

No. 59/1983

List "A"

RANDALL LUDLOW ASKELAND v. THE QUEEN

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL:

NEASEY J.

NETTLEFOLD J.

EVERETT J.

3rd November 1983

ORDER OF THE COURT:

Appeal dismissed.

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The appellant was convicted of having murdered his wife at Launceston on 10th November 1982. The cause of death, which occurred in the bedroom of the matrimonial home, was that the appellant struck several heavy blows with a window weight on the head of the deceased as she lay prone in bed.

The principal issue contested at the trial was whether certain oral statements of a confessional nature made to investigating police, and a signed record of interview in which the appellant admitted having caused the death of the deceased, but claimed that she had provoked him into striking the fatal blows, should be admitted in evidence. In general, the appellant's claim was that the confessional statements had been brought about by oppressive conduct on the part of interrogating detectives, and therefore that his confessions were not voluntary; and in any event should be rejected as a matter of discretion by the trial judge. The nature of the oppressive conduct claimed was that the police

officers had conducted an extended interrogation occupying a period of some 18 hours, had abused and oppressed the appellant orally, and had by a combination of these means overborne his will. A lengthy examination of witnesses on the voir dire was conducted before the trial judge, who in the end declined to accept the appellant's account of the interrogation, accepted that given by the police, and admitted most of the confessional evidence. The appellant thereupon gave evidence in his own defence, in which he narrated an account which accorded substantially with the content of his confessional statements to the police. He now appeals against conviction upon a number of grounds, which however fall largely into two groups. One group attacks the admission of the confessional evidence, and the other complains that the trial judge's directions in law on the subject of provocation reducing murder to manslaughter were erroneous in law. In addition he seeks a new trial on the ground of fresh evidence.

The appellant at the time of trial was a legal practitioner aged 35 years, and a partner in a firm of solicitors. He stated in evidence that his principal fields of legal expertise were civil litigation and family law. These matters are relevant because of the nature of some of the grounds of appeal.

The following account of relevant events is taken from the appellant's evidence. He travelled by car to Hobart on 9th November 1982, in order to attend a meeting connected with his interest in postal history, and to transact some legal business. He had told his wife that he intended to make the journey but did not intend to stay overnight. However, it was after 9.00 p.m. by the time the stamp meeting finished, and he then decided to stay in Hobart, and booked in at his usual place, the Town House Motel. He then telephoned his wife in order to tell her that he had decided to stay overnight. The conversation was normal for a time,

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but then she "just suddenly changed", said he didn't love her any more, and was always away. She then said, "If you are not going to be here with me I've got somebody else who will be", and hung up. Sudden changes of mood were not unusual with her, he said. However, he was very upset, and decided there and then to return to Launceston, and also "latched on to the words, 'I've got somebody else who will be there'". He started to wonder whether that might be true. The appellant then proceeded to narrate a substantial amount of evidence about the sexual relationship between himself and his wife, difficulties they had had in that respect, and how they had on medical advice undertaken a course of counselling.

The appellant said that on his way back to Launceston he thought about the history of the marriage and began to brood, and the further he went the more suspicious he became. By the time he reached Launceston he thought it a probability that his wife had somebody else with her. He decided to park his vehicle away from the house in case she did, so as not to alert them. Some lights were on at the house when he arrived, and he found his wife awake in the bedroom, in bed. At that point in the evidence he was led by his counsel to give further details about the marital history, including the fact that he and his wife, on the medical counsellor's advice, had been used to reading "sex books" in bed together, as a means of assisting her to get more enjoyment out of their sexual relationship. He also gave details about various aspects of his wife's temperament which had caused difficulties in their marital relationship.

Then the appellant was taken back to the narrative of events. He said that he greeted his wife, saying that he was glad to see that she was by herself, but to this she made no reply. He saw a window weight near his side of the bed.

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It was one of many used to weight fishing nets at Low Head, where they had a holiday cottage. This particular weight came from a net which he had brought back to Launceston to have repaired. He got into bed and tried to get his wife to talk with him, but she seemed reluctant to do so. She turned over and lay prone, and after a few minutes silence she suddenly said, "You are too late, you've just missed him, and he's a jolly sight better at it than you are, he fills me right up". At various times during the marriage she had teased him about the small size of his penis. His reaction to this remark by his wife was that he "was just overcome with a fit of rage". He had been delighted to find that she was alone, but angered that she would not talk to him, which he could not understand, and then this remark was made. He said "I remember picking up the window weight....I never intended to do it. I just did it." He said he knew what he had done, but was not conscious of doing it at the time. He did not recall striking his wife with the weight, but remembered picking it up, and some extraordinary feeling coming over him. He did not remember any more until he was sitting there crying. He got up, dressed, spent some time crying in another room, and then conceived the idea of fabricating a burglary.

The appellant then, on his own evidence, spent some time and ingenuity in simulating the effects of a burglary by a person who had forced an entry to the house. He propped the door of the bedroom so that his son could not enter it, then left the house, taking with him a knife and part of a coat-hanger and wearing rubber gloves, all of which he had used in simulating the burglary. He drove away in his wife's motor car, then left it, returned to his own, and drove back to the motel in Hobart, disposing of the above-mentioned articles at random on the way. After breakfast in the motel room he went to the Post Office to make some telephone calls. One of the people he rang was a partner in his legal firm, the purpose being, he said, to make sure that somebody found the children.

