

Court of Criminal Appeal New South Wales

Case Title: A reference by the Attorney General for the State of New South Wales under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott

Medium Neutral Citation: [2013] NSWCCA 102

Hearing Date(s): 28 November 2012

Decision Date: 06 May 2013

Before: Bathurst CJ at [1]; Hall J at [71]; Button J at [72]

Decision: Conviction set aside. Verdict of acquittal entered.

Catchwords: CRIMINAL LAW - conviction for murder in 1947 - release following Royal Commission - death of appellant - whether the Court had jurisdiction to deal with the matter under the Crimes (Appeal and Review) Act 2001 despite the death of the appellant.

CRIMINAL LAW - conviction for murder in 1947 - release following Royal Commission - death of appellant - whether appellant's conviction was a miscarriage of justice.

Legislation Cited: Crimes Act 1900, s 474B, s 474C, s 475
Crimes (Appeal and Review) Act 2001, s 76, s 77, s 86
Criminal Appeal Act 1912, s 5, s 6, Pt VI
Evidence Act 1995
Federal Court of Australia Act 1976 (Cth), s 24

Cases Cited: Lawless v The Queen [1979] HCA 49; (1979) 142 CLR 659
Mallard v The Queen [2005] HCA 68; (2005) 224 CLR 125
Managing Director NSW Technical and Further Education Commission v Fines (1993) 32 NSWLR 385
McDermott v R [1948] HCA 23; (1948) 76 CLR 501

Mickelberg v The Queen [1989] HCA 35; (1989) 167 CLR 259
R v Abou-Chabake (2004) 149 A Crim R 417
R v Doyle [2001] NSWCCA 252; (2001) 123 A Crim R 151
R v Jefferies [1969] 1 QB 120
R v Johns [1999] NSWCCA 206; (1999) 110 A Crim R 149
R v Maguire [1992] QB 936
R v McDermott (No 1) (1947) 47 SR (NSW) 379
R v McDermott (No 2) (1947) 47 SR (NSW) 407
R v Pederick (Court of Criminal Appeal, unreported, 21 May 1997)
R v Rimon [2003] VSCA 136; (2003) 6 VR 553
R v Rowe [1955] 1 QB 573
Ratten v The Queen [1974] HCA 35; (1974) 131 CLR 510
Re Application of Pearson [1999] NSWSC 143; (1999) 46 NSWLR 148
Re Ross [2007] VSC 572; (2007) 19 VR 272
Sen v The Queen (1991) 30 FCR 173
Stephenson v Human Rights and Equal Opportunity Commission (1996) 68 FCR 290

Category: Principal judgment

Parties: Frederick Lincoln McDermott (Appellant)
Regina (Respondent)

Representation

- Counsel: Counsel:
T Molomby SC and A Healey (Petitioner)
N J Adams SC and J C Davidson (Attorney General of NSW)

- Solicitors: Solicitors:
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File Number(s): 2011/231313

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JUDGMENT

- 1 **BATHURST CJ:** In 1936 Mr William Henry Lavers ("Mr Lavers") and his family occupied a store and attached home alongside the road which linked Grenfell to Forbes. The house and store were approximately 12 miles north of Grenfell and 30 miles south of Forbes. Having regard to the time that the events the subject of this application took place, I will use Imperial measurements.
- 2 On 5 September 1936 Mr Lavers went out of the store telling his wife he was going to feed his horses. He was never seen alive again.
- 3 About an hour after Mr Lavers left the store his wife went outside to find him. She saw that the petrol hose for one of the bowzers at the front of the store was on the ground, there was a sprinkling of blood on the cement base of the bowser and some blood and matted hair on its side. On the ground just out from the bowser there was a stick which had a noticeable smell of petrol. Alongside the bowser there were fresh diamond pattern tyre tracks. Police followed the tracks back towards Grenfell where they turned off the Forbes Road and into the Marsden Road and then on to a reserve where they appeared to have stopped. A small fire had been made at the reserve. The tracks led off the reserve again and on in the direction of Forbes. The tracks near the store were very distinct and were followed north up the road to a turnoff within three miles of Forbes.
- 4 On 10 October 1946 an itinerant shearer, Frederick Lincoln McDermott ("Mr McDermott") was arrested and charged with the murder of Mr Lavers. Following a trial by jury he was convicted on 26 February 1947 and sentenced to death. Two appeals to the Court of Criminal Appeal were unsuccessful, the High Court refusing leave to appeal from the second one: *R v McDermott (No 1)* (1947) 47 SR (NSW) 379; *R v McDermott (No 2)* (1947) 47 SR (NSW) 407; *McDermott v R* [1948] HCA 23; (1948) 76 CLR 501.

