki Vitara. Mr White provided him with those records.
>
> A week later, the accused goes back to Mr White and asks for another copy, telling Mr White 'This is required for the Coroner.'
>
> Now, ladies and gentlemen, firstly, why on earth would the accused want to have the car park records for Caroline's car? We submit the only rational reason is he wanted to make sure that his story that he was going to advance to the police was going to account for, or accommodate, whenever it was that Caroline's car had left that car park, because there was an E record there. Goodness only knows why he wanted to get another copy, but he deliberately lied to Mr White when he said that he was required for the Coroner. Of course by the time the police came to that car park, the records were no longer available for a whole lot of reasons that were given in evidence that I don't need to remind you of."

236 The prosecutor's assertion is tenable but to my mind it is reasonable that, although innocent, the applicant would make inquiries about what happened to Ms Byrne on the day of her death. Any rational person would seek to retrace her steps and try to put the events into some perspective. At best, this evidence is ambivalent.

Credibility of Mr Tony Byrne

237 The applicant submitted that Mr Tony Byrne was discredited in his evidence and this Court should be very cautious in accepting any evidence that depends on his account. The applicant submitted that this was particularly important with respect to the Offset Alpine issue as it was Mr Byrne's evidence that provided the majority of the material upon which the claim is based.

238 The applicant emphasised examples of contradictory accounts in evidence, which he submitted discredited Mr Byrne. Mr Byrne gave evidence that on 25 December 1993 at 2.30 to 3 pm the applicant answered a call from Rivkin who he said told him that there was a fire the night before and he had to pick up Rivkin from the airport at 7 pm. Mr Byrne says Rivkin later returned to play scrabble, remaining with the Byrne family until 9 to10 pm. In fact, a Department of Immigration form, which the applicant tendered, showed that Rivkin did not return to Australia until 29 December 1993. Mr Byrne's account was not accurate, at least as to the date.

239 Mr Byrne also claimed that in March 1994 the applicant told him that he had purchased shares in Offset Alpine and that the share price was rising. Mr Peter Riordan, a solicitor with the ASC in 1995, said that there was no evidence that the applicant had ever owned shares. Of course, this does not mean that Mr Byrne did not accurately report what he had been told. Although on reading his evidence it is plain that Mr Byrne did not like or trust either Rivkin or the applicant, I am not persuaded that his evidence should be disregarded. However, as I discuss elsewhere, the suggested evidence of a motive involving Rivkin is so thin that it should never have been left with the jury.

Andrew Blanchette

240 Blanchette was a former boyfriend of Ms Byrne.

241 He was previously a police officer but was medically discharged in 2000. By the time he gave evidence at the trial he had resigned from the police service and was employed as an investment manager.

242 Blanchette gave evidence that he was first asked to remember what he was doing on 7 June 1995 in 2008. He said that he first became aware

that he was being considered a suspect for Ms Byrne's murder during his cross-examination.

243 There was evidence from Mr Byrne and friends of Ms Byrne of arguments which occurred between Ms Byrne and Blanchette in the months before her death. In May 2008 Det Insp Jacob became aware that the applicant's representatives were suggesting that Blanchette should have been considered a suspect. This suggestion was contained in draft memoirs prepared by the applicant. However, the applicant had never suggested that the death was anything other than suicide and the applicant had never requested that further inquiries be made about Blanchette.

244 In the first two weeks of April 1995, Ms Byrne told her father of an argument she had had with Blanchette. She had come back from June Dally-Watkins to pick up her car which was parked at the building her father managed. She walked into his office and said, "Oh daddy, that Andrew Blanchette, he was waiting for me outside Dally's." She said a terrible argument developed and everybody stopped and looked.

245 A statement of cafe owner, Mr Ernest Velonas, dated 6 June 1996 was tendered at the trial. Roughly three or four months before Ms Byrne died, Velonas said he saw her involved in an argument with a uniformed police officer. Blanchette denied that he had been involved in an argument.

246 Blanchette and Ms Byrne apparently discussed the applicant on occasions. Around six weeks before her death, Blanchette and Ms Byrne had dinner together in East Sydney. The dinner was interrupted when she received a phone call. Blanchette said that he could hear a male voice "screaming" at her. She went white. Blanchette said that he tried to calm her but she said she had to go and left immediately.

247 Mr Byrne reported to a Dr Schultz that "Blanchette had become aggressive and stalked and rang Caroline, and whenever he knew where she was, he would ring and make funny phone calls." On his own evidence, Blanchette

was also cold and dismissive towards her in the week or days before her death. He said, “She wouldn’t let go. I asked her to leave me alone at that time.” Blanchette was also accused of stalking and violence towards her by his former girlfriend MM, who he dated from late 1995 to 1998.

248 According to the evidence of Blanchette’s former girlfriend MM, he slept over at her house on 7 June 1995. She said that she went to sleep around 10 to10.30 pm. At that time Blanchette was still in her bed. She said that she woke up at midnight to 1am and found Blanchette was not in bed. It did not concern her and she assumed he had gone home. She went to the kitchen to get water and did a “loop” around the house but did not see him. When she got up the following morning between 6 and 7am MM saw Blanchette and asked where he had been in the night. He said he was in the sunroom as something was troubling him and he could not sleep.

249 Blanchette had previously displayed animosity towards the applicant. He admitted in his evidence telling Ms Byrne that the applicant was “gay” in the weeks before she died. However, he admitted that he had no reliable information to that effect. He also told Mr Byrne that the applicant was “a faggot” and had implied that Rivkin was the applicant’s partner. He had encouraged Mr Byrne to compile documents for the police in relation to Ms Byrne’s death and encouraged the investigation.

250 Mr Byrne gave evidence of a conversation between him and Blanchette. Blanchette told him that there was a lot of gossip around the City Gym that the applicant and Rivkin were “faggots.” Byrne said he took it as “sour grapes” because Blanchette had quite strong feelings for Ms Byrne.

251 The evidence did not support the defence theory that Blanchette may have been the killer. Although Blanchette’s account that he had been at MM’s house all night was not corroborated, there was nothing to implicate him in Ms Byrne’s murder or suggest that he was at the Gap at the relevant time.

252 As part of his routine duties as a police officer at Newtown Police Station, Blanchette together with Snr Const Nick Pitchuev attended the Glebe mortuary at around 8.30 or 9am on Thursday, 8 June 1995. While Snr Const Pitchuev was upstairs for a Coronial inquest, Blanchette looked at the admissions book at the morgue. He said, “It was common practice to have a look at some of the entries.” He said that as he was checking through the admission book, he received a call from Duval, a very good friend and fellow policeman at Newtown at the time. Duval told Blanchette that Ms Byrne was dead and that she was hit by a car. Blanchette responded, “I'm at the morgue, I'm at the morgue now…I’ll call you back.” Blanchette said, “I went straight to the admission book. And I think it was one of the last, or one of the last entries saying it was an unidentified woman there. And yeah, I read the entry. Said it was believed to be Caroline Byrne, awaiting some dental records.”

253 Blanchette spoke to the morgue admission attendant and asked him to look for certain identifying marks on her body. “She had an incision on her right knee, a little small one centimeter by one centimeter cross where she had a cyst removed when she was a kid. She had a mole in the exact same position as myself – we used to laugh about it as kids – on the left hand side of her shoulder.” The attendant did not go to check those features.

254 There was evidence from Ms Blumenfeld that she had not called Duval until around midday on 8 June 1995 to tell him of Ms Byrne’s death. From this evidence the applicant made the suggestion that Blanchette had independently examined the morgue book for the presence of Ms Byrne’s name.

255 Blanchette recalled being stopped by the applicant on the side of the road later that day and was told that Ms Byrne was hit by a car and had died. Blanchette said, “That is absolute bullshit…I am going to find out what happened.” He told the applicant that he had been at the morgue and had read the entry in the morgue admissions book.

256 On Friday, 3 October 2008, the Friday before MM gave evidence at the trial Blanchette, who had long ceased his relationship with MM, rang her. Shortly after the conversation, MM contacted Det Sgt Matthew Moss and made a statement. According to MM's statement, Blanchette said in their telephone conversation:

> "I need to talk to you about what is going on. You are going to be put through the ringer by the defence. I'm sorry that you have been brought into this. This has nothing to do with you. You have to listen to what I am saying. The defence are going to be very hard on you. There is stuff that I know they are going to say about you. You have no idea. And you need to know what they are going to say."

257 The statement continued:

> "Whilst I was talking to Andrew I could hear what sounded like coins dropping in a pay phone. I said 'I know what the truth is. I have done my statement. There is nothing I have done wrong that they could bring up in Court'. He said, 'I remember that night. I was already in bed and you came in and got into bed. I felt uncomfortable and that's why I got out.' I said, 'That's a load of bullshit. I have a good memory of that night also.'"

258 Blanchette insisted that they meet in person to discuss these matters. He said, "I don't care where I have to go but I need to see you."

259 When MM responded, "I won't be meeting you. There is nothing to discuss. I have made a statement. Everything I have said has been the truth,, Blanchette responded, "Okay, nobody needs to know about this phone call. It didn't happen,"

260 Blanchette agreed that he had urged further investigation of Ms Byrne's death (including speaking to Mr Byrne and Dally-Watkins). He agreed that in a number of statements he had said that he did not think she had committed suicide (in statements made in 1996, 2000 and 2004). Blanchette did not tell the truth to the police about his contact with Ms Byrne in his statement dated 4 April 1996, telling them he had not seen her

since they split up. He spoke to the Coroner himself about the investigation.

261 These actions by Blanchette raise suspicion about his integrity. However, there is no reason to doubt the evidence of MM and whatever motive Blanchette may have had for talking with her about her evidence, it does provide him with an alibi at least up until 10 to 10.30 pm, making it most unlikely that he had any involvement with Ms Byrne's death at 11.30 pm. His urging that her death be further investigated is not consistent with his being the killer.

The 1996 video

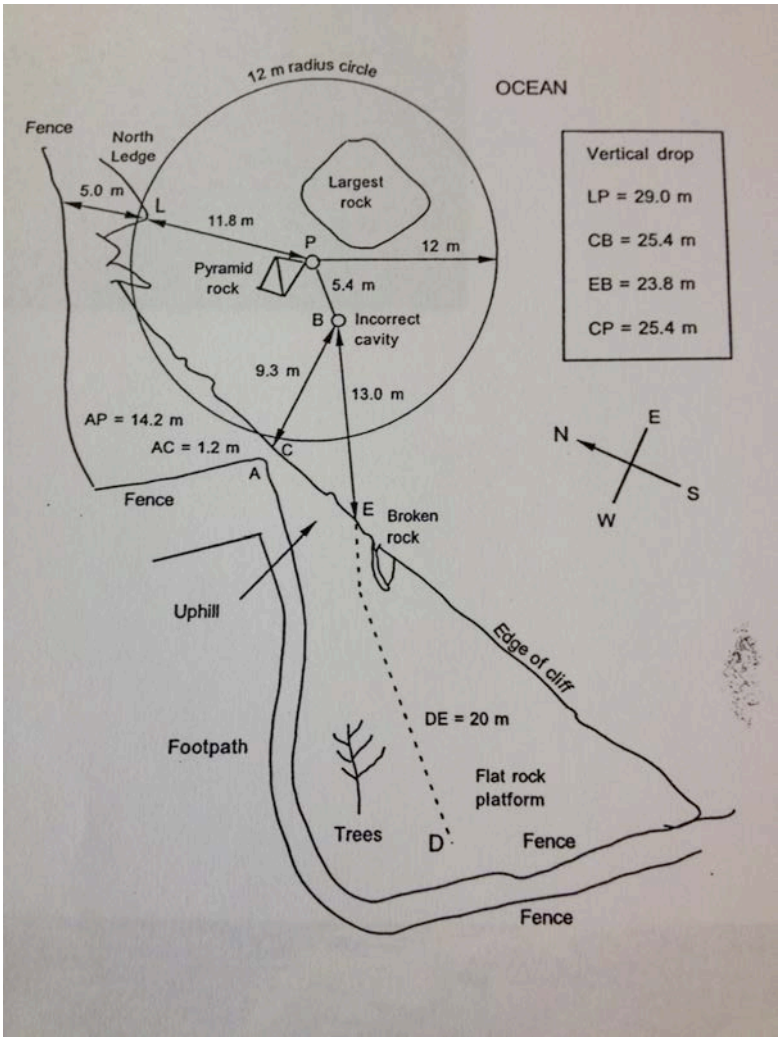
262 Sgt Powderly was the first person to descend the cliff and reach the point where Ms Byrne's body had lodged in the rocks. He was there for 1 hour and 20 minutes altogether. He identified that she was dead and called for extra equipment from Police Rescue, including a Larkin frame to enable the body to be taken to the cliff top. He was joined by Snr Const Camwell who assisted in removing the body which had become wedged in the rocks. By the time the body was retrieved rigor mortis had set in. The night was dark and, out of a concern for his comfort and safety, Sgt Powderly said that he did not wait beside the body but moved himself to a position where he was protected from the incoming waves behind a large rock. He said that he waited there for 40 to 45 minutes. While he was waiting to retrieve the body he tried to work out the point at which Ms Byrne may have left the cliff top. He said that he did this by working out "where the feet were pointing [which he said was]… at the edge of the cliff right on the corner of that fence where I conducted the third view with the Mitrolux light." Although controversy later emerged as to where the body was located, he did not change his view as to the point at which Ms Byrne left the cliff top.

263 The police, including Sgt Powderly, originally assumed that Ms Byrne had committed suicide. However, there were no witnesses to the event, there was no suicide note, and the police, as they reasonably were required to do, did not terminate their investigation into the tragedy. In 1996 the police decided to record a video which would be made available to media organisations in an endeavour to seek out persons who may have seen the event or have witnessed other incidents at the time which may assist the police in putting together an account of the relevant events.

264 The police video was in evidence at the trial. It was narrated by Sgt Powderly in the careful manner which the police are trained to adopt when relating the events in which they have been involved. Sgt Powderly was standing on the cliff top and Snr Const Camwell, who had assisted Sgt Powderly to remove the body, traversed to the bottom of the cliff and out onto the rocks. She is shown on the video pointing with both arms to the location where Ms Byrne's body was apparently found. As she does this Sgt Powderly is recorded as saying that "Snr Const Camwell is now indicating the exact position where the body was found." Snr Const Camwell was pointing to the spot which has subsequently been referred to as hole B.

The physics of the issue

265 At trial, the Crown called expert medical evidence from Professors Fryer and Giordian Fulde and scientific evidence from A/Prof Cross and Professor Bruce Elliot. The applicant called medical evidence from Professor John Hilton and Dr Johan Duflou and scientific evidence from Professor Marcus Pandy and A/Prof Ness. A/Prof Cross and A/Prof Kevin Ness have expertise in physics. Profs Elliot and Pandy have expertise in the field of biomechanics.



266 The important features of the Gap are evident in the diagram prepared by A/Prof Cross and tendered into evidence at the trial.

267 In this diagram, hole A is marked “P,” hole B is marked “B,” the corner fence post is marked “A” and the northern ledge is clearly indicated. The southern rock platform is the large area within which the path DE is mapped. It was assumed at the trial that the northern ledge would provide a run up distance of 4 m to a person jumping or a person throwing another. This assumption was challenged by new evidence tendered to this Court.

268 A/Prof Cross said that although he originally concluded that Ms Byrne could have jumped from the southern ledge to hole B he later changed his mind. He said that he altered his opinion after finding out about Ms Byrne’s athletic ability and carrying out his experiments. Those experiments

included women jumping and being thrown by strong men into a swimming pool. Prof Pandy and A/Prof Ness were not asked about hole B at the trial.

269 The measurements of women running made by A/Prof Cross excluded the possibility of Ms Byrne having jumped to hole A from the northern ledge. However, those conducted with the more sophisticated equipment of Prof Pandy indicated she could.

270 A/Prof Cross said that he had concluded that the "running speed" for 13 females aged 20 to 35 years after they had run 4 m ranged from 3.7-4.85 m/sec. In his experiments one of the women tested would have achieved the speed to dive to hole A. However, A/Prof Cross said that none of the police cadets could have jumped to hole A.

271 Prof Pandy, an expert in biomechanics, also conducted several tests with two test subjects to make his own preliminary assessment of running capabilities over 4m. The two tasks required the test subjects to run as fast as possible over 4m on level ground and to run as fast as possible over 4m and then jump. Data was taken over three or four runs by using a video-motion-capture system to calculate velocity by a process of differentiation across nine high-speed cameras and an average of the horizontal speed was determined. Prof Pandy commented on the system's accuracy, stating that "it's a gold standard in the field." Test subjects were chosen to match roughly with the proportions of Ms Byrne. Prof Pandy concluded that both test subjects would have been able to reach hole A from the northern ledge given the calculation of required horizontal velocity set out by A/Prof Cross. Both subjects achieved over 4.83 m/s for a run and jump over 4 m. Prof Pandy concluded that both test subjects would have been able to reach hole A from the northern ledge given the calculation of required horizontal velocity set out by A/Prof Cross.

272 Although A/Prof Cross conducted more tests I am in no doubt that, because of the sophistication of his equipment, the tests conducted by Prof Pandy are more reliable. Mr Charles Rosemond, a senior biochemist

at the Australian Institute of Sport who gave evidence, accepted that Prof Pandy's results would not have placed his subjects in the category of elite athletes. A/Prof Cross was critical of the speeds predicted by Prof Pandy, saying that they were only possible for an elite athlete. However, he explains that measuring a person's speed over a distance greater than 4 metres may not give a true measure of the person's capacity to accelerate over a short distance.

273 Prof Elliot conducted tests from which he concluded that A/Prof Cross' conclusions were valid. He said: "In general terms the numbers seem to blend and therefore I was happy that the numbers that he'd reported were in actual fact valid."

274 A/Prof Ness considered the measurements and calculations compiled by A/Prof Cross and concluded that the calculations were valid. However, he said, "where we differ on is the uncertainties in these calculations." These uncertainties he summarised thus:

> "Q: And what do you actually mean by the particular conditions?
> A: We do not know the precise – the starting – the starting velocity, the starting angle, the position in, say, a two-dimensional X and Y information, the actual position in space of the centre of mass of the body and – sorry, and we do not know precisely where the body landed either."

275 To my mind all of this experimental analysis must be approached with considerable reservation. The tests carried out by A/Prof Cross were all conducted in daylight and in conditions where none of the participants had reason to fear for their safety. The run up was secure and the persons who were thrown were of course cooperative. One test was done where the female volunteer was asked to remain limp. However, even in this experiment she cooperated and facilitated her safe entry into the water.

276 The circumstances on the night of Ms Byrne's death were quite different. It was a "pitch black" night, cold (it was the middle of winter) and, having

regard to the evidence of Sgt Powderly, the surface areas were likely to have been moist from sea spray or mist. The northern ledge had a gravelly surface and at its edge a sheer drop of about 30 metres. Any person throwing another person over the cliff the required distance in a spear throwing motion (which was suggested by the prosecution) would, with the person above their head, have taken some steps towards the edge, holding the person's neck and groin and in a two handed motion launching them over the edge. The risk to the thrower was obvious and made more significant by the darkness and the lack of any safety protection. If Ms Byrne was conscious at the time she would undoubtedly have struggled to resist being thrown. Prof Elliot, who was called by the Crown, said that "if someone was struggling, I seriously doubt that you could throw them with any great velocity at all, certainly not with the velocity required to get from the ledge to hole A." All of the experts agreed that a struggling person would be more difficult to throw.

277 Because of the problem of Ms Byrne struggling if she was conscious, the prosecutor changed tack during the trial and suggested that she may have been unconscious or incapacitated. However, no effective experiments were done to ascertain whether an unconscious Ms Byrne could have been thrown the required distance.

278 The medical experts gave evidence as to the injuries to Ms Byrne's body to assist in understanding how she landed and whether hole A or hole B could be excluded as the landing point. However, to my mind their evidence was inconclusive and, given the controversy as to whether Ms Byrne could have jumped to hole A, does not assist in resolving whether Ms Byrne was thrown off the cliff top.

279 Ultimately there remains a dispute between the academics as to whether Ms Byrne could have jumped or been thrown to hole A. Because of the state of the evidence, I find myself unable to definitively resolve that dispute. The experiments were conducted under ideal conditions and as

A/Prof Ness indicated, the variables from the real conditions are such that I am not satisfied that Ms Byrne was thrown from the northern ledge.

How did the prosecution put its case?

280 Towards the end of his final address to the jury the Crown prosecutor summarised the Crown case in the following terms:

> "The accused met up with Basquali and Samartis between 12 and 1. At some time before 1 pm, the accused dropped off Rene Rivkin at the Alife restaurant. Between 1 pm approximately and 3 pm approximately the accused was at Watsons Bay with Caroline Byrne and a second man, unknown at about 3 pm they, left Watsons Bay. At that stage everything was friendly.
>
> Shortly after 3 pm following lunch at Watsons Bay, the accused and Gary Redding report to Rene Rivkin at the Alife restaurant. Rivkin becomes agitated. Between 3.30 and 4 pm Caroline Byrne's card is used to do some shopping or banking transactions, at Paddington and Vaucluse. At some stage around 4.30 to 5 pm Caroline Byrne in the Vitara returns to Watsons Bay. We don't know why, what it was that caused her to return to Watsons Bay.
>
> By 5.14 pm the accused has switched off his phone. By 5.30 pm Caroline Byrne's phone is switched off and her diversion is switched off. Around the same time, the accused's diversion is switched off. At 5.48 pm the accused makes his last mobile phone call for the day until 4.44 am the next morning. He ignores some pager messages from Rene Rivkin and his son around the 7.30 to 8.30 mark.
>
> At some stage in the evening, the accused and a second male join Caroline at Watsons Bay. At 8'ish Mr Doherty sees the accused and Caroline Byrne with a second man arguing in Military Road. By that stage the situation had become very ugly, with the accused berating Caroline in a very similar manner to the way that he had berated her at the gym the previous Friday. Caroline was cowering in exactly the same way that Christine McVeigh had seen her cowering at the gym the previous Friday. She was still answering him back in a combative manner.
>
> They continued arguing from about 8pm for about three and a half hours until her death at 11.30 pm. The argument went right up until the scream. The scream was most likely Caroline being rendered unconscious or incapacitated. Her death was not a suicide but a murder.

> The accused by his precise knowledge of where her body was located and by the orientation of her body head down, must have been present with her during the argument and when she went over the Gap. The scream was most likely Caroline being rendered unconscious or incapacitated.
>
> The accused has no alibi between leaving Basquali and Samartis and meeting up with Peter and Tony Byrne, except for the sighting at the Alife restaurant at 3 pm.
>
> We submit that the accused had a motive to kill Caroline, and he had the requisite strength to spearthrow her to her death, either on his own or in combination with the second unknown male. We submit the accused caused her death, either on his own or in combination with the second unknown male."

281 Criticisms are made of the Crown prosecutor's address under ground 6 of the appeal. I shall deal with those issues separately. However, when determining whether the jury's verdict was unreasonable it is important to give careful consideration to the way in which the prosecutor put the Crown case to the jury.

282 The prosecutor accepted that before the jury could convict the applicant they had to be "satisfied beyond a reasonable doubt that Caroline Byrne did not commit suicide, because unless the Crown can exclude suicide beyond a reasonable doubt, the accused is entitled to an acquittal." As was appropriate the prosecutor referred to some of the evidence in the course of his address and invited the jury to draw conclusions from it. In relation to other matters, sometimes critical matters, the prosecutor argued for conclusions based on his own speculative propositions. There is always a danger when a prosecutor takes this course, a danger which the applicant submitted materialised in this case and caused the trial to miscarry.

283 The prosecutor commenced his address by concentrating on the evidence which suggested that the applicant was able to identify Ms Byrne's body on the rock ledge in the dark of the early morning of 8 June. The prosecutor emphasised that the evidence was that the applicant knew where the body was and also knew that her feet were up. The prosecutor

submitted that the only way in which the applicant could have known where Ms Byrne was and that her feet were up was if he were "there when her body went over."

284 The prosecutor put it in this fashion to the jury:

> "How would he possibly know that she's feet up? He couldn't possibly have known that. If somebody, if you suspected that a loved one had jumped off the Gap, you would think that their body was splat on the rocks. You would not think, 'I can see her feet, I can see ankle skin, I can see the end of the trousers.' The only rational explanation for the accused's knowledge is that the accused was there when she went over the cliff."

285 The evidence of the others present at the time, particularly Peter Byrne, was that the night was so dark and the presence of spray and wash on the rock shelf was such that, in combination, it was not possible to see anything at the bottom of the cliff. This must mean that the applicant could not have known, even if he was responsible for Ms Byrne falling to her death, that she had lodged in the rock shelf with her feet in the air. There was nothing to suggest that visibility would have been better at the time at which she died compared with the time at which the others who sought to identify her were present. The Crown prosecutor did accept that the applicant was not acting rationally in the early hours of the morning.

286 The Crown prosecutor emphasised that when interviewed in 1996 by Insp Wyver, the applicant appeared to change his story. The prosecutor said that he "told blatant lies in an attempt to avoid the inevitable conclusion that we say one reaches about his knowledge of where her body was and the orientation of her body." I accept that in some respects details he gave to Insp Wyver were different to what he is reported to have said on the evening. However, faced with the assertion by others that it was not possible to see anything, it is likely that even an honest person would seek to rationalise their own behaviour on that evening. When challenged about this issue in his interview with the "Witness" program, he responded by saying: "I'd be a bit of an idiot wouldn't I to point to everybody about where

she was if I had killed her." The ultimate difficulty for the Crown submission is that if nothing could be seen that night then, even if the applicant were responsible for her death, he would not have been able to identify where she was and the position of her body.

287 The prosecutor submitted that this issue was the "bottom line of the prosecution case." It was said to be "a killer point, an irrefutable point." It will be plain that I do not accept that this issue had that impact or indeed was of any particular significance at all. The trial judge said of it:

> "When the Crown prosecutor began his closing address to you, he spoke about what he called the 'bottom line' and the 'killer point'. The prosecutor was referring to the position and attitude of the deceased's body and to evidence of what the accused said at the cliff top, looking down to the rocks below. A number of people gave evidence of what the accused said on that occasion, and there is a dispute about what he said. There is only one contemporary account of what he said, and that is what the accused told the police at Rose Bay. You have exhibit AP, the statement of 12 June 1995 soon after the events. That matter is not touched on in the interview which took place in the following month.
>
> The evidence of witnesses who have told you what the accused said, or what he told them he had said, is all based on statements which did not come into existence until after this became a murder inquiry in May 1996. An important witness relied on by the Crown is Mr Peter Byrne. You will remember that Mr Byrne senior, on behalf of the Byrne family, told the police that no member of the Byrne family would be giving a statement. There is no evidence that Mr Peter Byrne, when preparing his statement a year or so later, worked from any written note that he had made of what the accused said."

288 His Honour continued on this issue:

> "921. The issue here is this - and it was postulated for you in, I think, the second or the third of the 50 questions the Crown posed for your attention at the close of his address - it is called "the bottom line", "the killer point":
>
> 922. "What did the accused say? Did he say, 'I can see legs and a body'."

923. There are various versions in the evidence of the witnesses: Peter Byrne; the "Witness" programme (page 10); Constable Griffith (448); Peter Byrne's evidence (at 386) was: "He stated to me that he could see legs and a body." That's a pretty strong statement," He could see legs and a body."

924. Mr Powderly told you that the man who was presumably the accused said "That's her. That's the clothes she was wearing."

925. Mr Gale said at 454, "The accused said, 'That's her'." And he said, when asked whether there was any way he could have seen the body at the base of the cliff, he said, "No, it was not possible."

926. And there are various other statements in the evidence of Miss Cook, Miss Butler, Miss Watson.

927. Mr Cracknell says it was so dark that they couldn't see anything from the helicopter. "We couldn't see anything", he said. They had the helicopter there for 25 minutes.

928. It is difficult to know what to make of that evidence. Why would anybody go to the expense and trouble and, not to say, danger of having a helicopter in a position in which they couldn't see "anything" for 25 minutes raises a strong suspicion, I suggest. Perhaps all he meant was they couldn't see a body.

929. Anyway, he described the light the helicopter had, a very, very powerful one, and he said they couldn't see anything.

930. This goes to two things: first, the blackness of the night, the difficulty of seeing, you have heard evidence of sea spray; and the things that the accused said.

931. The accused's account is in his statement. He said he thought he saw - "I thought I saw." And the question was raised for you: well, what did he really say? Did he say "I see legs and a body"; "I see legs or a body"; or, "Is that legs or a body?" and the like. What he said in his statement bears upon the question, but it doesn't say what he said to the police.

932. Assuming in favour of the Crown that he said - and this is what the Crown submits that you should find - he said, "I can see legs and a body", or words having that meaning,

the question says to you: how could he possibly have known that unless he had thrown her off the cliff?

933. The submission put against it is this: how could the fact that he had thrown her off the cliff possibly inform him where the body was, or that the body was in a hole with the legs in the air?

934. Refer to Crown's question number 3, if you've made a note of it. The Crown asks you: how could he have known that the legs were sticking up if he hadn't thrown her off the top?

935. What is put against it is, well, if it was a black night, how could he have known by being at the top? Committing a crime doesn't improve your eyesight, or the weather. And there is no evidence that the weather and the visibility were any different between the two times that we're talking about.

936. The deceased went off the cliff, let's say, at 11.30, some time a little before midnight, and the time of the conversation about which this evidence is given took place some time in the wee small hours, a matter of two hours later, maybe more, well before dawn.

937. It would be speculative for you to suppose that there might have been a change in the visibility in between times. So how could the accused's statement of what he saw show that he had thrown the deceased off The Gap?

938. The submission is that he couldn't - either he could see from where he was standing, looking down, talking to Peter Byrne and then to the police, either he could see or he could not. And, if he could see, then he could have seen, of course, when he threw her off The Gap.

939. But the Crown case is not made out in that case - or the Crown argument is not made good. If he couldn't see from the top - if he couldn't see from where he was saying - well, from where he was speaking next to Peter Byrne and next to the police, he could not have seen from where he threw the deceased off The Gap, if that is what he did. And the answer may simply be that he could see; he was describing what he could see, or what he thought he could see.

940. How could he see it? Well, there were lights waving around. You will need to ask yourselves whether the evidence that you could not see anything, even with a police magnalite light with full batteries, can stand against this evidence. It is something for you to consider. You have the submissions on both sides.

941. The Crown says it shows that he knew - he knew the body was in a hole with its feet sticking up, because he had thrown her off the top.

942. The defence says it is an argument that simply does not run: either he could see or he couldn't. If he could, he could see on both occasions; if he couldn't, he couldn't see on either occasion.

943. There is evidence that lights were used sweeping around. Think about that, ladies and gentlemen."

289 In the absence of the jury the Crown prosecutor and trial judge shared the following exchange:

"950 CROWN PROSECUTOR: Thank you, your Honour. Your Honour, on what has been identified as the Crown's "bottom line" point, your Honour said, "The answer might simply be that he could see." Your Honour, that is not only contrary to the position that the Crown has taken, but it is contrary to every version that the accused-

HIS HONOUR: Mr Crown, your position is utterly without logic.

CROWN PROSECUTOR: Your Honour, the logic-

HIS HONOUR: There must be an explanation.

CROWN PROSECUTOR: The explanation is this, your Honour: that if the accused threw the deceased head first from the top of The Gap-

HIS HONOUR: He aimed for hole A, did he, or for hole B?

CROWN PROSECUTOR: He may well have assumed she landed head first.

HIS HONOUR: Oh, come on, Mr Crown, I am not putting that. Is there anything else?

CROWN PROSECUTOR: Yes, your Honour. Your Honour said that there were lights waving around.

HIS HONOUR: Yes.

CROWN PROSECUTOR: That was certainly the case when the police were there, particularly once the helicopter and the police rescue were there. But it was not the case, of course, when he was there with Peter Byrne.

HIS HONOUR: So he couldn't see?

CROWN PROSECUTOR: Yes.

HIS HONOUR: And couldn't have known.

CROWN PROSECUTOR: That's his account as well, your Honour, on every version he gives.

HIS HONOUR: That's the problem with this, Mr Crown. With respect, it is an utterly illogical submission you have made and it deserves to be destroyed.

CROWN PROSECUTOR: Your Honour, with respect, we don't accept that.

HIS HONOUR: You don't have to, but you have got it."

290 The Crown prosecutor then turned in his address to the evidence of the relationship between Ms Byrne and the applicant. The prosecutor's submission was that the relationship had been deteriorating and that the applicant had become very aggressive and abusive towards Ms Byrne.

291 In support of this submission the prosecutor referred to the evidence of the applicant speaking to others about his affection for Ms Byrne. The prosecutor put against this evidence the evidence of Georgiou that in discussions in February or March Ms Byrne was in the gym and told him that things were not going well with the applicant. He said that she suggested that things were getting to a similar position to when the relationship was terminated approximately 12 months earlier. Georgiou said that Ms Byrne said similar pessimistic things about the relationship to him in early April or May 1995.

292 The prosecutor referred to the evidence from Ms McVeigh about the alleged incident in the gym on the Friday night before Ms Byrne died. The prosecutor connected this event to Rivkin by referring to the fact that Redding (an associate of Rivkin) and his girlfriend were present at the time. Redding of course denied that he was present on this occasion. The Crown conceded that had Redding's girlfriend been called to give evidence, she too would say that she had witnessed no such event.

293 It may be, and I would accept, that an incident such as that described by McVeigh may have occurred but on a different occasion. She was asked to recall the events in 2006 and the denial by Redding, which is plausible, that he was present at the gym on that occasion undermines the reliability of McVeigh's evidence. Furthermore, there is no doubt that on the Friday Ms Byrne was unwell with the flu, making it unlikely that she would have gone to the gym that evening.

294 Having raised this incident with the jury, the prosecutor then used it in an entirely impermissible manner. He told the jury that the Crown submission was that:

> "This argument must have been something very serious, and it must have had something to do with the accused's employment with Rene Rivkin. That's why Gary Redding was standing next to him. I mean, would you have a rip roaring row with your spouse or partner with one of your fellow employees from your work standing next to you? Of course you wouldn't. Neither would the accused if it was something purely personal. It must have had something to do with Rene Rivkin for Gary Redding to be there."

295 This submission was entirely speculative. If an argument did occur it could have been as a consequence of trouble in the relationship, which had nothing to do with the applicant's employment with Rivkin. Redding was a friend of the applicant's. The fact that he was present (if he was) may have had nothing to do with Rivkin. It is plain that the prosecutor introduced the prospect that the event was related to Rivkin in order to support his theory as to the applicant's motive. It was a speculative smear.

296 In support of his theory that the relationship between Ms Byrne and the applicant was fracturing the prosecutor then turned to the evidence of Ms Geraldine Howarth, who was a fellow model with Ms Byrne at the Gordon Charles Agency. She said that she had gone to the agency on 5 June 1995 to resign. She said that she saw Ms Byrne, who looked upset and appeared to have been crying. Tanya Zaetta had lunch with Ms Byrne on that day. The prosecutor reminded the jury that she had said that Ms Byrne had said to her that "Gordy and I are having a moment."

297 Finally, the prosecutor referred to the occasion on 31 May when according to Mr Byrne his daughter visited him and, while she was with him spoke to the applicant on the telephone. After hanging up she said: "I'll have to go. That was Gordon. He's in a shitty mood."

298 The prosecutor made the summary submission to the jury that there were 6 witnesses who said there were problems in the relationship between the applicant and Ms Byrne. He told the jury that they should conclude that Ms Byrne would not put up with a relationship on these terms, particularly as she had come from a very polite, supportive, loving family background. This was the foundation for the proffered motive that the relationship had deteriorated to the point where Ms Byrne wanted to terminate it and, rather than lose her, the applicant killed her.