The Crown alleged at the trial that the appellant anticipated, as was his purpose, that this partner would enter the house and find the body of his wife. This in fact happened. The partner gave evidence that the appellant had told him that he had been trying to ring his wife but could not raise her. The appellant carried out some small bits of business in Hobart that morning before returning to Launceston. He arrived back at about 11.30 a.m., and was met by police officers at the gate of his home.

He agreed in cross-examination that when told by the police about what they had found in the house his demeanour was one of shock and grief; which he said was genuine. He admitted, however, that then and during that day and for the next twenty days he strongly maintained innocence of any complicity in his wife's death, and "put on an act", saying that his wife's killer must be brought to justice, and so on. He also arranged for a locksmith to investigate and report on the supposed break-in and forced entry to his house.

It is clear from the evidence that the appellant was regarded as a prime suspect by the police from the beginning, and they over a period of some three weeks began to accumulate various pieces of evidence indicating that he had been seen in and around Launceston during the early hours of 10th November. At about 9.30 a.m. on 30th November, two police officers, Sergeant Otley and Senior Constable Garratt, went to the appellant's law office and required him to accompany them to the police station.

From this point in the narrative I cite from part of the learned trial judge's account when giving reasons in writing at the end of the trial for his rulings following the voir dire. At 10.00 a.m. Sergeant Otley began to interrogate the appellant. Handwritten notes, purporting to be verbatim,

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were made by Constable Garratt. His Honour recounts that much of the evidence of this interview was admitted without objection, and certain parts of it were ruled to be inadmissible. At about 3.00 p.m. on that day, certain further questions and answers were asked and given which the appellant contends were wrongly admitted in evidence. The relevant passages are:-

"Q. You said that you and Wendy had a satisfactory sex relationship, explain to me why you had, in your office, several pornographic paperback novels?

A. What are you talking about?

Q. I believe that these books were of no literary value other than each chapter depicting sexual activity?

A. No answer.

Q. We've been informed by one of your colleagues that you have disposed of these books since your wife's death, is that correct?

A. I may have had one or two, which colleague?

Q. Was Wendy aware of these books?

A. No reply.

Q. What was the purpose of these books?

A. Pause. Wendy and I used to read them in bed together of a night.

Q. Are you suggesting that your wife read these books?

A. Yes.

Q. Well why keep them at the office?

A. No reply."

Later during the interrogation the following passages occurred:-

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"Q. I believe that the trip to Hobart on the 9.11.82 was nothing more than to establish an alibi for your wife's murder. I believe that you conceived the plan to murder your wife sometime before you travelled to Hobart on the 9.11.82?

A. (Sobbed) No I didn't kill her.

Q. I also believe that after murdering your wife you fabricated a burglary by ransacking your home and interfering with your back-door lock?

A. No, no.

Q. That's when you started making mistakes - you're not a practical person?

A. I know I'm not. (Cried).

Q. You have no knowledge of how a burglary is committed?

A. No.

Q. Would you look at this photograph of your wife as she was discovered on the morning of the 10.11.82?

A. No, I won't look. (Photograph placed in front of him).

(The photograph in question was No. 2 of P.4).

.....

Accused: Is there any scientific evidence to prove that she died in her sleep?

Otley: No.

Accused: Can you explain the lack of blood?

Otley: I can't; that's something that worries me. The pathologist should be able to.

Accused: Can I have a glass of water? (Mr. Garratt went to get one). Michael, be patient with me. It's going to take some time yet. I didn't kill her."

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Otley: (giving evidence) "The interview room door has to be fixed ajar, and as Detective Garratt was doing that, the accused said: 'Can I speak to Bert and Bob please?' (Two detectives - my interpolation). I said: 'Certainly Randall.' Detective Senior Coad and Detective Hinds then came into the room, and Detective Garratt and I then left."

His Honour sets out in his written reasons the content of further passages of the interview, taken from Detective Hinds' evidence, which was confirmed by that of Detective Coad. The substance is as follows. Hinds, being outside the interview room, heard the appellant at about 4.05 p.m. say to Sergeant Otley and Detective Garratt, "Can I speak to Bert and Bob please?". When he heard that, he and Coad entered the room and Otley and Garratt left it. He then said to the appellant "How's things going now Randall?", and the appellant said "I'm getting there slowly". The appellant then said "I've got a lot of faith in you two fellows, will you tell me something?".....He said, "Do you think I murdered Wendy?". Hinds said "Yes", and the accused got up, walked backwards and forwards in the office, and said "I know you aren't fools, but you've got to understand that it's a big step for me to take to admit it. I want time to think, can I go to the toilet?" He was allowed to go to the toilet, down the passage, and was there for some time, until the police came and asked if he was alright. After rejoining them, the appellant produced a small pocket knife and said "You're not very safety conscious. I could have cut my wrists." He laughed when he said this. There was further conversation about the knife, and then appellant said: "Can you tell me one thing? Is there any scientific evidence to prove that Wendy was asleep when she was hit?" Hinds said "no". Coad said "Are you saying that you murdered Wendy?" The appellant said "Yes". Coad warned him, and said