- 5 The death sentence imposed on Mr McDermott was subsequently commuted to life imprisonment.
- 6 On 14 August 1951, a Royal Commission was established to inquire into the conviction. On 9 January 1952, the Royal Commission found that there was a strong probability that the jury was misled by incorrect evidence on a matter of importance and recommended that Mr McDermott be released from further imprisonment. Mr McDermott was released on 11 January 1952. He died on 17 August 1977.
- 7 On 11 November 2004 a farmer, Edward Markham, found a human skull on his property at Birangan Hill, Bald Hills Road, approximately 12 miles north of Grenfell. The police who attended the site also found human remains in the vicinity of those found by Mr Markham. The majority of the remains found by police were in a cave about 120 metres up Birangan Hill from where Mr Markham found the human skull. The remains were identified as those of Mr Lavers.
- 8 A Coronial Inquiry was subsequently held in which the Deputy State Coroner found that the remains were those of Mr Lavers, returned an open finding as to the manner and cause of death, and stated that the evidence placed the conviction of Mr McDermott as being a gross miscarriage of justice. The Deputy State Coroner subsequently wrote to the Attorney General and suggested that he consider making an application on behalf of Mr McDermott for a pardon.
- 9 On 12 July 2010 Ms Betty Sheelah, Mr McDermott's second cousin, wrote to the Attorney General seeking a pardon for Mr McDermott.
- 10 On 26 November 2010 the Attorney General referred the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act* 1912. The reference was made under s 77(1)(b) of the *Crimes (Appeal and Review) Act* 2001 ("the Act"). It was common ground that the

obligation of the Court under such a reference is to consider the whole case uninhibited by the way it had previously been dealt with. Although some assistance may be derived from the manner an appellate court has previously dealt with some of the issues, this does not relieve the Court of its statutory duty to consider the whole case: *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125 at [10]; *Mickelberg v The Queen* [1989] HCA 35; (1989) 167 CLR 259 at 312.

- 11 The appeal was heard on 28 November 2012. On the conclusion of the hearing of the appeal, the Court made an order quashing the conviction of Mr McDermott. These are my reasons for joining in that order.

Jurisdiction and parties

- 12 The parties made a joint submission that the Court had jurisdiction to deal with the matter notwithstanding the fact that Mr McDermott had died.
- 13 The relevant sections of the Act are ss 76, 77 and 86. These sections provide as follows:

"76 A petition for a review of a conviction or sentence or the exercise of the Governor's pardoning power may be made to the Governor by the convicted person or by another person on behalf of the convicted person.

77(1) After the consideration of a petition:

(a) the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or

(b) the Minister may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeal Act* 1912, or

(c) the Minister may request the Court of Criminal Appeal to give an opinion on any point arising in the case.

(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to

any mitigating circumstances in the case or as to any part of the evidence in the case.

(3) The Governor or the Minister may refuse to consider or otherwise deal with a petition. Without limiting the foregoing, the Governor or the Minister may refuse to consider or otherwise deal with a petition if:

(a) it appears that the matter:

(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or

(ii) has previously been dealt with under this Part or under the previous review provisions, or

(iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or

(iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and

(b) the Governor or the Minister is not satisfied that there are special facts or special circumstances that justify the taking of further action.

(3A) The Governor or the Minister may defer consideration of a petition if:

(a) the time within which an appeal may be made against the conviction or sentence (including an application for leave to appeal) is yet to expire, or

(b) the conviction or sentence is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the petition fails to disclose sufficient information to enable the conviction or sentence to be properly considered.

(4) The Minister must cause a report to be given to the registrar of the Criminal Division of the Supreme Court as to any action taken by the Governor or the Minister under this section (including a refusal to consider or otherwise deal with a petition).

(5) A petition (however described) that does not expressly seek a review of a conviction or sentence or the exercise of the Governor's pardoning power may be dealt with as if it did if the Minister is of the opinion that it should be so dealt with.

...

86 On receiving a reference under section 77(1)(b) or 79(1)(b), the Court is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction or sentence under the *Criminal Appeal Act* 1912, and that Act applies accordingly."

- 14 Equivalent provisions were originally contained in Pt VI of the *Criminal Appeal Act*. That Part was repealed and replaced by s 474B and s 474C of the *Crimes Act* 1900, which were in turn repealed in 2006 and inserted into the Act.
- 15 There are a number of matters which should be noted. First, a petition to the Governor under s 76 may be made by the convicted person or by another person on behalf of the convicted person. In this case the relevant application was, of course, made by Ms Sheelah on behalf of Mr McDermott. There is no reason from the text of the legislation why such an application cannot be made on behalf of a deceased person.
- 16 Second, s 77(1)(b) of the Act empowers the Minister to refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal. There is no requirement for a Notice of Appeal to be lodged or, for that matter, any action to be taken by the convicted person. As Spigelman CJ said in *R v Doyle* [2001] NSWCCA 252; (2001) 123 A Crim R 151 at [62]-[63] in respect of equivalent provisions in the *Crimes Act*, s 5 of the *Criminal Appeal Act* which confers a right of appeal on a person convicted on indictment, effectively is bypassed. Thus, a reference under the equivalent of s 77(1)(b) of the Act in that case both empowered and required the Court of Criminal Appeal under the s 86 equivalent to deal with the matter on appeal, notwithstanding the fact that it was a summary conviction to