299 The third step in the prosecutor's summation of the Crown case was a submission to the effect that the applicant was under great pressure at the time of Ms Byrne's death. Reference was made to the applicant's expectation of a career with Rivkin and how he believed that employment with Rivkin gave him the prospect of learning how to successfully invest on the stock market. He emphasised the evidence which on the Crown case supported a conclusion that the applicant big noted himself because of his relationship with Rivkin.

300 The prosecutor then turned attention to Rivkin. He reminded the jury that the applicant had gone overseas with Rivkin in relation to the Offset Alpine

issue and that Rivkin had been upset about the outcome of the home unit transaction and Mr Byrne's involvement in it. He emphasised the evidence that Ms Byrne had told her father that Rivkin was very depressed on one occasion and had said that he did not want to see the applicant at all because of his relationship with Ms Byrne. He also mentioned the evidence from Mr Byrne that his daughter had said to him that Rivkin was trying to drive a wedge between her and the applicant and that Rivkin was worried about the amount she knew about his business affairs and his private life and that Rivkin was depressed and that it was all because of her.

301 The prosecutor's submission was that by late March 1995 the situation between Rivkin and the applicant had become so bad that the applicant thought he was not going to get his bonuses, he was not going to get the home unit, and he probably would not even have a job. The prosecutor then made reference to evidence that Ms Byrne had told her father in late March that the applicant had a plan "to get around Rene."

302 There was no evidence as to what that suggested plan may have been. Shortly after that alleged conversation the applicant went overseas with Rivkin and, of course, continued in his employment. The prosecutor reminded the jury that the relationship between the applicant and Ms Byrne had previously faltered because of her concern that the applicant did not have a job. He told the jury that by late March to early April the applicant was at risk of losing his employment again. He told the jury that they might think that he feared that if he lost his job he would lose Ms Byrne and, as a consequence, his whole self image with his family and his friends was under threat.

303 The prosecutor reminded the jury of the claims which the applicant had apparently made to others about the legitimacy and likelihood of a successful insurance claim in relation to the Offset Alpine fire. The prosecutor said that this information was made available to Mr Byrne, Georgiou and others including "Caroline." However, there was no evidence

that Ms Byrne actually knew any of the details of any illegitimate dealings. No doubt Rivkin was troubled by the rumours surrounding his dealings in Offset Alpine and it is plain that a successful insurance claim would have restored the company's cash position. As it happened, Offset Alpine was compensated by the insurer and ASIC dropped the investigation into the Offset Alpine matter without laying any criminal charges.

304 The ultimate submission which the prosecutor made was that the applicant "had confidential information about powerful people, including people in government. He had told people things, including Caroline and Tony and Angelo that you might think would have horrified Rene Rivkin if he knew. So Rene Rivkin had every reason to be paranoid about Caroline and Tony."

305 The difficulty with this submission is that there was no evidence of any confidential information or that Ms Byrne was aware of any such information about "powerful people." Furthermore, there is nothing to suggest that Rivkin knew that the applicant had told anyone about confidential information relating to such people. The suggestion that Rivkin was upset and that his concern was sufficient to motivate the applicant to kill Ms Byrne was entirely without foundation. The submission should not have been made. The exploitation of public rumour and the use of mere innuendo to compensate for inadequate evidence of motive is not consistent with the obligations of a prosecutor to press the Crown case "to its legitimate strength" by reliance upon credible evidence: per Rand J *Boucher v The Queen* (1954) 110 CCC 263-275. The prosecutor continued submitting that:

> "Rene Rivkin was paranoid in the first place about Tony [Byrne] particularly, but that then he became absolutely – totally paranoid about what information Caroline had about him and his business affairs and his personal affairs and that is what Caroline said to her father."

306 It seems that the prosecutor's suggestion of Ms Byrne's knowledge about inappropriate dealings was taken from the evidence of Mr Byrne and Duval. It was brief and, in my opinion, insufficient to support the prosecutor's submission.

307 In around March 1994 Ms Byrne and the applicant came over for dinner to Ms Byrne's parents' home. Mr Byrne gave evidence that:

> "Caroline went into the kitchen and began to prepare the meal, to take it out of the carton and put it on the plates. Gordon and I walked about two metres away from Caroline into the dining room and Gordon produced a, what I saw was a share price indicator … about the size of a mobile phone and he said 'Offset Alpine Printing are at $1.37. I've recently bought shares in Offset Alpine. The insurance company is going to pay up. The shares are going to go up in price.' Then in a clear audible voice he said, 'The fire was a set-up.'"

308 When asked whether Ms Byrne appeared to be listening to the conversation, Mr Byrne responded, "I looked at Caroline at the end of that conversation and she looked up at me."

309 Duval gave evidence of a conversation with Ms Byrne at the City Gym in late 1994 or early 1995, relating to the "business of Rene Rivkin," in particular in relation to a fire and an "insurance claim." He said at that point the applicant came over, asked Ms Byrne to stop talking, then it "got heated" between the applicant and Duval. Ms Byrne walked away. No other details of the actual conversation were given.

310 The prosecutor submitted that the applicant was under great stress "where the woman of his dreams was the subject of paranoia by the employer upon which his whole self esteem was based."

311 The prosecutor also introduced, as the evidence entitled him to do, the suggestion that there may have been a homosexual relationship between the applicant and Rivkin. I accept that this may have caused Ms Byrne concern.

312 The prosecutor then turned to the evidence of the applicant's apparent possessiveness of Ms Byrne. He submitted that the applicant was a "control freak" who oppressed Ms Byrne. The submission which the Crown prosecutor put was that:

> "But, ladies and gentlemen, by the time she spoke to Angelo Georgiou, when the accused had become abusive to her, she realised that his attention to her had a very negative side. It was very dark and unwanted and verging on being stalking, and it had taken on a completely different character. You might think that by that stage she had wised up to how unattractive and unwanted that sort of possessiveness really was.
>
> So, ladies and gentlemen, by the time of her death you might think Caroline was well aware of the negative side of this absolutely controlling and possessive behaviour of the accused towards Caroline really was [sic]."

313 The evidence could not support this submission. There was evidence that the applicant was possessive of Ms Byrne and there was evidence of arguments between the two. But the evidence could not support the proposition that the applicant was generally abusive or that his behaviour was "dark and unwanted" and verging on stalking as the prosecutor submitted.

314 The prosecutor then submitted that the jury should conclude that the relationship between the applicant and Ms Byrne was unravelling. He said:

> "That he had become very abusive and threatening; that she was scared; that she didn't know how she was going to get out of the relationship cleanly; and, that things were going from bad to worse.
>
> From his point of view, he stood to lose everything: love, employment, money, future fortune, self esteem, the façade of prestige he had built up with others. His whole life was about to unravel we would submit to you that she must have intimated to him that she wanted out, and it must have been obvious to him that this time it was going to be forever.

> We submit that he decided to make one last desparate attempt to woo her back into their relationship, and that's why he made arrangements for her not to be at work on 7 June 1995. When he failed to convince her to stay in their relationship, he killed Caroline rather than losing her and losing everything else in his life."

315 I do not accept that there is any significant evidentiary foundation for this submission. There is no doubt that Ms Byrne was reporting depression on the Monday and for that reason went to see her doctor. The evidence is clear that she was troubled about her employment and her future as a model. There is no evidence that she reported any relationship between her depression and problems in her relationship. If this were the case she could be expected to have told Dr Pan about them.

316 The evidence supports the conclusion that, at least in part, the cause for Ms Byrne's unhappiness was the difficulty she was experiencing with her job and the loss of the prospect of a full-time modelling career. If her depression was of sufficient intensity for her to feel that she was unable to work it would be an entirely sympathetic act for the applicant to have sought to arrange a medical certificate to excuse her attendance from work. Furthermore, it is completely understandable that both he and Ms Byrne would not have wanted to disclose to June Dally-Watkins that the reason for her absence was depression, particularly if it was due to her employment concerns.

317 The prosecutor then turned his attention to where Ms Byrne's body had been found and sought to persuade the jury that it could be satisfied that it was found in hole A. It was submitted that the evidence of Sgt Powderly on this issue should be accepted. I discuss this issue elsewhere. I am not persuaded that Sgt Powderly's evidence is entirely reliable. I do not doubt his credibility but the circumstances in which he changed his description of the location cause me to have serious doubts that he ultimately identified the correct position. It must be remembered that not only did Sgt Powderly say on the 1996 video that Snr Const Camwell was pointing to the exact position where the body was located, but Snr Const Camwell herself

assisted in retrieving Ms Byrne on that night. It was not until 2004 that Sgt Powderly said that he had made a mistake in 1996. He says that over his time with the police rescue squad he recovered a number of bodies from the Gap. Retrieving, after 9 years have passed, a memory of the precise events on a dark, windy night with sea spray around would be difficult for any person. By the time he was able to revisit the site, A/Prof Cross had become involved and was questioning whether the correct location had been identified. A/Prof Cross' reasoning for doing so appears to have no foundation other than perhaps out of concern to eliminate the possibility of suicide, thus leaving open a prosecution for murder.

318 The prosecutor then turned to examine the evidence as to the means by which Ms Byrne could have ended up in hole A. He submitted that the evidence of A/Prof Cross made plain that Ms Byrne could not have jumped and ended up in that location and accordingly she must have been thrown. The Crown prosecutor said, "the most persuasive evidence that she did not commit suicide is that she could not have committed suicide to end up in hole A. That really is the be all and end all of it." This involved acceptance of A/Prof Cross' evidence, which I have indicated was challenged by Prof Pandy.

319 The submission that followed was extraordinary and should never have been made. The prosecutor submitted that Ms Byrne was thrown by the sort of throw that shot putters do:

> "where they hold the ball right close to their shoulders and then go round and round and finally throw the ball from the shoulders using not just their arm's strength but their body strength, all their body strength – their upper shoulders, their body, their lower body, even their legs and feet – to propel that shot put out as far as they can. So that is the sort of action that we are talking rather than a spear. But let's call it a spear throw for the purposes of argument."

320 This submission was entirely unsupported by any evidence. The evidence of A/Prof Cross described the throw as a spear throw with the applicant (or another person) lifting Ms Byrne above his or her head and throwing Ms

Byrne like a spear. The video of the tests which A/Prof Cross conducted did not include an action of throwing anything like that which the prosecutor described. The tests which A/Prof Cross conducted had the thrower holding the woman above his head with his arms apart so as to throw the body using the force of both hands, one near the head and the other near the groin. The suggestion of a shot put action was an invention of the prosecutor during the course of submissions for which there was absolutely no support in the evidence.

321 The prosecutor also submitted that the evidence of A/Prof Cross was that a man who could bench press 100 kilograms would have the strength to spear throw a 57-kilogram woman on his own or in combination with someone else.

322 The prosecutor then advanced the proposition that in all probability Ms Byrne was unconscious or at least incapacitated when she was thrown off the cliff. However, all the experiments which A/Prof Cross conducted had a co-operative subject being thrown. The experiments did not assist in establishing whether a dead or unconscious person could have been thrown the relevant distance. Although Dr Duflou said that the injuries or lack of them on Ms Byrne's body were consistent with her being unconscious, the evidence from the scientists and physics experts did not support that proposition.

323 The prosecutor then suggested that the description of the scream given by the fishermen was inconsistent with Ms Byrne committing suicide. I do not accept that proposition. I have no difficulty with the proposition that someone who has decided to jump may exclaim once they have launched themselves into the air. The evidence of the length of the scream was one or two seconds, about the time it would have taken for her to go from the cliff top to the rocks below. The scream was reported to have diminished in intensity consistent with her falling away from the listener, making it more likely that the person was falling when the scream was emitted.

324 The prosecutor's thesis was that the scream occurred at the time Ms Byrne was rendered unconscious and before she was thrown over the edge. To my mind the evidence suggests otherwise.

325 The prosecutor submitted that the evidence indicated that the scream was preceded by an hour of argument by a female and two males. This suggestion came from the evidence of Doherty. He then told the jury that "people that commit suicide generally don't argue for an hour beforehand." There was no evidence to support this proposition and for my part I would not accept it. I have no difficulty with the possibility of someone being involved in an intense argument, and then distressed by that event and perhaps surrounding circumstances, committing suicide.

326 The prosecutor also submitted that the evidence that Ms Byrne had taken $50 from the bank and purchased a Freddo frog and petrol that afternoon were inconsistent with her intending to commit suicide. Again, I would not accept that as a necessary conclusion. I believe it possible that a number of hours after the purchases had been made she could have resolved to take her own life.

327 I have discussed elsewhere the evidence of observations purportedly made of the applicant and Ms Byrne and another person at Watsons Bay in the afternoon and at night on the day she died. Mindful of the inherent difficulties with identification evidence and the problems with the particular evidence in this case I am not persuaded that on either occasion it could be reliably accepted that the applicant or Ms Byrne were observed in the Watsons Bay area. The prosecutor indulged in considerable speculation. He said this:

> "Of course Mr Redding has given evidence. Mr Redding has denied being at Watsons Bay on that day, or any other day, either with the accused or Caroline Byrne or with anybody.
>
> However, you should bear in mind this: that at about 3 pm, Mr Jaggard, Mr Michael Jaggard, who was the operator of the Alife restaurant in Stanley Street, East Sydney gave evidence that at

> about 3 pm he saw the accused arriving at the Alife restaurant with Gary Redding, and the accused spoke to Rene Rivkin who was lunching at the restaurant. Now, I'll come back to that.
>
> I would also ask you to bear in mind that Gary Redding was the man who was standing shoulder to shoulder with the accused just the previous Friday when the accused was berating Caroline. Gary Redding was also a weight lifter at the time.
>
> If the accused had attempted to isolate Caroline that day, to provide him with an opportunity to convince Caroline to stay in their relationship, and if he was doing that because of fears that were held by Rene Rivkin about what Caroline and her father knew about him, and if they had – the accused had failed to convince Caroline to stay in the relationship, that would account for why the accused reported back to Rene Rivkin at the Alilfe restaurant about 3 pm and why Rene Rivkin appeared to be agitated and was throwing arms around when he spoke with the accused."

328 This speculative construction of the events by the prosecutor achieved two things. Firstly, he was hinting at the fact that Redding, who he said was a weight lifter, was the second man who the Crown hypothesised was involved in Ms Byrne's death. Secondly, he related the involvement of Rivkin in the events of that day with the speculative motive which the prosecutor had created. Any proper foundation for that motive was entirely lacking. The Crown prosecutor ultimately tells the jury that they may be unable to say who the second man was on that night. However, "so long as you are satisfied that the accused was there, that the accused was party to Caroline Byrne being thrown over the Gap, then he is guilty of her murder, whether or not you can decide who the second man was."

329 The Crown prosecutor's submission identified the difficulty. Even if the applicant was present at the time Ms Byrne died and even if she was thrown over, if there was a second man, the role of the applicant in the events is unknown. Furthermore, if there was a second man there is no evidence of an agreement between the applicant and that person and no understanding of the means which may have been used to bring Ms Byrne to her death.

330 Doherty was first asked to recall the events of this evening in 1998. I have set out his evidence under Ground 2.

331 The prosecutor sought to advance the reliability of Doherty's identification by reminding the jury that his description of what Ms Byrne was doing was said to be similar to that when the accused "cornered and berated" and swore at her at the gym. This comparison seems to my mind to be wholly without foundation. In the event described by McVeigh at the gym Ms Byrne is not reported to have said anything. However, at Watsons Bay Doherty identified a woman who was in the gutter sobbing, slurring her words, arguing back and in his view affected by drugs and alcohol. The description of the two incidents have little in common. Furthermore, the autopsy confirmed the absence of evidence of either alcohol or drugs in Ms Byrne's blood.

332 Ultimately, all that Doherty is able to say in relation to the applicant was that after observing him on the "Witness" program he thought that he was similar to the person he saw in the street who emerged from under an awning. He does not identify the applicant as that person.

333 The prosecutor sought to explain away Doherty's description of the woman he observed as being affected by drugs or alcohol by saying:

> "Of course, he would, because he had seen numerous people in that area who were drunk or affected by drugs having arguments like that. That of course is likely."

334 The prosecutor continued:

> "That doesn't mean that that woman was actually drugged or drunk. We submit to you that Caroline Byrne at that stage had been subjected to the most concerted attempt by the accused to convince her to stay in her relationship; they were arguing and arguing and arguing and continued to argue until the time of her death. You might think that she had been so harangued in such a vociferous way by the accused that she was just totally and utterly distressed, not wanting to go, not wanting to be there, wanting to be out of the relationship, not knowing how to cleanly end it, as

> she told Angelo Georgiou, and that is why she was slurring her words and sobbing."

335 This submission is almost entirely without foundation. It is a fiction which the prosecutor was not entitled to advance to the jury. The evidence of Doherty was clear that the person he saw was drunk or affected by drugs. There was no evidence that there had been continuous argument during the day or that the source of that argument was that Ms Byrne had on that day said she was to terminate the relationship and the applicant was attempting to convince her to stay.

336 The prosecutor then turned his attention to the applicant's account of the relevant events. He told the jury that "the Crown case is that the accused told a tissue of lies about where he was during the course of the day." He raised a number of matters.

337 He referred firstly to the applicant's account to the police of the events at about lunchtime. The applicant told the police that he dropped Rivkin and Richardson at the Alife restaurant and went home to see Ms Byrne, but she was so groggy he left and joined his friends Basquali and Samartis at Ditto's restaurant between 1.15 and 1.45 pm. He said he ordered lunch but left without eating it when telephoned by Rivkin, who asked him to pick up Richardson.

338 The prosecutor criticised this account which he said "is completely contrary to the evidence of Basquali and Samartis. Basquali says arrangements were made by telephone and it all happened between 12 and 1 pm." The implication is that the jury should accept Basquali's account of events, including the time, but reject the applicant's.

339 I accept that there are some anomalies in the applicant's account of these events. However, I do not believe that a recollection of the precise time at which any of these events may have happened has great significance.

Recalling one's luncheon arrangements and their precise timing based on ordinary human experience presents difficulties.

340 The prosecutor used these times as critical in placing the applicant at Watsons Bay at about 1 pm. I have already expressed my doubt that either Ms Byrne or the applicant were at the Gap at that time. The challenge which the prosecutor made to the applicant's account of the events at about lunchtime does nothing to give weight to the prosecution argument that they were observed in the vicinity at that time.

341 I accept that there are other anomalies. The applicant said he was telephoned by Rivkin and directed to pick up Richardson. The telephone record does not record such a call and Richardson denied lunching with Rivkin on that day. The applicant may have been confused about the sequence of those events and falsely recalled picking up Richardson. Richardson apparently frequently lunched with Rivkin. It may also be that the applicant was lying. However, if he was lying it could only be to avoid a conclusion that he was with Ms Byrne at that time. Given that she did not die until 11.30 pm that night, was known to be suffering depression, and was troubled about her working life, it was entirely plausible that she would be at home and that the applicant would make other arrangements for his lunch. On any view the applicant was with his friends at the restaurant for a relatively short period about lunchtime. If he otherwise lied about his movements at this time I do not believe it has significance for the Crown case.

342 The telephone record shows a call from the applicant to Basquali at 1.18 pm. The prosecutor said this was when the applicant told Basquali he was not coming back to eat the meal he had ordered. It is of course equally possible that this was a call in which the applicant confirmed that he was on his way to the restaurant. Either theory is speculative.

343 The prosecutor next asked the jury to consider the evidence about the applicant and Redding at the Alife restaurant. He accepted that Rivkin

dined there on the Wednesday 7 June. Jaggard, who owned the restaurant, said that Rivkin would normally start lunch at 1 pm and that the applicant dropped him off.

344 Jaggard said he saw the applicant and Redding arrive at the restaurant at about 3 pm. The prosecutor did not suggest that this was in any way suspicious but said suspicion arose when Jaggard was later approached three times by the applicant and "threatened not to say anything about having been seen at the restaurant that day. And also offered a share deal in the UK if he kept quiet."

345 There is no apparent reason to doubt Jaggard's account. However, nor is there any reason why the applicant would "cover his tracks" by seeking to suppress knowledge that he was at the restaurant on that day. The prosecutor extended his submission to include reference to discussion between Redding, Mr George Freris and Jaggard. To my mind, rather than those discussions being relevant to any involvement of the applicant in Ms Byrne's death, they suggest that there may have been other reasons why the relationship between them was fragile. Of course, what the prosecutor was doing was seeking to put into the jury's mind a connection between Rivkin, Redding and the applicant, and the killing of Ms Byrne. There being no reason why the applicant would not want to have been seen with Rivkin at that time on that day, the speculative proposition which the prosecutor was seeking to sustain was untenable.

346 The prosecutor then invited the jury to consider the situation with respect to Richardson. This was said to be an "alibi" asserted by the applicant.

347 I accept that there is an inconsistency between the account given to the police by the applicant and the evidence of Richardson. The applicant said that he picked Richardson up at the Alife restaurant at between 2.00 and 2.30 pm and took him to the ACP building or to the Rugby League building. Richardson denies this happened.

348 It may be that the applicant is lying about the issue or is mistaken. To my mind it is of no consequence. The prosecutor says that the applicant lied to create an alibi against it being asserted that he was with Ms Byrne at the Gap during the afternoon. I am not persuaded that beyond the issue of credit this controversy is of any moment. The prosecutor accepted that the applicant was at the Alife restaurant at 3 pm without Ms Byrne. What matters is whether he was with her and caused her death at 11.30 pm.

349 The prosecutor reminded the jury of Jaggard's evidence of threats made to him by the applicant. He said that this was because Jaggard was in a position to "destroy the Richardson alibi." However, the prosecutor also proffered that it may have been because it was believed that Jaggard "had heard his discussion with Rivkin."

350 By this submission the prosecutor again linked Rivkin to Ms Byrne's death in a manner entirely unsupported by any evidence. Given Richardson's own denial that he lunched with Rivkin it would seem unlikely that the applicant would have threatened Jaggard so as to have him deny that he was at the restaurant with Redding and Richardson.

351 It may be that there was a belief that Jaggard had overheard a conversation which the applicant did not want repeated, but there is nothing to link the threats allegedly made to Jaggard to Ms Byrne's death.

352 The prosecutor's next reference was to the issue of Rohypnol. The applicant told police that he went home and found Ms Byrne asleep and wanting to sleep more. He said that he identified and she confirmed that she had been taking Rohypnol tablets which he had left in the bathroom. Cameron, a friend to whom the applicant spoke about the matter, said that the applicant gave her a further tablet at the time.

353 The autopsy following Ms Byrne's death did not reveal any Rohypnol in her blood stream, although there was evidence in her urine that she had taken it at some time in the recent past. The prosecutor used this evidence to

submit, as he was entitled to do, that the applicant had invented his account of Ms Byrne taking Rohypnol to "enhance his fabricated suicide scenario."

354 If the account was invented, it does little to add to the possibility that Ms Byrne committed suicide. It is apparent beyond argument that at the time she was depressed. A fabricated story about Rohypnol was hardly necessary to bolster this suggestion. Furthermore, if he had given her another tablet at lunchtime it would be less likely that she would have aroused herself sufficiently to find her way to the Gap and commit suicide.

355 I accept that there are matters which are not adequately resolved and it may be that the applicant fabricated this sequence of events, but I am not persuaded that this issue is of any particular significance to the prosecution case.

356 The prosecutor then turned attention to the applicant's account of the events during the evening. He submitted that the entire sequence of events was fabricated. He drew attention to the following:

- The fact that Ms Byrne's mobile phone was turned off.

- The fact that the applicant, although saying he listened to the messages on the home telephone, did not appear to be aware of a message from Peter Byrne, Ms Byrne's brother.

- The fact that when he woke up, the applicant does not say that he attempted to ring Ms Byrne or attempted to telephone home on any later occasion.

- The fact that the applicant says that he fell asleep and was apparently not wakened by his pager.

- The fact that the applicant's mobile telephone was apparently turned off between about 5.30 pm and 8 pm.

- The different accounts the applicant gave of when he woke up varying between 11 pm and 1 am.

- The fact that Peter Byrne says that he took a call from the applicant at about 12.30 pm which was after the applicant had supposedly found her car at the Gap and had already spent time searching for her.

357 The prosecutor identifies these and other anomalies in the applicant's account. He emphasises them in making the submission that the applicant was in fact with Ms Byrne at the Gap. He further emphasised that it seemed unusual that the applicant would attempt to find Ms Byrne at Bondi or Camp Cove or the Gap on a cold winter's night. Furthermore, although he said he went to the Connaught he did not say that he went into the car park where Ms Byrne usually parked, merely passing outside the building. The prosecutor emphasised the coincidence which the applicant said caused him to look for Ms Byrne at the Gap.

358 The prosecutor also placed emphasis on the applicant's account of his behaviour when searching for Ms Byrne at the Gap. He identified the lack of thoroughness in the search and abandoning it to go to the Connaught to pick up Mr Byrne and Peter, a scenario which the prosecutor described as absurd. He also emphasised that he did not attempt to telephone his home to see whether Ms Byrne had returned.

359 I accept that there are anomalies and inconsistencies in the accounts which the applicant gave of his movements. His account of falling asleep and when waking panicking and going about a search instead of ringing Ms Byrne or her family to find out where she may have been arouses

suspicion. However, a suspicion, even a strong suspicion, is not sufficient to make good the prosecution case.

360 The evidence is that when the applicant telephoned Peter Byrne he did not use a mobile phone. The applicant said its battery was flat and he only replaced it early in the morning. Although the prosecutor was inferring that the applicant had for some sinister reason not used his mobile phone I can see no logical reason why this would be. The applicant said that by this time he had been to the Gap, and unless he is in an entirely different location, which was never suggested, he would have had no reason to obscure the fact that he was at the Gap.

361 The prosecutor also emphasised the fact that, although the applicant would have had the option of taking a car owned by Rivkin from the car park which was electronically monitored, he said that he chose instead to walk a further distance and take a vehicle from Rivkin's collection in a car park where there was no electronic monitoring. It was submitted that he did this in order to mask the fact that he had previously taken the vehicle rather than having collected it after he had woken up at home. I accept that the applicant's seeking a car from the more distant car park raises suspicion but there may be other explanations for his actions.

362 The prosecutor then turned his attention to the fact that during the course of the search by the police for Ms Byrne's body the applicant said that he could identify her and recognised the clothes she was wearing. Const Woods said that the applicant said to him that he knew it was Ms Byrne because he knew what clothing she had. He apparently said she had one pair of joggers, four pairs of tights and one denim jacket. He gave a different account of her clothing when interviewed for the Witness program.

363 The prosecutor emphasised the evidence that Ms Byrne had a significant array of clothes, as one would expect of a professional model. It was submitted that the only way the applicant could have known what clothes

Ms Byrne was wearing that evening was if he had been with her during the day. There is force in the prosecutor's submission.

364 The prosecutor then turned his attention to the fact that when Ms Byrne's car was searched the police did not find anything of significance in it. However, subsequently the applicant was known to have her mobile phone, her watch (which the evidence was "she always wore") and the referral to the psychiatrist. The evidence was that he produced the referral from Ms Byrne's handbag which the prosecutor said was not found by the police when they searched Ms Byrne's car. He also had the two transaction vouchers which evidenced the purchases that Ms Byrne had made that afternoon.

365 There is no evidence as to how the applicant came upon these items. The prosecutor suggested that they must have been in the applicant's possession before Ms Byrne died establishing that he was with her that afternoon. There is no doubt that, at least in respect of the transaction vouchers, it may be significant that they were not found in her car. However, given that Ms Byrne's car was at the Gap and the purse was found in it there is no logical reason why the other items were not "innocently" discovered by the applicant. There was no reason for the applicant to have had possession of her watch or, for that matter, the referral to the psychiatrist. If he was intent upon killing her he may have secreted her mobile phone although, as I have indicated, there is an innocuous explanation for her failure to use it that day.

366 Early on the Thursday morning the morgue rang Tony Byrne's apartment and indicated that they had found keys on Ms Byrne's body. The evidence was that this came as a shock to the applicant who proceeded to "rush out" to pick them up. The prosecutor submitted that the applicant's shock at Ms Byrne's keys being found was because the applicant had killed Ms Byrne. He said that he stripped her of the items in her possession but missed the keys which explained his surprise when the morgue rang Mr Byrne's apartment.

367 This submission was mere speculation. It is difficult to identify any reason why if the applicant intended to kill Ms Byrne it was necessary to "strip" her of any of these items.

368 The prosecutor submitted that over the following days the applicant continued his "relentless pursuit to try and convince Tony and Peter that Caroline had committed suicide." He emphasised that on 9 June the applicant had said to Peter and Tony "she has left a trail. She used her card at Paddington and then she has used her card again at Vaucluse, virtually leaving a trail." He said that the only way the applicant knew this was because he was in possession of the relevant vouchers and stressed that the withdrawal slip from the bank does not disclose the bank from which the money was obtained. The prosecutor submitted that the only way in which the applicant could have known that the money came from the Westpac bank at Vaucluse was if he had been present with her or had himself made the withdrawal. It was submitted that the knowledge which the applicant had was completely contrary to his assertion that he had not known what Ms Byrne had been doing throughout that day.

369 As the evidence suggests the applicant said that he could establish that Ms Byrne was at Westpac Vaucluse and produced the voucher to establish it, there is at the least an anomaly. The applicant must have known that the voucher did not disclose the branch of the Bank. It would seem likely that he had other reasons for deducing she had obtained money at Vaucluse.

370 The prosecutor then turned his attention to the sequence of events on the Tuesday which he said supported his submission that the applicant was attempting to isolate Ms Byrne so that he could try and convince her not to leave their relationship. He said that he had decided to take Ms Byrne out of general circulation the following day.

371 I have discussed this issue elsewhere. It may be that there are some inaccuracies in the chronology reflected in the various statements which the applicant made. However, the prosecutor's analysis of these events is nothing more than speculation. What is clear is that Ms Byrne was not at home until sometime around 8 pm. The prosecutor emphasised that in his phone call to Clifford the applicant told a number of lies about Ms Byrne's situation. I accept that he did lie, however as I have previously indicated it is equally possible that he did this out of an endeavour to assist Ms Byrne rather than because he had some purpose of isolating her so that he could in some way spend the day persuading her not to leave the relationship. Whatever inaccuracies there were in the applicant's statements and whatever lies he told to Ms Byrne's employer, they did not lead logically to the conclusion that the applicant had made a deliberate decision to isolate Ms Byrne. There was no basis for the drawing of such an inference. That scenario amounted to nothing more than conjecture.

372 The drawing of an inference is not a matter of conjecture. An inference must be logically based, that is, it must bear some logical relationship to the evidence from which it proceeds: see *Holloway v McFeeters* (1956) 94 CLR 470; *Peacock v The King* (1911) 13 CLR 619 at 661.

373 There are other apparent contradictions in the applicant's account of the events of the Tuesday night, including his reference on one occasion to his understanding that she had been at the Gap. This leads to consideration of Ms Byrne's telephone records which disclosed that she had made two calls from a location registered as "North Shore."

374 The prosecutor suggested that the applicant indicated that Ms Byrne may have been at the Gap in order to support the possibility that she had committed suicide. The prosecutor said:

> "We submit there are two possibilities: either it was just rhetoric, it was just hot air that he was issuing out to try and convince these people that Caroline had committed suicide, without having any knowledge at all about where she had been on the Tuesday before

> she came home; or, alternatively, that phone call was made at the Gap on the Tuesday night, because he took her phone to the Gap and made a call, thinking to himself, 'this is going to support my case that she has committed suicide so that I can say that she's been out at the Gap the previous night.' Because there is no other rational explanation: it's either something he's randomly said out of the blue, or it's something that he's calculated he planned in advance. One really can't pick between the two of those."

375 The prosecutor's submission is entirely speculative. The applicant explained on one occasion that the suggestion that Ms Byrne's phone calls indicated that she may have been at the Gap came from a suggestion from the police. That may be so. But it was not necessarily sinister that in seeking to reconstruct Ms Byrne's movements he may have suggested that, given the phone calls, she was at the Gap. After all she had to be in a location where the calls would register as "North Shore."

376 The prosecutor then discussed issues concerning the applicant's capacity to bench press 100 kilograms, in particular the evidence given by Duval. He also discussed the suggestion that Blanchette may have been involved.

377 It was after this summary that the prosecutor asked the jury to consider his fifty questions.

Conclusion on Ground 1

378 The prosecution case against the applicant was circumstantial. The High Court emphasised in *Hillier* at [46] that when considering a circumstantial case "all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence."

379 In *Chamberlain [No 2]* at 535 Gibbs CJ and Mason J said:

> "In a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no

> inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together: per Lord Cairns, in *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at 279."

380 In the course of these reasons I have considered the many aspects of the prosecution case. They have, of necessity, been separately discussed for the purpose of determining the contribution which they together make to the entire prosecution case. Of primary significance to that case is a conclusion that the applicant was with Ms Byrne at the Gap when she died.

381 The prosecutor's hypothesis as to the relevant events involves considerable speculation. It assumes that Ms Byrne was at Watsons Bay at about lunch time but left, going to some unknown destination, before again returning to Watsons Bay late in the afternoon. It assumes that the applicant, travelling in a different vehicle to Ms Byrne, was with her at the Gap at about lunchtime and then left her and at some stage later returned and met up with her again. It assumes that, although happy during the afternoon, in the evening they fell into argument, an argument which lasted for three and a half hours. It assumes that Ms Byrne was probably rendered unconscious before she was thrown over the Gap by the applicant acting on his own or in combination with a second unknown male.

382 I acknowledge that some of the actions by the applicant both before and following Ms Byrne's death raise suspicion about his possible involvement. However, many aspects of his conduct before her death which are criticised by the Crown were consistent with him acting out of a genuine concern for her wellbeing. Lying to protect her job with June Dally Watkins and putting about a fake story that her death was an accident rather than suicide are most rationally, and to my mind convincingly, explained by a concern for her welfare and reputation. After discovering her car and probable death his reactions must have been affected by shock and anxiety. The evidence, including that of Mr Byrne and Peter Byrne, confirm

that this was the case. Even if he was responsible for her death he could not have seen where her body had lodged without the aid of the police lighting.

383 I am not persuaded of either of the motives suggested by the Crown. The Crown case that the applicant was besotted by Ms Byrne to the point of exclusive possessiveness is, standing alone, inconsistent with an intention to kill her. The prosecutor invited the jury to speculate that Ms Byrne ws preparing to leave the applicant in order to give this suggested motive some cogency. There was no reliable evidence that Ms Byrne was contemplating leaving the relationship or that she had communicated that intention to the applicant.

384 I am not persuaded that Ms Byrne and/or the applicant were at the Gap together at any time on 7 June. I have discussed this issue in greater detail under ground 2. The Crown placed great emphasis on Doherty's evidence and the conclusion that he observed Ms Byrne and the applicant. The problems in accepting this evidence are significant. I have discussed them in greater detail when considering Ground 2.

385 I appreciate that the applicant's account of falling asleep at home and hours later setting about finding Ms Byrne and discovering her car at the Gap raises suspicion. There are other anomalies in his account of the events. However, after considering the entirety of the evidence I am not persuaded that the applicant was at the Gap at the relevant time. The Crown must prove its case. No burden falls upon the applicant.

386 Ms Byrne died when she landed on the rocks at the base of the Gap. To my mind whether she voluntarily fell or was thrown cannot be determined from the expert evidence. Although the evidence of Whelan suggested that Ms Byrne may have recovered from her previous depressive episode in which she attempted suicide, there was considerable evidence that she was very depressed at the time and had previously attempted suicide. I am not persuaded beyond reasonable doubt that she did not take her own life.

387 I have reviewed the entirety of the evidence at the trial and have expressed my view about the significance of many parts of it. Having regard to the entirety of the evidence I have concluded that the verdict of the jury cannot be supported. To my mind the circumstances do not establish beyond reasonable doubt that the applicant murdered Ms Byrne.

388 Leave to raise Ground 1 should be granted, the appeal upheld, and a verdict of acquittal entered. However, it remains necessary to deal with the other grounds of appeal: *Cornwell v The Queen* [2007] HCA 12; 231 CLR 260 at [105].