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"Now do you wish to talk about it?" Appellant said "Yes, it will take a long time." He walked towards the window, turned around, and said: "Bob would you be so terribly offended if I spoke to Bert for a couple of minutes on his own?" Coad said "No", and left the office. The appellant walked up and down in the office, and then said "It's been the truth I told them, up to and including making the telephone call from Hobart. I did come home that night, because she said if I didn't come home to bed, she would get somebody else in to take my place. I came home. I parked the ute in Campbell Street. Your witness is wrong when he said he saw the car - the ute parked at the El Rio Service Station." He said "I let myself in the back door. I went into the bedroom. I saw the sash weight near the bed. I tried to talk to her. She wouldn't talk. I got into bed and sat there. I tried to talk to her again. She said: 'You just missed the fellow I had here. He's a jolly sight better lover than you.' With that, I grabbed the weight and hit her and kept on hitting her."

Detective Coad then came back into the room, and Hinds told him what appellant had said, which appellant confirmed. Coad said "Is that what happened Randall?" Appellant said "Yes, and you wouldn't believe how much better I feel already." He said "Can you tell me something?", and then: "Can you tell me why there wasn't more blood splattered about the room?" Coad said "I can, I believe, but I'll leave that to the pathologist." He said "Will you two interview me, I'd like you to." Hinds said "Detective Sergeant Otley is in charge of the investigation. He will interview you, I'll relate to him what you have told us." Hinds and Coad then left the office and spoke with Otley, and Hinds returned to the interview room with Otley.

The learned trial judge then dealt with various other matters to which some reference will be made later,

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including a dispute as to the period of time covered by the interviews. Apart from this time difference, the account of the oral confession given by the accused in his sworn evidence on the voir dire was in substance the same as that given by the police. The judge in his reasons dealt with these factors, saying that the "time shift" was crucial. He accepted the police account of this and rejected the appellant's account. As to the appellant's account, his Honour said:-

"The accused was also impressive at times, but at other times his evidence carried a strong suggestion of artifice, sometimes conscious, sometimes perhaps the product of rationalisation. On some matters such as the circumstances surrounding the taking of the photographs on 1st December 1982, I positively disbelieve him. There were, too, internal inconsistencies in the version which he gave. I do not mean to say there were contradictions, but the account was suspect to some degree because of the extravagant mood swings which he related. For example, his professed trust at the time of confession in those who had recently abused him was, at least, curious. But mood swings of this sort could conceivably, I suppose, be a feature of the accused's character. So one turns to the uniformed police.

.....

.....

All three were, in my opinion, honest and credible witnesses. But if the accused is correct they must have deliberately made false entries on the night of 30th November 1982 or shortly thereafter." (His Honour meant as to the times when various actions were taken up to the charging of the accused and placing of him in the cell). "For what reason? To confuse the accused? To shorten the apparent length of the interrogation which was, on any version of events, a long one? It was never suggested to them that they conferred with the C.I.B. or were instructed by the C.I.B. about their keeping of records. What purpose could they have for the actions attributed to them? I asked this question of Mr. Wright arguendo, and his answer was not, in my opinion, convincing. There is a surreal quality about the accused's version of events which in itself invites disbelief. Putting

together my assessment of the oral evidence with the documentary exhibits I am satisfied that the prosecution evidence as to times is correct. In reaching that conclusion, I have put to one side, because of the possibility of error in identification, Mr. Askeland's" (i.e. the appellant's father) "evidence that in the evening of 30th November a plain-clothes officer roughly answering Garratt's description, told him that his son had been charged.

It does not, of course, follow automatically that the other events to which the accused deposed did not occur during a shortened time span. But my rejection of his evidence affects his credit. In the examination of the evidence of oppression the internal inconsistencies in the accused's evidence are significant. The accused's version of the actual confession and the preliminary searching questions asked by him is in script, although not in actors, very close to that given by the Crown witnesses. The accused said that he confessed because he trusted Hinds and Coad. (He was on Christian name terms with them, as he was with Otley. He had known them for years). He said that just prior to the oral confession, and after suffering a long period of abuse from them, he told them that he was glad to hear that they had been "completely exonerated" of allegations of falsification of a signature to a record of interview "because I had always considered them to be decent chaps". He said he asked Bob Coad "...if he would be offended if I asked him to leave." He said he asked Hinds and Coad to interview him. He signed the interrogation register on which Inspector Archer recorded his comments that the record of interview was accurate and that the police had behaved as gentlemen. His attitude to Otley and Garratt on the next morning is indicated in the photographs, but there is also evidence of his joking with them in the police car. All of this material sits ill with his allegations of brutal psychological pressure from Otley and Garratt and of prolonged verbal abuse such as repeatedly being called "a cunt" by Hinds and Coad. On the other hand it sits well with the questions that he asked and with the police evidence that he asked Otley (Michael) to be patient with him, that he called in "Bob and Bert" (Coad and Hinds) and told them that he was "getting there slowly"; that he "had a lot of faith in you two fellows", that "you've got to understand it's a big step for me to take to admit it", that he went to the toilet for the avowed

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purpose of getting time to think, that he produced the knife in the way he said he did and so on. The slow and deliberate progress of the interviews gave him ample time to reflect on the advisability of confessing to those who had, as he said, so shamefully treated him. I reject his account of the interrogations."