which the appeal rights conferred by s 5 of the *Criminal Appeal Act* would not apply. See also *R v Johns* [1999] NSWCCA 206; (1999) 110 A Crim R 149 at [5]; *R v Pederick* (Court of Criminal Appeal, unreported, 21 May 1997) per Hunt CJ at CL; *Re Application of Pearson* [1999] NSWSC 143; (1999) 46 NSWLR 148 at 157.

- 17 It is clear that at common law a convicted person's right of appeal against conviction and penalty abates on death, with the possible exception of the case where the relevant penalty is a fine for which the estate of the deceased convicted person is liable: *R v Rowe* [1955] 1 QB 573 at 575; *R v Jefferies* [1969] 1 QB 120 at 124. Indeed, in the latter case Widgery LJ (as he then was) stated that whatever the position at common law, the right of the legal personal representative of a deceased convicted person to continue to prosecute an appeal where the relevant penalty was a fine depended on the terms of the statute giving a right of appeal. It is not necessary to consider whether s 5 of the *Criminal Appeal Act* confers such a right on the legal personal representative of the convicted person.
- 18 In *Sen v The Queen* (1991) 30 FCR 173, the appellant lodged an appeal against his conviction for murder but died before the appeal was heard. The relevant provision giving rise to the right to appeal (s 24(1)(b) of the *Federal Court of Australia Act 1976* (Cth)) was silent as to the fate of the appeal in these circumstances. The Full Court of the Federal Court following *R v Rowe* supra and *R v Jefferies* supra held that the right of appeal conferred by the statute abated on the death of the appellant: *Sen* supra at 175. However, the Court indicated that s 475 of the *Crimes Act* (the predecessor to s 77 of the Act) might well provide a means by which the correctness of such a conviction may be examined and afford a means by which a deceased family may have the correctness of a conviction considered: *Sen* supra at 176.
- 19 In *R v Rimon* [2003] VSCA 136; (2003) 6 VR 553 the Court of Appeal in Victoria reached a similar conclusion to that in *Sen* supra. However, once

again the Court adverted to the possibility that an application under the Victorian equivalent of s 77 of the Act could provide a means of reviewing the conviction: *R v Rimon* supra at 554.

- 20 It is clear that the question of whether a reference to the Court of Criminal Appeal under s 77(1)(b) of the Act and the power of that Court to hear the appeal under s 86, notwithstanding the death of the convicted person, depends upon the construction of those provisions of the Act: *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290 at 296-297; *Managing Director NSW Technical and Further Education Commission v Fines* (1993) 32 NSWLR 385 at 388. In the latter case Mahoney JA pointed out that there was no general or presumptive rule which would determine the matter.
- 21 In the present case, it seems to me that as a matter of construction the Act both empowers the Minister to refer the conviction of a deceased person to the Court of Criminal Appeal, and requires the Court to determine that appeal notwithstanding the death of the convicted person.
- 22 This is for these reasons. First, unlike an appeal brought under s 5 of the *Criminal Appeal Act*, the convicted person does not have to take any steps to prosecute the appeal. The Minister's power under s 77(1)(b) of the Act to refer the case to the Court of Criminal Appeal is activated on consideration of a petition under s 76. As I indicated earlier, such a petition can be brought by another person on behalf of the convicted person. Second, s 86 of the Act requires the Court to deal with the case in the same way as if the convicted person had appealed (emphasis added). The words "as if", in my opinion, indicate that the Court is to treat the appeal as one properly brought and which it had power to deal with under s 6 of the *Criminal Appeal Act*. There is no question in those circumstances of any right of the convicted person abating; it is the Minister who has the power to instigate the process and once instigated the Court is required to determine the appeal.