Ground 2: A miscarriage of justice was occasioned by the directions given by the learned trial judge in relation to:

a. The positive identification evidence of Martin and Melbourne relied on as day time sightings of the applicant and Ms Byrne at Watsons Bay; and/or

b. The evidence of Mr Doherty and Miss Kingston relied on by the prosecution as night time sightings of the applicant and Miss Byrne.

389 Identification evidence has been the source of many problems in the criminal law. It can prove particularly troublesome unless care is taken when leading the evidence and, if there is a jury, careful instruction, including relevant warnings, is given by the trial judge. Section 165 of the *Evidence Act* is an acknowledgment of the care with which identification evidence must be approached.

390 The difficulties which the law has previously recognised are apparent in the present case. As I have previously indicated, there are two separate occasions on which different witnesses said they "recognised" the applicant and Ms Byrne at or near the Gap on 7 June. The evidence in respect of both of those occasions has many of the difficulties which the law has previously recognised when dealing with identification evidence.

(a) The positive identification evidence of Martin and Melbourne relied upon as day time sightings of the applicant and Ms Byrne at Watsons Bay

391 In 1995 Martin and Melbourne carried on the business of the Bad Dog café in premises at Watsons Bay adjacent to the Gap. They were approached by Watson and Dally-Watkins at their cafe on about 16 June 1995. The two women showed the men a photograph or photographs of Ms Byrne. The particular photographs which they were shown were not in evidence at the trial. In their evidence, Martin described being shown a single black and white photograph and Melbourne said that he was shown only a single photograph of Ms Byrne.

392 Dally-Watkins gave evidence about the meeting with Martin and Melbourne. She said that when shown the photograph they said to her "we think that we recognise that girl and saw her go by." However, when she gave evidence at Ms Byrne's inquest, Dally-Watkins said that they first said to her "ah no, no." Although their first response was that they had not seen the woman, after talking together, they apparently said that they thought they had seen her. They told Dally-Watkins that she was with two men. When giving evidence they said that one was "a tall man, slim with fair hair wearing a brown jacket." Dally-Watkins' notes of the meeting do not contain mention of a brown jacket although she noted the description given as "tall and fair." This is a significant omission because one of the identifying characterisations of the applicant was that he often wore a brown jacket. The second man was described as "a much shorter person, who was dressed in all black and had black hair tied back into a kind of pony tail."

393 Dally-Watkins gave evidence that when shown the photograph, one man had said "how can I forget those legs?" She said that they also said to her: "it looked rather sinister that this gorgeous woman with great legs was being escorted by two thuggish looking guys." One of the witnesses

described one of the men he observed as “very tall, fair hair; strong facial features and structure, leather jacket.” Dally-Watkins said that she thought it sounded like a description of the applicant. When giving evidence Dally-Watkins refreshed her memory from her statement dated 13 December 1999 after which she corrected the description given of the clothing worn by one of the men to a “brown suede jacket.” Dally-Watkins agreed that she herself would not have described the applicant as “thug like looking,” “unkempt” or “unpleasant.”

394 Dally-Watkins said that after speaking with the two men she attended the memorial service for Ms Byrne, which was held on 21 June 1995, where she saw the applicant and Leigh. She said that she thought that each was “an exact description of the two men made by Martin and Melbourne.” She took photographs of the applicant at the service when he was wearing a brown suede jacket.

395 Within a week Dally-Watkins took these photographs of the applicant back to the Bad Dog café and showed them to Martin and Melbourne. She said that she could not remember what they said but that “they thought there was a strong resemblance.”

396 In her notes she wrote that on this visit they indicated that the girl they saw may have been someone else. They also said that it was possibly a day earlier than previously discussed that they had seen her. Melbourne gave evidence that he had been shown photographs of Ms Byrne and the applicant on the same day. Martin did not give evidence on this topic.

397 Martin gave evidence at the trial in which he said that between 11 am and 1 pm on a day in the week prior to Dally-Watkins coming to the café he and Melbourne “saw Caroline Byrne and two other men, didn’t know it was her at the time.” He said the girl was “stunning” and did not seem “to go together with the two men.” She was in her early twenties, wearing tights and loose shirt-type top, with dark blond hair and was between 5 foot 10 and 5 foot 11. He described one man as “tall, sort of gingerish-blondish

hair, athletic build, but, you know, not a big man." He was "Anglo" and was "wearing an oversize jacket" which he described as "anorak-type darkish." The second man was described as "shorter with a dark leather jacket" and a "fairly slight" build.

398 Melbourne gave evidence that he saw the three people on two occasions. The first was before 1 o'clock and the second occasion was around 3 pm. He described the girl as tall, blonde and striking and wearing a blue denim jacket. He said she looked like a model and was laughing. He said the group "seemed happy." The tall man was described as a "tall rangy sort of guy" with fairly long hair and wearing a type of suede jacket "yellowy, orange or banana-coloured type of thing." After refreshing his memory he described the colour as "brown." He said the tall man had a "very round chin" and a "very strong jaw line," and he said he looked a "bit poncy" and "pretty fit." The second man was described as "short." He had long black dread locks. He was dressed all in black.

399 The evidence of the occasion on which they were shown the photographs of Ms Byrne does not indicate that they immediately recognised her. Martin said that they "all sort of came to the agreement, yes, that was the girl we saw." This was said to be during a conversation with details "going backwards and forwards" including the mention of the Vitara motor vehicle. Melbourne gave evidence that when he was shown the photograph he "immediately recognised her." However, he was reminded that he had said in his police statement that "he thought it looked like the girl we had seen walking with the two males in the park a couple of weeks earlier." As it happens he denied saying this to the police and was adamant he said "it was the girl."

400 The inquest into Ms Byrne's death commenced in November 1997. On 25 November 1997, when there were a number of people gathered in the foyer of the Coroner's Court, Martin was present. He later said that he recognised the applicant among those gathered. Melbourne also said that he recognised the applicant on this occasion. Of course, by this time they

had been shown photographs of him and the matter had received coverage in the media.

401 Both Martin and Melbourne also gave evidence of having recognised Leigh among those who were gathered at the courthouse, believing that he was the "second man" they had seen at the Gap on the day Ms Byrne died.

402 Both men were wrong about Leigh. The prosecution accepted that "in all probability" the identification of Leigh was not correct.

403 At the trial the prosecutor asked both Martin and Melbourne to identify the applicant, who was, of course, seated in the dock. They both said that he was the person they had seen in the park.

404 The prosecutor also showed Martin the photographs taken by Dally-Watkins of the applicant at the memorial service. One photograph included a Bentley motorcar in the background. Martin was asked whether he was able to say anything about the clothing on the person in the photograph and the clothing worn by the person who he said he recognised to be the applicant at Watsons Bay. He responded that the jacket was similar.

405 Melbourne was shown some photographs of Ms Byrne and asked to compare them with the girl he saw in the park. He responded, "it's the same girl, but the photograph's different."

406 Prior to the summing up, senior counsel for the applicant requested a *Shepherd* direction in relation to the positive identification by Melbourne and Martin and also the evidence of Doherty, which I discuss below. He also made submissions in relation to issues of displacement given the media coverage of the matter before the trial. His Honour ruled against the application.

407 The Crown prosecutor conceded that the accused was entitled to a warning pursuant to s 165 of the *Evidence Act* in relation to the identification evidence given by Martin and Melbourne. He also conceded that the identification using the photograph could be legitimately criticised because it was just one photograph and not an array. The Crown disputed that displacement was relevant in relation to the evidence of identification at the café but conceded displacement was a relevant issue in relation to the evidence at the inquest. The prosecutor did not advert to the dock identification which he had conducted.

408 Martin and Melbourne also gave evidence of having seen a Bentley motorcar at the Gap. They said it was a two-door vehicle and that they "know about these cars." It was apparent that the only relevance of that observation was that Rivkin owned a Bentley. However, the evidence was clear. Although Rivkin at some time owned a Bentley (probably acquired after Ms Byrne died) his was a four-door model whereas Martin and Melbourne were certain that they had observed a two-door car. It was possible, and, given his regular movements through the area, it would seem likely, that the car which they observed was that of Mr John Singleton. The evidence about the sighting of the car raised a false issue and served only to reinforce, as the prosecution no doubt intended, the relationship between the applicant and Rivkin to give weight to the prosecutor's suggestion that the motivation for the killing was to preserve Rivkin's reputation and coincidentally the applicant's job.

409 It is apparent that the evidence of both Martin and Melbourne suffered from every problem which has previously been considered in relation to identification evidence. Their evidence was contaminated by the discussions with Dally-Watkins and the fact that they were shown a single photograph rather than an array of photographs and were shown photographs of the applicant at the same time they were told he was Ms Byrne's boyfriend. There were also difficulties arising from the fact that the photographs showed the Vitara motor vehicle and Rivkin's Bentley, thus associating them with Ms Byrne and the applicant.

410 The law is replete with warnings about the fallibility of evidence of this type.

411 In *Alexander v The Queen* [1981] HCA 17; (1981) 145 CLR 395 at 400, Gibbs CJ, in relation to identification of a person subsequent to being shown a single photograph of a single person, said:

> "it would be unfair and improper to show to a witness, before the identification parade was held, a single photograph of a person who was said to be the suspect, and it would be unsafe to act on evidence of identification given in those circumstances: *R v Russell* [1977] 2 NZLR 20 at 27."

412 This reasoning was applied by this Court in *R v Blick* [2000] NSWCCA 61; (2000) 111 A Crim R 326 at 335 [28]-[29], where Sheller JA held (James and Dowd JJ agreeing):

> "But, unfortunately, to show Mr Small a group of photographs in which only one was of a man with a goatee beard, when that was an identifying factor in Mr Small's mind, is, in my opinion, little better than showing him only one photograph, the photograph of the appellant. The prejudice to the appellant was both unfair and very considerable because it placed firmly in the mind of Mr Small the photographic image when he came to make his statement and to give evidence at the trial.
>
> The probative value of an identification in those circumstances was particularly low. The unfair prejudice was substantial particularly when it is remembered that the photographic identification was an essential feature in the Crown case. In my opinion, on the application to reject the identification evidence based on the photograph, there could only be one conclusion and that was that the probative value of Mr Smail's identification evidence by reference to the photographs was outweighed by the danger of unfair prejudice to the defendant. Accordingly, the Court was bound to reject that evidence. "

413 The phenomenon known as the “displacement effect” was described by Stephen J in *Alexander* at 409:

> "Having been shown a photograph, the memory of it may be more clearly retained than the memory of the original sighting of the

> offender and may, accordingly, displace the original memory. Any subsequent identification, in court or in an identification parade, may on the identifying witness's part, in truth involve a matching of the man so identified with the remembered photograph, which has displaced in his memory his recollection of the original sighting."

414 This type of evidence was referred to later in Stephen J's judgment at 414 as akin to "worthless"; see also Mason J in *Alexander* at 426; *Davies and Cody v The King* [1937] HCA 27; (1937) 57 CLR 170 at 178-179 (Latham CJ, Rich, Dixon, Evatt, McTiernan JJ); *R v Carusi* (1997) 92 A Crim R 52 at 55 (Hunt CJ at CL, Ireland and Newman JJ agreeing); *R v Agkul* [2002] VSCA 222 at [26]-[27]; [2002] 5 VR 537; *R v Skaf* [2004] NSWCCA 37 at [80]; *Aslett v R* [2009] NSWCCA 188 at [55]-[56]. In *Skaf* at [80] this Court described the displacement effect in the following terms:

> "The displacement effect refers to the risk that a witness who has seen a photograph of someone may unconsciously have his or her memory reinforced by the photograph as distinct from his or her earlier observation of the person in the flesh; and that that displaced memory may be the basis of a later in-court or other identification made in the presence of the accused person."

415 It has been accepted by the courts that the value of dock identification evidence is minimal. The nature of the evidence is such that it is of "little probative value when made by a witness who has no prior knowledge of the accused, because at the trial circumstances conspire to compel the witness to identify the person in the dock": Mason J in *Alexander* at 426-7. In *Davies and Cody* at 182, the Court (Latham CJ, Rich, Dixon, Evatt and McTiernan JJ) held:

> "Similarly, if a witness is shown a single person and he knows that that person is suspected of or charged with the crime, his natural inclination to think that there is probably some reason for the arrest will tend to prevent an independent reliance upon his own recollection when he is asked whether he can identify him. This tendency will be greatly increased if he is shown the person actually in the dock charged with the very crime in question. "

416 The evidence having been admitted at the trial, strong directions were necessary and required by law: *Domican v The Queen* [1992] HCA 13; (1992) 173 CLR 555 at 561-2; *Festa v The Queen* [2001] HCA 72; (2001)

208 CLR 593 (Gleeson CJ at [26], McHugh J at [68]-[82], Kirby J at [172]-[180], and Hayne J at [216]-[219]); ss 116, 165 of the *Evidence Act.* An obligation also rested on the prosecutor, who had argued that appropriate safeguards could be ensured through directions and who had resorted to dock identification, to assist the judge with appropriate directions.

417 In *Kanaan v The Queen* [2006] NSWCCA 109 at [182]-[183], it was said:

> "In the case where the issue of identification plays any significant part of the Crown case, the judge must isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence — whatever the defence raised and however the case is conducted.
>
> Whereas it is necessary pursuant to s 116 for the judge to go beyond how the case has been conducted and to refer to every matter of significance which may reasonably be regarded as undermining the reliability of identification evidence (unless the identification is in the end not in dispute: see *Dhanhoa v The Queen* (2003) 217 CLR 1 at [19]-[22], [53]), the warning required pursuant to s 165 need be given only if requested by a party... "

418 The evidence of Martin and Melbourne was summarised by the trial judge, who also reminded the jury of the Crown case. Directions with respect to identification evidence were also given. It was submitted by the applicant that the directions were insufficient. The directions were as follows:

> "624 Where there is a dispute about whether the jury should accept and act on evidence of identification, as there is here, it is usual for the trial judge to warn the jury about the need for caution. I am not giving you this direction because of any view I have formed about the evidence of either Mr Martin or Mr Melbourne. You must approach with special caution the evidence of any witness who has identified the accused or the deceased. That caution is necessary, even though you may be satisfied that the witness has been completely honest in giving the evidence. Even a completely honest witness may be mistaken in making an identification. I am not suggesting that the evidence of such a witness must be regarded as unreliable. My task is to draw your attention to the possibility that it is, so as to enable you to exercise appropriate caution.

625 There are many things which affect the reliability of evidence of identification. You will need to consider how long the purported identifying witness had the subject under observation and in what circumstances; what were the witness and the observed person doing; how far from each other were they; what was the light like; did the witness know the person, or had the witness previously seen the person; did the witness have any special reason for remembering the person observed; was there anything remarkable or unusual about the manner or the appearance of the person observed: You must consider all the circumstances of the sighting.

626 Then you must consider how much time went by before the witness identified the person and how that was done. How did the witness then describe the person? How did the description correspond with the appearance of the person? You must all consider whether, by the time the witness first described the person, the witness had seen a photograph of the person. You must consider whether, before the act of identification, the witness has seen a photograph of the person.

627 The experience of the criminal courts over the years has shown that identification evidence, honestly given, has on occasions turned out to be unreliable. In fact, there is an instance in this very case with these very witnesses.

628 The experience of the courts shows that there is a risk, when a witness first describes a person after seeing, for example, a photograph of that person, that the two or more images may be confused in the mind of the witness. So the witness may describe in whole or in part not what was seen on the occasion but what was seen in the photograph. If the witness sees a photograph of the person before any later act of identification there is a risk that the witness, in making the identification, may confuse what he has remembered about the person and what is remembered about the photograph.

629 Because an identifying witness honestly believes the identification to be reliable and accurate, the evidence will probably be impressive, even persuasive. The question, however, is not whether the witness is honest, but whether the evidence is reliable.

630 You must ask yourselves whether the act of identification is the independent act of the witness alone, or whether the witness may have been influenced by anything said or done by anyone else."

419 Counsel for the applicant emphasised that the trial judge told the jury that "Mr Martin was not apparently shown any photograph of a man." They were further directed that "there is the circumstance that *only in Mr Melbourne's case* he identified the accused at Court, having seen a photograph of him already" (emphasis added). This reference to the courthouse identification was in relation to the identification at the Coroner's Court. The jury were directed to "warn yourselves of the danger that he might have been recognising not what he had seen on 7 June but what he had seen in a photograph that he had been shown at the Bad Dog Cafe."

420 The applicant submitted that the direction that "only" Melbourne saw the photographs of the applicant was not correct. The submission should be accepted. Dally-Watkins gave evidence that she showed both men the photographs of the applicant. The applicant emphasised that this was important evidence because, based on this evidence, Martin's identification of the applicant at the Coroner's Court and his descriptions of the "first man" were also subject to the "displacement effect" and required specific directions.

421 In the course of his summing up the trial judge referred to some of the difficulties with the evidence of Martin and Melbourne, saying that they were "aspects of the matter you have to bear in mind." The jury was not given a warning to be cautious, with the reasons for such caution being made specific to the circumstances of this case as opposed to a warning in general terms: see s 116(1). Melbourne's evidence of his Coroner's Court identification was the subject of a specific warning; however, the warning was limited to him alone and to his Coroner's Court identification.

422 The evidence in relation to the Bentley was referred to by the trial judge, who said: "I think that has all fallen away and I'm not going to say any more about it" and "So I think that is evidence that ceased to have any consequence for - at least for identification purposes." It is not clear what "other purposes" his Honour may have had in mind. Once it was accepted

that the Bentley was not Rivkin's I do not understand how it had any relevance to the case.

423 The applicant emphasised that the jury were directed that the positive identification of Leigh, was to be regarded with "some reserve." The applicant complains that this direction was ineffectual given the positive, but plainly erroneous, identification of Leigh. In effect it was submitted that the jury should have been told that this impacted on the reliability of the identification evidence given by both men.

424 The applicant further complained that there was no direction in relation to the dock identification made by both men during the trial. The directions to the jury did not address the particular dangers of dock identification nor did they draw the jury's attention to it as a particular circumstance requiring the caution recognised by s 116(1) of the *Evidence Act*.

425 In response to the applicant's submission, the Crown emphasised that there was no challenge to the admissibility of any of this evidence. Nor was there a complaint at trial as to the adequacy of the directions.

426 The Crown submitted that the potential unreliability of the identifications was brought into sharp focus by reason of the somewhat unusual fact that both Melbourne and Martin had identified Adam Leigh as the second man who they had seen with the beautiful girl (who was subsequently identified as Caroline Byrne). The Crown accepted that the identification of Leigh was a mistake and emphasised that his Honour referred to this as Melbourne and Martin's "complete misidentification" of the second man.

427 The Crown also emphasised that contrary to the applicant's contention, this misidentification was noted as a circumstance that the jury should have regard to when assessing the reliability of the identification evidence. His Honour said:

> "...the need to approach very cautiously evidence of this kind, the fact that sometimes witnesses appear convincing. And you will recall that both Mr Melbourne and Mr Martin said they were sure that the second man was Adam Leigh. Absolutely positive, Mr Melbourne said. So expressions of confidence or certainty are to be regarded, in such matters, with some reserve."

428 In relation to the issue of contamination the Crown emphasised that the trial judge addressed the point that Melbourne and Martin had been involved in a discussion about their recognition of Ms Byrne. In relation to the use of a single photograph, it was submitted by the Crown that the identification of the beautiful woman in the park as Ms Byrne could only have been as a result of the witnesses having been shown a photograph of her. It was submitted that there was no evidence that the photograph was shown in circumstances that were suggestive or persuasive. The Crown emphasised that the identification occurred just nine days after the day they saw the woman at a time when their sighting of her and the details of her appearance were fresh in their memory.

429 After careful consideration of the evidence I have come to the conclusion that the evidence of Martin and Melbourne to the effect that they saw Ms Byrne, the applicant and another man at the Gap on the Wednesday afternoon was of little probative value. The Gap and Robertson Park are locations regularly visited by many people. The visitors will be of varying ages and no doubt from time to time attractive women will be accompanied by healthy young men.

430 I do not intend any criticism of Dally-Watkins, who was no doubt genuinely troubled by Ms Byrne's death. However, after she had taken photographs of only the applicant and Ms Byrne to the two men the reliability of their recollections was seriously compromised. Those difficulties were compounded by the events at the inquest and the dock identification at the trial.

431 If the applicant and Ms Byrne were accurately identified at Watsons Bay during the afternoon it was, of course, many hours before she died. The

picture given by Martin and Melbourne was of a happy occasion and there was nothing in their evidence to suggest that there were problems in the group which could have later developed to the point where Ms Byrne was murdered. The only purpose of the evidence was to contrast it with the applicant's claim that he was not at the Gap during the afternoon. Given the account he had given of his movements that day, his credit was a significant issue at the trial.

432 The difficulty facing the applicant is that his defence counsel made no complaint about the directions given by the trial judge at the time. I am satisfied that, most particularly in relation to the evidence of Martin, he should have. Perhaps it was a slip by counsel, as there could be no reason for a conscious decision to let the issue pass.

433 I have otherwise reviewed the whole of the directions which the trial judge gave with respect to the identification evidence. His Honour did identify the frailty of Martin and Melbourne's recollection and the fact that they could not relate their recollection to any particular day or date. The jury were effectively counselled about the fact that the misidentification of Leigh confirmed the difficulties witnesses have with making an accurate identification. His Honour did emphasise that the evidence of the witnesses who said they saw a white Vitara at the Gap, and that it could have been Ms Byrne's car, included witnesses other than Martin and Melbourne. If the car was Ms Byrne's, and of course it was known definitely to have been there the following morning, this would support a conclusion that Ms Byrne was also there.

434 Apart from the difficulty with the direction in relation to Martin's evidence I do not believe the trial judge's directions were inadequate. The difficulty with the Martin direction is significant but would not alone have justified a new trial. The irresistible conclusion is that the evidence of Martin and Melbourne was so compromised and their recollection so unsure that little or no weight could be given to it. To my mind it could not have justified a

conclusion that the applicant was lying when he said that he had not gone to the Gap that afternoon.

b. The evidence of Mr Doherty and Miss Kingston relied upon by the prosecution as night-time sightings of the applicant and Ms Byrne

435 Doherty lived in an upstairs apartment in the Watsons Bay shopping centre on Military Road, a short distance from the Gap. He gave evidence that on an evening in 1995 before 8 o'clock and prior to an helicopter searching at the Gap at about 1 to 2 am he heard "a young girl outside who was sort of slurring her words and moaning." She was "with her head in her hands sitting on the kerb at the bottom of the light pole on the far side of the road." He said there was a man under the awning and a smaller man sitting on the wall just up from the girl. He said that the woman was "talking and slurring and moaning at the same time … I did say in my statement that she was slurring aggressively and really she was slurring in return to the argument. She was sort of being combative, but I thought she was just too drunk and she was not making sense." He said the man was shouting at her from the other side of the road. He said the argument kept going and they walked off towards the north, towards "the Gap park."

436 Doherty described the man under the awning as "a tall man probably around 6 feet tall. He had dark clothes. I thought it was a leather jacket, probably black, and it was like a three-quarter length down to you know, the thigh below the bottom, and he had short cropped blonde hair." The other man was "dressed in dark clothes … he was small … about 5 foot 6 inches and I thought he had something on his head like a beanie." The girl had "dark clothes on … and I have a feeling that she had denim on. I don't know whether it was a denim jacket or denim jeans or something."

437 He said that at about "10.30ish" he could hear argument coming from near the pathway where the Simon University meets the Gap lookout. He said he believed this to be a continuation of the argument he had heard earlier.

He said that the argument went on for about an hour and then at 11.30 pm or 12 am he heard a scream and then nothing.

438 Doherty spoke to a neighbour, Kingston, the next day and told her of hearing a scream. He did not tell anyone else at the time or contact the police to report his observations. Three years later in 1998 he spoke to Kingston again when she showed him a newspaper article which contained photographs of the applicant and Ms Byrne. Ten days later he again spoke to Kingston and gave her a description of the people he had seen back in 1995.

439 Doherty said that he watched the "Witness" program on television in 1998 when the applicant appeared. He said that he had a "proper look" at the applicant and from the program said he was able to observe that the applicant had a similar stature, height, build and hair to the man under the awning. He made a statement to the police in April 1998.

440 Doherty told police that the man he saw under the awning had "short cropped hair to blonde hair." He said that he could not describe the woman "only to say she had dark clothes on." He said that the "tall guy and the girl were obviously arguing … she seemed drunk or stoned or both … her voice was slurring but was aggressive and she was having a go at the taller guy." Her words were "all slurred" – "It was like a rant." He described the taller man as having short hair and long limbs with "long arms and long legs." Doherty said that he did not see the face of the girl and could not describe her hair. He said he could not tell whether she had long hair "because she had her hands on her head."

441 The evidence from Ms Byrne's family and friends of Ms Byrne's personality and demeanour was entirely at odds with her being "drunk" or "stoned" and sitting in the gutter arguing and shouting at people. Her sister Deanna said that she had never seen Ms Byrne drunk and her friend Zaetta said that the description given by Doherty would be "absolutely absurd" if applied to Ms Byrne.

442 Doherty's description of the taller man, which the Crown submitted was likely to be the applicant, was not consistent with his appearance at the time. Photographs of the applicant taken on 10 June 1995 by Dally-Watkins and Cochrane do not show him to have very short hair. Mr Byrne also gave evidence that at the time the applicant "certainly did not have short back and sides."

443 Doherty described the person he saw as having "short cropped blonde hair" which was "very, very short." He was emphatic that the man he saw did not have long blonde hair. He said that you could "see the shape of the head very clearly."

444 This again raises one of the common issues in relation to identification evidence. When the applicant appeared on the "Witness" program he did have short hair. There is every chance that Doherty's memory has been influenced by the images he saw of the applicant well after 1995.

445 Kingston gave evidence of learning in June 1995 that a person who was a model had been found at the bottom of the Gap and that one or two days later Doherty told her that he heard a scream on that night. She said that in 1998 she spoke to Doherty and told him to read a newspaper article saying that two fishermen had heard a scream that night from the part of the Gap near Simon University.

446 She said that after she had read the article and seen the photographs in it Doherty had told her "I think I might have seen her around on that day, the day before" and that on the night he had seen "a girl with long blonde hair sitting in the gutter with her head in her hands moaning."

447 Kingston accepted that when she made her statement to the police on 8 February 1999 she made no reference to Doherty saying that the girl "had long blonde hair." Although she accepted this to be the case she insisted that "John definitely told me she had long blonde hair at the time."

448 The applicant submitted that this evidence from Kingston should have been rejected. The evidence was hearsay and the person to whom it was attributed had given evidence denying even seeing the hair of the woman. The conversation to which she was referring was said to have occurred 3 years after the sighting and was first recounted at the trial 13 years after the events had happened. It was submitted that the evidence had no probative value and was unfairly prejudicial to the applicant.

449 Although there was a discussion about the evidence at the trial it would seem that it had not been anticipated by either the Crown or the defence, who were both taken by surprise. There was some difficulty in having Doherty recalled and the matter was dealt with by the trial judge directing the jury to treat Kingston's evidence "with the utmost caution."

450 The applicant emphasised that no direction was given by the trial judge in relation to the general and particular dangers of using Doherty's evidence with respect to the identity of either man. The trial judge told the jury that "Mr Doherty did not purport to identify any of the three people he saw." However, the applicant points out that in the course of his evidence Doherty asserted that the man he saw was "of similar stature," with hair that was "similar" to the applicant "the same build" as the applicant and "looks similar to" the applicant.

451 It was submitted that this evidence constituted "identification evidence" and accordingly attracted the need for directions and a caution both generally and in recognition of the circumstances of this case. It was submitted that, in particular because of the difficulties occasioned by the "Witness" program, it was incumbent on the trial judge to give firm and comprehensive warnings. Both Doherty and Kingston gave evidence that Doherty had seen photographs of the applicant in the newspaper before he gave evidence at the trial. Doherty had also seen the "Witness" program which clearly suggested that the applicant was suspected of killing Ms Byrne.

452 The applicant also emphasised that the evidence of Doherty had a greater prominence in the trial than may otherwise have been the case. During the course of their deliberations the jury requested the transcript of Doherty's evidence and of the "Witness" program - an indication of their significant interest in the issues he raised.

453 The issues sought to be raised by the applicant in relation to the evidence of Doherty and Kingston require leave under Rule 4 of the *Criminal Appeal Rules* 1952. No objection was taken to Kingston's evidence that Doherty had told her that the girl had long blonde hair. Furthermore, there was no request for any further direction from the trial judge on these issues.

454 When the trial judge was considering the directions which he would give to the jury the directions to be given in relation to identification were discussed and the following exchange occurred:

> "Mr Terracini: With respect to ID, it is self evident about the dangers of Martin and Melbourne, and we feel certain your Honour will give directions on that. But in relation to Doherty, Doherty, in our submission, is in a separate category.
>
> HH: That is not about identification at all, I don't think.
>
> Terracini: If your Honour is in agreement, we would submit that it is not ID evidence at all, It doesn't ID.
>
> HH: It is what McHugh J used to call 'circumstantial identification evidence'; namely, evidence of somebody or some thing having similar characteristics, but not identified as being the person or thing under consideration.
>
> Terracini: Yes. We are ad idem in that, but we want a direction, though tailored, to that kind of non ID, because there is certainly room for confusion as to what he is actually saying. The jury may be of the view that he is actually saying, albeit not directly, 'Well that's the accused' – and, of course, he is not. We would ask your Honour to give a direction tailoring the relevant areas of the law about the unreliability of relying on that kind of material because the officer-in-charge of the case himself has said, 'the reason why

we didn't ask Doherty to take part in an ID parade is because of the potential unreliability.'

HH: Yes. Yes, you will make some strong submissions on that."

455 As it happened his Honour's directions generally accorded with the discussion with counsel. He said:

"884 Please understand that Mr Doherty's evidence is not evidence of identification. Mr Doherty did not purport later to identify any of the three people he saw. There were no photographs, no identification parade.

885 At best, the evidence is of people, including two whose appearance was consistent with their being the accused and the deceased. And I don't put that as a statement of my opinion. It is a question for you whether the description is consistent with those two people being the accused and the deceased.

886 The Crown submits that it is a circumstance which proves, when considered together with all the other circumstances, that the accused and the deceased were close to The Gap after 8pm on 7 June 1995 and that they, and the unidentified man, were engaged in an argument at The Gap right up to the time that the deceased died.

887 Now, Mr Doherty said that after the party moved up towards The Gap, he continued to hear the argument. He regarded it as a continuation of the argument of the three of them. In fact, his evidence was that he hadn't heard the second man speak at all while they were in the vicinity of his unit. Whether he was saying that the second man spoke when they were away from him, out of sight, isn't clear, but he regarded it as a continuation of the argument; and it ended with a scream, and they were up in that place, that he took to be in the direction of the university, for an hour or more.

888 I was speaking to you yesterday about hearsay evidence. Miss Kingston gave evidence. There is one example in this case where the problem of an out-of-court statement being solved by the calling to give evidence of the person said to have made the statement - so that that person could be asked about it - was not solved.

889. Mr Doherty gave evidence first out of him and Miss Kingston. We took his evidence by video-link. You will

remember he was in Cork in the Republic of Ireland. And he gave you evidence, broadly, along the lines that I have summarised for you.

890 He was asked about the woman's hair and he said that he could not see it because "she had her" - and the transcript says "hands in head". It may be that he said, "head in hands", perhaps "hands on her head". Anyway, it's pretty clear that the hands and the head were together and that was what was preventing him from seeing her hair. He could not say anything, therefore, about her hair.

891 He was asked whether he had spoken to Miss Kingston about what he had seen and he said that he had, and described to her what he had seen.

892 Now, the Crown and the defence have copies of Miss Kingston's statement, and they were anticipating what she would say in evidence when called on the following day, and so she was called.

893 She added to her evidence something not contained in her statement, and took everybody by surprise - at least it took the defence by surprise.

894 She said that Mr Doherty had told her that the woman had long blonde hair. Now, this put Mr Terracini at something of a disadvantage because it had to be left just like that. Miss Kingston was adamant that that is what Mr Doherty had said to her. Mr Doherty had been excused and there was no prospect of reestablishing the link with the Republic of Ireland.

895 In his closing address, Mr Terracini invited you, on that account, to reject Miss Kingston's evidence. She had added something. It was a fabrication, he submitted to you.

896 I direct you that you must treat with the utmost caution the evidence of Miss Kingston about what Mr Doherty told her about the hair of the woman he had seen sitting on the kerb opposite his studio.

897 I repeat the warning about the caution you must exercise when dealing with hearsay evidence, evidence that can't be tested, because the person said to have made the statement is not available.

898 Now, the Crown submits that the two persons - the first man and the woman - were the accused and the deceased. The defence submission is that you will simply not be

satisfied about that. You will accept the account of the accused that at that time he was asleep in Macleay Street in the circumstances that have been described to you, and that he told the police about.

899 Mr Doherty was an honest witness who described what he saw. But, really, at the end of the day, he is not identifying anybody. This is just evidence of people who might have looked like the accused and the deceased, and it is a matter for you whether they did. It is not identification evidence."

456 Section 116 of the *Evidence Act* is in the following terms:

"116 Directions to jury

(1) If identification evidence has been admitted, the judge is to inform the jury:

(a) that there is a special need for caution before accepting identification evidence, and
(b) of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury."

457 His Honour traversed the evidence of each of the witnesses and agitated the parties' submissions in relation to it. The directions emphasised the weaknesses of the evidence and isolated and identified matters of significance which could be regarded as undermining its reliability. I am satisfied that the direction had the authority of the judge's office behind it. In every sense the direction complied with requirements set out in *Domican* at 561-2.

458 I am satisfied that the trial judge directed the jury in clear and appropriate terms. The jury would not have failed to appreciate the risks associated with the evidence. I do not accept this ground of appeal.

459 However, as I have indicated when discussing Ground 1, I stress that the evidence of Doherty does not satisfy me that, contrary to the applicant's denial, he was present with Ms Byrne at the Gap that evening. His

description of the woman he saw is most unlikely to have been Ms Byrne. It could be expected that at Watsons Bay in the evening people affected by alcohol and drugs would be seen in argument. Ordinary experience would regrettably suggest that some people may be sufficiently physically and emotionally distressed to sit in the gutter. However, the autopsy conducted on Ms Byrne did not find evidence of any alcohol or drugs apart from the residue of Rhohypnol.

460 It is apparent that Doherty's recollection of seeing a person who may have resembled the applicant may have been influenced by the "Witness" program. I am not satisfied that he saw either the applicant or Ms Byrne on the Wednesday evening.

Ground 3: The evidence and the opinions of A/Prof Cross caused the trial to miscarry.

461 The applicant challenged the evidence and opinions of A/Prof Cross. It was submitted that his opinion that Ms Byrne had been "spear thrown" from the "northern ledge of the Gap" was based on a number of "assumptions, experiments and assumed facts." It was argued that before his evidence could be considered these assumptions had to be identified and proved by admissible evidence: *Ramsay v Watson* [1961] HCA 65; (1961) 108 CLR 642 at 649; ss 55, 76, 79 and 137 of the *Evidence Act*. It was further argued by the applicant that in order for A/Prof Cross' opinions to be probative, the assumptions he made needed to have a reasonable foundation in evidence and, furthermore, he needed to be qualified to express the relevant opinions. The applicant submitted that since these conditions were not met the trial miscarried.

462 The applicant submitted that the flawed assumptions accepted by A/Prof Cross related to:

- conditions under which A/Prof Cross' experiments were conducted;

- the availability of 4 m of run-up on the northern ledge;
- the northern ledge being the point of departure;
- the 180-degree rotation of Ms Byrne's body;
- the applicant's weight being 80 kg, thus enabling him to bench press 100 kg;
- the athletic ability of Ms Byrne;
- Ms Byrne ending up in hole A; and
- the use of a spear throw to throw Ms Byrne off the cliff top.