.....

The learned trial judge further said:-

"I am satisfied that the confession was voluntary. Although the accused was closely confined for a long time, and the questioning in the latter stages was rough, the accused was at all times aware of his rights to refuse to go to the station unless arrested, to remain silent, to ask for legal representation, to ask to be released, or if charged, to be taken before a magistrate, but he did not choose to exercise those rights. He did not refuse to answer questions except in isolated cases where it suited him to do so. He was in my opinion confident and prepared to fence with his interrogators. It is true that the police agree that he sobbed at a crucial stage of the interrogation. Whether that was real or not I cannot say, but it was closely followed by the question from the accused "Is there any scientific evidence that she died in her sleep?" a question which indicates a free and searching mind. His subsequent confession to Hinds was, in my opinion, part of a conscious plan calculated to save what he could out of what he saw as an imminent wreck. The record of interview was only the fulfilment of that plan. There are no indications in either of a broken will or a mind undone. I express no opinion as to the truth of the confessions.

I am satisfied that it would not be, in any sense, unfair to him to allow the confessions to be given in evidence.

.....

I also dismiss the objection to the photographs." (This referred to certain photographs of the accused, taken by a police photographer, in the company of other police officers in and about his house on the morning after the confession had been made and the accused had been charged. The photographs depict the accused doing various things about the house, and apparently showing some things to the officers. These are my interpolations). "In my opinion, the

accused knew beforehand that he would be photographed, knew that he was being photographed, that the photographs would be used in evidence, and knew that he was under no obligation to take part in that process."

I now turn to the specific grounds of appeal. The first seven of the grounds which remain complain of the admission of confessional material into evidence. Grounds 1 and 2 have been abandoned. Ground 3 claims that the material concerning the pornographic books should not have been admitted into evidence because it was irrelevant and unfairly prejudicial. In my opinion this material was properly admitted. The nature of the sexual relationship between the appellant and his wife during the marriage was a proper subject for questioning by the interrogating officers, and once the appellant had made the confessional statements then the questions and answers concerning the sexual relationship became relevant to the issue whether or not the confessional evidence (assuming it should not be excluded for any evidentiary reason) would be accepted by the jury, and if accepted, what its significance was in relation to the issues of murder and manslaughter. That is to say, it was part of the overall evidentiary context which the jury were entitled to consider in deliberating upon the principal issues before them. See e.g. R. v. Tsingopolous (1964) V.R. 676. There is therefore no substance in ground 3.

Ground 4 is that the trial judge erred "in failing to appreciate that the evidence of Constable Canning and Inspector O'Garey was consistent with the accused's version of events of the evening of 30th November 1982."

This was a minor matter, and constitutes no more than an argument that the trial judge should not have accepted the police version concerning the "crucial" time difference on the evening of 30th November 1982. There is no substance in the ground, because there is no indication that the trial judge

did fail to appreciate that point; and in any event, as I shall say later, there was ample evidence to justify the trial judge's conclusions on these matters, and no adequate reason to disturb them.

Ground 5 reads -

"The learned trial judge erred in failing to appreciate that the duty books of Garratt, Hinds and Coad revealed significant entries and omissions which were inconsistent with the Crown case and were consistent with the accused's version of events of the evening of 30th November 1982."

His Honour's reasons for his findings on the voir dire indicate that he did not fail to appreciate these points, but as has been said in relation to ground 4, he had amply sufficient reason for rejecting the accused's version of events.

Ground 6 is that the trial judge erred in finding that Otley was not asked to produce his duty book. This matter is of no significance overall, and does not warrant detailed attention being paid to it.

Ground 7 alleges that the trial judge erred in finding that the appellant at all material times was aware of his rights to refuse to go to the police station unless arrested, to remain silent, to ask for legal representation, to ask to be released, or, if charged, to be taken before a magistrate.

Having regard to the professional background of the appellant, his maintaining his innocence and "putting on an act" in the face of police investigations for a period of some three weeks after the death of the deceased, and his admission to the cross-examiner that he had a reasonably good idea of the content of the Judges' Rules, his Honour's findings as embodied in ground 7 were amply justified. Any other finding I should

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have thought would have bordered on the unreasonable.

Ground 8 alleges that the trial judge erred in finding that the appellant knew beforehand that he would be photographed, was being photographed, that the photographs would be used in evidence, and that he was under no obligation to take part in that process. In my opinion there is ample material in Otley's cross-examination, in the appellant's evidence, and in the photographs themselves to justify the view that the appellant must have known that he was being photographed at his home on the morning after he was charged. The photographer was obviously quite close to him on a number of occasions when the photographs were taken. He is pointing out objects in a number of them, and his overall demeanour as shown by the photographs appears astonishingly casual and easy in his then circumstances. I would have thought there was no doubt he knew perfectly well he was being photographed, and of the significance of that process.