- 23 Such a construction seems to me to be consistent with the purpose of the provisions. That purpose, in my opinion, is to remedy injustices which cannot be remedied by the use of the normal appellate process. The fact that a wrongly convicted person has died does not mean an injustice has not occurred. There is no reason to limit the words of s 77 and s 86 so as to prevent a remedy in the case of such injustice.
- 24 The conclusion to which I have come is consistent with that reached by the Court of Appeal of England and Wales in *R v Maguire* [1992] QB 936 at 941, 946-947. A similar approach to the Victorian equivalent of the section was taken in dicta by the Victorian Court of Appeal in *Re Ross* [2007] VSC 572; (2007) 19 VR 272 at [89]. It is also consistent with the comments made on equivalent sections in *Sen supra* and *R v Rimon supra* to which I have earlier referred.
- 25 It follows in those circumstances this Court had jurisdiction to hear the application.
- 26 So far as the question of parties are concerned, I agree for the reasons set out in the joint submission that it is appropriate for the Attorney General to represent the Crown in the reference under s 86. However, I am not sure that it is appropriate that Mr McDermott should have been named as the appellant. Rather, it seems to me that the appropriate course would have been to simply refer to the matter as an application under s 77(1)(b) of the Act re the conviction of Frederick Lincoln McDermott and to have granted the petitioner and the Attorney General leave to appear on the hearing under s 86. However, it does not seem to me necessary to take any steps to amend the Notice of Appeal and other court documents at this stage.

The trial

27 The Crown case at the trial was based primarily on four matters. First, identifying the car whose tyre tracks were observed as an Essex Tourer, about a 1924 model, belonging to a Mr Jack Parker. There was evidence that the car was used by Mr McDermott and a friend Mr Geoffrey McKay. It was alleged that they murdered Mr Lavers while using the car. Second, evidence which identified Mr McDermott using the car at about the time the murder was said to have taken place. Third, reliance was placed on what was said to be confessions made by Mr McDermott. Finally, the Crown demonstrated that a statement made by Mr McDermott that on 4 and 5 September 1936 he was shearing at a property about four miles outside of Forbes for which he was paid by cheque was incorrect. It is necessary to deal in more detail with each part of the case as outlined.

(a) The car

28 Late in the afternoon of 4 September 1936 two fencers, a Mr Alfred Coble and a Mr Benjamin Berry, were working on a property about 19 miles from Grenfell when they saw a car travelling from Forbes towards Grenfell. Mr Coble described the car as very noisy and a faded blue or grey colour. Mr Berry described it as an old bluish grey touring car making an unusual noise. Each of them gave evidence that a little before sunrise on the next day they saw the same car travelling back towards Forbes.

29 Mr Henry Masterson was a share-farmer on a property about 12 miles out from Forbes. He said that a little after 6.15am on the morning of 5 September 1936 he saw an old grey tourer stopped on the side of the road. A man with a black billycan looked at the radiator and then went to a nearby creek. Mr Masterson kept working on his tractor and when he looked again the car was about three-quarters of a mile away travelling fairly fast.

30 Mr William Whillis, Mr Lavers' brother in law, gave evidence that just on 6.00am on 5 September 1936 he heard a very noisy car coming from

Grenfell. He watched it to within 200 yards of Mr Lavers' store. He said the noise seemed to die away at the store.

- 31 Mr Walter Hancock was a farmer who worked 15 miles north of Mr Lavers' store. He said that some time after 6.20am he saw a car he described as a very noisy old model tourer which looked to be light coloured travelling towards Forbes.
- 32 Mrs Phoebe Priddle, whose husband owned the property opposite Mr Lavers' store, stated she heard a car starting up at the store with a lot of noise and then proceeding into the distance. She placed the time as some time before 6.20am. A Mr Stanley Ray said he was loading gravel at around 6.00am when he heard a car travelling fast towards Forbes. Three other witnesses who respectively lived and worked at properties to the south of the store, that is between the store and Grenfell, heard but did not see a car travelling towards Forbes at around the same time.
- 33 Mr Parker said he had an Essex Tourer which he thought he had bought in 1935. He said it was about a 1924 model. He said he drove it on occasions with Mr McDermott and Mr McKay. The car was traced and some of its parts were tendered at the trial. Mr Coble said the parts in Court were similar to the colour of the car he had seen. Mr Berry said that it was a long time ago but it seemed to resemble the car in shape and colour. It was the Crown case that the car, which had made the tracks leading to and from the store on the morning of 5 September 1936, was Mr Parker's car.

(b) The identification of Mr McDermott

- 34 A Mr Thomas Kelly ran a garage in Forbes. He gave evidence that around the time of Mr Lavers' disappearance he sold petrol to an old grey tourer with a birdcage on the side and the driver dipped the tank with a piece of redwood quadrant. He said it was similar to the stick found on the ground

near the petrol bowser at Mr Lavers' store on the morning of 5 September 1936.

- 35 Critical to the Crown case was the evidence of Mrs Essie May King, a travelling phrenologist and psychologist, who worked under the name Madame Cleo (phrenology is a pseudo science based on the theory that mental powers are indicated by the shape of the skull). Mrs King said she had a stall at the Parkes Show in late August and on 4 September 1936 she was travelling with her husband from Parkes to Wyalong along the Forbes/Grenfell Road. About mid-morning she said she saw a car on the side of the road with two men standing beside it. The men stopped the Kings and asked if they could spare any petrol. They said no. She identified the car as a very old model with a bluey-grey body. Shown parts of the car at the trial she said that it looked like the back of the car she saw.
- 36 Mrs King gave evidence that they drove on, the car passed them and about ten or twelve miles further on they again came upon it standing at the side of the road. She said one of the men had a billycan. As the Kings passed the stationary car she said she looked back and saw the man going to the waterhole. She said the man with the billycan appeared to be the man in the dock. Her evidence was as follows:

"Q Have you seen since then one or both of these men?