463 The Crown submitted that the evidence of A/Prof Cross was only one item of evidence in a circumstantial case, the combination of which proved the case beyond reasonable doubt. The Crown further submitted that, significantly, apart from one limited area of the proposed evidence of A/Prof Cross (the likelihood of injury being caused), his expertise was not challenged below. Nor was the admissibility of his evidence challenged on any other basis. The evidence he gave was in accordance with the contents of his statements/reports, which had been served on the applicant before the trial. A/Prof Cross had also given evidence and had been cross-examined by defence counsel at the committal proceedings.

464 The applicant's submissions on this ground are detailed and lengthy. It is not necessary to repeat all of the detail in order to resolve the issues that they raise, at least in so far as they contribute to the resolution of the appeal. I have also discussed the evidence of A/Prof Cross under Ground 9, which is concerned with fresh evidence.

465 It was submitted to this Court by the applicant, no doubt in recognition that no objection had been taken at the trial, that if a fact upon which a particular opinion was based was not established by the evidence, then the opinion should have been given little or no weight: *Ramsay* at 648-9; *Paric v John Holland (Construction) Pty Ltd* [1985] HCA 58; (1985) 59 ALJR 844 at 846; *ASIC v Rich* [2005] NSWCA 152 at [155]; (2005) 218 ALR 764.

466 The challenge to the admissibility of A/Prof Cross' evidence at the trial was confined to his views on the issue of the likelihood of injury being caused to Ms Byrne as she landed on the rocks at the base of the cliff. Although his evidence was not otherwise challenged, significant and important aspects of his evidence were concerned with biomechanics, which required an understanding of the functioning and capacity of the human body. In *HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414 at [44] Gleeson CJ said:

> "Experts who venture 'opinions', (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted."

467 To my mind A/Prof Cross was allowed, without objection, to express opinions outside his field of specialized knowledge.

468 It was submitted to this Court that at the very least A/Prof Cross' lack of expertise in these areas diminished the weight that could reasonably be attributed to his evidence. A/Prof Cross' qualifications are in physics and his primary area of expertise is in plasma physics. He has spent some time since his retirement assisting the police in the investigation of incidents of persons falling and has published alone, or with others, some papers concerned with the physics of sport. In the course of these tasks he has applied his knowledge of basic physics. He has no qualifications or experience in biomechanics.

469 A/Prof Cross' conclusions as to the manner of Ms Byrne's death involved a number of steps. He accepted Sgt Powderly's revised location for her body at hole A and, as the fresh evidence confirms, set about "proving" that she must have been thrown there rather than having voluntarily jumped. The progressive development of "his experiments" and refinements of his theory indicate the problems he encountered before he was satisfied that his assumption could be proved.

470 The steps in A/Prof Cross' ultimate analysis were:

(a) If Ms Byrne had jumped to hole A and landed feet first she would have needed to have a launch speed of "roughly 4.5m/sec." A running dive with her ending up head first required an extra velocity of .3 to .4 m/sec.

(b) Unless you start with angular momentum a person will fall straight down once they leave the rock ledge. A/Prof Cross said: "if you start off with zero angular momentum, which is the normal case, you cannot create angular momentum diving through the air" and "you cannot create rotation as you are falling through the air and you will land feet first, regardless of launch speed."

(c) A female of average athletic ability, or even of better-than-average ability, could not launch themselves at 4.5 m/sec and end up in hole A. Only an elite Olympic athlete could do so.

(d) Ms Byrne must have gone straight into hole A. If she had hit Pyramid rock first her legs would have swung around and hit the rocks, leading to observable injuries.

(e) Only a high speed throw, and even then only what A/Prof Cross called a "spear throw," would have taken Ms Byrne to hole A. The necessary run-up for such a throw was 2 to 4 m but if it was beyond 4 m "the thrower would risk propelling himself over the edge when he threw."

(f) Because the thrower would have held Ms Byrne above his head, her launch point would have been 1 m higher than if she had jumped, with the consequence that her required launch speed to reach hole A would have been 4.4 m/sec.

(g) A/Prof Cross had no mechanism by which to test the applicant's capacity to throw Ms Byrne. However, he assumed a correlation between a capacity to bench press and a capacity to throw. He believed it to be reasonable to assume that if the applicant weighed 80 kilograms he could bench press 1.25 times his body weight. Based on his "experiments" he concluded that the applicant could have thrown Ms Byrne at the required speed for her to enter hole A.

471 A/Prof Cross assumed that the point at which Ms Byrne left the cliff top was an area which has become known as "the northern ledge." He assumed, and it was common ground at the trial, that there was at the time 1 m of vegetation on the ledge which confined the available run-up for a jumper or thrower to 4 m. This assumption was based upon a photograph which the evidence on the appeal revealed was taken in 2003. It is not clear whether it captures vegetation on the northern ledge or shadow. However, a photograph taken in August 1995, which I would admit into evidence, establishes to my mind that there was no vegetation on the ledge when Ms Byrne died.

472 A/Prof Cross calculated that there was a 29 m vertical fall for a running jump or dive but a 30 m vertical fall for a spear throw from the tip of the northern ledge to close to the centre of mass of Ms Byrne, above the base of hole A. Of course, the utility of these measurements depends upon an assumption that Ms Byrne was thrown or jumped from the tip of the ledge, which in my view is unlikely to be the case. She died on a dark night and there was nothing to restrain a person from falling off the northern ledge if they approached its tip. The horizontal distance from the tip of the northern rock ledge to close to the centre of mass to the base of hole A was 11.8 m. There was a 10-degree launch angle for a running jump and/or a running dive. The required rotation from a running jump or dive to a head downward position was 180 degrees.

473 A/Prof Cross assumed that in 1995 the applicant weighed 80 kilograms and could bench press 100 kilograms. He also assumed that the ability to

throw a 25-kilogram bag (a “dead” weight) correlated to an ability to throw a 57-kilogram person at the likely launch velocity.

474 A/Prof Cross assumed that Ms Byrne had average or below-average athletic ability. He believed that his test group of 11 females which he used in the running and jumping test were a “reasonable cross section of people with varying athletic abilities.” He also accepted that 6 of his test group of 7 police cadets doing running dives were of “better than average athletic ability” and one was a “very good” athlete but “not elite.” The results from all of the test groups including the 11 female athletes were averaged and resulted in an average running speed of 4.3 m/sec which he believed was a “better than average” speed.

475 In relation to hole B A/Prof Cross said that in his view it was not possible for a female of average athletic ability or less to have done a running dive from any identified location on the cliff face to hole B. However, he believed it was possible for an adult male who could bench press 100 kilograms to spear throw a 57-kilogram female from near the bend in the fence to hole B and also from the safe side of the fence. He was of the opinion that if Ms Byrne had gone head first straight into hole B “her shoulders would have impacted the sides at 80 kilometres an hour.”

476 If A/Prof Cross’ conclusions were to be of significant utility it must be assumed that the conditions under which his experiments were conducted were not materially different to the conditions on the night Ms Byrne died. And, as I have previously indicated, this was not the case.

477 A/Prof Cross conducted his tests at the police academy in Goulburn using the gymnasium and swimming pool under ideal conditions when his thrower and victim were in no fear of what might happen. Furthermore his “victim” was alive, conscious and did not resist her thrower. The running surface provided at the Goulburn pool was flat and level and had no pebbles. In both the jumping and running dive experiments a mat was used.

478 The reality of the northern ledge was quite different. It was “pebbly and sloped down.” A/Prof Cross having inspected that location described it as being “quite dangerous” and “right at the very end it was crumbly and pebbly.”

479 The evening on which Ms Byrne died was described as “pitch black.” Sgt Powderly described the surface at the top of the cliff on the seaward side of the fence at 4.40 am as wet and slippery. The evidence was that the sea was dispersing a spray that evening.

480 All of the female subjects of the experiments who were thrown into the swimming pool were police cadets. They were instructed to cooperate with the thrower. It was thought too dangerous to do otherwise.

481 A/Prof Cross recognised that there would be a difference between throwing a struggling person and one who was cooperating. However, he said he could not identify the difference and he was not qualified to resolve the problem. He accepted that he had no evidence either way to make any judgment about the issue. He accepted that if there was a struggle this could potentially result in a lower speed throw but not a faster speed throw.

482 He was also asked:

> “Q: So far as running is concerned, you’ve told the court that the experiments that you did were in full daylight conditions, generally over even ground?
> A: Yes, correct.
>
> Q: What effect on running speed, if any, in your view, would it have if the person was running in complete darkness on uneven ground?
> A: It would have a major impact, I would imagine.”

483 A/Prof Cross did not conduct any tests in relation to a struggling conscious woman. He said that he had constructed one experiment where a woman who was described as “limp” was thrown. However, although the subject

simulates being limp in the arms and legs it is apparent that she cooperates by diving out of the throw. This, of course, is the inevitable reaction of someone who is about to be released to fall into the water.

484 This evidence creates considerable difficulty for the Crown case. If a conscious person could not be thrown at the required speed, the Crown case must assume that Ms Byrne was unconscious. Indeed, this was the position ultimately taken by the prosecutor at the trial. However, the evidence does not enable a conclusion to be drawn as to whether an unconscious person could be thrown the required distance.

485 Prof Elliot, who is a professor of biomechanics and a qualified sports scientist, gave evidence in which he confirmed the calculations done by A/Prof Cross. However, when asked about the experiments he said:

> "If you reduce the light and you reduce the surface evenness, or certainty, then both the running and diving results would be different … uneven surface would make throwing more difficult."

486 Of course, all of these variables were present on the night Ms Byrne died. Prof Elliot said that if a person was struggling he "would seriously doubt that you could throw with any great velocity at all" and "certainly not with the velocity required to get from the ledge to hole A."

487 In his closing address the Crown prosecutor significantly changed the emphasis in his case, telling the jury that Ms Byrne was "probably unconscious" or "incapacitated" prior to being lifted over the fence onto the northern ledge. He accepted that if Ms Byrne had been conscious when she was thrown she would have been struggling and screaming. He told the jury that "it defies rationality that anybody in the midst of an argument [which he described as a violent argument] would allow themselves voluntarily to go over that fence." He told the jury that the scream heard by the fishermen was a consequence of Ms Byrne being incapacitated and that she had either been "knocked semi-conscious or perhaps she had

been winded so dreadfully that she couldn't call out or something to incapacitate her during the course of an attack."

488 The consequence is that although the experiments done by A/Prof Cross may support a conclusion that a compliant and conscious woman could have been thrown the necessary distance, his work does not allow any conclusion that the applicant could have thrown an unconscious or incapacitated woman into hole A.

489 A/Prof Cross gave evidence that he had measured the northern ledge to be 5m from the fence to the tip. There was debate before this Court as to whether in fact the distance was greater. However, relying upon a photograph with a caption dated "1996" he confined the run up to a distance of 4 m. He believed there was a metre of vegetation adjacent to the fence. During the course of his evidence he was asked by the prosecutor to "assume that the vegetation had been recently removed" from the northern ledge when he observed it in 2004.

490 In his evidence during the appeal A/Prof Cross said that he first found out that the photo was actually taken in 2003 during a conversation with Michael Streatfield of the Forensic Imaging Group in 2006. He did not tell the Crown Prosecutor that the photograph had been taken many years after Ms Byrne had died. In his evidence before this Court he denied that he deliberately refrained from informing the prosecutor. In his second report dated 26 July 2004, A/Prof Cross not only acknowledged the 4m run up and conducted experiments on that basis, but also did so on the basis of the photograph believed to be taken in 1996. The photo was included in Appendix 3 of the report.

491 At the trial, he said, "the earliest photos that I've seen were 1999 I think." He was then asked by the Prosecutor to assume that evidence would be given to suggest that vegetation was present in June 1995.

492 The possible presence of the vegetation on the northern ledge in June 1995 was important in determining the length of the available run-up upon the assumption that Ms Byrne had committed suicide. If the run-up was 5 metres instead of 4 metres, the applicant contended, Ms Byrne could have jumped to hole A from the northern ledge and the prosecution could not have excluded suicide. As I have indicated, the photograph tendered to this Court clearly shows that the vegetation which was assumed to be present was not present in 1995. The consequence is that the assumptions and accordingly the conclusions reached by A/Prof Cross cannot be accepted. However, as I discuss later, I have other concerns about the reliability of his opinion.

493 There is a disagreement between the parties over A/Prof Cross' assumption as to the centre of mass of a person who jumped or dived. The assumption which was made could potentially affect the distance a person would travel after they left the ledge. There was also controversy in relation to the distance of the drop from the northern ledge and the horizontal distance which was necessary for Ms Byrne to have travelled to land in hole A.

494 The applicant contended that if appropriate assumptions were made, the minimum speed required for Ms Byrne to have jumped to hole A was 4 m/sec.

Rotation

495 There was also debate about whether or not Ms Byrne would have rotated during the course of her fall, the extent of any possible rotation, and the consequences for determining whether or not she was thrown or jumped.

496 Sgt Powderly's evidence was that Ms Byrne's feet were pointing towards the base of the cliff and up to the corner fence post. He recalled that she was at an angle of 55 degrees from vertical and in "a dive" position.

Notwithstanding this evidence A/Prof Cross adopted a different position for the body, being a position consistent with the theory that Ms Byrne was thrown from the northern ledge into hole A. If this occurred her body probably rotated in mid air.

497 A/Prof Cross appears to account for a head-to-toe rotation of 180 degrees based on Ms Byrne running upright but landing head first in hole A.

498 Prof Pandy, in his February 2011 report, which I would admit as fresh evidence, noted the observation of Sgt Powderly that Ms Byrne's feet were oriented towards the corner fence post rather than the northern ledge and said that rather than a 180-degree bodily rotation, as A/Prof Cross had assumed, "a 135 degree [rotation], for example, would be sufficient to deliver the body in the orientation observed by Sgt Powderly on the morning of 8th June 1995." In this Court Prof Pandy also said, "the only way that that [rotation] could happen is that some force acted to start turning the body. So if the hole is over in this direction and you are leaving in this direction, the only way you could get your legs pointing over there is if some force acted to start twisting the body about another axis other than the axis about which you rotate head to toe." He also said that the prospects of having a forward rotation and an axial rotation at the same time were "unlikely."

499 I do not believe it possible or necessary to conclusively resolve this issue.

Calculation of horizontal speed

500 There was a dispute between the experts as to the likely horizontal speed achieved by Ms Byrne as she fell. Although I should record the elements of the debate I do not believe it assists in resolving this appeal. The assumptions which must be made and the uncertainties of the actual circumstances of Ms Byrne's death make the intellectual discussion interesting but ultimately of little utility.

501 For Ms Byrne to jump and end up in hole A from the northern ledge, A/Prof Cross determined, the required initial horizontal speed was 4.5m/s. This calculation was made using the following formulae:

- T = 0.452 vH where H is the height above ground level and T is the time in seconds to reach the ground.

- V (m/s) = D/T where V is the horizontal projection speed, D is the horizontal distance and T is time traveled.

502 A/Prof Cross said a number of other factors also needed to be considered. They were wind and air resistance, launch angle, centre of mass, and rotation.

503 The expert witnesses all agreed that the affect of wind and air in this case were negligible.

504 In respect of the launch angle A/Prof Cross assumed an angle of about 10 degrees, as this “requires the minimum effort, on the part of the person jumping or diving, to reach the required distance.” When he carried out his experiments the average launch angle of the participants was actually 19 degrees. He said that “20-25 degrees is the typical jump angle in the broad jump” and that once you go above 25 degrees, it slows down your horizontal speed.

505 A/Prof Ness, who was called by the applicant, challenged A/Prof Cross’ assumption. He calculated that the launch speed to reach hole A could have been less than 4.5m/s. He assumed a person leaning half a metre off the cliff who landed half a metre in front of Pyramid rock. In that case, the horizontal distance travelled would be reduced to 10.8m. His calculation assumed a launch angle of 30 degrees. Both A/Prof Ness and A/Prof Cross agreed that a jump at an angle of 30 degrees would require a lot

more effort and force than a jump at a lesser angle to travel a given distance.

506 Prof Elliot agreed with A/Prof Cross that the horizontal velocity of a jumper would decrease if they jumped at a launch angle of 30 degrees.

507 Prof Pandy was not asked and did not comment on the launch angle.

508 In his second report dated 26 July 2004, A/Prof Cross stated, “when a person runs or jumps or is thrown, the launch point of the centre of mass is usually about 0.4 or 0.5m in front of the foot on the ground.” This assumption is relevant to how far the person could travel in the air.

509 Ms Byrne’s body was lodged head first in the rocks. As a consequence, A/Prof Cross assumed her body rotated 180 degrees from the vertical. He said that Ms Byrne would have slowed as she rotated. Accordingly he said that her launch speed had to be an additional 0.3m/s to 0.4 m/s in order to reach hole A. A/Prof Cross concluded that slightly less speed (approximately 4.4 m/s) would be required if Ms Byrne was thrown given that she would have had a higher launch point and additional time to fall. He estimated that it would have taken Ms Byrne roughly 2.5 seconds to reach the rocks.

510 Prof Elliot, who was called by the Crown, agreed with the arithmetic involved in A/Prof Cross’ calculations, including the required horizontal launch speed and the allowance of 0.3m/s for rotation. Prof Pandy checked A/Prof Cross’ calculations and agreed with the required horizontal launch speed and the allowance of 0.3m/s for rotation, given the assumptions made by A/Prof Cross.

511 However, both A/Prof Ness and Prof Pandy said that there was not enough data available to come to a concluded view as to the horizontal launch speed in this case. A/Prof Ness said that although he did not

dispute the arithmetic, the calculations were unreliable since the actual departure point, departure speed and elevation were unknown.

512 A/Prof Ness said that since the departure point was unknown, he believed that it was reasonable to consider a range of distances in his report – height being from 29m to 31m and horizontal distance 11.3m to 12.3m. With those variations, A/Prof Ness estimated the necessary horizontal launch speed could be anywhere between 4.6 ± 10 per cent error.

The landing point

513 It is significant that although Sgt Powderly changed his mind about the location from which he retrieved Ms Byrne's body he did not change his view about the launch point, which he said was the corner post marked with the letter "A" on the map. A/Prof Cross considered other launch points on the cliff, in particular an area known as the southern rock platform and other locations just north or south of a point referred to as the "corner fence post." He drew a circle with a radius of 12 m from where the body was found.

514 The southern rock platform allowed a 20m run-up for a jump toward Pyramid rock up an incline of up to 7 degrees. A/Prof Cross conducted uphill running experiments and concluded that "a person of average athletic ability or less would not be able to do a running dive from the southern rock platform to end up in the hole at pyramid rock [hole A]" as it would have required a launch speed of 6 m/s or 7 m/s.

515 From a point just south or just north of the corner fence post, A/Prof Cross said there was a run-up of 2.5 m. He said, "In terms of taking a dive into there [indicated – hole A] that I – the run up distance is smaller than the run up distance here [indicated – northern ledge]. The height here is smaller than the height of the northern ledge. It was not possible according to my calculation measurements."

516 A/Prof Cross said:

> "There were three reasons why this particular area [near the corner fence post] I excluded as possible launch sites: the first reason was that this area here is inaccessible from the footpath; the second reason is there is a much smaller run-up space than there was available on the northern ledge; and thirdly some of this area slopes downwards. So, even if you were to stand on various points along here [indicated on model], including this particular point that juts out, if you were simply to stand on that, you would run the risk of toppling over. The north ledge itself was clearly a – what should I say? A more appropriate, a more obvious location where somebody could take a run and a jump or be thrown off the cliff."

517 For this reason only the northern ledge was considered as a viable launch point. However, A/Prof Cross ultimately concluded that a woman of average athletic ability would be unable to launch herself from the northern ledge and end up in hole A.

518 Prof Elliot, when asked whether he agreed with this conclusion, stated, "considering a young lady of average physical fitness, one would assume that to be the case, yes." Prof Elliot agreed that "the most logical conclusion from the data present is that Caroline Byrne was spear thrown from the top of the Gap."

519 Prof Pandy agreed with the calculations of A/Prof Cross, given his assumptions. However, according to his own experiment, with females of average athletic ability, Prof Pandy was of the opinion that Ms Byrne may have been able to jump to hole A from the northern ledge.

520 A/Prof Ness said he "could not make up his mind" whether the deceased died as a result of a throw of any kind, or a running jump, or a jump that turns into a dive resulting in her being head first.

521 A/Prof Cross said that since hole B was "even further away [from the northern ledge], that [it] would be even less likely" that Ms Byrne dived into hole B from the northern ledge.

522 A/Prof Cross initially said "that either from the northern rock platform or the southern rock platform at any point, it is not possible for a female of average athletic ability or less to have done a running dive to end up in either the correct location at pyramid rock [hole A] or the incorrect location [hole B]." However, he later altered this position and said that "if you are a very good athlete, yes." someone running quickly could get himself or herself to hole B from the southern platform. This was consistent with the opinion in his first report dated 19 November 2003 in which he concluded that "the most likely cause of death was that Caroline Byrne ran over the edge of the cliff in the dark at a point 8 m south of the safety fence." A/Prof Cross said he originally altered his view because only a few experiments were conducted before the first report was completed and there was only limited information about Ms Byrne's athletic ability. When asked whether he maintained this view from his first report, he said, "I wouldn't say that's what I think now." In his fourth report, dated 1 November 2005, A/Prof stated that he provided "new evidence [which included her allegedly modest athletic ability] to show that Caroline Byrne would not have been able to jump or dive as far as the incorrect cavity."

523 Prof Elliot gave evidence in relation to A/Prof Cross' conclusions:

> "Q: Do you agree with Professor Cross's conclusion that Caroline Byrne could not have jumped or dived from anywhere in the vicinity of the corner of the railing where it approaches the edge of the cliff, to end up in the incorrect location?
> A: There is some conjecture. If you were – depending on the length of the run-up from the edge of the cliff to the incorrect location, you're getting close to the level of acceptability, or at least of uncertainty, to that position, but certainly not to the position where I would believe to be the correct location."

524 Professors Pandy and Ness were not asked and did not comment on hole B. Prof Pandy was also not asked and did not comment about alternative launch points.

Conscious or unconscious

525 The Crown prosecutor told the jury that "in all probability, Caroline Byrne was unconscious or at least incapacitated when she was thrown off the cliff at the Gap." For this conclusion the prosecutor relied on Ms Byrne's broken humerus and the fact that she had a compound fracture of the metacarpal as well as the evidence of the fishermen and Doherty of a single short scream. The Crown also relied upon the forensic evidence of Dr Hilton and Dr Duflou that injuries to the knuckles on both hands and the missing fingernail could be consistent with defensive injuries from an earlier struggle.

526 However, the prosecutor submitted to the jury, "it is not necessary in deciding your verdict in this case, for you to make a definitive decision whether or not she was unconscious or incapacitated."

527 By contrast, the applicant submitted that evidence established that the spear throw could only be achieved with a conscious, compliant participant.

528 A/Prof Cross said that he did a throwing experiment with a completely limp female. However, as earlier stated, the video footage of the experiments suggests, as would seem inevitable, a level of compliance from the female participant. She endeavours to be limp in the arms and legs but can be seen diving out of the throw. A/Prof Cross accepted that he did not attempt to take into account a struggling woman in his tests, as that would have been too dangerous. He also stated that he was not qualified "to assess, what difference, if any, it makes to throwing a person that does not want to be thrown over the cliff, that is being alive, as opposed to somebody that's

already died and gets thrown over the cliff." He accepted that he had no evidence to make a judgment or to "quantify in any way the degree of movement or struggle that somebody would be making if they were going to be thrown off a cliff and they're alive." However, he did indicate that "a struggle could potentially result in a lower speed throw but not a faster speed throw."

529 Prof Elliot said that, "if someone was struggling, I seriously doubt that you could throw them with any great velocity at all…certainly not with the velocity required to get from the ledge to hole A."

530 Both Profs Ness and Pandy concurred that it would seem to be more difficult to throw a struggling person. A/Prof Ness was not able to say what degree of difficulty it would pose to a thrower.

531 If Ms Byrne was conscious, the only reasonable possibility is that she was struggling. However, the evidence was that a struggle would lower the possible horizontal velocity, perhaps to a point where her body would be unable to reach hole A from the northern ledge. Additionally, A/Prof Cross conceded that no experiments were actually conducted on struggling women due to the danger it posed to the participants.

532 The alternative proposition is that she was unconscious. I doubt whether the "limp" throw provided sufficient evidence to found a conclusion that her unconscious body would have been able to be thrown to hole A from the northern ledge. The only experiments throwing actual "dead weights" were punching bags, which weighed 25 kg. In his book, A/Prof Cross said, "the 25 kg weight used in this experiment was thrown faster than the men could throw a 57 kg weight, but I was not particularly interested in the actual weight thrown or the throw-speed in this experiment. The point of the experiment was to determine whether throw speed, when throwing a heavy weight, is related to bench-press ability": at 144. In other words, no experiments were done throwing the equivalent of an unconscious woman who weighed 57 kg.

533 As I have indicated, I do not believe it is necessary to resolve these issues. Once it is recognised that all of the experiments were done with a compliant and conscious subject and it is accepted that such a person could not have been thrown the required distance (because they would resist), debate about the detail of the appropriate assumptions and prospective conclusions has little purpose.

Conclusion in relation to Ground 3

534 I have indicated above that only limited objection was taken at the trial to the admissibility of A/Prof Cross' evidence. Ground 3 asserts that his evidence caused the trial to miscarry. That issue is relevant to Ground 1. I have in my judgment when discussing Ground 1, the present ground, and Ground 9 expressed my view about the weight that should be afforded to A/Prof Cross' opinions.

Ground 4: His Honour erred in rejecting evidence showing rocks at the base of the Gap being covered in water, and movement of water over the rocks, as being irrelevant to the trial.

535 It will be apparent from what I have written in these reasons that one of the most significant issues at the trial was the position from which Ms Byrne's body was recovered. If Ms Byrne had taken her own life there was obviously a limit to the distance she could have travelled from the cliff top towards the ocean. The calculations of A/Prof Cross were intended to demonstrate that if the body was recovered from hole A Ms Byrne could not have committed suicide – the distance from the cliff top was too great and accordingly she must have been thrown.

536 There was always the possibility that, whether or not Ms Byrne had been thrown from the cliff top or had launched herself, her body may have been carried by the sea to the place from which it was recovered. I am satisfied

having regard to the discussion I have set out below that this possibility was not fully explored at the trial. Of course, if it had been, depending upon the evidence, it may be that the Crown could not have excluded the possibility of suicide, being unable to establish with any confidence the launch point or how far Ms Byrne travelled before being picked up by the ocean and lodged into the rocks.

537 Dr Duflou, a forensic pathologist, gave evidence at the trial. He said that he had researched a number of cases of falls from the Gap. He has carried out the autopsy of many bodies of persons who had fallen from significant heights.

538 He referred to a case where a young man committed suicide at the Gap and his body had ended up wedged in rocks. The person was sitting on the edge of the Gap when he was seen to push himself off the cliff and, when he landed, was then carried by a "large" swell.

539 The prosecutor objected to any further evidence in respect of this event, his concern being that the evidence was irrelevant because there was no suggestion that on the night of Ms Byrne's death there was a large swell.

540 The trial judge accepted the objection and ruled that the evidence was not relevant.

541 Defence counsel also sought to ask Dr Duflou about a photograph, apparently taken by the Department of Lands on 31 December 1999, showing water at the base of the Gap. The prosecutor objected to these questions in these terms:

> "Your Honour, the evidence that is unchallenged in this case is that there was the time of high tide is known and there was a very slight swell that night. The only evidence is that the water was going to the very base of the rocks at Pyramid rock only and not washing over them. The photograph that my friend has shows the water completely covering all of the rocks and it would be quite

misleading to show it to Dr Duflou let alone to tender it and we would object."

542 His Honour determined that the photo was "irrelevant" and had "no probative value at all."

543 In his later questioning of Dr Duflou, the Crown prosecutor suggested that there was "no water going over the top of these rocks" on the relevant night.

544 There are some difficulties with the submission made by the Crown prosecutor, which was accepted by the trial judge. The prosecution case was that Ms Byrne died between 11 and 11.30 pm in the evening. The evidence at the trial was that it was high tide at approximately 3 am on 8 June, with low tide at approximately 9 am. The records indicate that there was a light breeze blowing north, north-west. The deep water wave record showed waves of up to 3.29 metres at 11 pm on 7 June and waves of up to 3.05 metres at 5 am the following day. The evidence indicated that there was no way of calculating the effect of waves hitting the jagged rocks and cliff line at the base of the Gap and bouncing back into the ocean.

545 It was not until 4.40 am that Sgt Powderly located Ms Byrne's body using his light at the top of the cliff. He was subsequently lowered down to the base of the cliff. He gave evidence that while he was there "a fairly large surge of water came in and I got wet … another couple of large surges of water came through and I got very wet." Sgt Powderly had to take shelter from the water. He gave evidence that the water kept surging up in different areas. He said "I don't know the size of the sea that day, but I was conscious of it and it was quite large, and that a whole lot of the holes around where – underneath where I was and where the body was, water kept surging up quite strongly." He said that he was "saturated and wet, and the wind that was coming in off the ocean was still bringing a mist in."

546 In the DVD that was filmed on 7 August 2003 and tendered at the hearing, Peter Byrne described “the sea crashing in, it was quite a big swell …” He described having seen the heavy swell with waves breaking over the rocks and “spray everywhere.”

547 It is apparent from this evidence that the submission by the Crown prosecutor that “there was a very light swell that night”, which it would seem was the foundation for his Honour’s rejection of the evidence, could not be sustained. Apart from any analysis of the actual measurements relative to the tide at any particular time, the observation of Sgt Powderly well after high tide when the ocean was receding was that the sea was “quite large.” Furthermore, the prosecutor’s submission that the evidence was that water was going only to the base of the rocks at Pyramid rocks and not washing over them would not seem to be accurate. In these circumstances the applicant submitted that he had been denied the opportunity of evidence from Dr Duflou that may have cast doubt on the means by which it had been assumed that Ms Byrne’s body came to be wedged in the rocks. In effect, the applicant was denied a submission that Ms Byrne’s body had been moved by the tide and swell and, as a consequence, that the possibility of her suicide could not be excluded.

548 The respondent submitted that the ruling by the trial judge was correct and emphasised that the photograph that trial counsel sought to place before Dr Duflou depicted a mass of swelling water at the base of the Gap, which to a large extent was covering the rocks. It was submitted that if the photograph had gone into evidence it could have misled the jury because the evidence of the sea on the relevant night was on any view less than shown in the photograph.

549 With respect to the evidence from Dr Duflou of the potential for the ocean to move a body at the base of the cliff, the respondent emphasised that this evidence was rejected because the witness introduced it in an answer which was not responsive to the question he had been asked.

550 The respondent emphasised the fact that although Sgt Powderly gave evidence that he got wet, he did not suggest that the water was covering the rock platform or describe a sea which may have been capable of moving Ms Byrne's body. The police recovered her body with a Stokes litter which was balanced on top of the rock without there being any suggestion that it may be washed away.

551 I am left with a sense of unease about this evidence. The applicant did not lead or seek to lead any evidence to establish that the conditions on the relevant night were similar to those depicted in the photograph taken in December 1999. Accordingly, the applicant did not and could not substantiate a submission that the photograph was relevant.

552 However, with respect to the evidence of Dr Duflou about the potential of the ocean to move Ms Byrne's body, the submission of the Crown prosecutor is more troublesome. The observations of Sgt Powderly were made many hours after Ms Byrne is presumed to have died. By this time the tide was going out. The opportunity to explore the water conditions at the time Ms Byrne was presumed to have left the cliff top was excluded by the trial judge's ruling.

553 It was apparent from the evidence of Dr Duflou that was admitted that depending upon the sea conditions, Ms Byrne's body could have been moved and possibly become lodged where it was found.

554 The difficulty for the applicant is the approach which his counsel took at the trial. Although the issue was advanced in this Court in a manner that suggests it should have been explored at the trial, this was not the way it was approached at the trial. Whether it was possible for Ms Byrne's body to have been moved by the ocean before finally becoming lodged in the rocks required an investigation of the tide and wave movement and an analysis of the injuries to her body. The defence did not undertake that task, confining the issue to the tender of a photograph, which could not be

confirmed to be relevant to the sea conditions on the night Ms Byrne died. For that reason I would not sustain this ground of appeal.

Ground 5: His Honour erred in law in declining to identify for the jury and direct as to the intermediate facts requiring proof beyond reasonable doubt in accordance with *Shepherd v The Queen* (1990) 170 CLR 573.

555 Defence counsel asked the trial judge for directions to be given in accordance with the decision in *Shepherd* in relation to four matters. Firstly he submitted that the jury must be satisfied that Ms Byrne was conscious when she was thrown, secondly that the method of throwing was the "spear throw," thirdly that Ms Byrne was spear thrown into hole A, and fourthly that the applicant was not at home at the time of death. Finally, in the context of discussions about joint criminal enterprise, defence counsel submitted that joint criminal enterprise should not be left to the jury and the jury should be directed that they had to be satisfied that it was the accused that did the act causing death.

556 The Crown prosecutor opposed these directions being given.

557 With respect to the first matter, whether Ms Byrne was conscious or unconscious, the trial judge ruled that he did not understand senior counsel for the applicant to have identified a fact that had to be proved beyond reasonable doubt and he did not hear the Crown on this point. With respect to the other matters, his Honour concluded that there was no intermediate fact requiring proof beyond reasonable doubt. He said, "all the Crown's case was [was] that the deceased had landed in hole A, it had not undertaken to prove that conclusion to the exclusion of hole B. The only purpose of the evidence about hole B was to provide for the possibility that that was where the deceased had landed."

558 With respect to the spear throw method his Honour ruled that because of the evidence of A/Prof Cross, that method was the only one available: "if

the jury found that the accused or any person for whose act he was responsible did the act causing death, it would follow that the method used was the 'spear throw'." His Honour determined that since the commission of an act causing death itself had to be proved beyond reasonable doubt, it was unnecessary to direct the jury that they must find beyond reasonable doubt that the only available method was used.

559 It is common to refer to a *Shepherd* direction being required in relation to intermediate facts "which constitute indispensable links in a chain of reasoning towards an inference of guilt" what is now known as a *Shepherd* direction: *Shepherd* at 579.

560 The obligation for a trial judge to give what is now known as a *Shepherd* direction was discussed in *Chamberlain [No 2]* at 626-627. In *Shepherd* at 585 the principle was explained by Dawson J in the following terms:

> "if it is necessary for the jury to reach a conclusion of fact as an indispensable, intermediate step in the reasoning process towards an inference of guilt, then that conclusion must be established beyond reasonable doubt."

561 With respect to the submission that the jury had to be satisfied that Ms Byrne was conscious at the time of the spear throw, no further submission was made in relation to that issue in this Court and we can put it to one side.

562 With respect to the manner of the throw being a "spear throw" with Ms Byrne landing in hole A the position is otherwise. The Crown case at trial was that hole B could be excluded. The Crown called Det Quigg, Prof Fryer and Prof Fulde and provided evidence of measurements and observations, including from Sgt Powderly to exclude hole B as a possible landing point.

563 A/Prof Cross also said that the only method of throwing which could have taken Ms Byrne to hole A was a "spear throw" with the thrower being

located on the northern rock ledge. It was submitted by the applicant that it would follow that if the prosecution were to exclude suicide they had to prove that Ms Byrne ended up in hole A. However, A/Prof Cross said Ms Byrne could also have been thrown, although not jumped to hole B.

564 The trial judge directed the jury when summing up that the Crown did not have to prove beyond reasonable doubt that the body was in hole A, however, his Honour said to the jury:

> "You should be clear that these (hole A and hole B) are the only two possible places the hole – the body could have landed, on the evidence. It is not open to you to find that the body landed in any other place."