Ground 9 is that the judge erred in not withdrawing the confessional material from the jury in the light of "important inconsistencies between the evidence of Brush on the voir dire and that given by the same witness later in the trial, particularly as to entries made by him in the charge room register". This ground relates to what the learned trial judge described as the "time shift" - that is to say, the difference between police evidence that the accused was charged at 8.45 p.m. on the evening of 30th November, and the appellant's evidence that the interrogation continued from time to time throughout that night, and that he was not charged until 3.50 a.m. in the early hours of the next morning. The learned trial judge accepted the police evidence on this, as earlier recounted, and disbelieved the appellant's version. In my opinion the reasons which he gave for doing so are unassailable. He held that Inspector Archer, who conducted the

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interrogation book procedure, was an impressive witness, that Sergeant McMahon the officer of the watch, and Constable Brush, the charge room officer, were "honest and impressive", and (elsewhere in the reasons) that the three uniformed police witnesses, Archer, McMahon and Brush were "honest and credible witnesses". On the other hand, his Honour positively disbelieved the relevant evidence of the appellant. The great and irreplaceable advantage which a trial judge has in seeing and hearing witnesses in order to judge their credibility is just as important in respect of the result of a voir dire as it is in the ordinary course of a trial. It is a matter of the inherent advantage of an observer and auditor over one who reads the printed page.

But in addition, an appraisal of the probabilities involved makes it virtually impossible to believe the appellant's account of the time at which he was charged. No less than seven police witnesses gave relevant evidence - O'Garey, Otley, Coad, Hinds, Archer, McMahon and Brush. Entries of a sequential nature, dispersed with other entries not related to the appellant, were made in the watch house register and the charge book. These corroborate the police version. For example, entry No. 276 in the charge book, relating to the appellant, states the time of being charged at 8.45 p.m. Bag No. 4 is entered by Constable Brush as having been used for disposal of the appellant's property. The following entry, No. 277, is dated 30th November at 9.15p.m., and entry No. 278 at 10.00p.m. No property apparently was detained from the person the subject of entry No. 277, but bag No. 5 was used for the subject of entry No. 278. That is to say, the prima facie appearance of these entries is sequential in the manner one would expect. So also with Sergeant McMahon's watch house register. The entry relating to the appellant is No. 188 on page 21, the time is stated to be 8.45 p.m., the next entry is at 9.00 p.m., and so on. Also, the appellant signed two documents which contain a

time consistent with the police evidence; namely the record of interview and the interrogation register form completed by Inspector Archer.

To accept the appellant's proposition that he was not charged until 3.50 a.m. would require the supposition that police witnesses who had unrelated parts in the investigation and the resulting procedures colluded so as to shorten the apparent time span of the investigation, and in order to support their collusion signed incorrect entries as to time in relevant documents in such a way as to maintain the sequential nature of the entries in relation to other persons being charged. What could be the motive? It could only have been, in order to forestall the possibility of an objection being made at the trial to the admissibility of confessional statements on the ground that the interrogation was overlong and oppressive. Such a theory is so preposterous as to be incredible. There is no substance in ground 9.

Overall, I have no doubt that the trial judge was right in ruling the confessional material to be admissible. In the end, the reasons which his Honour himself gave are wholly persuasive.

Most of the remaining grounds of appeal relate to an alleged erroneous direction in law concerning provocation reducing murder to manslaughter. The substance of his Honour's directions in respect of provocation occurs in the following passage:-

"Provocation is the actual deprivation of the power of self-control caused by an insult which is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. Now, there are four propositions there. The first is that provocation is not made out - I am sorry - I will change that - provocation does

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not exist unless there is an insult proffered. That is the first thing, there must be an insult proffered. Secondly, that insult must be one which would be sufficient in the circumstances as you find them, to deprive an ordinary person, placed as the accused was, of the power of self-control. Now "ordinary person" means exactly that - an ordinary person. Not a person who is irrationally or insanely jealous, not a person who is eccentric, but an ordinary person like one of you, placed as the accused was though, in all the circumstances in which he found himself. So the question there is whether there was an insult which in the circumstances as you find them, and in the circumstances in which you find the accused to have been, that insult was one which would be sufficient to deprive an ordinary person of the power of self-control. That is to say, not one which would - not merely one which would enrage him, but one which would so enrage him that he would be unable to control the impulse to strike out in the way that he did. Do you understand that? The third proposition involved in that definition is this: the insult, if any, which you find was proffered by the deceased to the accused, did in fact deprive the accused of self-control - that is what is meant by actual deprivation of the power of self-control. So it has to be an insult, an insult which in all the circumstances, as you find them, would deprive an ordinary person of the power of self-control, and which did in fact deprive the accused of the power of self-control. And the fourth proposition is in the next paragraph in the memorandum - struck in the heat of passion - and that means struck on the sudden in a passion caused by the insult before there is time for the actor's passion to cool."