A I have seen one of them.

Q Where did you next see him?

A At the Grenfell lower court.

Q Can you see him here?

A Yes, that is the man in the dock."

- 37 She subsequently gave evidence that she had been shown some photographs by police the year before and helped identify two men. The photographs were called for and Mrs King gave evidence that one of the two produced was not that which was originally shown to her.
- 38 Two days after Mrs King had given evidence, Detective Sergeant Calman, one of the investigating officers who had interviewed Mrs King, stated the two photographs that she had identified were those of Mr McDermott and Mr McKay. The photograph of Mr McDermott was small, taken nine years after the event in question and Mrs King gave evidence at the committal hearing that, in contrast to the photograph, when she saw him in September 1936 he was wearing a hat.
- 39 Whether that evidence should have been put before the jury was a matter of debate between the parties to these proceedings. However, the trial judge carefully directed the jury on this issue. He warned that the photograph was taken when Mr McDermott was a lot older than when Mrs King had seen him, that Mrs King had not seen him before, and that she had not seen him between her observation of him on the road and the time she saw the photographs. He also indicated to the jury that they should take very careful heed of Mr McDermott's counsel's warning concerning the dangers of the identification evidence.
- 40 Mr King did not identify either man but otherwise confirmed Mrs King's account. He was shown the car parts and said that the back was the part of the car he saw and the parts looked very familiar.
- 41 The prosecution's case was that Mr and Mrs King and Mr Kelly had seen the same old grey tourer with a birdcage, and further, the piece of redwood quadrant that Mr Kelly had seen used as a dipstick was the piece of wood with a noticeable smell of petrol found near the bowser outside Mr Lavers' store. The car was said to be the one with the distinctive diamond pattern tracks going past the store towards Grenfell on 4 September 1936 and

coming back the next morning when the piece of redwood quadrant had been dropped. The car was said to be Mr Parker's car and Mr McDermott and Mr McKay were said to be the occupants.

(c) The confessional evidence

- 42 Mr McDermott had a companion named Florrie Hampton. A drover, Mr George Holland, gave evidence that about two and a half years before the trial Ms Hampton began to abuse him violently after a conversation about a horse he had traded to Mr McDermott. Mr McDermott tried to stop her and a conversation to the following effect took place:

"He said 'Shut up'. She said 'You are only a damn murderer'. She said 'You are a damn murderer, you murdered Lavers, you murdered Lavers'. He said 'I did not'. He said 'I'm not the main one, Scotty hit him first and I hit him with the handle'. She said to him 'And you put him in the truck and drove him to a reserve and cut the poor devil up with an axe didn't you?' She said 'You cut him up with an axe'. He said 'I didn't, it was we not I'. She said 'You drove him to the sheep yards in Grenfell and buried him in the corner of the sheep yards at Grenfell'."

Mr Holland said that both Mr McDermott and Ms Hampton were very drunk at the time.

- 43 Mr Holland reported this conversation to the police. Some time later when he was in a shop in Griffith, Mr McDermott said to him "you want to tell the bloody police more next time". Mr Holland replied "You want to watch your tongue" and Mr McDermott said, "Go on, get away, I don't want to bloody well talk to you".
- 44 A Ms Doretta Williams gave evidence that two years prior to the trial she was camped at a farm near Griffith when there was a quarrel between Mr McDermott and Ms Hampton in which the following words were spoken:

Ms Hampton: "You killed Lavers for seven gallons of petrol. And put his body in the car and drove out to the old Grenfell sheepyards, cut it up with an axe and buried it."

Mr McDermott: "Yes, of course I killed Lavers for seven gallons of petrol, put his body in the back of the car, drove out to the old Grenfell sheepyards, cut his body up with an axe and buried it."

- 45 Mr McDermott was interviewed by Detective Inspector Allmond, Detective Sergeant Calman and Detective Sergeant Humphris on 13 December 1944. Detective Sergeant Humphris gave the following evidence of this interview:

"Calman said 'Do you know a man named George Holland?' The accused said 'Yes'. Calman said 'He has informed the Police that he heard you say that you and another man killed Lavers and disposed of the body'. The accused said 'I told Florrie I was questioned by the Police at Bathurst about the Lavers case; she has told people that I killed Lavers for a drop of petrol'. I said 'Were you questioned by the police at Bathurst?' He said 'No, but McKay was'."