565 His Honour also gave the jury directions in relation to suicide.

> "One of the things you will be asking yourself during the course of your deliberations is whether the deceased could have got herself, under her own power, into hole A or hole B. And that is allied to this question of suicide of course, because if you conclude that she could not – and since there is no evidence upon which you could find that the body finished in any other place, the only evidence goes to hole A or hole B; there is no third choice – if she could not, under her own steam, have got to either of those places, then she must have got there by some means other than her own power and will. So that is relevant to this question of suicide. It is not necessarily the first question you have to answer but it is relevant."

566 In the appeal the applicant said that there were some difficulties with this direction having regard to the fact that there was considerable evidence at the trial that the body may have landed in any one of a number of crevices at the base of the Gap. However, no complaint was made about this direction at the trial.

567 The prosecutor constantly referred to hole A as "the correct location" and hole B as "the incorrect location" throughout the trial. In his closing address the prosecutor argued that Ms Byrne could not have landed "in the incorrect position" and described hole B as "the wrong hole." He said it was "ludicrous" to suggest she was found in hole B.

568 Although the Crown submitted that Ms Byrne landed in hole A, and therefore that suicide could be excluded, if she landed in hole B, she still could have been murdered. Although an important fact, the Crown case was not dependent on Ms Byrne getting lodged in hole A.

569 The Crown prosecutor addressed the jury upon the assumption that Ms Byrne was probably unconscious when she was thrown off the cliff. I am not persuaded that the jury had to be satisfied that she was conscious at the time. If the jury concluded that she was, it would more realistically be able to conclude that she was thrown to hole A. However, the jury was entitled to consider the whole of the evidence when considering whether suicide could be excluded: *Hillier* at 637-638 [46]-[48]; *Burrell* at 105; *Velevski v The Queen* [2002] HCA 4; (2002) 76 ALJR 402 at [43]-[44]; *R v Keenan* [2009] HCA 1; (2009) 236 CLR 397 at 434 [126].

570 With respect to the matters raised by the applicant under this ground of appeal I am not persuaded that a *Shepherd* direction was required. It was the case that A/Prof Cross hypothesised that a spear throw was used (although the prosecutor proffered a “shot put” variant of this in his final submission) but this was a matter which the jury was required to consider together with other matters consistent with murder or suicide. The same approach is appropriate to the question of whether the applicant was at home that evening.

571 I would reject this ground of appeal.

Ground 6: The trial miscarried by reason of the prejudice occasioned by the Crown prosecutor.

572 Under this ground of appeal two issues were ventilated. The first issue related to a suggestion by the Crown Prosecutor that Redding was or may have been the second man seen by Martin and Melbourne in the afternoon

of 7 June 1995 in Robertson Park at Watsons Bay, and that he may also have been the second man seen by Doherty that night.

573 This matter was raised by the defence counsel at the trial. He sought an order discharging the jury but the application was declined.

574 The second issue was not raised at the trial, at least in the manner raised on the appeal. It is concerned with the Crown Prosecutor's invitation to the jury to consider a list of fifty questions which the prosecutor told the jury were "the salient questions in order to decide the outcome of the case." The fundamental submission was that by adopting this approach to his address the prosecutor committed the error discussed in *R v Rugari* [2001] NSWCCA 64; (2001) 122 A Crim R 1 at [57].

575 The examination by an appellate court of whether a miscarriage of justice occurred was considered in *Libke v The Queen* [2007] HCA 30; (2007) 230 CLR 559. At [83], Hayne J considered whether submissions made by the Crown Prosecutor were "comments that suggested (whether directly or indirectly by appealing to prejudice or passion) that the jury should follow some impermissible path of reasoning": see *R v DDR* (1999) 99 A Crim R 327 at 340-343; [1998] 3 VR 580.

576 At the time of the trial, the duties of a Crown prosecutor were set out in Rules 62-65 (now rules 82-85) of the *New South Wales Barristers' Rules*. The *Barristers' Rules* then in force were made by the Bar Council under s 702 of the *Legal Profession Act* 2004 and were binding on legal practitioners by virtue of s 711 of that Act. Rules 62-65 were as follows:

> **"Prosecutor's Duties**
>
> 62. A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

63. A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

64. A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

65. A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight."

577 Section 13 of the *Director of Public Prosecutions Act* 1986 empowers the Director to furnish guidelines to Crown prosecutors in respect of the prosecution of offences. Section 15(2) further provides that prosecutors to whom the Director has furnished guidelines are obligated to comply with those guidelines. The current Guidelines were in force at the time of the applicant's trial, and the *Barristers' Rules* set out above were incorporated into Appendix B to the Guidelines. Relevantly, Guideline 2 sets out the "Role and Duties of the Prosecutor" as follows:

> "A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness.
>
> A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest. A prosecutor acts independently, yet in the general public interest. The "public interest" is to be understood in that context as an historical continuum: acknowledging debts to previous generations and obligations to future generations.
>
> In carrying out that function:
>
> > 'it behoves him - Neither to indict, nor on trial to speak for conviction except upon credible evidence of guilt; nor to do even a little wrong for the sake of expediency, or to pique any person or please any power; not to be either gullible or suspicious, intolerant or over-pliant: in the firm and abiding mind to do right to all manner of people, to seek justice with care, understanding and good countenance.'
>
> (per RR Kidston QC, former Senior Crown Prosecutor of New South Wales, in *"The Office of Crown Prosecutor (More Particularly in New South Wales)",* (1958) 32 ALJ 148).

It is a specialised and demanding role, the features of which need to be clearly recognised and understood. It is a role that is not easily assimilated by all legal practitioners schooled in an adversarial environment. It is essential that it be carried out with the confidence of the community in whose name it is performed.

> 'It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'

(per Rand J in the Supreme Court of Canada in *Boucher v The Queen* (1954) 110 CCC 263 at p 270).

In this State that role must be discharged in the environment of an adversarial approach to litigation. The observance of those canons of conduct is not incompatible with the adoption of an advocate's role. The advocacy must be conducted, however, temperately and with restraint.

The prosecutor represents the community generally at the trial of an accused person.

> 'Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.'

(per Deane J in *Whitehorn v The Queen* (1983) 152 CLR 657 at pp 663-664).

Nevertheless, there will be occasions when the prosecutor will be entitled firmly and vigorously to urge the prosecution's view about a particular issue and to test, and if necessary to attack, that advanced on behalf of an accused person or evidence adduced by the defence. Adversarial tactics may need to be employed in one trial that may be out of place in another. A criminal trial is an accusatorial, adversarial procedure and the prosecutor will seek by all proper means provided by that process to secure the conviction of the perpetrator of the crime charged."

578 The duty to present a case fairly, completely and with fairness to the accused was emphasised in *Livermore v The Queen* [2006] NSWCCA 334; (2006) 67 NSWLR 659 at [24] where this Court cited with approval the dicta in *McCullough v The Queen* (1982) 6 A Crim R 274; [1982] Tas R 43 at 57:

> "[It is] quite impermissible [for a Crown Prosecutor] to embark upon a course of conduct calculated to persuade the jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial."

579 In *Livermore* at [31] this Court held that a number of features of a Crown address, either alone or in combination, might require censure by an appellate court. These include:

> "(i) A submission to the jury based upon material which is not in evidence.
> (ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.
> (iii) Comments which belittle or ridicule any part of the accused's case.
> (iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.
> (v) Conveying to the jury the Crown Prosecutor's own opinion."

580 Additionally, where submissions are made that contain matters which the appellant is asked to explain, the onus of proof is inappropriately reversed: *Rugari* at [57].

581 When it is submitted that a trial has miscarried by reason of the prosecutor's address, it is necessary to consider the whole of that address. Each case will depend on its particular circumstances: *Causevic v The Queen* [2008] NSWCCA 238; 190 A Crim R 416 at [6] (McClellan CJ at CL; Barr and Price JJ agreeing).

The second man

582 This issue is complex and requires an understanding of the course of the trial and the manner in which the prosecutor developed the Crown case. The primary submission of the prosecutor to the jury was that the applicant acting alone had thrown Ms Byrne from the cliff top. However, the prosecutor did, in the alternative, suggest that a second man may have been involved.

583 The discussion of a possible second man and the possibility that it was Redding gave greater prominence to the prosecutor's speculation that the motive for the killing was related to the need to protect Rivkin from being exposed for his part in the alleged Offset Alpine scandal.

584 This issue first arose out of the evidence of Melbourne and Martin which I have earlier considered. A short summary will assist in understanding this ground of appeal.

585 As I have earlier related, the evidence of Melbourne was that he saw a female with two males joking, laughing and jumping around towards the Watsons Bay Hotel. Melbourne described the second man as "a lot shorter than the other man," "all dressed in black" with "long black dreadlocks" and a "dark complexion." A couple of hours later the same three people were described as coming up the path from the direction of Doyles restaurant. According to Melbourne's evidence they did not seem intoxicated and seemed happy.

586 The evidence of Martin was that between 11 am and 1 pm he saw three people (2 males, 1 female) walking through Robertson Park towards the Watsons Bay Hotel. He said it was the stunning looks of the female which attracted his attention.

587 Both men purported to identify Leigh as the second man, apart from the applicant, who they saw in the Park. It was accepted by the prosecution that both Melbourne and Martin were mistaken in their identification of

Adam Leigh as the second man. This misidentification significantly damaged the reliability of their evidence identifying Ms Byrne and the applicant.

588 The issue was confronted during the trial when the prosecutor sought to lead evidence from De Geus which would have had the effect of allowing the Crown to submit that Redding was present with the applicant and Ms Byrne at Watsons Bay during the afternoon. By this means the prosecutor apparently sought to restore Melbourne and Martin's credibility. The relevance was said to be that because Redding was a known associate of the applicant, if Redding was present it would be more likely that the applicant was also present.

589 The trial judge formed the view that the course which the prosecutor sought to take was both speculative and an impermissible means of developing an argument that the applicant had been in Robertson Park. The trial judge said to the prosecutor - "No, you may not do that, Mr Crown."

590 Consideration of the possible evidence of De Geus occurred at a relatively early stage of the trial. As the evidence unfolded it became clear that the prosecution was advancing the suggestion that the "second man" in the Park in the afternoon may have been Redding. Although it was also the Crown case that another person was present with the applicant and Ms Byrne later in the evening, the Crown did not assert that Redding was that person. Although that assertion was not made by the Crown the inclination amongst the jurors to come to that conclusion would undoubtedly have been strong.

591 If the jury believed that Redding was present during the evening it would enhance the likelihood of the jury accepting the prosecution's suggested motive. The jury knew that, like the applicant, Redding was an employee of Rivkin. There was evidence suggesting that he was present during the alleged argument between Ms Byrne and the applicant at the gym on the

Friday before Ms Byrne's death. The applicant's counsel was also concerned that the prosecutor unfairly referred to Redding as a weightlifter to raise in the mind of the jurors, while also denying that the submission was being put, that Redding was the second person who participated in throwing Ms Byrne from the Gap. Defence counsel's concern was that the prosecutor effectively trailed the thought that another Rivkin employee who was, like the applicant, alleged to be a strong man, had been present and joined with the applicant in killing Ms Byrne.

In the course of the Crown prosecutor's address he said:

> "Of course Mr Redding has given evidence. Mr Redding has denied being at Watsons Bay on that day, or any other day, either with the accused or Caroline Byrne or with anybody.
>
> However, you should bear in mind this: that at about 3 pm, Mr Jaggard, Mr Michael Jaggard, who was the operator of the Alife restaurant in Stanley Street, East Sydney gave evidence that at about 3 pm he saw the accused arriving at the Alife restaurant with Gary Redding, and the accused spoke to Rene Rivkin who was lunching at the restaurant. Now, I'll come back to that.
>
> I would also ask you to bear in mind that Gary Redding was the man who was standing shoulder to shoulder with the accused just the previous Friday when the accused was berating Caroline. Gary Redding was also a weight lifter at the time.
>
> If the accused had attempted to isolate Caroline that day, to provide him with an opportunity to convince Caroline to stay in their relationship, and if he was doing that because of fears that were held by Rene Rivkin about what Caroline and her father knew about him, and if they had – the accused had failed to convince Caroline to stay in the relationship, that would account for why the accused reported back to Rene Rivkin at the Alilfe restaurant about 3 pm and why Rene Rivkin appeared to be agitated and was throwing arms around when he spoke with the accused."

592 As a consequence of this statement, which defence counsel submitted was in defiance of the trial judge's earlier ruling with respect to the evidence of De Geus, the defence applied for the jury to be discharged.

593 The application was refused. Critical to his Honour's reasons was acceptance of the Crown's position that it would not be asserting that Redding was present during the evening. His Honour said:

> "It was not clear to me what might be the significance for the defence of evidence of the presence or absence of Mr Redding at Watsons Bay at 1.00 pm and 3.00 pm. It would have been different if the Crown was asserting that Mr Redding was the second man at night, because that would carry with it at least an implication, even if there was no assertion, that he was involved in the death of the deceased. But that was not the way the Crown was conducting its case. It seemed to me that nothing said by the Crown, and no necessary result of my having refused to let the Crown bolster the evidence of Mr Martin and Mr Melbourne by reference to the appearance of Mr Redding, had inhibited the defence in the cross-examination of Crown witnesses.
>
> Notwithstanding the appearance of things when the Crown Prosecutor opened the case to the jury, it was apparent by the fifteenth day of the trial, at a time well before Mr Redding came to give evidence, that the Crown was leaving open the position that the second man seen by Mr Martin and Mr Melbourne and the second man seen by Mr Doherty were different men. It was also clear that the Crown would not assert that Mr Redding was the second man seen by Mr Doherty and thereafter involved with the accused and the deceased. Mr Terracini did not at that time ask for the recall of any witness who had already given evidence. The defence were not inhibited from cross-examining any witness, including Mr Redding, about his whereabouts on 7 June 1995. In fact Mr Terracini asked him whether he had ever been at Watsons Bay with the accused and the deceased in particular circumstances which he described, corresponding with the description given by Mr Doherty.
>
> By the time of the argument about re-establishing the credit of Mr Martin and Mr Melbourne through the evidence of Ms De Geus, Mr Freris had been examined and cross-examined about the appearance of Mr Redding. A photograph of Mr Redding, Ex AO, had been received into evidence without objection.
>
> After my judgment, two witnesses were examined without objection and cross-examined about the appearance of Mr Redding. First, Mr Jaggard, through whom photographs of Mr Redding, Ex CJ, were tendered without objection. Mr Jaggard was cross-examined at T1647 about Mr Redding's clothing and appearance.
>
> Mr Freris was re-called to give evidence and at T1678 was cross-examined about Mr Redding's clothing and appearance.

> Mr Redding gave evidence, first on the voir dire and then before the jury. The Crown asked him without objection first in the absence, and then in the presence of the jury, whether he had been at Watsons Bay with the accused and the deceased on 7 June 1995. He denied being there. Mr Terracini dealt with that topic in cross-examination and asked him about his appearance particularly his tattoos, and about the clothing he used to wear.
>
> It is plain from this material that it was always the Crown case that Mr Redding might have been the second man seen by Mr Martin and Mr Melbourne. Mr Terracini must have realised that that was so, judging from his cross-examination of Mr Redding himself and of Mr Freris and Mr Jaggard about Mr Redding's appearance. That also explains why Mr Terracini did not object to evidence about Mr Redding's appearance after the ruling I made about the Crown's attempt to re-establish the credit of Mr Martin and Mr Melbourne by calling evidence from Ms De Geus.
>
> The only way in which the Crown case might have changed was in that it did not assert that Mr Redding was the second man seen by Mr Doherty. If there were any doubt about that, it became clear when I dealt with the evidence of Ms De Geus. In the summing-up I told the jury that it was not open to them to find that Mr Redding was the second man seen by Mr Doherty.
>
> In my opinion no prejudice resulted to the accused from my rejection of the Crown's proposed evidence on the fifteenth day of the trial and no prejudice resulted from what appeared to be the Crown's change of position as it emerged on the fifteenth day of the trial on its case whether the second man during the afternoon and the second man at night were the same man.
>
> It seemed to me that nothing said by the Crown Prosecutor in the passage of his closing address which I have extracted contravened anything I had said when dealing with Ms De Geus' proposed evidence.

594 It is apparent from his Honour's reasons that the issue of concern was whether the prosecutor had transgressed his Honour's ruling in relation to prospective evidence from De Geus. His Honour accepted that, by reason of the Crown's clarification of the position and his Honour's direction to the jury that it was not part of the Crown case that Redding was present that night, the issue could be appropriately disposed of.

595 When a trial judge has refused an application to discharge a jury, and the accused has been convicted, any appeal to this Court is not against the failure to discharge the jury as such, but rather against the conviction. The question for this Court is whether the refusal of the trial judge to discharge the jury occasioned the risk of a substantial miscarriage of justice. Generally, an appellate court will be slow to interfere with the discretionary decision of the trial judge. The trial judge is in a better position to appreciate the significance of the events during the course of the trial.

596 In the present case there are two issues. Firstly, did the prosecutor breach his Honour's ruling and, if so, did the failure to discharge the jury occasion the risk of a substantial miscarriage of justice.

597 As to that first aspect, although the applicant asserts that the comments by the Crown prosecutor were a breach of the ruling, no factual foundation for the argument was developed. I am satisfied that the applicant's submission is based on a misunderstanding of the ruling made by the trial judge and the circumstances in which it was made. It also does not acknowledge, as does his Honour's reasons, the evidence that was given after the relevant ruling and the ultimate submission by the Crown prosecutor to the jury.

598 As I understand his Honour's ruling, he did not rule that the Crown could not suggest that Redding was the second man. The ruling, in relation to the admissibility of the evidence of De Geus, was concerned with whether the Crown could lead evidence from her to restore the credit of the witnesses Melbourne and Martin in so far as they had misidentified Leigh as the second man. The trial judge ruled that the proposed evidence had no probative value on that issue and for that reason rejected it.

599 I am also satisfied that the submission by the Crown prosecutor was not concerned with the second person at night and was concerned only with the afternoon sighting. The Crown prosecutor had previously indicated to the jury that they did not need to resolve who the second man was at the

lunchtime sighting and that it was not possible to prove the second man at lunchtime was the same as the second man at night.

600 After the discharge application was refused, the Crown prosecutor told the jury that there was “just no evidence to identify the second man who was with the accused at Watsons Bay” and that the “evidence may not be sufficient for you to say that it was Mr Redding who was with the accused at lunchtime, in which case the identity of the second man at Watsons Bay with the accused at lunchtime may also remain unknown.”

601 The trial judge also made it clear to the jury in summing up that there was no evidence upon which they were entitled to find that any particular person, including Redding, was the other person at Watsons Bay with the applicant that night. His Honour said to the jury:

> "you will have noted the description that Mr Doherty made of the second man, and you may have wondered, having seen the photograph of Mr Redding, whether he might have been the second man. You should understand that it is not the Crown case that Redding was the second man at 8 o 'clock that night. You could not conclude, on the evidence, that Redding was the second man.”

602 The applicant made no complaint about that direction, nor was there a request for any further direction. In particular, the applicant made no request for any direction (or further direction) to address what is now suggested to be the impermissible line of reasoning that was open.

603 There is no basis to conclude that the jury did other than follow the directions of the trial judge. I am not persuaded that the Crown prosecutor breached the trial judge’s ruling.

The fifty questions

604 The second issue raised under this ground of appeal concerns the course which the Crown prosecutor took at the end of his address to the jury. He

initially asked the trial judge whether he could give the jury a series of 50 questions incorporated in a written document. Defence counsel objected and the trial judge refused to allow this to occur. The prosecutor then introduced the questions in his oral address. Defence counsel took no further objection and it was submitted by the respondent that Rule 4 applies. Final resolution of that question depends upon a proper understanding of the nature of the objection. However, I do not believe it is necessary to take time over that issue. If further objection should have been taken it is clear that there was no tactical reason why it was not taken. The difficulties which the prosecutor's conduct created are so significant that I am satisfied it caused the trial to miscarry occasioning a miscarriage of justice.

605 The fundamental problem with the course taken by the prosecutor was that both generally and with respect to particular questions the prosecutor reversed the onus of proof. Asking questions, even in a rhetorical manner, and inviting the jury when considering its verdict to consider whether the applicant had provided satisfactory answers to the questions was an impermissible course for the prosecutor to follow.

606 It is plain that the raising of matters which an accused is asked to explain reverses the onus of proof: *Rugari* at [35]. Asking "rhetorical" questions falls into this category: *Rugari* at [36].

607 In the course of his address the prosecutor said:

> "Now, because I don't get another chance to speak to you and because I don't know exactly what Mr Terracini is going to say to you, I am going to suggest to you that there are 50 questions that you should consider, because these are questions, *the answers to which will assist you in deciding how you resolve this case. Most of them are things that I have already said to you*.
>
> I am not going to dictate them to you, but you might like to just make a few brief notes to remind yourselves of what these 50 questions are.

What I am suggesting to you is that during the course of Mr Terracini's address, you pay particular attention to any responses that he might have to these questions. He might choose not to respond to them at all, but, if he does choose to respond to them, I suggest to you that they might be of particular importance to you in resolving this case.

1: How did the accused know exactly where Caroline's body was located before it was found by the police?
2: How did the accused know that she was feet up before she was found by the police?
3: Why did Caroline tell Angelo Georgiou such terrible things about the deterioration of their relationship and the grave fears that she held for her safety?
4: What was the argument in the gym about that was witnessed by Christine McVeigh on the Friday before Caroline's death and why was Gary Redding standing shoulder to shoulder with the accused?
5: Was the accused expecting massive bonuses from Rene Rivkin; and, if so, when and after what deal had been done?
6: Why was it that the accused employment [sic] with Rene Rivkin was under such a threat in about March 1995, and what was the plan that he devised to get around this?
7: If the accused had been advising people to buy Offset Alpine Printing Company shares at a time when he knew that the price was going to massively increase, was this insider trading information? If so, had he disclosed such insider trading information to Caroline and Tony Byrne and, indeed, to others?
8: If the ASC inquiry was important enough to cause Rene Rivkin to go on a three-week overseas trip to speak to bankers, was the accused under any pressure at being called before the inquiry on Tuesday, 6 June?
9: Was Caroline concerned about Rene Rivkin's intentions towards the accused? And did those concerns heighten during the overseas trip?
10: Why did the accused order his lunch with Basquali and Samartis at Ditto's if he was planning afterwards to go home and have lunch with Caroline?
11: Why is there no phone record of Rene Rivkin contacting the accused on his mobile phone on 7 June to ask him to drive him, other than a call at 11.38 am?
12: How did the accused get it so wrong about having driven Graham Richardson before and after lunch on 7 June when he spoke to his friends just three days later on the Saturday?
13: Is it just an amazing coincidence that Mr Martin and Mr Melbourne described two people at Watsons Bay around lunchtime who so closely fit the description of Caroline Byrne and the accused?
14: What was the Vitara doing at Watsons Bay at lunchtime on 7 June?
15: What was it that apparently made Caroline so groggy at lunchtime on 7 June, as related by the accused? And why

was there no trace of any drug or alcohol in her blood at the time of her death?

16: What was it that the accused reported to Rene Rivkin at the Alife restaurant, when he arrived with Gary Redding, at about 3pm on the 7th that caused Rene Rivkin to become so agitated?

17: Why was it that the accused became so defensive about Mr Jaggard having seen him at the Alife restaurant at about 3pm on 7 June, that he threatened Mr Jaggard and offered him a share deal in the UK?

18: Why did Caroline purchase some petrol and a Freddo frog and get $50 out of the bank between 3 and 4 pm on the 7th?

19: What was the Vitara doing at Watsons Bay at 4 to 5 pm on 7 June?

20: Did the argument at Watsons Bay that went for three and a half hours, leading up to the scream, involve Caroline Byrne?

21: Would Caroline have voluntarily gone over the fence onto the rock at the cliff line if she was having a severe argument with two men during which she had been sobbing?

22: Why would Caroline have only issued a very brief scream?

23: How would anybody, athletic or not, do a running dive from the top of The Gap in almost total darkness and on uneven ground into either hole A or hole B?

24. In the light of Professor Cross's testing, is there any other way of throwing someone into hole A other than a spear throw by a very strong man?

25: In 1995 was the accused a very strong man?

26: Why did the accused fall asleep for four and a half hours, as he says, when he got home?

27: Why didn't he hear his beeper going off?

28: Why was his mobile phone switched off and the voice mail diverted?

29: Why was Caroline's mobile phone switched off and the voice mail diverted?

30: Did the accused listen to the messages on the answering machine?

31: When he awoke, why did he get into a panic?

32: When he got into a panic, why didn't he try ringing Caroline's mobile?

33: When he got into a panic, why didn't he ring The Connaught?

34: Why didn't he look for Caroline in coffee shops at Kings Cross or in the city?

35: Why did the accused walk nine blocks to get the Ford pick-up truck from the Sanctuary?

36: Why didn't the accused go into The Connaught to see if Caroline or her car was there?

37: Was it sheer coincidence that the accused found the Vitara at Watsons Bay?

38: When he found her car at Watsons Bay, did he think she might be with Peter or one of her friends at the hotel, or one of the restaurants?

39. When he searched her car, did he find the note from Lateef and, if so, why didn't he become concerned that she might be with another man?
40. Why did he conduct such a brief search, and only to the north of the fishermen?
41: Why did he abandon the search in order to pick up Tony and Peter Byrne when they could just as easily have come to Watsons Bay themselves?
42: Why did he engage in a charade when he gave the wallet to Peter and Tony to look at?
43: Why did he engage in such a cursory search with Tony and Peter between the fishermen and the house?
44: If his mobile phone battery was really flat, why didn't he try ringing home to see if Caroline had come back home? And why didn't he access his messages when he got the battery for the phone?
45: How did he know precisely what clothing Caroline was wearing?
46: Why were Caroline's keys found on her body but not her handbag, her wallet, her mobile phone, her watch, her referral and her recent receipts?
47: What made the accused think that Caroline had been at The Gap on the evening of Tuesday, 6 June?
48: Why had the accused tried to get a medical certificate from Dr Grech before Caroline came home on Tuesday, 6 June?
49: How did the accused know that Caroline had been laying a trail from Paddington to Vaucluse towards The Gap on the afternoon of 7 June?

Finally, number 50: Why did the accused never mention any of his concerns about Andrew Blanchette to the police?

Now, ladies and gentlemen, there's something very important that I should say to you about those questions.

The accused is not under any obligation at all to prove anything in this case. My learned friend, Mr Terracini, has no burden of proof at all. We submit that *the answers to those questions* have been provided in the evidence, and that they all point to the guilt of the accused.
So, when I say that you should listen attentively to what Mr Terracini says about all or any of these questions, you should bear in mind that he is not under any obligation to prove any of those things. It is for the Crown to prove the case against the accused, as was explained to you at the very start of the trial by his Honour - and I am sure that his Honour will again tell you that during the course of the summing up."

608 The applicant submitted to this Court that many of the individual questions were objectionable and together they caused the trial to miscarry. The submission is detailed. I do not believe it is necessary to rehearse it in its entirety.

609 It was submitted in relation to the first question that it was an example of the prosecutor putting as a statement a matter which was in issue in the trial and it was, at best, a submission as to what facts the prosecutor said may be drawn from available inferences. The statement that the applicant “knew exactly where her body was and it was feet up” was made earlier in the prosecutor’s address. The suggested “answer” to the first “question” had already been given by the prosecutor, again as a statement, namely that "he was there with her when she went over the cliff.” The prosecutor went on to say that this was “a killer point, an irrefutable point. Some evidence for which there is no other rational explanation other than the guilt of the accused. Call it what you like. Call it a bottom line.” This was relied on by the Crown without more as proving the applicant's guilt.

610 The statement that the applicant knew “exactly where” the body was located before it was found was later withdrawn by the prosecutor, but in the absence of the jury. The jury may have been left with the impression that the applicant knew “exactly” where Ms Byrne’s body was before the police located her. "Exactly" had become "approximately" by the Crown’s own admission. This concession obviously weakened the strength of any submission that the applicant’s knowledge could be the “killer point.”

611 In any event, far from being a “killer point,” the submission to my mind was inevitably flawed. All of the evidence indicated that the night was so dark that no one could have known precisely where Ms Byrne was, or more particularly that she was head down with her feet upwards.

612 Question 23 was: “How would anybody, athletic or not, do a running dive from the top of The Gap in almost total darkness and on uneven ground into either hole A or hole B?” This question reversed the onus of proof by calling for an explanation from the applicant. It was for the prosecutor to exclude the possibility that Ms Byrne could have dived from the top of the Gap to either hole A or hole B (or any other point), not for the applicant to show that anybody, athletic or not, could do this.

613 Several questions invited the jury to speculate. Question 18 was: “Why did Caroline purchase some petrol and a Freddo frog and get $50 out of the bank between 3 and 4 pm on the 7th?” I am satisfied that this question was unfair to the applicant. The question could only be answered by the deceased. The answer had already been suggested earlier in the address although it had no basis in the evidence. The prosecutor had said: "We submit that a depressed person intending to commit suicide would not have purchased a Freddo frog, or petrol or taken $50 out of the bank.” Professor Robert Goldney, a psychiatrist and an expert in depression and suicide, was not cross-examined about this. He gave evidence that people do not always exhibit symptoms of sadness or depression before they attempt to commit suicide. The submission was presumably intended to influence the jury on a key issue in the trial, namely Ms Byrne's depression in the days leading up to her death.

614 Questions 5 to 9 were:

> ”5: Was the accused expecting massive bonuses from Rene Rivkin; and, if so, when and after what deal had been done?
> 6: Why was it that the accused's employment with Rene Rivkin was under such a threat in about March 1995 and what was the plan that he devised to get around this?
> 7: If the accused had been advising people to buy Offset Alpine Printing Company shares at a time when he knew that the price was going to massively increase, was this insider trading information? If so, had he disclosed such insider trading information to Caroline and Tony Byrne and, indeed, to others?
> 8: If the ASC inquiry was important enough to cause Rene Rivkin to go on a three- week overseas trip to speak to bankers, was the accused under any pressure at being called before the inquiry on Tuesday, 6 June?
> 9: Was Caroline concerned about Rene Rivkin's intentions towards the accused? And did those concerns heighten during the overseas trip?"

615 To my mind these questions invited speculation about the actions of the applicant and Rivkin and were unreasonably prejudicial to the applicant. The prosecutor unfairly invited the jury to be suspicious of the applicant’s

dealings with Rivkin in a manner which was clearly intended to smear his character. The trial judge later ruled that the connection that the Crown contended for between the ASC inquiry and the fire at the Offset Alpine factory was speculative and directed the jury to this effect. There was no reference to the 50 questions in this direction. The applicant was never charged with insider trading and there was no evidence to support such charges.

616 The prosecutor also asked whether the evidence of the descriptions by Martin and Melbourne of the people whom they saw was "an amazing coincidence." This question reversed the onus of proof and was no doubt designed to bolster the evidence of these witnesses. It invited the jury to engage in impermissible reasoning with respect to identification evidence. The prosecutor had conceded in the absence of the jury that the evidence of Martin and Melbourne was of a kind which may be unreliable, conceding the necessity for a direction pursuant to s 165 of the *Evidence Act*. He also conceded that these witnesses had incorrectly identified a second man, Leigh, and had identified the applicant from a single photograph of him, with any subsequent identification suffering from the displacement effect. Reasoning that similarity “couldn't be a coincidence” is contrary to authority: *R v Ali* [2001] NSWCCA 218 at [10]; (2001) 122 A Crim R 498 (where the Court held that, in the same way as one person can make an honest mistake in identifying someone, so too can a number of people).

617 The reversal of the onus of proof was further exacerbated by the prosecutor's concluding words: “we submit that the answers to those questions have been provided in the evidence, and that they all point to the guilt of the accused.” Given the contents of the questions he framed for the jury, this submission invited the jury to use consciousness of guilt reasoning which the trial judge had expressly rejected when the prosecutor asked for directions in relation to lies exhibiting consciousness of guilt. A specific example of a question that defied the trial judge’s ruling is Question 12: “How did the accused get it so wrong about having driven

Graham Richardson before and after lunch on 7 June when he spoke to his friends just three days later on the Saturday?"

618 The questions and the comment that the answers "all point to the guilt of the accused" also involved a breach of s 20(2) *Evidence Act* in that the comments "suggest[ed] that the defendant failed to give evidence because the defendant was ... guilty of the offence concerned." The word "suggest" in s 20(2) encompasses comment which makes "reference, direct or indirect, and either by express words or the most subtle allusion" to guilt being a reason that an answer might not have been given: *RPS v The Queen* [2000] HCA 3; (2000) 199 CLR 620 at 630. Not only the answers but also the failure to answer them ("pay particular attention to any responses that he might have to these questions. He might choose not to respond to them at all...") were relied upon as evidencing the guilt of the accused ("the answers to those questions have been provided in the evidence, and ... they all point to the guilt of the accused"): see *Azzopardi v The Queen* [2001] HCA 25; (2001) 205 CLR 50 at 70-71, 75 [67]; *RPS* at 630.

619 The trial judge gave the appropriate directions to the jury in relation to the applicant remaining silent in his case. However, his Honour did not refer at all to the 50 questions. The jury were not told to ignore any of them.

620 As I have previously indicated, senior counsel for the applicant objected to the 50 questions being placed before the jury in a document: see *Libke* at [133] (Heydon J). However, the prosecutor proceeded to put them to the jury orally in a careful and deliberate manner. He also invited the jury to take notes and indicated that he would pause to allow them to take notes.

621 In his closing address, counsel for the applicant attempted to deal with the questions. However, by so doing he gave prominence to them and left the jury to ponder whether the Crown's challenge had been met. He was wrong to take this course. He should have again sought to have the

questions excluded and once the prosecutor had spoken to them he should have applied for the jury to be discharged.

622 He said:

> "It is all very well to ask the 50 questions - and I will come to some of them - about why this and why that? Well, if he is not there, how would he know?
>
> The Crown has to disprove that she committed suicide. It is not for him to prove anything."

623 And also:

> "If you go through a number of these questions, it presupposes, first of all, that we are guilty and we know the answers to all these issues. Just about every single one of the matters associated with the questions assumes there's something sinister: Why did the accused fall asleep when he got home? ... Be very very careful about these sorts of questions and do not permit those amongst you that want to then, as it were, reverse the onus of proof, where he's got to start proving things to you as opposed to the Crown trying to create a smokescreen because of the inadequacies of the case."

624 Apart from the 50 questions the applicant submitted that the prosecution made further "unfair submissions in an attempt to persuade the jury that the deceased had not committed suicide." To my mind the criticisms which were made are justified.

625 The applicant submitted that the prosecutor impermissibly gave his opinion in relation to the emotional impact of performing a "dive" from the top of the Gap. It was submitted that he asked the jury to determine factual issues in the trial on the basis of how they would feel: "Think of the fear that a person would have before they threw themselves off the Gap. Do you really think that Ms Byrne in that condition would have been able to propel herself at such a fast speed to get headfirst into Hole A?" Inviting juries to "determine contested factual issues on the basis of how they would feel, how they would react, or what they would do" has been described by

Simpson J as “a dangerously wrong approach”: *GDD v The Queen* [2010] NSWCCA 62 at [121]; see also *R v Roulston* [1976] 2 NZLR 644 at 654.

626 The respondent submitted that the applicant’s submission was misplaced and that the prosecutor was not inviting the jury to determine factual issues on the basis of how they would feel but rather to consider the actual conditions that might have prevailed. I do not accept that submission. I am in no doubt that the prosecutor was asking the jury to imagine how they would have felt and, by inviting them to speculate in this manner, inappropriately invited them to determine one of the critical factual issues on this basis.

627 After making submissions in relation to the applicant discussing Ms Byrne's depression after her death, the prosecutor asked the jury: “what parallel universe is this accused living in?” The prosecutor continued: “Undoubtedly, Caroline had told Dr Pan that she was depressed. She had a lot to be depressed about; she wanted out; she couldn't see how to do it cleanly; she was fearful; she was fearful for her life; she was in a terrible situation. That's what she was depressed about.”