In my opinion, that direction was not erroneous in law, but I shall proceed to deal with each of the complaints made about it.

Grounds 10, 11 and 15 are linked.

They are as follows.

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- "10 The learned trial judge misdirected the jury as to provocation by telling them that provocation could only have the effect of reducing murder to manslaughter if the insult allegedly offered by the deceased to the accused would cause an ordinary man to strike out in the way in which the accused did."
- "11 The learned trial judge should have directed the jury that if an insult offered by the deceased to the accused was sufficient to deprive an ordinary person of the power of self-control whether or not such ordinary person would have reacted thereupon to the same extent as the accused reacted, this was sufficient in law to satisfy the threshold test of provocation."
- "15 The learned trial judge should have directed the jury that in assessing the likely reaction of an ordinary man to the insults offered to the accused by the deceased they should envisage an ordinary man having the same physical attributes and personal characteristics, history and experiences as the accused except insofar as such characteristics consisted of idiosyncratic mental or behavioural responses."

I desire to say, first, that I agree with what was said by Nettlefold J. and Cosgrove J. in their separate judgments in Jeffrey v. The Queen, so far unreported, Serial No. 85/1982, regarding the law in Tasmania of provocation reducing murder to manslaughter. Each of those judgments specifically holds that the law as stated by the House of Lords in D.P.F. v. Camplin (1978) A.C. 705 is inapplicable to the law of provocation in Tasmania under the Criminal Code. I agree, for the reasons which their Honours give.

It seems to me that the direction by the learned trial judge in the present case was in accordance with his exposition of the law in Jeffrey's case, with which I have just indicated

my respectful agreement. I do not think his Honour meant to instruct the jury, nor would they have so understood, that they must be satisfied that the wrongful act or insult would necessarily have deprived any ordinary man of the power of self-control. His Honour repeated a number of times the words of the Code, "sufficient to deprive an ordinary person of the power of self-control". There can be no better guide than the words themselves. "Sufficient to" means what it says - "enough to" deprive an ordinary person of the power of self-control. That is to say, it is obvious commonsense that ordinary persons are likely to react differently to a specific wrongful act or insult, and many ordinary persons would not in fact be deprived of the power of self-control by a wrongful act or insult which would be "sufficient" so to deprive an ordinary person - see my own judgment in the unreported case, Kearnan v. The Queen C.C.A., Serial No. 80/1968; and also "The Objective Test in Provocation" (1983) Crim.L.J. Vol. 7, No.3, p.142. The learned trial judge in the present case directed the jury in terms of the sufficiency of the wrongful act or insult to deprive an ordinary person of the power of self-control, in terms which were in no way at variance with the law as laid down by the High Court of Australia in Packett v. The King (1937) 58 C.L.R., 190; or with the manner in which the law was expressed by, for example, Barwick C.J. in Johnson and Anor. v. R. (1977) 136 C.L.R., 619.

Ground 12 has been abandoned. Ground 13 complains that the trial judge erred in directing the jury that any insult which the deceased had offered to the appellant during the telephone conversation which took place whilst he was at the Town House in Hobart and the deceased was in Launceston could not in law be regarded as provocative conduct capable of reducing murder to manslaughter. It being a question of law whether particular conduct was capable of amounting to provocation within the meaning of the Code (Packett v. The King (*supra*); Johnson and Anor. v. R. (*supra*); Bedelph v.

The Queen (unreported) Serial No. 7/1980 C.C.A.), the learned judge rightly in my view directed the jury that nothing said by the deceased during that telephone conversation was capable of amounting to provocation. I should have had grave doubts whether any of the alleged statements by the deceased were capable of amounting to provocation in law, but the Crown conceded that taken as a whole they were, and accordingly I am prepared to accept that view. However, I have no doubt that the deceased's alleged statements during the telephone call while the appellant was in the Town House at Hobart were insufficient to deprive an ordinary person of the power of self-control, and no reasonable jury could have held otherwise.

Ground 14 claims that the trial judge should have directed the jury that any such insult (meaning what the deceased had said during the telephone conversation referred to in ground 13), coupled with the deceased's remarks immediately prior to the accused striking the fatal blows, were together capable of constituting one provocative episode. This ground is not persuasive because the learned trial judge did in substance instruct the jury according to that view. The jury were instructed that they were entitled to take into account the Hobart telephone conversation as part of the web of facts and circumstances in which the appellant found himself when the crucial conversation took place in the bedroom at Launceston. That was a correct way to put the matter, in my opinion. The position, in summary, was that the Hobart conversation could not of itself have been sufficient to deprive an ordinary person of the power of self-control, but it was one of the relevant circumstances which the jury were entitled to take into account in deciding whether the statements made in the bedroom were so sufficient, and whether the other requirements for provocation reducing murder to manslaughter were satisfied.

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Ground 16 relates to absence of evidence of motive.
It reads:-

"The learned trial judge failed to adequately direct the jury as to the danger of convicting the accused of murder in the absence of evidence of motive or reason for the accused to strike his wife except as the result of such provocation as claimed by him to have been offered."