- 46 Mr McDermott was again interviewed by Detective Sergeant Calman on 10 October 1946. A Detective Constable May gave evidence that during the course of the interview the following exchange took place:

"Calman: Did you say to Florrie in Samuels' presence at any time that you were at Grenfell when Lavers was killed, and use the words 'I will do you in the same as I done the other fellow?'

McDermott: I suppose I did.

Calman: Do you know a woman named Doretta Williams?

McDermott: Yes.

Calman: Are you on good terms with her?

McDermott: Yes.

Calman: Did she visit you and Florrie at Griffith after tea one Sunday night when you were both living at an Italian's place where you were working the garden and Florrie was cooking?

McDermott: Yes, that is right, she came there one night.

Calman: Whilst she was there, did you and Florrie have a quarrel and did Florrie said to you 'You killed Lavers, cut his body up and buried it in some sheep yards?'

McDermott: Yes, she was always saying it to me.

Calman: Did you then say 'I killed Lavers for two gallons of petrol, we had no money to pay for the petrol so I hit him on the head with the crank handle and we put him in the car, and drove out of Grenfell to the sheep yards and buried him there?'

McDermott: Yes, that's what comes of saying too much, if I had not said that I would not be in this trouble.

Calman: Is it true that you said in Holland's presence that you killed Lavers?

McDermott: Yes, but if Florrie had kept her mouth shut I would not be here now. Have you seen McKay?

Calman: Yes.

McDermott: Did he say that I did it?

Calman: No, he didn't say that. If you were concerned in the murder of Lavers as you have said, will you tell us what was done with the body?

McDermott: I do not want to say any more now.

Calman: Are you willing to make a further statement in writing in connection with these matters we have spoken to you about?

McDermott: No, I would rather not say any more."

- 47 In his statement from the dock at the trial, Mr McDermott denied killing Mr Lavers and also denied telling anybody that he had.

(d) The alibi evidence

- 48 Mr McDermott stated in his interview on 13 December 1944 that he was in Forbes all day on 5 September 1936. In a statement he made following that interview he said he was shearing with Mr McKay on a property just

outside Forbes on 4 and 5 September 1936. He said they received two cheques dated 5 September each of £1 payable to J McKay and F May. A Mr Henry Tomkins, who managed a property, Eulowra, about four and a half miles out of Forbes, recognised Mr McDermott but said he had sheared on the property under the name Munro on 7 September 1936, not 5 September 1936. He initially believed the cheques were an advance.

- 49 The cheques were located. The one to F May was dated 5 September and the one to J McKay dated 7 September.
- 50 After initially giving evidence Mr Tomkins made further inquiries. He was recalled and said the cheque of 5 September had nothing to do with the shearing. He had found a cheque for £1/10/- drawn on 8 September and he said that he gave that to Mr McDermott and Mr McKay on that day. He said the two cheques of 7 September and 8 September represented payment for shearing on 7 September.
- 51 In light of the evidence outlined above the jury found Mr McDermott guilty of the murder.

The Royal Commission

- 52 In 1951 a Royal Commission was established to inquire into the conviction of Mr McDermott. The Commission found that the car which made the tyre tracks was not Parker's car nor could it have been an Essex Tourer. The Commissioner's conclusions were as follows:

"The fact, therefore, is now fully established which did not appear at the trial, that the car body in Court was not part of Parker's car. This is not of fundamental significance, for no witness ever said that the car at the scene of the murder was Parker's. It could have been any car of the colour and type described by Mrs. King and other witnesses. But in one respect its presence in Court may have prejudiced the accused - the witnesses who identified the colour of the car by pointing to the parts in Court, and saying the car they saw was similar, may well have impressed their evidence on the jury by the concrete definition of colour, and by reducing the colour described by

Mrs. King and the witnesses who saw the car on the next morning, to the common standard of the object in Court.

...

A much more important fact has been brought to light as a result of fresh evidence. I have already mentioned that Sergeant Jardine measured the width of the track of the car near the petrol bowser and found it to be 56 inches. It now transpires that the track of the Essex car is less than that. A letter has been received and put in evidence from the manufacturer of the Essex car giving its specifications, in which is set out width of track 54 7/8 inches. ...

...

I am satisfied by the fresh evidence that the tracks made near the petrol pump, which at the trial were accepted as having been made by the car which stopped there at the time Lavers was killed, could not have been made by an Essex car and so could not have been made by Parker's car. On the totality of the evidence now available no jury could find as a fact, beyond a reasonable doubt, that Parker's car was on the scene on the morning of the 5th September, 1936. But the jury at the trial must be assumed to have found that fact against the accused.

...

As, therefore, by the terms of my Commission I am directed to report on the whole of the facts after receiving additional evidence and to say whether in my opinion, as a result of my inquiries, the prisoner should serve his sentence or be released from further imprisonment, I have to report that in my opinion the additional evidence establishes a strong probability that the jury were misled by erroneous evidence upon a matter of importance in the trial, and that this evidence contributed to their conclusion of the prisoner's guilt. I have to report therefore that in my opinion the prisoner should be released from further imprisonment."