628 This statement was also capable of seriously misleading the jury. The evidence did not suggest that Ms Byrne had told Dr Pan that she was depressed for any of these reasons, rather she had said she could not explain why she felt depressed. I repeat Dr Pan’s evidence:

> “Q: Would you tell the court, as best you can recollect, and using your notes if you wish, what the conversation was that you had with Caroline on that particular day?
>
> A: She had been feeling depressed for about a month. She had been feeling a bit low for about a month and depressed for the past week, and she had recently started a new job in sales for June Dally-Watkins, and her boyfriend had been away recently for about three weeks with work, and he was now back. And she couldn’t put her finger on what she thought was making her feel down. She had felt depressed about three years previously, and she had had counselling and had medication and it had helped

and she got better. And she said nothing specific had happened to set off her feeling depressed, and I asked her specifically if she had any thoughts of harming herself, not because I thought that she would, but more because that's a routine question that you ask a person that is feeling depressed, and she said definitely not. And because she said she had been depressed in the past, and that seeing a psychiatrist and taking antidepressants helped, I referred her to – she couldn't remember the name of the previous psychiatrist, so I referred her to a psychiatrist that I knew. And I rang, to get her an appointment, and they actually offered her an appointment for the following day, but she declined that appointment because she had a work commitment for June Dally-Watkins. She had to go and visit a girls school to, I think, tell them about the deportment classes and things. And she was very adamant that she wanted to attend this work commitment, and – because I said, 'Well, you know, I could write you a medical certificate.' Mainly because sometimes it's hard to get appointments, and because this appointment was available, I thought it would be good if she could take it. But, as it was, they then offered her an appointment for the day after that, so Wednesday."

629 For ease of reference I also repeat her letter to the psychiatrist:

"Dr Cindy Pan 5/6/95

Dear Dr Sippe,

Many thanks for seeing 24 y Caroline Byrne who is feeling very very depressed recently for 2/12 but much worse for the past 1/52. She cannot understand why because nothing has actually happened to act it … that she can think of. She had the same thing … 3 yrs ago and saw a psychiatrist (? Who) and had medication which helped her out of it.

She has just started a new job doing sales for June Dally Watkins and one's not sure how she feels about it.

She feels she can't do anything, can't sleep, can't express herself. No thoughts of self harm.

Many thanks for your review and management.

Yours sincerely."

630 The submission of the prosecutor was speculative and capable of seriously prejudicing the applicant. There is no suggestion that she was depressed because she feared for her life. The submission was also unfair to the applicant in so far as it relied upon the evidence of Georgiou. His evidence was a recollection of events 9 to10 years after the fact of a conversation with Ms Byrne about the relationship at some time prior to her death. The conversation may have taken place as early as the end of 1994. Even accepting Georgiou's evidence (which I discuss elsewhere in these reasons), there was no evidence that a relationship problem was linked to her depression in the week of her death.

631 On several occasions the prosecutor offered his own opinion as to how a person committing suicide would act. This included saying to the jury that "People that commit suicide generally don't argue for an hour beforehand." There was no evidence in the trial to support this opinion. He also spoke of the phenomenon of people who commit suicide leaving messages to others prior to their death. These submissions were contrary to the evidence of the only relevant expert in the trial, Prof Goldney, that people certainly do not always exhibit depressive symptoms prior to a suicide attempt. The prosecutor's remark should not have been made. It was a serious breach of the prosecutor's duty to put the Crown case fairly before the jury: *Libke* at [71] (Hayne J); *Richardson v The Queen* [1974] HCA 19; (1974) 131 CLR 116 at 119 (Barwick CJ, McTiernan and Mason JJ); *R v Rugari* at [53]; *R v Liristis* [2004] NSWCCA 287; (2004) 146 A Crim R 547 at [90]-[95] (Kirby J, Studdert and Hislop JJ agreeing); *R v KNP* [2006] NSWCCA 213, (2006) 67 NSWLR 227 at [32] (McClellan CJ at CL, James and Hall JJ agreeing); *Livermore* at [31].

632 A Crown prosecutor has a role of great significance in ensuring that an accused person receives a fair trial. That role has been discussed most recently in *Livermore* at [24]-[30]. It is appropriate to repeat what the court said on that occasion:

"The Role of the Crown Prosecutor and the Limits of Trial Advocacy

24 This Court recently had occasion to repeat those aspects of the decision in *R v McCullough* (1982) 6 A Crim R 274 (at 285), touching upon the duties of a Crown Prosecutor, in *KNP v Regina* [2006] NSWCCA 213 at [32]. *McCullough* has also been referred to, with approval, in the course of this Court's decisions in *R v Joseph Attallah* [2005] NSWCCA 277, *R v Liristis* (2004) 146 A Crim R 547 at 563ff and *R v Rugari* (2001) 122 A Crim R 1 at 10. For present purposes, it is necessary to set out the following aspects of the dicta in *McCullough*:-

> It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. …However, it should also be said that the observance of those canons of conduct is not incompatible with the adoption of an advocate's role. Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, *he is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack that advanced on behalf of the accused. But he must always do so temperately and with restraint*, bearing constantly in mind that his primary function is to aid in the attainment of justice, not the securing of convictions. As the New Zealand Court of Appeal said in *Roulston* … 'it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused.'
>
> The feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another. Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and *quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial* (emphasis added).

25 A seminal statement of the responsibilities of a Crown Prosecutor in a criminal trial appears in *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J:-

Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused trial is a fair one. The consequence of a failure to observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, *the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with a consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered.* (Italics not in original)

26 In *R v Callaghan* (1993) 70 A Crim R 350 at 356, the Queensland Court of Appeal held that it was not appropriate that Crown Prosecutors use the dignity of their office to tell a jury something that is not in evidence and that counsel's role is to make submissions, not express personal opinions or enter the fray as a contestant.

27 In *R v Kennedy* (2000) 118 A Crim R 34 at 41; [2000] NSWCCA 487, Studdert J, with whom Heydon JA and James J agreed, found submissions by the Crown Prosecutor, which were critical of a Crown witness who was not sought to be declared unfavourable, improper. It was held that the submissions may well have influenced the jury to reject evidence that the witness gave which was favourable to the accused's case and which impacted on the credibility of the complainant. This was said to be a "serious irregularity" resulting in a miscarriage of justice.

28 In *Rugari*, Carruthers AJ, with whom Spigelman CJ and Sperling J agreed, explored a number of breaches by the Crown Prosecutor of the "reasonable restraints" imposed upon him. In particular, an expression by the Crown Prosecutor of his own view of the quality of the evidence was said to be inappropriate. There were other inappropriate comments, which when taken together, gave rise to the prospect that in convicting the accused, the jury was "actuated, partly at least, by the inappropriate and prejudicial remarks made by the Crown Prosecutor" (at 12).

> 29 In *Liristis*, the description by the Crown Prosecutor of the accused's evidence as "pathetic" and comments in the course of the Crown's address which included his own reaction to the evidence given by the accused were said not to exhibit the fairness and detachment which a Crown Prosecutor is expected to have, in accordance with Deane J's statement in *Whitehorn.*
>
> 30 Similarly, in *KNP*, the introduction in the closing address of the Crown Prosecutor's personal thoughts was said to be "a gross breach of his duty to present the Crown case in an impartial and fair manner. By imposing his own view on the jury there was a risk that they might believe that they were required to decide whether the prosecutor was correct in his personal views rather than assessing for themselves whether the evidence proved the Crown case." (per McClellan CJ at CL at [53]).”

633 In *GDD* at [55], Grove J said:

> "[T]here must remain a risk that a jury would consider a Crown Prosecutor a figure of public authority and whose expressed personal opinions were therefore of particular weight and reliable. It is to avoid that risk that the law requires counsel to make submissions based upon the evidence and proscribes the expressions of personal opinion."

634 When a prosecutor fails to comply with the required standards of fairness an accused person may be denied a fair trial. *Whitehorn v The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 663-4. See also *Cittadini v The Queen* [2009] NSWCCA 302 at [99]-[101] (McClellan CJ at CL, Fullerton and Schmidt JJ agreeing); *Causevic* at [4], (2008) 190 A Crim R 416 at 418 [4] (McClellan CJ at CL, Barr and Price JJ agreeing); *GDD* at [21], [44]. I am satisfied that this occurred in the present case

635 There were further matters in the Crown prosecutor's address about which the applicant, in my opinion, justifiably complained in relation to some of them. They included the following:

(a) An attempt was made by the prosecutor to explain “beyond reasonable doubt” and “reasonable possibility” to the jury. However,

the trial judge intervened to stop the prosecutor and his error did not ultimately occasion any prejudice to the applicant.

(b) The prosecutor expressed an opinion in his address as to why a "spear throw" would have been used, taking the throwing of a child as an example: "the best way you are going to throw that child ... that's how you will get them the furthest up in the air or furthest away from you in the water"; "you're going to be able to throw that child further using that particular throw than the child would be able to run into the water"; "by throwing a person using the spear throw, you 're using your shoulder muscles"; "you have got all your upper body strength." The applicant complained that there was no evidence in the trial in relation to such an activity or outcome. This proposition was correct; there was no evidence about throwing children. However, the activity to which the prosecutor was referring is well understood in the community and, used as it was by the prosecutor as an illustration, there was no unfairness.

(c) It was submitted that the prosecutor overstated the effect of A/Prof Cross' evidence by saying that no defence expert had criticised A/Prof Cross' conclusion but had "agreed with his calculations" and that "Ms Byrne - who was, at very best, average and probably less than average athletic ability - would not have been able to get into hole A from the northern rock platform. That's in daytime." It was further submitted that it was incorrect to suggest that no defence experts had criticised A/Prof Cross' conclusions. Prof Pandy's experiment produced a contrary result and A/Prof Ness was unable to make a conclusion due to the many unknown variables. It was also submitted that the prosecutor incorrectly characterised the deceased's athletic ability.

636 The Crown responded to submission (c) by arguing that the submission complained of had been taken out of context. It was submitted that the Crown prosecutor was correct in submitting that "not one of the experts

called by the defence has criticised Professor Cross' conclusion that in order to get from the northern rock platform into hole A you needed to leave the rock platform at 4.5 metres per second and that if you were running horizontally you would need an additional 0.3 metres per second for the rotation." The witnesses called by the applicant agreed with the calculations of A/Prof Cross. Contrary to the applicant's contention, there is nothing incorrect or misleading in the submission. The Crown submission should be accepted. It is an accurate response to the evidentiary position at the trial although its significance is a matter I have discussed elsewhere.

637 It was further submitted that the prosecutor urged the jury to accept evidence pertaining to a "spear throw" for which there was no scientific basis, stating: "do you need a scientific paper from some scientific journal to be able to come to that conclusion? Isn't it just good commonsense …"

638 I do not believe there is substance in this complaint. The Crown prosecutor was entitled to ask the jury to accept the "spear throw" although it had not been discussed in a scientific journal. The admissibility of the evidence on the topic was not challenged. A/Prof Ness, who was called by the defence, accepted that it was possible that Ms Byrne was spear thrown.

639 It was further submitted that the prosecutor belittled expert evidence called by the defence, exemplified by his own description of A/Prof Ness's evidence of uncertainties as "manifestly absurd": "Yes, if she was a metre further up or if she got a metre further down, or if it was a metre further out or a metre closer, yes there are uncertainties. But they are not uncertainties in the context of this case." It was submitted that this was incorrect as even on the Crown case, the centre of mass of Ms Byrne and the point where the body hit the rock near or in hole A were uncertainties of at least a metre. The launch angle, landing point, speed at which she left the cliff face, and location of departure were also uncertainties. To my mind this criticism is justified in part. There were significant uncertainties, assuming Ms Byrne was thrown off the cliff top, about each of the

elements in A/Prof Cross' calculations. As it happens these calculations are only useful if the circumstances were such that A/Prof Cross' idealised situation existed in fact, about which there must be considerable doubt. However, I am not persuaded that it is appropriate to conclude that the prosecutor unfairly dealt with this evidence so as to contribute to any injustice. He was entitled to argue that the jury should accept A/Prof Cross' evidence to the exclusion of experts who were called by the applicant.

640 The applicant also complained about the submission made by the prosecutor in relation to where Ms Byrne was found. It was submitted that the prosecutor stated as a fact a proposition that was highly contentious in the trial and called for circular reasoning. The prosecution had to prove that Ms Byrne landed where she was found (on its case, hole A); however, this was put as a statement of fact to the jury: "Isn't that the best evidence of all? Where her body was found? It was found in that hole." I am not persuaded that this submission was inappropriate in the context. Although it was in issue as to where the body was found, I am satisfied that the jury understood this and would have understood that the submission was made upon the assumption that the jury were satisfied Ms Byrne's body was retrieved from hole A.

641 There is more substance in the complaint which the applicant made that the prosecutor went on to argue using his own opinion, not the evidence in the trial: "Had she hit any other rock, the body being very flexible and limp she would have ended up splat on some other rocks." This was contrary to the evidence of A/Prof Hilton that a fall from 30 m might not cause any external injuries or necessarily result in death and that there were many variables that determined the injuries you would expect. Dr Duflou gave evidence that persons falling from high tower blocks can sustain very similar types of injuries; there may be extensive lacerating and abrading injury, or there may be none. His evidence was that the injuries could have been occasioned by falling on to any of the rocks at the bottom of the Gap.

642 The applicant emphasised that the prosecutor relied on the video evidence of mannequins not fitting into hole B and asked rhetorically, “How is she going to end up into hole B at 45 degrees?” It was submitted that reliance on the mannequins was dubious as:

(i) they had different dimensions to the approximate dimensions of the deceased taken from a static photograph;
(ii) evidence sought to be led by the Crown to this effect, by placing mannequins in the two holes at a view, had been rejected by the trial judge;
(iii) the mannequin was stiff at the time of entry and not flexible like a human body; and
(iv) there was no account taken of the effects of decompression, death and the onset of rigor mortis.

643 The applicant did not object to the use of the mannequin at the time. As I understand the Crown prosecutor he was suggesting that the jury should consider the video in relation to the mannequin and hole B and also compare it with the video created by the defence. The video was in evidence, counsel was entitled to refer to it and the jury was entitled to take it into account. The criticisms that are made refer to matters of evidence and submission.

644 It was submitted that the prosecutor also misrepresented the evidence of Dr Duflou. The prosecutor said in his closing address: “You will recall that Professor Duflou, who has done more post-mortem examinations, according to Mr Terracini, than any other doctor in Australia, said that he would expect that if somebody had themselves jumped or was thrown either over the Gap and they were conscious, that they would instinctively put out their arms; and if they were going headfirst, that would result in massive, massive injuries to the hands and arms. Of course, Caroline had one broken bone in one hand and some grazes on her knuckles. So Dr Duflou has said that the lack of injuries is consistent with her being unconscious.” It was submitted that:

> "The prosecutor both exaggerated and misstated the evidence. A/Prof Duflou had disagreed with the proposition that because there was the broken fifth metacarpal (there being no other fractures to the hand or forearms) therefore Ms Byrne (if she fell head first) was unconscious when she fell. He expressly disagreed that "she *would* have fallen head first." The prosecutor also failed to refer to the evidence of a broken humerus, or that evidence of fracture(s) of the bones of the arms is an expected injury occasioned by the reflex of putting out ones [sic] hands. The deceased had fractures to the right hand and arm, consistent with her being conscious and falling to her death. The prosecutor's questions and submission also presupposed a head first landing, which both forensic pathologists had specifically rejected. The injuries could have been occasioned "on any number of rocks at the bottom of the Gap" (emphasis in original).

645 The Crown responded to this criticism by drawing attention to a portion from the transcript of Dr Duflou's evidence. It reads as follows:

> "Q: Most people will put their hands out and get massive injuries to their hands, wrists and lower forearms.
> A: Yes, absolutely.
>
> Q: And she didn 't have anything like that, did she?
> A: Correct, no.
>
> Q: Is that consistent with her being unconscious at the time of falling.
> A: Yes it could be."

646 In re-examination:

> "Q: Do you see any indicators on the deceased that were consistent with her trying to break the fall?
> A: I do not believe that those were present in this case."

647 It was submitted that the submission complained of was entirely consistent with the evidence. I do not accept this submission. All that I understood Dr Duflou to say was that the nature of Ms Byrne's injures, or the lack of them, meant that she could have been unconscious – not that she was necessarily unconscious. However, the criticisms which were made are not

such as to occasion a miscarriage of justice. In so far as they required a response it was a matter for trial counsel to deal with in his address.

648 There is force in the applicant's criticism of the prosecutor's submission to the jury in relation to the evidence of Doherty. The prosecutor said in relation to Doherty's observation of the argument in the street:

> "It was very cold. Mr Doherty gave evidence that the same three voices that he heard arguing for an hour before the scream he had previously heard at about 8-ish. At about 8-ish, he sees a girl sitting in the gutter underneath the light pole with her head in her hands, sobbing, slurring her words, arguing back to a man, who was initially under the awning so Mr Doherty couldn't see him. The description which he gives is very, very similar to the description of what Caroline was doing when the accused cornered her and berated her and swore at her in the gym, as witnessed by Christine McVeigh."

> "This woman was moaning and slurring her words and arguing back in a combative style. Mr Doherty thought that she was either drunk or affected by drugs. Of course, he would, because he had seen numerous people in that area who were drunk or affected by drugs having arguments like that. That doesn't mean that that woman was actually drugged or drunk. We submit to you that Caroline Byrne by that stage had been subjected to the most concerted attempt by the accused to convince her to stay in her relationship; they were arguing and arguing and arguing and continued to argue until the time of her death. You might think that she had been so harangued in such a vociferous way by the accused that she was just totally and utterly distressed, not wanting to go, not wanting to be there, wanting to be out of the relationship, not knowing how to cleanly end it, as she told Angelo Georgiou, and that is why she was slurring her words and sobbing."

649 These submissions did misrepresent Doherty's evidence. The evidence of Doherty was plain. There was nothing to suggest that the state of the woman who Doherty observed was a consequence of her being harangued and desperately wanting out of the relationship. The submission by the prosecutor misrepresented the evidence and I am satisfied the prosecutor breached his obligation of fairness and detachment: *Liristis* at [94]. He was "fighting for a conviction": *Gonzales v The Queen* [2007] NSWCCA 321; 178 A Crim R 232 at [100] citing *Roulston* at 654. This was a serious breach of the prosecutor's obligation.

650 It was submitted by the applicant that the prosecutor also departed from the way in which he had opened the case against the applicant when he sought to argue in his closing address that the deceased was probably rendered unconscious or incapacitated by the applicant at the top of the Gap and then thrown off. He made the remark to the jury that "unconscious people, or incapacitated people, are not people who commit suicide." He then went on to tell the jury that "it is not necessary, in deciding your verdict in this case, for you to make a definitive decision whether or not she was unconscious or incapacitated. If at the end of the day, that's one of those matters that you just can't decide, so be it. It doesn't prevent you from reaching a verdict."

651 It was submitted that if the jury were being invited to reason in the manner the prosecutor had suggested, namely that suicide could be excluded as Ms Byrne was unconscious at the time that she went over the Gap, then they needed to be satisfied beyond reasonable doubt of this fact.

652 It was submitted that the prosecutor relied on: his own misstatement of the evidence of Dr Duflou (as discussed above in relation to injuries to her arms and hands); a further misstatement of Dr Duflou's evidence that "the lack of injuries is consistent with her being unconscious"; a misstatement of evidence from Dr Duflou and Prof Hilton as being that "some of the injuries that were found on her [were] consistent with being defence injuries" (acknowledging however that they could have been occasioned in the fall); a misstatement that "what they do say is they are the sorts of injuries that people get during a struggle and they might be defensive injuries"; the short scream heard by the fishermen as evidencing Ms Byrne being rendered unconscious at that time; the lack of any screaming as she was "dragged to the fence, lifted over the fence ... lifted up, and then ... thrown over"; and his own opinions in the form of submissions as to how depressed people would and would not act to support the case that she was unconscious when thrown over.

653 It was submitted that this was a radical change in the case which was not disclosed earlier when the *Shepherd* directions were being discussed and at which time a direction concerning Ms Byrne being unconscious was specifically opposed by the prosecutor. It was further submitted that the reasoning suggested by the prosecutor was dangerous.

654 As a matter of fairness in a criminal trial, the Crown is required to formulate the basis upon which it puts its case against the accused, call that evidence in its case and essentially to adhere to that case: *Tran v The Queen* [2000] FCA 1888; (2000) 105 FCR 182 at [133]. It was submitted that the jury should not have been invited to engage in speculation and conjecture. It was further submitted that the "unconscious" theory was untenable and could not properly sustain a guilty verdict. It was criticised as a "new theory" designed to explain a number of failings in the Crown case in relation to the "spear throw" technique posited by A/Prof Cross and challenged by the evidence of Professors Elliot, Ness, Pandy, Hilton and Duflou. It was submitted that, as in the case of *R v Anderson* (1991) 53 A Crim R 421 (discussed in *Tran* at [136]–[147]), the prosecutor took, in his closing, an "unfair opportunity to put to the jury that a major weakness in its case was much less serious than it actually was" and this was "compounded by the Crown's unfair attempt to persuade the jury to draw inferences that were not properly open." In *Anderson* this was described by Gleeson CJ as the Crown being "permitted, in an unfair manner, to obscure a major difficulty concerning the reliability of the evidence of its principal witness ...": at 449. It was submitted that this approach, uncorrected by the trial judge in the summing up, caused a miscarriage of justice.

655 In *Tran* at [147] the Court held that "a[n] inappropriate and unfair attempt on the part of the Crown to persuade a jury to draw inferences of fact, and accept argumentative suggestions, that were not properly open on the evidence may result in a finding that there has been a miscarriage of justice. This will ordinarily lead to the quashing of the conviction and may result in the substitution of a verdict of acquittal." It was submitted that in

the applicant's case the conduct of the prosecutor warrants quashing of the conviction and, when all factors are considered together on this appeal, additionally the substitution of a verdict of acquittal.

656 The Crown responded by submitting that the applicant at trial had accepted that the Crown was entitled to change its case within reason (including on this aspect now complained of). In any event, it was submitted the Crown prosecutor's submission was not a change in position; in opening and closing the case, the Crown prosecutor submitted that it was not necessary for the jury to determine whether Ms Byrne was unconscious. Although the applicant contented to the contrary, the trial judge held that the Crown was not required to prove that fact beyond reasonable doubt. In addition, in so far as the applicant asserted that the Crown changed its position after the issue of a *Shepherd* direction had been argued, the Crown emphasised that no complaint was made below, nor had the applicant sought to re-argue the issue.

657 It was further submitted that, contrary to the applicant's contention, the propositions argued by the prosecutor were not misstatements of the evidence or expressions of personal opinion. They were said to accurately reflect the evidence given or to be inferences available on the evidence.

658 With some hesitation I accept the Crown submission. My hesitation stems from the fact that when opening the case the prosecutor did not place any emphasis on the prospect that Ms Byrne was unconscious. I am satisfied that it was because of the difficulties with A/Prof Cross' evidence that the prosecutor changed his position. However, I am not satisfied that he was precluded from doing this or that by so doing the trial miscarried.

659 However, for the reasons I have previously indicated I would uphold Ground 6 of the appeal.

Ground 7: The trial judge erred both in leaving murder on the basis of joint criminal enterprise to the jury and in

failing to identify properly the basis upon which any such verdict should be reached.

660 When opening the Crown case the prosecutor raised the possibility that Ms Byrne may have been killed by the applicant alone or by his act in a joint enterprise with another. The identity of the other person was never stated. The prosecutor said:

> "The elements of murder are: firstly a death – and there won't be any doubt about that; secondly, a death arising from an act of the accused or an act for which the accused is legally responsible. So an accused can be legally responsible if he or she does an act themselves or an accused can be legally responsible if the accused is with someone else who does an act in combination with the accused; that is, there is a joint enterprise by the accused and someone else to do an act …"

661 Before final addresses the Crown sought to persuade the trial judge that he should give the jury a direction in relation to joint criminal enterprise. This was opposed by defence counsel. Defence counsel submitted there was no evidence which would support the Crown's position. With obvious hesitation the trial judge did allow the prosecution to address on joint enterprise murder and his Honour, although cursorily, also dealt with the matter.

662 In closing the Crown prosecutor made this submission:

> "His Honour will also give you directions on what we lawyers call 'joint criminal enterprise'; that is, that if two people are engaged together in the commission of a crime, it doesn't matter which one of them actually does the physical act. That if they are both cooperating with each other and engaged in a joint enterprise, a joint act, it doesn't matter whether one of them has done it or the other one has done it, in law, each of them is responsible.
>
> Of course, here the Crown says that the accused – we cannot say whether the accused was responsible for throwing Caroline Byrne's body over the Gap on his own or with another person, a person unknown. Either way, in law, he is responsible for her death – and his Honour will explain that to you."

663 In support of his submission that the jury might find that there was a joint enterprise, the Crown prosecutor pointed to the evidence that at about lunchtime on 7 June 1995 the deceased was allegedly seen with two men in Robertson Park near the Gap. Later that evening Doherty reported seeing a woman who the prosecutor said was Ms Byrne sitting in the gutter opposite his residence. Another man was seen nearby although he did not appear to join in any argument. As I have discussed elsewhere, Doherty did not see the woman's face and he gave evidence 14 years after Ms Byrne's death, having first come forward in 1998. Doherty said that three people walked from somewhere near Doherty's residence towards the Gap. Doherty said he later heard further argument.

664 As I have discussed in relation to Ground 3, it is now apparent that there are insurmountable problems for the prosecution in submitting that Ms Byrne was thrown by two men. A/Prof Cross' "experiments" did not support a theory that two men could have made the throw. In his evidence during the appeal, A/Prof Cross conceded that his earlier evidence in the trial was incorrect. He gave evidence in this Court that "two men *cannot* throw as fast as one man" and that "two men could not throw fast enough to reach [hole A]" (emphasis added).

665 However, there are other and equally significant problems. At the trial the Crown prosecutor was no doubt concerned that the Crown case would be diminished if the presence of "the second man" was not explained and for that reason embraced the theory of a possible "joint throw." Furthermore, he no doubt assumed that the jury would reason that a joint effort would enhance the probability of reaching the identified landing point.

666 The trial judge's summing up of the case of joint criminal enterprise included the following:

> "108. There is no dispute that the deceased, Caroline Byrne, died on the night of 7 and 8 June 1995. There is no dispute that if the accused or any person for whose act he was

responsible deliberately threw her off the cliff, the intention in doing so was to kill her.

109. So there is only one question upon which your verdict depends, namely: whether the accused did the act causing death, or whether someone else did it and he made himself responsible for it. Before you may properly find the accused guilty of murder, you must be satisfied beyond reasonable doubt either that he threw the deceased off the cliff or that he made himself responsible when somebody else threw her off the cliff.

110. The Crown contends that the accused threw the deceased off the Gap. Alternatively, the Crown case is that the criminal activity that took place at the cliff top was carried out jointly by the accused and an unidentified man. In putting its case this way, the Crown relies on a body of law known as 'joint criminal enterprise', by which one person may be considered liable for the acts of another or others.

111. A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit an offence.

112. As I am dealing with this topic, you may notice me using the words, 'agreement', 'arrangement', 'plan'. They all mean the same thing for these purposes.

113. The understanding or arrangement need not be arrived at by any particular words, written or spoken. The existence of a joint criminal enterprise may be inferred from all the circumstances including anything said. The agreement or arrangement may not have been reached at any particular time before the offence is committed. The circumstances, in which two or more persons are participating together in the commission of a particular offence may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them there and then to commit the offence.

114. If the agreed offence is committed by one or other or others of the parties to the joint criminal enterprise, or if all play some part in committing that offence, all parties are equally guilty, regardless of the part played by each in its commission.

115. A person participates in a joint criminal enterprise either by committing the offence charged itself, or, knowing that the offence is being or is about to be committed, by

intentionally assisting or encouraging another party to the joint criminal enterprise to commit that offence. The presence of that person at the time that the offence is committed and a readiness to give aid if required is sufficient to amount to an encouragement to any other participant in the joint criminal enterprise to commit the offence.

116. Let me give you some examples …"

667 Later his Honour directed the jury:

"123. So the pivotal element of murder, which you must be satisfied about beyond reasonable doubt before you can find the accused guilty, is, as I've stated there, that the accused did the act causing death or made himself responsible for it. Those last words 'or made himself responsible for it' bring in the application of the principles of joint criminal enterprise, which I have now told you about."

668 Inevitably the trial judge's direction contained no discussion of any facts which may have supported a joint criminal enterprise. Beyond the evidence that Doherty saw two men and a woman there quite simply were not any.

669 The issue raised by this ground of appeal was recently considered by this Court in *Sever v The Queen* [2010] NSWCCA 135 at [144] where Latham J said:

"144. Invariably, a Crown case based on joint criminal enterprise arises in circumstances where the accused and another, or other persons, are present together at the commission of an offence, and the accused does not perform the act constituting the offence. Such a case attracts the standard directions set out by Hunt CJ at CL in *R v Tangye* (1997) 92 A Crim R 545 :-

(1) The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused.

(2) A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

(3) A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime.

145 In such a straightforward case of joint criminal enterprise, as the direction makes clear, the existence of the agreement and the participation in that agreement by the accused are matters of inference established by the circumstances in which two or more persons are participating together in the commission of the offence, and the presence of the accused at the time the offence is committed, coupled with intentional assistance to, or encouragement of, the other participant(s).

146 It is, of course, possible for the Crown to mount a case based on joint criminal enterprise where the accused is not present at the commission of the offence; *Osland v The Queen* [1998] HCA 75 at [27], [93]; (1998) 197 CLR 316 at 329-330, 350 ; *R v Prochilo* [2003] NSWCCA 265. However, the existence of the agreement or enterprise, and the participation in it by the accused in such a case cannot be inferred from the circumstances in which the offence is committed, because (to state the obvious) there is no evidence of what the accused said and/or did during the commission of the offence. The jury must look to evidence of events, other than those pertaining to the offence itself, for proof beyond reasonable doubt of the existence and scope of the agreement, and the accused's participation in it.

> 147 In the instant case, there was a complete absence of evidence of that character. There was no evidence of the identity of a potential co-offender. There was no evidence of conversations between the accused and others that were capable of amounting to an agreement to commit an offence. There was no evidence of acts on the part of the accused, such as the transfer of a large amount of money to another or the purchase of material linked to the fire, that suggested an intention to carry out such an agreement."

670 Although I would not myself make this finding, it was possible that the jury concluded that Ms Byrne was the woman seen by Doherty and that the applicant was with her. They may also have accepted the evidence that there was another man in the vicinity who walked with Ms Byrne and the applicant towards the Gap. However, the evidence is otherwise silent. There is no evidence to indicate the identity of the other man or suggest that the other person remained at the scene at the time Ms Byrne went to her death, much less participated in the alleged crime. There was no evidence of any conversation between the men or evidence from which it could be inferred that there was an agreement between the applicant and the other man to do anything. There was quite simply no evidence to establish the existence of a joint criminal enterprise.

671 The Crown submitted to this Court that it was enough for the prosecutor to satisfy the jury that the applicant was at the Gap at the relevant time with Ms Byrne and that another man was present. Surprisingly it was submitted that "the fact that the second man's identity was unknown, and the absence of direct evidence [I interpolate there was no evidence at all] of conversations between the applicant and this unknown man such as to evince an agreement to commit the offence of murder, does not equate to there being no foundation upon which to leave a secondary basis for the applicant's conviction." As Latham J's reasons in *Sever*, with which I agree, make plain, this submission must be rejected. See also the discussion by Beazley JA in *Cooper v The Queen* [2011] NSWCCA 258 at [67].

672 This ground of appeal must succeed. It alone would justify a new trial.

Ground 8: The learned trial judge erred in allowing the Crown to present evidence and make submissions suggesting that the deceased's knowledge of details relating to the Offset Alpine fire was a motive for the offence of murder.

673 I have previously alluded to the fact that in a number of respects the Crown case was built upon speculation. It must be remembered that in the background to the trial were stories in the press which implied that Rivkin had deliberately arranged a fire at the Offset Alpine premises so that he could benefit from the insurance. The allegation was that the premises were insured for more than they were worth. It was also suggested in the press that the dealings in the shares of Offset Alpine by Rivkin and possibly Richardson had been undertaken with the benefit of "inside knowledge" that the insurance payment would be forthcoming to the detriment of other shareholders or prospective shareholders who did not have that knowledge. Of course, if the rumours were true Rivkin had been involved in serious criminal activity. Rivkin's personal reputation had already been adversely affected by a criminal conviction for dishonesty relating to his business dealings.

674 Both Rivkin and Richardson were well-known public figures. It was most unlikely that the jury or at least a number of its members were not aware of who they were and the rumours about them and their general reputation.

675 On the day before Ms Byrne died the ASC interviewed the applicant in relation to trading in Offset Alpine shares. He had of course recently travelled overseas with Rivkin, including to Switzerland in relation to Rivkin's business affairs.

676 At the outset of the first trial, senior counsel for the applicant objected to the Crown leading evidence in relation to the Offset Alpine issue to support a motive in the applicant to kill Ms Byrne. The Crown prosecutor had

indicated that he would allege that one of the motives for the applicant murdering Ms Byrne was to prevent her possible disclosure of confidential information which she had in relation to the financial dealings of Rivkin in Offset Alpine. The prosecutor added that the evidence would also show that the applicant was under pressure at the time, although how this was relevant to any motive to kill Ms Byrne I do not understand.

677 Objection was taken to this evidence. It was submitted that the evidentiary foundation for the admission of the evidence was thin and any probative value it may have had would be outweighed by unfair prejudice: *Evidence Act* s 137. Counsel's submissions emphasised that the Crown had indicated that it was not advancing a solicit to murder case or that Rivkin had any involvement in Ms Byrne's death. It was further submitted that there would be no evidence that Ms Byrne feared that she would be harmed because of any knowledge that she had or that there was any evidence that she in fact had knowledge that would be potentially dangerous to Rivkin or the applicant. Rivkin gave evidence that he had met Ms Byrne on a few occasions but had no idea of any knowledge she may have had of his business dealings. Counsel for the applicant also drew attention to the fact that there were no findings of impropriety or the giving of false evidence ever made against the applicant, who in any event was not a shareholder, employee or office holder of Offset Alpine.

678 Counsel submitted that if the evidence was admitted it would result in unfair prejudice to the applicant. It was submitted that evidence of the applicant's interaction with Ms Byrne would inevitably be caught up in the minds of the jury with the reputation of Rivkin. Although counsel recognised that the trial judge would tell the jury how they should deal with the evidence, he nevertheless submitted that the jury would inevitably associate the applicant with the rumours surrounding Rivkin and Richardson, which would adversely colour their thinking even though the law assumed that the jury would act in accordance with his Honour's directions.

679 Counsel also pointed to the inherent inconsistency in the Crown's position. The Crown identified two motives for the applicant killing Ms Byrne. I have previously discussed them. The first motive was said to be that she was not happy in the relationship with the applicant and wished to terminate it and, because the applicant did not want to lose her, he killed her. The second motive was said to be that the applicant had decided to kill her to protect Rivkin because she knew too much about Rivkin's business dealings and Rivkin feared she may tell others. If the applicant was desparate to maintain the relationship, Ms Byrne would stay alive, exposing Rivkin to the risk which the alternative theory was said to embrace.

680 The evidence which the Crown proposed to call, and which it ultimately was allowed to call in relation to this suggested motive, came primarily from the deceased's father, and the witness Georgiou. Georgiou gave evidence of a conversation which he said he had with Ms Byrne at the end of April or early May and in which Ms Byrne said of the applicant:

> "He's under a lot of pressure, he's always under a lot of pressure. Sometimes I fear for my life with Gordon. I have to break this off and leave him. Gordon's very possessive. I can't break it off cleanly. He gets in a lot of jealous fits."