The rule of law as stated by s.13(4) of the Criminal Code is that, "except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial." Therefore, failure on the part of the trial judge to direct the jury "adequately" as to absence of motive could not be an error of law. It could only be an omission to make an observation upon the evidence, within the provision of s.371(j) of the Code. Omission to make an observation upon a particular matter of evidence could rarely provide a successful ground of appeal. The fact that evidence of motive is admissible evidence generally against the accused in a criminal prosecution does not mean that the trial judge is required to remind the jury where there is absence of such evidence. Whether it is desirable to do so must depend upon the circumstances - see Plomp v. The Queen (1963) 110 C.L.R., 234, per Menzies J. at 247 ff. Nor is it incumbent upon a trial judge to direct the jury that it is dangerous to convict in the absence of evidence of motive, or to give any like direction. It is an obvious proposition of fact that in many cases there may be a motive, and perhaps a strong one, but no evidence of it available. The learned trial judge did in the present case remind the jury that there was no evidence of motive, but even if he had not there would have been no omission amounting to misdirection.

Finally the court is required to consider the application by the appellant for a new trial on the ground of the availability of fresh evidence which was not available at the time of trial. The new evidence is contained in four affidavits, all of which relate to the disputed question of

fact whether the appellant was charged at about 8.45 p.m. or at approximately 3.50 a.m. on the following morning. This is the matter referred to in detail earlier. The affidavits are as follows:-

1. By a former handwriting expert with the Tasmania Police Force, Mr. Donald Graham Murray, who deposes that he is now the only civilian handwriting expert in practice in Tasmania. His affidavit relates to the conflict in the evidence of Constable Brush, the charge room officer, which emerged during the voir dire, as to whether he had written the time, "8.45" in entry No. 276 in the charge book at Launceston Police Station. This notation referred to the time at which the charge of murder was made against the appellant on 30th November 1982. Constable Brush said, or inferred, in evidence on the voir dire that Sergeant Otley had written in the entry "8.45" and had crossed out "a.m." to indicate the time of arrest at 8.45 p.m. At that stage of the voir dire he identified other handwriting on the left hand page of the entry as his handwriting, saying that all that on the right hand page of the entry had been made by Sergeant Otley. Later in the voir dire, however, he said that in fact he had made the entry "8.45". He was cross-examined about the matter, counsel suggesting to him that Sergeant Otley and not he had made the time entry. However, at that stage the trial judge indicated that the question of who had written the time entry, Brush or Otley, would not affect his mind on the issue of voluntariness of the confession, and counsel thereafter desisted from the cross-examination. The substance of Mr. Murray's affidavit is that, although he was given no information as to the identity of "subject A" and subject B", a comparison of the hand-

writing of those persons (who, it is clear, were Constable Brush and Sergeant Otley), led him to form the opinion that the time entry "8.45" was written by "subject B" - i.e., Sergeant Otley.

2. An affidavit by Mr. Rex Allen Stanley of Launceston, who deposes that he was employed as a sub-editor on "The Examiner" newspaper on the evening of 30th November 1982. He states that on the evening of 30th November 1982 the chief sub-editor of that newspaper had been waiting to hear from a cadet journalist, Mr. Tony Richman, whether the police had charged "the 36 year old man" who according to news reports had been taken to the police headquarters earlier that day. Some time between 9.15 p.m. and 9.45 p.m. he walked with Mr. Richman to the Launceston police headquarters and there spoke to Detective Inspector O'Garey. From recollection he believes he asked the Inspector whether a charge had been laid in the Askeland case. O'Garey, he said, did not give a direct answer, "but gave me the impression that enquiries were incomplete". He received the impression that a charge had not been laid but was likely to be laid against "the 36 year old man" (i.e., the appellant) before "The Examiner" newspaper was on the streets next morning. However, the deponent also says in the affidavit that a news report published in "The Examiner" edition of 1st December 1982 states that a man was charged in the present case "about 9.30 p.m.", and he says "I am not a person who would add such information without some basis of fact".

3. Mr. Tony Edward Richman, a student, deposes that in November 1982 he was employed by "The Examiner" newspaper as a cadet journalist. He recalls accompanying Mr. Rex Allen Stanley to the Launceston police headquarters as stated in Mr. Stanley's affidavit, but does not have a clear recollection of the conversation at police head-

quarters nor any notes of it. However, he says that he has no reason to disagree with Mr. Stanley's recollection.

4. Mr. Phillip W.E. Smith, a solicitor, deposes that he, being instructing solicitor for the appellant in relation to his appeal, and appearing as junior counsel for the appellant at his trial, did during the trial after the above-mentioned evidence had been given by Constable Brush attempt to secure the services of a handwriting expert to examine entry No. 276 in the charge room register. He learned of the existence of Mr. Murray as a handwriting expert, but was given to understand that he was suffering severe ill-health and was unable to work as a document examiner at that time. (Mr. Murray deposes in his affidavit that that was so). Mr. Smith states that as according to his enquiries Mr. Murray was generally regarded as the only handwriting expert available, it had not been possible to have a handwriting examination made of entry No. 276 during the trial. Mr. Smith also deposes that during the course of the trial extensive enquiries were made of all persons known to have been in the vicinity of the police station on the night of 30th November, but that as a result of those enquiries no knowledge was obtained relative to the matters referred to in the affidavits of Messrs. Stanley and Richman.