53 The Royal Commission also expressed strong reservations about the circumstances of the confession. However, the Commissioner emphasised that at the trial Mr McDermott had denied saying that he had killed Mr Lavers, in contrast to his evidence before the Commission in which he stated that he had said so in an argument but it was not true.

54 Although the Royal Commission did not refer to it, Mr Kelly during the course of his evidence at the Commission said that after seeing Mr

McDermott at the committal hearing, he was quite satisfied he was not the person he had seen in the car. It also emerged that he had given a statement to the police on 28 September 1936 describing the person he had seen in a manner inconsistent with it being Mr McDermott.

- 55 There were two other pieces of evidence which emerged as a result of the documents produced at the Royal Commission. The first was that a Constable Grogan reported that his wife had seen a car answering the description of Mr Parker's car with a noisy engine and a birdcage in Boorowa on Sunday 6 September 1936. More importantly, on 26 September 1936 a Constable McLaughlin reported that a car answering the same description was seen at 8.00am on 5 September 1936 at Yass.

The discovery of the body

- 56 As I indicated, Mr Lavers' body was discovered in a cave about 120 metres up Birangan Hill in November 2004. The evidence of Mr Thomas John Lavers, the son of Mr Lavers, was that whilst it may have been possible in 1936 to drive a car along Bald Hills Road and over a paddock to Birangan Hill, a car could not be driven up the Hill. More importantly, the tyre tracks from Mr Lavers' store extended to a turnoff three miles south of Forbes. There was nothing to suggest the vehicle turned off the Grenfell/Forbes Road at any time prior to that, much less at a place 12 miles or thereabouts north of Grenfell.
- 57 A Dr Denise Donlon, a Forensic and Biological Anthropologist, examined the body. For the purpose of this appeal she provided an opinion stating that there was nothing identifiable in relation to the skull consistent with the terms of Mr McDermott's confessions, that the body of Mr Lavers was not chopped or cut up with an axe and that if it was, she would have expected to have noticed marks indicating that that had occurred.

The grounds of appeal

58 The Notice of Appeal filed in the proceedings contained four grounds. Ultimately only Ground 1 was relied upon. This was in the following terms:

"1. The appellant's conviction was a miscarriage of justice in that a review of the whole of the evidence, including fresh evidence not called at the trial, as outlined below, demonstrates that he was not guilty:

(a) The car parts tendered as coming from the car owned by Jack Parker, an associate of the appellant, did not come from that car.

(b) The tyre tracks found in front of Lavers' store and leading north up the road towards Forbes were not made by Jack Parker's car.

(c) A car matching the description given by the witness Essie May King of the car she observed in which the appellant was said to be travelling on the road between Forbes and Grenfell on 4 September 1936 was seen in Yass, 97 miles south/south-east of Grenfell, at about 8.00 am on 5 September 1936.

(d) The garage proprietor Tom Kelly was quite satisfied that the appellant was not the man he had seen with an old grey tourer car with a birdcage on the side to which he had served petrol around the time of Lavers' disappearance, and the description he gave of the man did not fit the appellant's friend Geoffrey McKay.

(e) The identification of the appellant by Essie May King from a small photo nearly nine years after her observation of the person of interest was inherently unreliable.

(f) The identification of the appellant's friend Geoffrey McKay by Essie May King from a small photo nearly nine years after her observation of the person of interest was inherently unreliable.

(g) The identification of the appellant by Essie May King was contaminated by the suggestibility of his photo being one of only very few full length photos shown to her.

(h) The identification of the appellant's friend Geoffrey McKay by Essie May King was contaminated by the suggestibility of his photo being one of only very few full length photos shown to her, and by his being the only person shown wearing a hat.

(i) Lavers' body was concealed at a remote and inaccessible location some kilometres east of his store, and thus the car whose tyre tracks ran from the store directly north towards Forbes could not have been involved in his disappearance.

(j) The finding of Lavers' skeleton at a remote and inaccessible location some kilometres east of his store cannot be reconciled with the statement made by the appellant to the effect that 'Yes, of course I killed Lavers for seven gallons of petrol, put his body in the back of the car, drove out to the old Grenfell sheep yards, cut his body up with an axe and buried it'.

(k) The remoteness and inaccessibility of the location at which Lavers' skeleton was found is such that there is an overwhelming probability that those who took him there were local people who knew the area."