681 The Crown sought to use this conversation to support the proposition that the applicant was under a lot of pressure because of the circumstances surrounding the investigation of the Offset Alpine issues. The Crown alleged that in early May:

> "The pressure of the Offset Alpine Company first started. We would submit that this would enable the Crown to legitimately make a submission to the jury that the pressure she was talking about in that conversation relating to investigation of the Offset Alpine Printing inquiry which prompted the overseas trip by Rene Rivkin and Gordon Wood. They left on 7 May, came back on 27 May."

682 The Crown was correct that Mr Rivkin went overseas with the applicant at that time. It seems to have been accepted that the issue of concern during

that trip was dealings in relation to the financing of Offset Alpine. However, the applicant was not a shareholder in Offset Alpine at any time, was not a director, and was not in any way involved in the management of the company. Although at times he sought to aggrandise his role with Rivkin, his role was to drive Rivkin and perform relatively menial tasks for him.

683 There was an additional element to the applicant's concern. The evidence which the Crown proposed to tender came from conversations which the applicant allegedly had with Ms Byrne, members of her family, particularly her father, and others. By this time the relationship between the applicant and Mr Byrne had soured over the dealings with respect to the acquisition of the apartment (see [66]). It was apparent that Rivkin bore ill will towards Mr Byrne who in turn did not trust Rivkin or the applicant.

684 His Honour gave a judgment in relation to this issue, concluding that the evidence had probative value. His Honour said:

> "[10] In my opinion the evidence has probative value. The Crown will not assert, and the evidence will not establish, that the accused was involved in any of the wrong doing which justified the conviction of Mr Rivkin or Mr Adler. The jury will be made to understand that it is the case. They will be told that they are not to take into account anything that they may have seen, read or heard in the news media about Mr Rivkin or Mr Adler unless it is put before them as evidence in the case. I am to assume that the jury will obey the directions that they are given.
>
> [11] So, I think any risk of unfair prejudice will be removed."

685 The evidence led on this aspect of the motive was primarily from Mr Byrne, whose evidence was criticised. I have previously referred to this issue: see [237]-[239].

686 Mr Byrne's evidence was discredited in the trial in a number of other respects. He agreed that he "had no evidence whatsoever that Gordon and Rene were having an affair." However, he had been prepared to write to the police alleging this to have been the case. He also gave evidence

that he believed the applicant was an “unnamed, unknown investor” in Offset Alpine, which he also agreed was not correct. He said that he had “never bothered” to look into whether the applicant had shares in Offset Alpine but assumed this was so. He said that he believed the applicant belonged to a “secret society, an inner sanctum, where the code of silence in all matters must reign supreme.” He also gave evidence that he believed Martin and Melbourne were “messengers from God” and that he continued to believe this. He agreed he had made “outrageous claims” about another of Rivkin's employees, Mr Freris, despite knowing it “could have all been idle gossip.”

687 There was also evidence from Georgiou who claimed that in February or March 1994 the applicant advised him to invest money in a printing company called “Offshore,” that the shares would double, it was “fixed” and that there were government people involved. In cross-examination he clarified that by “involved” he meant “involved to invest” and that “Rene Rivkin has got influential people, influential friends. And they know when they put their money down, they make money. That's all it meant.” He claimed that the applicant met with him and his business partner about investing in shares in the company; however, the offer was not pursued.

688 I appreciate that for Mr Byrne the loss of his daughter was a tragic event enveloping him in overwhelming grief. However, it is apparent that he had formed a dislike for the applicant before his daughter died and also disliked Rivkin. He was suspicious of the applicant’s involvement in his daughter’s death and, in correspondence that was before the jury, had written to the police giving his account of the relevant circumstances. In that letter he raised the prospect that the applicant had killed his daughter in order to maintain his relationship with Rivkin, which would have been severed if Ms Byrne had publicly disclosed what it was alleged she knew about the Offset Alpine business affairs.

689 As it happened, in his closing address the prosecutor sought to establish a connection between the alleged argument at the gym, where the applicant

and Redding were said to have been present, and the applicant's relationship with Rivkin. His remark to the jury was that there "must have been something very serious, and it must have had something to do with the accused's employment with Rene Rivkin." He then submitted that this evidence and that of Georgiou showed that "the accused had become very, very aggressive and abusive towards Caroline." He then sought to link Georgiou's evidence to the argument in relation to the role of Offset Alpine in the applicant's motive. He asserted that the applicant had "inside information," and that accordingly "Rene Rivkin was … absolutely – totally paranoid about what information Caroline had about him and his business affairs and personal affairs" and "he had every reason to be paranoid because he, Mr Rivkin himself, was in a very perilous situation."

690 The prosecutor developed his theme of pressure on the applicant when he said:

> "From his point of view, he stood to lose everything: love, employment, money, future fortune, self-esteem, the façade of prestige that he had built up with others. His whole life was about to unravel. We would submit to you that she had intimated to him that she wanted out; and it must have been obvious to him that this time it was going to be forever."

691 The prosecutor told the jury that the applicant killed Ms Byrne rather than "losing her and losing everything else in his life."

692 There are to my mind great difficulties with this submission. As I have previously indicated there was absolutely no evidence to suggest that if there was an argument between the applicant and Ms Byrne the previous Friday evening in the gym, which in itself is doubtful (it may have occurred on some other occasion), the argument related to the applicant's employment with Rivkin. If it did occur and Redding was present there is no relevant evidence about the content of the conversation. The prosecutor's suggestion is entirely speculative. Furthermore, to submit that from this account of one argument the applicant had become "very, very

aggressive and abusive towards Caroline" gives the evidence far more significance than could ever have been justified.

693 The ultimate problem with the Crown submission is that there was no evidence that Ms Byrne had knowledge which could damage Rivkin or, if she had such knowledge, that she was in a position to communicate it to anyone who might use it to the detriment of Rivkin. Inherent in the Crown's submission was that the applicant felt it necessary to kill Ms Byrne to protect Rivkin and the applicant's relationship with him. The evidence could never sustain this proposition. The submission was made more sinister by the prosecutor pointing to Redding as the "second man." I have dealt with that issue under Ground 6.

694 The issue was further complicated by the fact that the prosecutor chose to lead evidence during the trial which suggested that there was a homosexual relationship between Rivkin and the applicant. Although this evidence was led, and at the very least must have coloured the jury's impression of both Rivkin and the applicant, by the close of the Crown case the prosecutor had changed his position. His ultimate submission was not that there was any homosexual relationship between the applicant and Rivkin but that there was rumour to that effect. This rumour was said to have undermined Ms Byrne's confidence in her relationship with the applicant.

695 Although no doubt Ms Byrne would not have welcomed the rumours, again, there was nothing to suggest that it had affected their relationship. Although there was evidence of Ms Byrne's concern about the relationship, there was also significant evidence that she was happy in the relationship and was in love with the applicant.

696 The trial judge dealt with this issue in his summing up. He told the jury that "the evidence does not permit you to run together this question of the fire, and whether it was a dodgy fire, with this question of the stock exchange related problem ..." His Honour reminded the jury that "by June, about

June 1994, the insurer had paid the claim, and that would seem to be the end of the matter. You will need to ask yourselves how, in June 1995 one year after the claim had been paid and the problem with the fire and the share price because of it had gone away, those things could bear upon the mind of Mr Rivkin and, in turn, the accused … how they could motivate anybody to do anything?"

697 His directions relating to the motives were in the following terms:

> "355. The concern, the Crown says, is that the deceased knew too much about the affairs of Mr Rivkin and was a threat to his business, that the accused must have appreciated that, and that that informed his attitude to her and ultimately became part of his motive to kill her.
>
> 356. This brings me to an important distinction that the Crown has made between the different purposes for which reported statements can be put into evidence. As an example, I have told you that the Crown has put into evidence what Mr Byrne senior said about what the deceased said about her concern about what others had said, including Mr Byrne senior, about some supposed homosexual relationship between Mr Rivkin and the accused. Hearsay on hearsay on hearsay, and on hearsay again, I think. Quite an unreliable chain of reportage, you might think. But it is not to prove that it was true that the Crown has tendered the evidence. I have explained to you why the Crown tenders that evidence, because of its effect on the deceased and on their relationship.
>
> 357. On the other hand, evidence tendered to prove the truth of the matter is to be seen in reports that the Crown relies on to show that the deceased knew too much. If the relationship should break up, if the deceased spitefully, or perhaps for any other reason, let drop something that the accused had told her about Rene Rivkin, Rivkin would be damaged. The accused would be damaged. Rivkin would know that the source of the damage was the deceased. That would sever relations or damage relations between Mr Rivkin and the accused, and the accused would lose his prospects with Mr Rivkin.
>
> 358. Of course, before anything like that could damage Mr Rivkin, there would have to be some substance to it. The deceased was not likely to be able to damage Mr Rivkin, or Mr Rivkin's relationship with the accused, by repeating, for example, that there were rumours about that they were in a

homosexual relationship, because Mr Rivkin would know that that was not true, and that would not trouble him.

359. Look at Mr Rivkin's response to these matters in the interview with Inspector Jacob. You will see he was quite dismissive about the deceased. He said, "I've only met her six or seven times. I don't know what she knew." He did not care what the deceased knew.

360. You might wonder really whether she knew anything - that is the submission - that could damage Mr Rivkin and, therefore, could affect the accused.

361. But I want to draw a distinction between these two different reasons for putting before you evidence of reported events. You have heard a number of witnesses tell you what other persons have said on a number of occasions before the trial began. Evidence of one person, of what a second person said out of Court, which is put before the jury to prove the truth of what the second person said is called hearsay evidence. Hearsay evidence is some evidence of the truth of what the second person is reported to have said. It is usual or common for trial judges to warn juries that such evidence may be unreliable.

362. In his closing address, the Crown Prosecutor drew a distinction between evidence of out-of-court statements tendered to prove the truth of what was said and those tendered simply to prove that the thing was said, for example, to prove the state of mind of the speaker at the time. So, if the deceased says to Mr Byrne, and if you accept his evidence to that effect, that she is worried about reports she has heard of a homosexual relationship between Gordon Wood and Mr Rivkin, then you can accept that. It is tendered to prove the state of mind of the deceased.

363. Let me explain exactly what I mean, though, by hearsay evidence. Evidence is hearsay if put before you to prove the truth of whatever was said out of Court. Sometimes out-of-court statements are put, but not to prove the truth of what was said but to prove that the thing was said. The difference between these two uses of out-of-court statements is important, so let me give you some examples right away from the facts of this case.

364. Suppose you have a case of a break-in in a private house. The owner of the house, Mr Smith, is giving evidence in the case against the thief. He says, "I was at work. The phone rang at 10 past 10 and I answered it. It was my daughter. She said, 'You know those strange people who have just

moved into the house across the road? Well, I've just seen the man running out of our front door carrying what looked like your new laptop computer. I checked and it's missing'." And then Mr Smith continues, "I immediately left work, jumped into a taxi, and arrived home. I arrived home at 10.30." If the evidence of Mr Smith is tendered to prove that the man from over the road stole the laptop, it is hearsay and the jury will be given a number of directions about the possible unreliability of that evidence. You see, what he is doing is relaying the evidence of his daughter. You would expect the daughter to be called in a case like that, not somebody else like her father to say what she said and what she saw.

365. But evidence of the conversation between the daughter and the father might be tendered to prove something quite different. Suppose that one of Mr Smith's work colleagues, Mr Jones, is not on very good terms with Mr Smith. He has in recent times been spreading untrue stories about him and Mr Smith has been resentful about it. Just after 10 o'clock on the day of the theft, somebody attacks Mr Jones at work. Mr Smith is seen dashing out of the building a few minutes later and jumping into a taxi. The police learn about Mr Smith's resentment of Mr Jones and they hear that he has been seen running out of the building shortly after the time that Mr Jones was attacked and jumping into a taxi and getting out of the scene. They put two and two together and charge him with the assault.

366. His case comes on in Court, and he wishes to explain his reason for running out of the building at 10 past 10. He gives the evidence of the phone call he received from his daughter. He does so not to prove the truth of what his daughter told him about the theft but to prove that she had told him those things. If accepted, it would prove why he suddenly ran out of the building at the time that he did and put an innocent explanation on an act the timing of which would otherwise be considered very suspicious indeed. Used in that way, the evidence was not tendered for a hearsay purpose.

367. I say to you again, that evidence has been adduced in this trial of things said by people who have not been seen or heard giving evidence at the trial. Mr Rivkin is one such person. Sometimes the evidence has been put before you to prove the truth of what was said; sometimes to prove that it was said; sometimes a piece of evidence may have been put before you for both purposes.

368. The deceased is another such person. Her reported statements are hearsay if tendered to prove the truth of what she said.

369. I direct you that evidence of both kinds of out-of-court statements may be unreliable. There are several reasons why you need to be very careful about whether to accept it and how much weight to place on it.

370. First, the evidence may be unreliable because it is not given formally in Court and it is not on oath. Secondly, if what the person is reported to have said is wrong in the first place, either because that person was mistaken or lying, no amount of repetition by others later on in Court is going to make that right.

371. Thirdly, there is a risk that the message spoken by the second person may not be accurately repeated by the witness or because, by the time the trial comes around, the witness cannot remember the detail in which it was first spoken. In this case, of course, there has been a significant delay between the events of 1995 and the trial in 2008.

372. Fourthly, if the original speaker, the one I call the second person, does not give evidence, then one of the speakers in the two-person conversation cannot be tested in cross-examination. That problem applies here, particularly to statements attributed to the deceased and to Mr Rivkin, because the Crown has been unable to obtain evidence from either of those people first-hand. Mr Terracini was unable to cross-examine the speakers because they were not present, and you were denied the opportunity, contrary to the position with other witnesses, to see them and hear them and form your own judgments about them.

373. Of course, the problem may go away if the original speaker is called to give evidence as well. Then, the speaker can be tested on what he or she said out of Court. The memory of the witness can be tested. Contrary suggestions can be put, and the like.

374. Now, there is one example in this case where the problem was not solved by calling evidence from the person said to have made the out-of-court statement. I will come back to that in due course. It concerns Mr Doherty and Miss Kingston, but it would be premature to deal with that just for the moment.

375. For the moment, in respect of all these reports of things said by people out of Court, which people, for any reason, do not come to give evidence, I warn you that you need to be cautious in determining whether to accept the evidence and the weight to be given to the evidence.

376. Now, just concerning the - I think I have already dealt with the fire. There is no evidence of any wrongdoing by the accused concerning that fire. There is no evidence that he owned shares. There is no evidence of insider trading, the expression used by the Crown. The accused was not a person of interest to the ASC.

377. Overall, the submissions on the one side are that the relationship was going bad. The accused felt the need to isolate, to segregate, the deceased, to make a last attempt to try to persuade her to stay with him because of all he knew he would lose if she did not agree to do so. You would be asked to infer in due course that she refused to do that and so it was necessary to go onto the final stages of this affair.

378. Mr Terracini says to you there is really no acceptable evidence that this relationship was so bad. There was no significant information possessed by the deceased that could possibly have injured Mr Rivkin. He did not even know what she knew. She was the least of his concerns. None of this amounts to any motive at all, for the accused to do anything he is asserted to have done.

379. I have finished now dealing with motive and I am going on to consider the evidence of the whereabouts of the accused and things that he did on 7 June, and the whereabouts of the deceased."

698 To my mind this direction does not adequately respond to the fact that the ASC inquiry was occurring at the time Ms Byrne died. In fact the applicant had been questioned by the ASC the previous day. It would have been obvious that if Rivkin had a concern about the fire and any consequential share dealings in Offset Alpine those concerns would have remained alive at the time of Ms Byrne's death. It can reasonably be presumed that Rivkin was stressed by the inquiry. The difficulty however is whether Ms Byrne knew anything of significance and, furthermore, whether Rivkin had any reason to suspect or place pressure on the applicant because of his relationship with Ms Byrne. There was simply no evidence to support this suggestion.

699 The trial judge's reasons for allowing the Crown to advance the evidence of the alleged motive are relatively brief. It would seem that his Honour's

concerns were confined to consideration as to whether the mention of Rivkin, who had been convicted of crimes emanating from his business dealings, would be unfairly prejudicial. His Honour does not appear to consider the submission that the evidence in support of the alleged motive was so thin that it amounted to unsubstantiated speculation and that by raising the issue in the manner proposed the applicant would be occasioned unfair prejudice that no direction could eliminate.

700 To my mind the applicant's submission on this issue at the trial was persuasive. It seems likely that his Honour was diverted from considering the essential elements of the applicant's submission by the submission, which defence counsel apparently made, that the Crown had to prove motive beyond reasonable doubt. The trial judge correctly rejected that proposition. However, the essence of the applicant's submission was that the Crown's proposition was entirely speculative and of its nature apt to colour the jury's assessment of the applicant in a manner which no direction by his Honour could remedy.

701 The submission which the prosecutor made to the jury confirms the speculative nature of the Crown's proposition. The prosecutor connected the evidence of an argument between the applicant and Ms Byrne and her alleged complaint about the state of their relationship with suggestions of wrongdoing by Rivkin and the suggestion that Rivkin knew that Ms Byrne had knowledge of the wrongdoing, and with the presence of Redding, both in the gym and at the Gap. The suggested inference, which I am satisfied the prosecutor intended the jury to draw, was that Rivkin, either directly or because of his relationship with the applicant, was a reason for her murder. It was suggested that the applicant killed Ms Byrne and the Crown was hinting that he had been assisted by Redding in order to protect Rivkin.

702 The trial judge did not consider the speculative nature of the Crown's proposition. Nor in the light of the essential elements of the submission did he give consideration to the means by which the prejudice to the applicant

could be confined or diminished. Consideration of the summing up does not suggest that his Honour dealt with the concerns.

703 His Honour did say in the summing up that the jury may wonder whether Ms Byrne knew anything that could damage Rivkin and, therefore, could affect the applicant. This observation was to my mind entirely apposite. It serves to underline the speculative nature of the Crown's theory. However, by the time his Honour makes this observation he has of necessity repeated the Crown's theory.

704 I am left in no doubt that the Crown's theory was of little probative value. By reason of the introduction of Rivkin, it created insurmountable prejudice in the minds of the jury.

705 I would uphold this ground of appeal, which on its own would require a new trial.

Ground 9: There has been a miscarriage of justice in the trial of the applicant on account of fresh evidence and evidence undisclosed at the trial.

706 The general principle is that parties to litigation, including a criminal trial, are bound by the manner in which they presented their cases at first instance: *Khoury v The Queen* [2011] NSWCCA 118 at [104] (Simpson J, Davies J and Grove AJ agreeing). In a criminal trial there is an obligation on the prosecution to disclose all relevant evidence to the accused. There is no obligation on an accused person to seek out information which the prosecution is obliged to produce: *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125 at [16]-[17]; *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708 at [23].

707 The law makes a distinction between "new evidence" and "fresh evidence." "New evidence" is evidence that was available and not adduced at the trial. "Fresh evidence" is evidence which either did not exist at the time of the

trial or, if it did, could not then have been discovered by an accused exercising due diligence: *R v Abou-Chabake* [2004] NSWCCA 356; (2004) 149 A Crim R 417 at [63] (Kirby J, Mason P and Levine J agreeing).

708 In *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510 at 516, Barwick CJ (McTiernan, Menzies, Stephen and Jacobs JJ agreeing), in his analysis of what may constitute a miscarriage of justice, referred to a category of instances of miscarriage as including the "production of evidence not available to the appellant at his trial." His Honour said:

> "The rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. *However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law*" (emphasis added).

709 His Honour went on to say at 517 that:

> "It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. *Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence*" (emphasis added).

710 And later at 520:

> "To sum up, *if the new material, whether or not it is fresh evidence*, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will actually be found if that new material is not fresh evidence" (emphasis added).

711 In *Gallagher v The Queen* [1986] HCA 26; (1986) 160 CLR 392 at 395, Gibbs CJ said in relation to s 6(1) of the *Criminal Appeal Act*:

> "The circumstances of cases may vary widely, and it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. I respectfully agree with the statement of King C.J. in *Reg. v. McIntee* [(1985) 38 SASR 432 at 435], that 'appellate courts will always receive fresh evidence if it can be clearly shown that failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand.'
>
> The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by the accused at the trial, is satisfied in the present case, and need not be discussed, although *it should be noted that this is not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial* …" (emphasis added).

712 The Chief Justice later said at 399:

> "It seems to me, with all respect, that where the trial was by jury, the accused was entitled to have the question of his guilt determined by the verdict of the jury, and that the Court of Criminal Appeal, in considering the effect of the fresh evidence, should consider what effect it might have had upon a reasonable jury. It is not enough that there is a bare possibility that a jury might have been influenced by the evidence to return a verdict of not guilty. On the other hand, it is too severe, and indeed speculative, a test, to require that the court should grant a new trial only if it concludes that the fresh evidence was likely to have produced a different result, in the sense that it would probably have done so."

713 There is a difference in approach between fresh evidence and relevant evidence not disclosed by the prosecution to the defence in a criminal trial. Where evidence has not been disclosed, the discussions in *Grey* and *Mallard* are authoritative and apply. The prosecution must disclose all relevant evidence to an accused, and a failure to do so may require the quashing of a verdict of guilty: *Mallard* at 133 [17] (Gummow, Hayne,

Callinan and Heydon JJ); *Grey* at 1713 [23] (Gleeson CJ, Gummow and Callinan JJ). In relation to evidence to which this common law obligation attaches, "there [is] no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled": *Grey* at [23] (Gleeson CJ, Gummow and Callinan JJ).

714 Where such evidence remains unpresented at trial, it is not the function of an appellate court to "seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to exploit forensically": *Mallard* at 135 [23]. Where evidence has a capacity to discredit the prosecution case, these matters are of significant forensic value: *Mallard* at 135 [23], 141 [42].

The book by A/Prof Cross and the other material on his website.

715 After the trial A/Prof Cross published a book titled "Evidence for Murder: How Physics Convicted a Killer." It was, of course, published when this appeal was pending. It is a comprehensive account of A/Prof Cross' opinion of various aspects of the evidence and of his involvement in the investigation. Although A/Prof Cross, in his book, acknowledges contemporary concerns about the integrity of expert evidence, he appears oblivious of the serious problems which the book reveals about his own involvement in the police investigations. The energy he applied to assisting the police was no doubt a result of worthy intentions, but then this is almost always the case. Once an expert has been engaged to assist in a case, there is a significant risk that he or she becomes part of "the team" which has the single objective of solving the problem or problems facing the party who engaged them to "win" the adversarial contest. It is an almost inevitable result of the adversarial system.

716 The Crown conceded, as it must, that the book by A/Prof Cross and a lecture that he posted on his website constitute fresh evidence. The evidence of A/Prof Cross was important in the Crown case. From his

process of experimentation, physical measurement and deduction the Crown sought to persuade the jury that the possibility that Ms Byrne committed suicide could be excluded. To the extent that his evidence may have differed from that of the experts called by the defence, if A/Prof Cross' credit were diminished, the likelihood of the jury accepting his evidence would have been reduced.

717 My reading of the book and the lecture leads me to the conclusion that if it had been available at the trial, it would have significantly diminished A/Prof Cross' credibility. In the book A/Prof Cross makes plain that he approached his task with the preconception that, based on his behaviour, as reported after Ms Byrne had died, the applicant had killed her. He clearly saw his task as being to marshal the evidence which may assist the prosecution to eliminate the possibility of suicide and leave only the possibility of murder. The book is replete with recitations of his role in solving the problem presented by the lack of physical evidence and records how he was able to gather the evidence which enabled the prosecutor to bring proceedings against the applicant.

718 The Crown submitted that even if the book occasioned significant damage to A/Prof Cross' credit, his evidence was relevantly supported by the evidence of Prof Elliot. I do not believe this to be the case. Prof Elliot disagreed about critical matters, including the validity of the tests in relation to a struggling conscious woman and the scientific validity of equating bench-press ability with the ability to spear throw.

719 The obligations of an expert witness were discussed by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82. They may be summarised as follows:

- Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as

to form or content by the exigencies of litigation. See also *Whitehouse v Jordan* (1981) 1 WLR 246 at 256 (Lord Wilberforce).

- An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.

- An expert witness should make it clear when a particular question or issue falls outside his expertise.

- If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert who has prepared a report cannot assert that the report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

- If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert reports, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

- Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

720 These principles were approved by Otton LJ in *Stanton v Callaghan* [2000] QB 75 at 107-8 and are accepted and applied in the UK in both civil and criminal cases. In *Meadow v General Medical Council* [2007] 2 WLR 286, they were again approved by Auld LJ at [204], by Thorpe LJ at [250] and by Sir Anthony Clarke MR at [21], [70]-[71], and were said to be "of particular importance in a serious criminal matter such as the trial of a defendant for murder" at [71]. In *R v Harris* [2006] 1 Cr App R 5, the Court of Appeal stated that the guidance of Cresswell J was "very relevant to criminal proceedings and should be kept well in mind by both the prosecution and defence": at [273].

721 In Australia, the *Ikarian Reefer* principles were discussed by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [79], by Debelle J in *James v Keogh* [2008] SASC 156; (2008) 101 SASR 42 at [67]-[72], and by Austin J in *ASIC v Rich* [2005] NSWSC 152; (2005) 190 FLR 242 at 320-1 [333].

722 The applicant challenged the admissibility of the evidence of A/Prof Cross in this Court. There is a live issue as to whether a failure to comply with the relevant obligations renders the expert's evidence inadmissible.

723 It was accepted by Austin J in *ASIC v Rich* at [256] that in this State, the law is not fully settled in relation to principles of admissibility of expert opinion evidence. Cresswell J's propositions were said by Austin J to have been "strongly influential upon the drafters of the Expert Code of Conduct, to which Pt 36, r 13C of the *Supreme Court Rules* refers." Austin J was of the opinion that neither the propositions of Cresswell J nor the Code of Conduct were to be construed as rules of admissibility of expert evidence: at [333]. He noted however, that the structure and content of the present law for responding to the problem of bias in expert evidence is "controversial and arguably unsatisfactory": at [335].

724 In *Sydney South West Area Health Service v Stamoulis* [2009] NSWCA 153 at [203], Ipp JA (Beazley and Giles JJA agreeing) said that the content of the duty of expert witnesses and the powers of the court to enforce that duty are yet to be finally determined.

725 The Code of Conduct is found in Schedule 7 to the *Uniform Civil Procedure Rules* 2005. It applies to expert evidence in criminal proceedings by virtue of Part 75 Rule 3(j) of the *Supreme Court Rules* 1970 and applies to A/Prof Cross' reports and oral evidence. Clause 2 of the Code imposes on an expert witness “an overriding duty to assist the court impartially on matters relevant to the witness's area of expertise.” Furthermore, there is a duty on the expert to state, “if applicable, that a particular issue falls outside the expert's field of expertise” and “If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.” There is also an obligation to disclose whether an opinion is “not a concluded opinion because of insufficient data or research or for any other reason.” An expert report is not to be admitted into evidence unless an expert has agreed to be bound by the Code (unless the Court otherwise orders) nor is oral evidence to be received from that witness: r 75.3J (3)(ii), (c)(i).

726 In *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588, the High Court unanimously held that where an expert purports to give evidence not based on his specialised knowledge, the evidence is inadmissible. The majority confirmed the relevance of the analysis of Gleeson CJ in *HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414 at [41] and of Heydon JA in *Makita* at [85] when determining whether the opinion of a witness is “based on specialised knowledge or belief”: *Dasreef* at [37]-[43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

727 It was submitted by the applicant that these authorities are relevant in two respects - first, the assessment by this Court of whether or not there has been a miscarriage of justice such as to warrant an acquittal or re-trial, and

secondly, in determining whether or not the evidence A/Prof Cross incorporated into affidavits and sought to be tendered by the Crown was admissible on the appeal. As to the second of these matters, it was submitted that where bias or interest or some other material breach of the Code of Conduct by an expert has been demonstrated, opinion evidence of that expert witness is inadmissible. The expert has demonstrated an unwillingness to be bound by the Code: cf *Supreme Court Rules* r 79.3J. It was submitted that there is no place for such evidence in a Supreme Court criminal trial. It was further submitted that the requirements for admissibility under s 79 and s 137 of the *Evidence Act* were not established in these circumstances.

728 It may be, as some previous decisions suggest, that an expert's evidence is not inadmissible merely because the expert has breached or overlooked the Expert Witness Code of Conduct: *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 at [12] (Campbell J); *Rich* at [333] (Austin J); *Stamoulis* at [208] (Ipp JA, Beazley and Giles JJA agreeing); see *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980 at [9] (Einstein J). This position accords with the view that bias is "no reason not to admit evidence of [the] expert": *Li v The Queen* (2003) 139 A Crim R 281; [2003] NSWCCA 290 at [71] (Ipp JA, Whealy and Howie JJ agreeing); see also *Haoui v R* [2008] NSWCCA 209 at [127]. It also aligns with the reality that "[h]owever desirable these new rules and protocols [contained in expert witness codes of conduct] may be, they cannot establish changes to the principles underlying the law of evidence": *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 at [15] (Ormiston JA, Chernov and Eames JJA agreeing).

729 This is not to say that the Expert Witness Code of Conduct is merely aspirational. Where an expert commits a sufficiently grave breach of the Code, a court may be justified in exercising its discretion to exclude the evidence under ss 135 or 137 of the *Evidence Act*. Campbell J adverted to this possibility in *Lopmand* when his Honour stated at [15]: "The policy which underlies the existence of Part 36 rule 13C is one which I should

take into account in deciding whether [the expert evidence] should be rejected under section 135." I respectfully agree with that approach. While there is no rule that precludes the admissibility of expert evidence that fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the *Evidence Act*. The expert's "failure to understand his [or her] responsibilities as an expert" (*Lopmand* at [19]) may result in the probative value of the evidence being substantially outweighed by the danger that it might mislead or confuse or be unfairly prejudicial to a party.

730 I do not believe it is necessary to resolve this issue in these proceedings. However, as I have said, to my mind the book which A/Prof Cross published has the consequence that his opinion on any controversial matter has minimal if any weight: see *Pan Pharmaceuticals Ltd (in liq) v Selim* [2008] FCA 416 at [157] (Emmett J).

731 A/Prof Cross refers at the end of his book to the Expert Witness Code of Conduct but in the same paragraph recognises that "it is well known [and presumably accepted by A/Prof Cross] that experts called by the prosecution tend to support the prosecution case and experts called by the defence tend to support the defence case. If they did not, they would not be called to give evidence": at 259-60. He later acknowledges that "the expert might be tempted to come up with a result that pleases the police, given that they are paying for his or her services. Alternatively the expert might be biased towards a certain outcome if he or she has been told by the police that other evidence indicates the suspect is guilty." Having regard to some of the remarks in the book I am in no doubt that these problems confronted A/Prof Cross. It is plain that A/Prof Cross believed by reason of the information given to him by the police that the applicant was guilty, and he saw his role as adding credibility to the Crown case by providing expert evidence as to how she may have died.

732 In the book A/Prof Cross indicates that he first became involved in the matter before the inquest which concluded in February 1998. It is apparent

that although the Coroner returned an open finding the police had suspicions concerning the applicant's role in the matter, which were suspicions that A/Prof Cross clearly shared. I am in no doubt that A/Prof Cross saw himself as the primary source of forensic assistance for the police in proving that Ms Byrne did not commit suicide but was murdered by the applicant.

733 A/Prof Cross says:

> "Ironically, back then I was convinced that if only the police, the coroner and the press would follow up on the evidence that I and Linthorne had presented, they would all see that the physical evidence contradicted the bizarre but circumstantial evidence casting strong suspicion on Gordon Wood's involvement. That evidence indicated that Wood either witnessed the fall or at least knew that she had fallen and knew exactly where to find her, but there was no direct evidence to indicate he or anyone else had pushed her over the edge. Anything I had to offer at that stage was of no help in building a case against Gordon Wood. Of course over the next nine years, this was all to change."

734 As far back as 1999 A/Prof Cross had involved himself in the matter to an extraordinary degree. He records his frustration with the police and coronial processes and the steps he took of his own initiative to press his opinions. He says:

> "Back in 1999, I was concerned that the police were not interested in measurements or calculations of possible jump- or push-speeds, otherwise they would have contacted Nick Linthorne or myself again. I therefore decided in December 1999 to write to the New South Wales coroner Mr Abernethy about the calculation I had done for Detective Wyver. His Clerk replied in March 2000, saying he appreciated the significance of my comments and thanked me.
>
> I took that to mean that he no longer had any interest himself. So I decided to contact the *Sydney Morning Herald* science writer to see if she might be interested in an article on the physics of falling off a cliff using the case of Caroline Byrne as an example. She wasn't the slightest bit interested either. I put it aside and had almost forgotten about it when three years later in November 2002, Andrew West from the *Sun-Herald* wrote an article on the Caroline Byrne case that made me sit up and take notice. The article was headed, 'Gap killer hunt.'

735 A/Prof Cross also discloses in his book that he actively promoted his own participation in the matter after he was not called to give evidence in the original inquest, contacting the Coroner Mr Abernathy in December 1999 (at 29), the *Sydney Morning Herald* science writer in early 2000 (at 29-30), a journalist from the *Sun Herald* in November 2002, the executive producer of 60 Minutes (at 30), the Director of Public Prosecutions (at 30) and finally Det Insp Paul Jacob, the head of the investigation (in Dec 2002). A/Prof Cross had not been called to give evidence at the inquest.

736 In September 2003, when Det Insp Paul Jacob asked him to provide a report, A/Prof Cross agreed to do so "despite having no previous experience in this type of investigation." Further to this, A/Prof Cross writes "the fact that I had never previously investigated a cliff fall didn't worry me in the slightest. Physicists are people who have learnt the necessary skills to undertake almost any project or to investigate almost any problem in physics, regardless of previous experience with the problem": at 62-3. In the book he denies being a "forensic expert" at 83.

737 He says in the book that he was prepared to take "as long as it took": at 63. Originally "[a]nything I had to offer at that stage was of no help in building a case against Gordon Wood ... over the next nine years, this was all to change": at 29. By 2004, there "was one important point that Tedeschi and I both agreed on. That is, the investigation conducted by the police over the previous seven or eight years would amount to nothing *unless I could prove that Caroline Byrne was physically not capable of jumping the distance*": at 109 (emphasis added). He had given himself "no chance of success" when he commenced work (at 251), implying an imperative to have the applicant convicted.

738 A/Prof Cross gives an account in his book of his own involvement in the investigation. The book confirms that he was an active part of the investigative team. He said that he "was not 100 per cent convinced about the landing spot" (at 79) or the orientation of the body pointing towards the

corner fence post when retrieved (at 79), so he urged Det Insp Jacob to make further inquiries in relation to these matters. He claimed that he and Det Quigg "located the actual launch point. It solved the problem of how Caroline managed to be wedged in the rocks below": at 92. He "convinced" Det Insp Jacob that "we needed to try harder to find a technique where a high speed throw might be possible": at 96.

739 A/Prof Cross disclosed that in his throwing experiments, his objective was to ascertain the "maximum possible throw speed" (at 103), rather than to ascertain the range of speeds. He says that the "spear throw" technique was "not well known", nor was it a technique that "came to mind immediately", but states that in his opinion, "someone who had been used to lifting heavy weights *might* have" thought to use such a technique: at 115 (emphasis added). He concedes in his book that a good technique was essential to the results he recorded: at 101-102. This was contrary to his evidence in the trial refuting that a "spear throw" was a learned technique which in turn had formed the basis for challenging A/Prof Ness on this point. A/Prof Cross also stated in his book: "the 25kg weight used in this experiment was thrown faster than the men could throw a 57kg weight, but I was not particularly interested in the actual weight thrown or the throw-speed in this experiment. The point of the experiment was to determine whether throw speed, when throwing a heavy weight, is related to bench-press ability": at 144.