Consideration

59 The grounds of appeal fall into two categories. Grounds 1(a), 1(d) and 1(i)-1(k) relate to what might be described as new or fresh evidence in the sense that those expressions have been used in the cases: see, for example, *Ratten v The Queen* [1974] HCA 35; (1974) 131 CLR 510 at 518-519; *Lawless v The Queen* [1979] HCA 49; (1979) 142 CLR 659 at 675; *R v Abou-Chabake* (2004) 149 A Crim R 417 at [63]. The second category, comprising Grounds 1(e)-1(h), focus on what occurred at the trial and contend that there was a miscarriage of justice by virtue of the admission and/or unreliability of the identification evidence given by Mrs King.

60 In that context three preliminary matters may be noted. First, in the present case a verdict of acquittal is sought. As I am of the opinion, for the reasons set out below, that the evidence is of such cogency to demonstrate the innocence of Mr McDermott, it is immaterial whether that evidence is fresh or simply new: see *Ratten* supra at 518-519; *R v Abou-Chabake* supra at [63]. Further, even if the distinction was relevant in the present case, I am not of the view that in the circumstances of Mr McDermott's trial, which took place some ten years after the death of Mr Lavers, any of the

evidence in question could have been discovered or available by the exercise of reasonable diligence.

- 61 The second preliminary matter is this. It does not seem to me necessary having regard to the cogency of the fresh or new evidence to consider the admissibility of the photographic evidence at the trial, the adequacy of the directions made by the trial judge in relation to it, or to the extent that the jury verdict was unsafe having regard to the evidence presented to it at the trial. As the Crown pointed out, this may involve consideration of the issue by reference to the relevant principles as they existed in 1947. It would certainly need to be considered without regard to the provisions in the *Evidence Act 1995* dealing with the admission of evidence that may be unfairly prejudicial to the accused. In the circumstances of the present case it seems to me both unnecessary and undesirable to undertake this task.
- 62 The third preliminary matter is this. Ground 1(k) speculates that the murder must have been committed by a person or persons resident in the area at the time. In the circumstances of the present case, it seems to me unnecessary to speculate in this way in determining the guilt or innocence of Mr McDermott.
- 63 As I indicated above, the evidence relied on by the Crown at the trial fell into four categories. The first was the contention that the murder was committed whilst Mr McDermott and McKay were using an Essex Tourer belonging to a Mr Parker. The evidence at the Royal Commission established that the car whose tyre tracks appeared outside Mr Lavers' store and on the Grenfell to Forbes Road could not have been a car of the nature of that owned by Mr Parker as the tyre tracks were inconsistent with it being such a vehicle. Further, there was evidence that a car answering the description of Mr Parker's car was seen in Yass at 8.00am on 5 September 1936.

- 64 There was no suggestion in the evidence that Mr McDermott had the use of any vehicle other than Mr Parker's car. The evidence thus undermined a significant part of the Crown's case. It also, of course, cast doubts on the evidence of Mrs King. Even ignoring the fact that it could not have been Mr Parker's car which made the tyre tracks, the evidence of Mrs King sits uneasily with the fact that a car answering the description of Mr Parker's car was sighted at Yass on the morning of 5 September 1936.
- 65 The reliability of any identification evidence linking Mr McDermott with the murder was further undermined by the evidence of Mr Kelly at the Royal Commission to the effect that the persons in the car to which he sold petrol around the time of Mr Lavers' disappearance (see par [34] above) did not answer the description of Mr McDermott.
- 66 In those circumstances it would not, in my opinion, have been possible to have been satisfied beyond reasonable doubt of Mr McDermott's guilt on the evidence relating to the car and the identification evidence. To the contrary, the fact that tyre tracks related to a car with which Mr McDermott had no apparent connection was indicative of his innocence.
- 67 There remained however the confession. As I indicated above, the Royal Commissioner expressed strong reservations about the confession, but was unable to reject it as unreliable having regard to Mr McDermott's evidence at the trial that he never made the statements to Ms Hampton alleged by Mr Holland or Ms Williams. However, the location of the body when it was discovered in 2004 coupled with the evidence of Dr Donlon indicated the confession bore no resemblance to what in fact occurred. The body was not discovered at the old Grenfell sheep yards, nor was it cut up with an axe. There was no basis for believing that when Mr McDermott made the so-called confession, he was accurately recording what occurred.

68 The remaining piece of evidence relied on by the Crown was the fact that it was established that Mr McDermott's statement that he was shearing just outside Forbes on 5 September 1936 was incorrect. However, whether or not Mr McDermott was shearing at Forbes on that day, the new and fresh evidence indicates that there was no material which on any reliable basis connected him with the murder.

69 In those circumstances, it is my opinion that had the evidence been available at the trial, the only verdict to which a jury could have come was a verdict of acquittal. In those circumstances there was a significant miscarriage of justice.

70 It was for these reasons I joined in the orders that the conviction of Mr McDermott be set aside and in lieu thereof a verdict of acquittal be entered.

71 **HALL J:** I agree with Bathurst CJ.

72 **BUTTON J:** I agree with Bathurst CJ.