740 A/Prof Cross stated in his book that before his report dated 17 February 2005 he had calculated that a bench-press ability of 100kg was the required strength to execute a spear throw at the necessary launch speed from the northern ledge: at 117. In the book he said that he did not include the calculation in the report because it was a "a convincing enough result." He said that he later made inquiries of Det Insp Jacob and was told that Duval said that the applicant could bench press 100 kg. He obtained this by an email exchange with Det Insp Jacob. The information about the applicant's physical strength came from Duval.

741 It was submitted by the applicant that his account was not correct because Duval's statement was made prior to 30 November 2004. It was submitted that it is reasonable to assume that this email exchange occurred prior to Duval's statement being taken given that A/Prof Cross had been asking Det Insp Jacob what the applicant could bench press. The credit of Duval was in issue at the trial and was tested without this information having been disclosed. This information also would have opened a line of material information for cross-examination of A/Prof Cross, Det Insp Jacob and Duval, which was denied to the applicant at his trial.

742 The applicant expressed concern about A/Prof Cross' assertion: "Had I wanted to, I could simply have told Bowe [the applicant's solicitor] that I didn't have any of the information he needed and then promptly destroyed it": at 153. It was submitted that this is clearly inconsistent with ethical practice. A/Prof Cross states that he recognised this was not "the right thing to do" and instead resisted production of the material. When the material was finally produced, A/Prof Cross claimed that a prior "crash" of his hard drive meant that not all of the material subpoenaed could be produced. He went on to explain that as a consequence of this "crash" he had needed to edit the recovered emails (278 out of "about 30,000") to put them into "readable" form: at 154-5. Following this A/Prof Cross admitted that in order to obtain leverage to enable him to claim a larger fee for the provision of the emails, he copied them onto a disc that he was aware there would be trouble reading, expecting the applicant's solicitor to have to contact him again at which point he could request more money: at 155.

743 The documents, including emails between A/Prof Cross and the police, were not produced until the evening of 16 October 2008, the 35th day of the trial. This caused disruption to the trial, necessitating its postponement and thus fracturing the cross-examination of the officer in charge, Det Insp Jacob, and A/Prof Cross himself. The emails also disclosed information for the first time in relation to witnesses who had already given evidence and had been excused from the trial (such as Sgt Powderly and Det Quigg).

744 Among these emails was an email message from A/Prof Cross to Det Insp Jacob which suggests that as of 18 December 2003 (the time at which, according to A/Prof Cross in his book, A/Prof Cross had two concerns, namely the exact landing spot and the orientation of the body of the deceased), Sgt Powderly had already rung A/Prof Cross, A/Prof Cross had asked Det Insp Jacob for Sgt Powderly's phone number and been promised it, and A/Prof Cross had been supplied by Det Insp Jacob with Sgt Powderly's email address. By 19 December 2003, A/Prof Cross had contacted Sgt Powderly but he had not heard back from him. Det Insp Jacob "copied" Sgt Powderly "in" on the reply, assuring A/Prof Cross that Sgt Powderly would be in touch with him as soon as possible. By 22 December 2003, A/Prof Cross had reported to Det Insp Jacob that he "had a call from Mark [Powderly]." It is clear from the email that A/Prof Cross and Sgt Powderly had spoken about the landing spot and direction of entry. Subsequently in 2004, Sgt Powderly for the first time identified hole A as the position where he retrieved the body of Ms Byrne.

745 At the time of Sgt Powderly's evidence, given on 4 and 8 September 2008, these emails between Det Insp Jacob and A/Prof Cross concerning Sgt Powderly had not been disclosed to the defence.

746 In his book A/Prof Cross describes the circumstances under which it was recognised that hole A was in fact the "correct" landing spot of Ms Byrne. He writes in the following terms:

> "I was not 100 per cent certain about the landing spot … I called [Detective Inspector] Jacob in December 2003 about both of my concerns. I asked him how he knew they picked the right landing spot way back in 1996. His answer surprised and alarmed me. He said he didn't know … Fortunately Jacob immediately saw the importance of what I was saying and arranged for Mark Powderly and two other police rescue officers to visit the site on 6 January 2004 … I remained at the top and chatted to Mark Powderly that day. After Mark directed the rescue guys (at the bottom of the cliff) to the right spot to take their photographs I quizzed him about the morning Caroline Byrne was found."

747 A/Prof Cross continued:

> "The day before we were to take the measurements (14 April 2004), Paul Jacob called me with some more distressing news. They were reviewing all their previous drawings and photographs and were comparing them with the photographs I had taken on 6 January 2004 when I visited The Gap with Powderly. The rocks surrounding the landing point in the 1999 photos were not the same rocks as those in the January 2004 photos. The landing point marked on the 1999 drawings and in the early photos had been marked incorrectly."

748 From this account it would appear that A/Prof Cross gave an incomplete account during his evidence at the trial. He only described the phone call between himself and Det Insp Jacob on 14 April 2004 and did not reveal that the January 2004 visit to the Gap was at his initiative.

749 Emails tendered to this Court as new evidence confirm that there was email communication between A/Prof Cross and Det Insp Jacob in December 2003 in which they discussed the possibility of contacting Sgt Powderly.

750 As I have previously indicated, Sgt Powderly's evidence at the trial was that he realised the mistake in the identification of the holes when he watched the 1996 video at the inquest. However, he said that he never told anyone about the inconsistency until he met with A/Prof Cross on 6 January 2004.

751 Det Insp Jacob gave evidence at the trial that he became aware that there was some doubt about Ms Byrne's landing spot on 8 January 2004 while he was compiling a brief of evidence for the DPP. He said, "we received some images, electronic images, from Professor Rod Cross and Detective Michael Streatfield on the email system. Those arose from some work they had done at the Gap [on] 6 January. Those images were viewed by one of my colleagues, Bianca Comina, who raised concerns with me that they appeared different, the rock formation and the images appeared different."

752 The applicant emphasised that A/Prof Cross also admitted in his book that he tried to influence the evidence of Sgt Powderly when: (a) on 6 January 2004 he "remained at the top and chatted to Mark Powderly ... I quizzed him ... I told him that my measurements and calculations pointed to another possibility ... *I tried to argue my case but he wasn't convinced*" (at 80-81, emphasis added) and (b) on 15 April 2004 he suggested the northern ledge as a launch point to Sgt Powderly. Sgt Powderly, however, "looked at me as if I were stupid. I knew it was far fetched ...": at 86.

753 The applicant emphasised that A/Prof Cross claimed in the book that following Sgt Powderly identifying hole A, he subsequently worked with Det Insp Jacob to "prove that Powderly's memory [that the landing spot was Hole A] was correct" (at 124) and to "convince" the prosecutor to indict the applicant for murder: at 122, 131. The applicant submitted that this is not the role of an expert in a criminal trial and demonstrates active involvement in the decision to prosecute and a high level of partiality against the applicant. That submission should be accepted.

754 The evidence with respect to the possibility of two men throwing Ms Byrne off the cliff top emphasises the problems of adopting such a role. In his lecture A/Prof Cross said:

> "So I was able to recommend and conclude in February 2005 that Caroline Byrne was thrown off the cliff, most likely by one man. Because when I tried it with two men, err, they couldn't throw fast enough."

755 This statement is inconsistent with A/Prof Cross' evidence at trial where he gave the following evidence:

> "A: I imagine if they [two men together] practised many times they would be able to coordinate their actions and then actually get a higher speed throw, but when I filmed them, the two men's spear throw technique resulted in a lower throw speed …
>
> Q: Are you able to tell us what the throw speed of the two men together?

A: I would have to look at my report, it is recorded there, but -

Q: Was it above?
A: It was between the one man and the two-man throw speed. It was about 4.4m/s [although in his report he described speeds of 4.02m/s and 4.15m/s].

Q: So sufficient to get Caroline Byrne to pyramid rock?
A: Yes."

756 Although the respondent sought to minimise this issue it has far greater significance than the Crown gives it. At the trial the prosecutor sought to take advantage of the suggested presence of a "second man" at the Gap in the afternoon and evening by raising the spectre of a joint criminal enterprise. It is likely that A/Prof Cross would have known this when he gave his answer at the trial.

757 The respondent sought to minimise the issue by describing A/Prof Cross as having made a mistake. I do not accept that benign description. A/Prof Cross must have known the true answer and must have realised it would seriously contradict the Crown's suggestion that two men were responsible for Ms Byrne's death. The ordinary person would be likely to believe that two men together could throw an object or person further than one man could. A/Prof Cross should have responded to this possibility as he responded in his lecture.

758 A/Prof Cross took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view from speaking with some police and Mr Byrne and from his own assessment of the circumstances that the applicant was guilty and it was his task to assist in proving his guilt. In my opinion if the book and the speech had been available to the defence and the extent of A/Prof Cross' partiality made apparent, his evidence would have been assessed by the jury to be of little if any evidentiary value on any controversial issue.

The proportions of the northern ledge

759 A/Prof Cross gave evidence at the trial that the northern ledge measured 5m from fence to tip. The QASCO survey measured the distance as 5.5m and the Crown survey 5.6m. However, A/Prof Cross used a distance of 4m as the available run up because he said that photographs showed about 1m of vegetation extending out from the fence. He said that the earliest photographs he had seen "were 1999, I think." This photograph, as discussed previously, was marked "1996."

760 Evidence was tendered before this Court of signage at the Gap which allows a more accurate dating of the photograph. In my judgment that evidence should be admitted. I am satisfied that it established that the photograph tendered at the trial could not have been taken before May 2003.

761 This discovery led to further inquiry by the applicant with respect to photographic evidence as to the state of vegetation on the northern ledge in 1995. Department of Lands photographs taken in 1994 and a photograph from surveying company VEKTA in 1995 tendered to this Court indicate that the vegetation relied on by A/Prof Cross to confine the run-up on the northern ledge was not present in 1995.

762 Additionally, there was evidence from the Area Manager for Sydney Harbour National Park (including the Gap area) for the NSW National Parks and Wildlife Service, Robert Bird, that in 1988 there was no vegetation on that ledge. He also says that there was no active bush regeneration of the area until May 1999.

763 I am satisfied that, contrary to the evidence presented in the trial, the northern ledge was clear of vegetation on 7 June 1995.

764 The “bush” believed to be present on the northern ledge was relied on by the prosecutor in his closing address as the reason why the northern ledge was chosen by the killer over the southern rock platform: “Well ladies and gentlemen the northern rock platform provided a fair degree of privacy and coverage by foliage … so the accused, by going up to the northern rock platform, ensured that he had some privacy to throw Caroline Byrne off the cliff.” In fact, the contrary is true.

765 As I have indicated, the horizontal length of the northern ledge, based on the QASCO study, was 5.5m, and based on the police survey was 5.6m. This was the available run-up on 7 June 1995, not 4m as stated by A/Prof Cross. The availability of a 5.6m run-up represents a substantial difference from the evidence of 4m relied on at trial. The report of Prof Pandy tendered on the appeal dated 19 February 2011 and which I would admit as new evidence, examines these differences and concludes that with such a run-up, the majority of A/Prof Cross's subjects could have dived to hole A.

766 During the trial, a run-up of 4 m was described by A/Prof Cross as a “maximum” for a “spear throw,” for the reason that “[a]nything more than 4 m, the thrower would run the risk of propelling himself over the edge when he threw.” In relation to an alternative throw where there was a “real risk” that a thrower would end up off the cliff, the method was described by A/Prof Cross as “totally unsuccessful.” Given that the run-up was more than 4m, this evidence from A/Prof Cross, if accepted, raises serious doubt that Ms Byrne could have been spear thrown from the northern ledge.

767 The photographic material discovered by the applicant was not disclosed by the prosecution at the trial. It should have been. As the applicant submitted, there is no reason why “the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled”: *Grey* at [23] (Gleeson CJ, Gummow and Callinan JJ).

768 The Crown responded to the applicant's submissions by emphasising that all of the photographs existed before the trial. This was of course true. However, when the prosecution represented the photograph that was in evidence as having been taken in about 1996, the applicant's advisers were entitled to accept and rely on that representation. As it happens it was not correct, the photograph having been taken in 2003.

769 Before this Court the Crown endeavoured to explain the lack of vegetation on the platform in 1996 through Mr Bird's evidence of work done in 2004. However, it does not follow that the vegetation removed in 2004 was present in 1995, some nine years earlier.

770 The applicant submitted that the evidence as to the available run up on the rock shelf justified an acquittal. I am not persuaded that this is the necessary conclusion. Prof Pandy prepared a fresh report for this appeal. In one sense it could not be fresh evidence, given that it involves evidence of further calculations upon the assumption of a greater run up distance on the northern ledge by reason of the absence of vegetation. However, given the evidence that the assumption that 4m was all that was available may not have been correct, there are potentially significant consequences for the possibility that Ms Byrne may have jumped. Those consequences are revealed in Prof Pandy's evidence. The appropriate forum to resolve the issue would be a new trial.

The orientation of the body

771 A/Prof Cross disclosed in his book that prior to December 2003, he was "not 100 per cent convinced about the landing spot" and was bothered by how the deceased "ended up wedged in a crevice with her feet pointing towards the corner fence post": at 79. As a result "I called Jacob in December 2003 about both of my concerns": at 80. In his book, he states, "fortunately, Jacob immediately saw the importance of what I was saying

and arranged for Mark Powderly and two other officers to visit the site on 6 January 2004": at 80.

772 A/Prof Cross states in the book that Sgt Powderly told him that Ms Byrne's legs and feet "were pointing straight up in the air towards the corner fence post, as if she had taken a head-first dive off that spot": at 81. This evidence of A/Prof Cross's knowledge of Sgt Powderly's observations of the orientation of the body of the deceased coincides with the evidence given by Sgt Powderly in the trial. However, it contrasts with the evidence of A/Prof Cross at the trial that Sgt Powderly had been responsible for the orientation of the mannequin with her feet pointing towards the northern ledge and had told him that this was how he found the deceased. A/Prof Cross gave evidence that when photographs of the mannequin were taken, Sgt Powderly was present and directed officers "to place the mannequin in the location and orientation that he requested and he - he told me that that is how he found her," namely with legs and feet pointing in the direction of northern ledge.

773 The prosecutor never suggested when questioning Sgt Powderly that he was present on 8 June 2005, or that he had ever said to A/Prof Cross that this was how the deceased had been found or that he had directed the orientation of the mannequin in these still shots as reflecting how he found her.

774 A/Prof Cross also states in his book that it was he who requested that the forensic imaging group take photographs of a mannequin in the holes: at 121. The photographs of the mannequin referred to in the book and in the evidence at trial were taken on 8 June 2005 by Snr Constable Brett Kuhner and Constable Hodgson. Snr Const Kuhner gave evidence at the trial but was not asked any questions about the orientation of the mannequin. There was no evidence in the trial that Sgt Powderly was present on 8 June 2005 and, in his statement dated 18 September 2008, Snr Const Kuhner did not name Sgt Powderly as being present.

775 It was submitted by the applicant that the admission by A/Prof Cross in his book that Sgt Powderly had told him that the orientation of the deceased was with feet pointing towards the corner fence post (and not the northern ledge) demonstrates that fundamental evidence was presented by A/Prof Cross in a misleading manner in his reports and at trial and that a fundamental assumption for his opinion was not correct.

776 Prof Pandy was asked to assume that the orientation of the body was in accordance with the evidence given by Sgt Powderly in the trial, that is, oriented with the soles of her feet pointing towards the corner fence post. In his report dated 19 February 2011, tendered to this Court, he expressed the opinion that "[t]his evidence suggests that it is more likely that the body was launched from a point near the corner fence post than from the northern ledge ...": at 21. Further, he was of the opinion that the axial rotation which would have been required to launch from the northern ledge and land in the true orientation as described by Sgt Powderly "does not seem plausible in this case especially if the body is already undergoing a forward rotation that is necessary for a head-first impact": at 22. He was of the opinion that the true orientation of the body was consistent with Ms Byrne ending up in hole B.

777 The respondent submitted in response that the orientation of the body was not fundamental to A/Prof Cross' opinion and that the views of Sgt Powderly were known at the trial.

778 To my mind the orientation of the body was significant to A/Prof Cross' opinion. It was certainly important to Sgt Powderly, who continued in his belief that it was likely that Ms Byrne had gone off the cliff from the more southerly position. However, throughout the trial A/Prof Cross assumed an orientation that was more consistent with his theory that Ms Byrne had come off the northern platform.

779 Passages in the book make plain that A/Prof Cross was not entitled to make this assumption. He had no reason to dispute the evidence of Sgt

Powderly. Sgt Powderly had told him of the correct orientation of the body. However, A/Prof Cross chose to ignore it.

780 A/Prof Cross gave evidence in cross-examination that over the years he has questioned what Sgt Powderly meant by the orientation in which he found the body of the deceased and claimed “to this day” that he did not know what Sgt Powderly meant about saying her legs were pointing up towards “the corner point.” This was also misleading if he was well aware that he meant the corner fence post, as he states in his book.

781 In re-examination, A/Prof Cross was asked to confirm in relation to the orientation of the body as seen in EX DV that “the final position” was as the mannequin was positioned. He confirmed as he watched: “Yes, now the mannequin is in the correct position.” This was re-affirmation that the orientation of the body was not as described by Sgt Powderly in his evidence and marked by Sgt Powderly to correct the position of the mannequin as depicted in the photographs. This is contrary to A/Prof Cross' knowledge, as disclosed in the book, that Sgt Powderly had said that the true orientation was towards the corner fence post.

There is fresh evidence relevant to the tide and swell and the reasonably possible landing points at the base of the Gap, in turn affecting the reasonably possible launch points from the top of the Gap.

782 There was evidence available from Dr Duflou but excluded at trial which concerned the suicide of a person who has been identified as RS. Subsequent to the trial an inquest was held into his death. RS died on 21 December 2007 at “about 9 am.” The time of death was established at the inquest as subsequent to his final text message sent at 8.47 am. He was observed to push himself from a sitting position off the edge of the Gap at a point described as “the Gap Bluff.” Mr Borrow-Jones from National Parks and Wildlife saw RS on the rocks below and observed what he described as "strong swell" washing the deceased onto the rocks. He was then

washed south from where he had landed and to the north of the Gap proper. He was then seen to be washed under the rocks. At 1 pm police located the deceased “trapped within a crevice on the rocks between large rock ledges. The deceased was partially viewable with his legs sticking up level with the surface of the rocks.” The police rescue squad attended. The deceased was found to be wedged tightly into the crevice.

783 Constable David Stuckey, from Rose Bay police, in his statement dated 10 January 2009 stated in the last paragraph on at 4: “RS’s [sic] was washed off the rocks at the Gap within minutes of RS jumping. The tide was high that morning and there was also a strong current and large swell.” Sergeant Barros, from Rose Bay police, described the swell in the morning as “fairly heavy and the tide was high.” RS was recovered at about 2.15pm.

784 The applicant obtained information in relation to the time of death of the deceased and tide and swell information for 21 December 2007 between 9 am and 2.15 pm was obtained. According to tide charts, high tide was 1.72 m at 6.18 am and low tide was 0.36 m at 12.59 pm. At 9 am the tide would have been approximately 1.04 m. The tide in the relevant times between when RS went off the Gap and when he was seen caught in a crevice with his legs were sticking up in the air was between 1.04 m and 0.36 m, that is, lower than the tide movement on the date of death of Ms Byrne between the hours of 1 pm on 7 June 1995 and 4.40 am on 8 June 1995. The swell was measured hourly from 9 am at medians of 1.38, 1.32, 1.29, 1.20 and 1.15 m, with a maximum wave height during that time of 2.54 m. These wave heights indicate a swell lower than that at relevant times on 7 and 8 June 1995.

785 It was submitted to this Court that this evidence further demonstrates that it was not correct for the prosecutor to say: “This is in a large swell that we’re talking about, where the body has been wedged in rocks because of a large swell. There's no suggestion in this case that was the fact in relation to this point.” Nor, it was submitted, was it correct for him to direct

the witness: “Q. Let's exclude the possibility of some massive swell that night that washed her body into the hole, okay, because the evidence is that there was some water at the base of these rocks but there was no water going over the top of these rocks, all right?”

786 It was submitted that this was not the evidence in the trial. The evidence of Sgt Powderly did not support the contention that “there was no water going over the top of the rocks" that night, particularly in circumstances where Sgt Powderly was at the base of the Gap at a time subsequent to high tide. It was submitted that the fresh and undisclosed evidence demonstrates that further to this the swell on the day that Dr Duflou was speaking of was in fact lower than that on the night in question.

787 Obviously the evidence from the inquest is new evidence. However, I am not persuaded that it would justify a new trial. The difficulty with the evidence is establishing that there is a relevant relationship between the position where RS left the cliff and the location where Ms Byrne was found. The evidence from the inquest demonstrates that a body may be moved by the water to where it finally gets lodged in the rocks. However, this assumes that the person fell into the water at a location from which they could be carried to some other position. The suggestion, which is plausible, that this may have happened to Ms Byrne is not supported by evidence available to this Court that she fell from a point where she could have landed in water which carried her to the hole from which her body was retrieved. However, the record of the trial confirms that this issue was not adequately explored by either party. It should have been so that this mechanism could either have been excluded or accepted as a rational possibility, rather than the trial being confined to a debate about hole A or hole B as the primary landing point of Ms Byrne.

Undisclosed evidence in relation to a woman threatening to commit suicide at the Gap on 8 June 1995.

788 Subsequent to the trial, it was brought to the attention of the solicitor for the applicant that the following exchange took place in Parliament in 2004:

> "1877 POLICE INVESTIGATIONS - Mr Debnam to Minister for Police: In relation to police investigations:
>
> (1) Did police attend any deaths, accidents or incidents, other than that of Caroline Byrne, at 'the Gap' at Watson's Bay on 7 June or 8 June 1995?
>
> (2) If so, which deaths, accidents or incidents did police attend, at what times and what police resources were used?
>
> Answer
>
> NSW Police has advised me:
>
> (1) Yes.
>
> (2) A car crew from Rose Bay Local Area Command investigated a report of concern for the welfare of a female threatening to commit suicide at the Gap on 8 June 1995."

789 The fact that a person threatened to commit suicide at the Gap on 8 June 1995 was not disclosed by the prosecuting authorities prior to the trial. No material in relation to this incident was provided in response to a freedom of information application to the NSW Police.

790 It was submitted by the applicant that the evidence held by the police in 2004 was and is relevant to the evidence of Doherty that he saw a distressed woman at the Gap at a time that he could not date, but a time proximate to the death of Ms Byrne. It was submitted that this is material which should have been disclosed at trial and was of material forensic significance to the applicant's defence: *Grey* at 1712.

791 It was submitted that given the admission of the prosecutor in the sentencing proceedings that the jury "must" have found that Doherty had seen Ms Byrne and the applicant, the failure to disclose this information by the prosecuting authorities demonstrates a substantial miscarriage of justice warranting the entry of a verdict of acquittal.

792 To my mind this material was not fresh. It was material available in Parliament in 2004. I am also not persuaded that it needed to be disclosed or that the circumstances revealed a lack of diligence in response to requests for information made on behalf of the applicant.

793 The thrust of the applicant's submission was that the evidence casts considerable doubt on whether the young woman Doherty observed holding her head in her hands as she sat on the curb underneath a street light across the road from his flat and arguing in a combative style with a man who was shouting at her whilst a second sat on a fence, and who he watched as she walked between the two men towards the Gap, was Ms Byrne.

794 Whilst Doherty could not state the date on which he saw a distressed young woman in the company of two men, his evidence was that it was the same night that he heard a scream and later, a helicopter, and that the following day he spoke to his neighbour Ms Kingston and a shopkeeper named Michael about someone having been found at the bottom of the Gap. He told them that he heard a scream the night before. There had been two occasions on which he had heard helicopters, in 1995 when a young model was found at the base of the Gap and in 1997 when a young Asian boy had fallen from the cliff at the end of the Higher School Certificate period.

795 The incident the subject of a Computerised Operational Policing System (COPS) entry reveals that police located the person of interest (who was being treated for chronic depression and had been prescribed Prozac medication). She had telephoned her friend and indicated that she was suicidal. A police patrol located this female and she was taken by police to St Vincent's Hospital in police custody. Unlike the COPS entries relating to Ms Byrne, there was no record (or indeed, need) for any rescue helicopter being utilised.

796 I reject the contention that the applicant's conviction was affected by a substantial miscarriage of justice by reason of the failure to disclose this material.

Fresh evidence in relation to Angelo Georgiou

797 Georgiou gave evidence in the applicant's trial relevant to the Crown case as to both the “Offset Alpine” motive (as set out in Ground 8) and evidence of conversations Georgiou claimed that he had with Ms Byrne in 1994 and early 1995, relied on by the prosecutor as direct evidence from Ms Byrne of “concerns about the relationship.” This evidence of “fear” was the only evidence in the trial of any such statement and Georgiou's credit was challenged by the applicant. Georgiou's first statement to police setting out the conversations was made on 20 May 2004, some 9 to10 years after the conversations were said to have occurred.

798 At the outset of the trial, objection was taken to the admission of this evidence. Senior counsel for the applicant submitted that the probative value of the evidence was low given the unreliability caused by the delay and that the danger of unfair prejudice in these circumstances was high. Barr J ruled that the evidence from Georgiou on its face seemed to be reliable and probative and that there was no danger of unfair prejudice.

799 Senior counsel for the applicant challenged Georgiou's credit in cross-examination.

800 Since the trial Georgiou has been charged with and pleaded guilty to an offence relating to dishonest conduct in 2009, which was said in the Fact Sheet to have extended over a three-year period prior to that. He also sought and obtained a “letter of comfort,” in relation to his evidence given in the applicant’s trial. Georgiou has also made admissions regarding the "fraud and deception" of Ms Halyna Chrapacz. This fraud occurred prior to the trial: see *Lawteal Finance Pty Ltd v Chrapacz* [2010] NSWSC 73. In

those proceedings Ms Chrapacz swore affidavits attesting that Georgiou deceived her in relation to her mortgage documents.

801 The applicant submitted that Georgiou was presented to the jury by the Crown as a reliable and credible witness. The judgment of Barr J relied on this presentation of the witness. It was submitted that this fresh evidence in relation to Georgiou's dishonest conduct and, further, his attempt to gain an advantage from having given evidence against the applicant, is of material significance, in the nature of that referred to in *Grey* at 1719 [55].

802 The Crown submitted that even if it were accepted that the material is fresh and cogent, the evidence, when viewed as it must be in the context of the evidence given at trial, would not have been likely to have caused the jury to have entertained a reasonable doubt about the applicant's guilt. Just as dishonest criminal behaviour does not render the impugned witness' evidence inadmissible, the fact that material, which may tend to impugn the integrity of a prosecution witness, emerges subsequent to conviction does not of itself result in the conclusion that the jury, acting reasonably, would have acquitted the applicant if that material had been available.

803 It was further submitted that unlike in *Grey* the Crown case was not so reliant on Georgiou's evidence that discrediting him would provide powerful considerations in the applicant's favour. Georgiou was not the only witness who provided evidence relating to Offset Alpine, and of Ms Byrne's "concerns about the relationship." McVeigh gave evidence of Ms Byrne cowering and in distress as the applicant berated her at the City Gym probably the Friday before Ms Byrne's death. She heard the applicant say aggressively to Ms Byrne, "You're a fucking idiot, Caroline," and that this was said in a reprimanding, aggressive manner. Williams said she saw Ms Byrne run out of the gym crying.

804 It was further submitted in relation to the letter of comfort that it was provided at a time after the witness had given evidence and in relation to

offences then unknown to investigating officers – this was not akin to a situation where a prosecution witness stood to gain by giving evidence having obtained an undisclosed benefit, as was the position in *Grey.*

805 It was submitted by the respondent that *Grey* is clearly distinguishable from the present case. In *Grey*, there was no disclosure of what was accepted to be vital information and the issue was whether the trial miscarried. The accused had not been provided with a copy of a letter of comfort, which had been given by the investigating officer to the key prosecution witness who had involvement in the events giving rise to the charges against the accused. The witness had received "a very significant benefit" as a result of his information. There, the prosecution case presented the witness as a reliable witness whose involvement, if any, in the events the subject of the trial was nonexistent or entirely innocent. This, the court held, was a disingenuous basis upon which to present the witness - as the undisclosed comfort letter made clear, the witness had widespread and deep involvement in the motor car “re-birthing” that was the subject of the charge.

806 In this case, the letter of comfort and the statement annexed to the affidavit of Det Insp Jacob make clear that the witness did not approach the police seeking to gain any advantage. Georgiou was reluctant to discuss the matter with the police and the only assurance given by police was initial anonymity.

807 It was submitted that this Court could not conclude that, when evaluated in light of all the evidence, there was a significant possibility that the jury, acting reasonably, would have acquitted the applicant if they had known about this information. I do not accept that submission.

808 Although I accept that the letter of comfort is of no relevance I am otherwise satisfied that this further evidence should be admitted as fresh evidence. There could be no doubt that the evidence of Georgiou was used by the prosecutor at the trial to assist in creating in the jury’s mind the

impression that the applicant was capable of killing Ms Byrne. Of course, quite how this could be reconciled with the proposition that he was very much in love with her, also advanced by the Crown, is not explained.

809 To my mind the evidence which is now available casts serious doubt on Georgiou's honesty. It could well be that with knowledge of his true character the trial judge may have rejected his evidence, or it may have effectively been put to one side by the jury. On either view, given the significance of Georgiou's evidence I believe that the new evidence, but for my view that the applicant should be acquitted, would together with the other material justify a new trial.

Orders

1. Leave to appeal is granted and the appeal is upheld and the conviction is quashed.
2. Order the entry of a verdict of acquittal.

810 **LATHAM J:** I agree with the reasons of the Chief Judge at Common Law and with the orders proposed. I only wish to add the following comments, in the light of the applicant's acquittal of murder.

811 As the analysis of McClellan CJ at CL demonstrates, the expert evidence was critical to the Crown case against the applicant because, without it, the Crown case could not exclude the reasonable hypothesis that Ms Byrne had committed suicide (an explanation that was seemingly accepted by her immediate family in the weeks following her death). However, the expert evidence, standing alone, did nothing to prove that the applicant played any role in throwing Ms Byrne from the Gap. Nor did the dubious "identification" evidence of the applicant's alleged presence with Ms Byrne, in the park during the afternoon and later in the evening, contribute anything, standing alone, towards proof of the applicant's guilt on the charge of murder.

812 There was a potentially fatal lacuna in the Crown case, namely, the absence of any evidence at all that the applicant was with Ms Byrne when she left the cliff edge. The Crown relied on an inference that the applicant was in her company, possibly with another man, continuously from the alleged sighting by Mr Doherty up until the scream was heard by the men who were fishing nearby. Having regard to the significant shortcomings in Mr Doherty's evidence, that was an inference that could not be reliably drawn.

813 It could not have escaped the Crown's attention that, without evidence of motive, its circumstantial case against the applicant depended substantially upon the combination of the expert evidence (which was already compromised by the conflict in the evidence surrounding the nomination of the place from which Ms Byrne's body was recovered) and the weak "identification" evidence. The applicant's lies were not available to the jury for use towards proof of his guilt, and the jury were told as much by the trial judge.

814 At the heart of the applicant's alleged motive to kill the woman he loved, rather than risk the loss of his employment and all the financial advantages it entailed, was the assertion by the Crown that Ms Byrne communicated to the applicant that she wanted to finish the relationship. The Crown's submission to the jury recognised the paucity of evidence underpinning this thesis. The submission was :

> We would submit to you that she must have *intimated* to him that she wanted out, and it must have been obvious to him that this time it was going to be forever. (italics not in transcript)

815 It is difficult to regard this submission as anything other than an invitation to speculate. Moreover, it fell short of asserting that Ms Byrne in fact directly conveyed to the applicant that she "wanted out". Yet, it is clear that a very substantial portion of the Crown case was devoted to the topic

of motive and that it, together with the expert evidence, occupied a position of primacy in the Crown's hypothesis.

816 It is convenient to return at this point to one of the principal judgments of the High Court on the subject of a circumstantial case, namely, *Plomp v R* [1963] HCA 44; 110 CLR 234. In the course of a discussion on motive and its role in a circumstantial case, Dixon CJ (Kitto, Taylor, Windeyer JJ agreeing) said at [5] :-

> All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where *it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused*; but all such considerations must be dealt with on the facts of the particular case. (italics not in original)

817 In my view, this is one of those cases where that danger arose.

818 Speculation, conjecture and suspicion can never amount to proof beyond reasonable doubt.

> There must be a mind convinced, or there is not that moral certainty which alone will justify a jury in condemning a person accused of crime: *Brown v The King* [1913] 17 CLR 570 at 586.

819 That certainty was entirely lacking in the Crown case against the applicant.

820 **ROTHMAN J:** I too agree with the reasons of the Chief Judge at Common Law and with the orders proposed. I also agree with the additional comments of Latham J.

821 The case presented by the Crown is, as has been pointed out, a circumstantial case. A large number of prosecutions are in that category. In this case, there was no direct evidence linking the accused to the death of Ms Byrne.

822 The received method of testing the sufficiency of evidence to establish the conclusion that a coincidence of events and circumstances warrants a belief in the causal connection between the facts that are capable of direct proof and the guilt of an accused is the examination of hypotheses logically consistent with the proved facts: *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 at 173, per Knox CJ and Dixon J. The joint judgment went on to comment:

> "In the end, however, the reasonableness or the probability of the occurrence of such hypotheses determines their admissibility, and when the coincidence of fact and concurrence of time are relied upon, the sufficiency of the circumstances must inevitably be judged by considering whether general human experience would be contradicted, if the proved facts were unaccompanied by the fact sought to be proved."

823 The foregoing analysis has been accepted and applied in criminal trials for at least 100 years before publication of the joint judgment and consistently since its publication. It goes fundamentally to the notion of proof beyond a reasonable doubt, which is necessary in order to find guilt. The High Court in *Peacock v The King* (1912) 13 CLR 619 had occasion to apply the same principle by reference to *Starkie on Evidence*, 3rd ed., published in 1842, and to the comments of Alderson B in *R v Hodge* 2 Lewin C.C. 227 at 228. The principle is of long standing. In *Peacock*, the High Court was considering a verdict arising from a death allegedly caused by the performance of an abortion.

824 It reiterated the principle that in order to prove guilt the facts proved and accepted were required to be such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person: *Peacock*, supra, at 634 per Griffith CJ. It summarised the principle as being sometimes stated, "that the circumstances must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused." The Chief Justice went on to say:

> "In the present case we know what the cause of death was, if we know anything about the case at all. It was the result of a miscarriage. The next question is: How may that have been brought about? We all know that it may be the result of accident or of purpose. If of accident, there is no guilt anywhere. If of purpose, it may be the act of the woman herself, or of some other person."

825 The same questions may well be asked in the current proceedings. I am prepared to accept that it is inconsistent with human experience, on the facts known and proved, for the death of Ms Byrne to have been an accident. Such a conclusion, while possible, would require a finding that Ms Byrne climbed over the safety fence and unintentionally fell to her death.

826 Beyond that conclusion all other conclusions on the elements to prove murder are conjecture. As made clear in the other reasons for judgment herein, the foundation to conclude that the death was by an act of violence perpetrated by another does not meet the requisite test. Further, the "proof" of the connection of the accused with the death of Ms Byrne fails to meet the required test to an even greater extent.

827 In order to find the appellant guilty of the charge preferred it was not sufficient to determine that which was more probable. Suspicion and conjecture, even grave suspicion, is not a proper basis for the finding of guilt.

828 This Court has read the evidence and has heard fresh evidence relating to the "scientific proof" that death could not have occurred by an act of suicide. There is a reasonable doubt as to that conclusion, which doubt is not attributable to the capacity of the jury to see and hear the evidence at first instance. Further, there is no cogent evidence proving to the requisite standard that the appellant was at the crime scene or connected with the death of Ms Byrne. At the very least there is a reasonable doubt of the kind to which the High Court referred in *M v The Queen*, supra.

829 As earlier stated, I agree with the Chief Judge at Common Law and with Latham J. These additional comments do not in any way qualify my earlier expressed agreement with the other reasons for judgment.

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