The Court of Criminal Appeal has full power under s.409(1) of the Criminal Code to receive new evidence, and no restrictions are placed by Chapter XLVI upon the court's power in that respect. Nevertheless, the circumstances and conditions under which this court will receive new evidence have for many years past been treated as subject to the rules as to credibility and cogency. The High Court of Australia in two recent cases, Ratten v. The Queen (1974) 131 C.L.R., 510, and Lawless v. The Queen (1978-79) 142 C.L.R., 659, has added substantially to exposition of the law on that subject. The principal judgment is that of Barwick C.J. in Ratten v. The Queen (supra), with which judgment McTiernan, Stephen and Jacobs JJ. agreed. The learned Chief Justice dealt with the matter of admission of fresh evidence at substantial length,

but a relevant passage for the purpose of the present application is as follows:-

" 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 be found if that new material is not fresh evidence. But if there is fresh evidence which in the court's view is properly capable of acceptance and likely to be accepted by a jury, and which is so cogent in the opinion of the court that, being believed, it is likely to produce a different verdict, a new trial will be ordered as a remedy for the miscarriage which has occurred because of the absence at the trial of the fresh evidence." (ibid. at p. 520).

His Honour had earlier defined the expression "fresh evidence", used in that context, as meaning "in the sense that it was not or could not have been available at the time of the trial". (ibid. at p. 518).

In order to understand the law as expounded by the learned Chief Justice it is necessary to study carefully the whole of his judgment, but in the later case of Lawless v. The Queen, ibid., we have the advantage of a summary of the law from Ratten's case, by Stephen J. and Mason J., in separate judgments. Stephen J. first cited the well known passage from the judgment of Rich and Dixon JJ. in Craig v. The King (1933) 49 C.L.R., 429 at p.439, which reads as follows:-

"The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be

calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced."

Stephen J. then proceeds,

"In Ratten the Chief Justice states the matter in more detail; he not only describes what must be the result of considering the fresh evidence, together with the original evidence, if the omission of the former from the evidence given at the trial is to be held to involve a miscarriage: he also describes the process involved in that consideration ((1974) 131 C.L.R. at p. 519). However, his description of the result which the evidence must be likely to produce is no different; it must be such that 'when the fresh evidence, if believed by the jury, is taken with the evidence given at the trial in that sense most favourable to the accused which reasonable men might properly accept it is likely that a verdict of guilty would not have been returned.' Again ((1974) 131 C.L.R. at p. 520) his Honour speaks of fresh evidence as being such that, when viewed together with the general body of trial evidence, it will be 'likely to produce a different verdict'. The Chief Justice also points out ((1974) 131 C.L.R. at p. 519) that in considering whether the inclusion of particular fresh evidence would be likely to produce this result, 'it is what a reasonable jury might reasonably make of this evidence which is the dominant consideration'.

In my view this is all clear enough. The Court of Criminal Appeal looks at the whole body of evidence including the fresh evidence; it bears in mind that the jury did convict the appellant and from that may gain some insight into the view which, in the absence of the fresh evidence, the jury in fact took of certain of the original evidence; it then considers what effect the introduction of fresh evidence would, in all the circumstances of the case, have upon the mind of a jury having regard to its relevance, to its credibility and to what may be described as its cogency, weight or power of persuasion. Relevance will no doubt be a relatively clear-cut issue; credibility (or plausibility, as it was called by their Honours in Craig v. The King and cogency will often be very much matters of degree. For example, credibility will not simply be a question of the subjective truthfulness of the witness who gives the fresh evidence (assuming it to be oral evidence); it will also depend upon that witness's

accuracy of recollection, keenness of powers of observation and recall, ability to express with precision that which is recalled, and so on; in short, it involves all those factors which go to determine the degree of acceptance of a witness's evidence. Then, again, any conflict which exists between the fresh evidence and the original evidence will have to be weighed in determining credibility. These are, of course, no more than some of the more obvious of those considerations which commonly arise in the daily judicial task of assessing evidence. I mention them only to stress the many factors that will intrude between a first identification of particular evidence as fresh evidence and the ultimate conclusion as to whether or not it is of such a kind that its omission from the trial process has resulted in a miscarriage." (ibid. at pp. 670-1).

Mason J. summarised the law from Ratten's case in similar terms in a lengthy passage.

I have no doubt that according to the principles laid down by the High Court in those cases, the application by the appellant for a new trial on this ground should be refused. There is no need to hear the evidence and consider its credibility, because the application may be decided upon the basis of an assumption that it is such as to be believed. In my view, leaving aside Mr. Smith's affidavit, the affidavits by the other three deponents have little cogency and would be most unlikely to affect the result of the trial. In particular, the question here is whether upon a re-trial the production of this evidence, considered along with the other relevant evidence, would be likely to affect the mind of the trial judge so as to cause him to hold the confessional evidence from the appellant to be inadmissible, or to reject it in the exercise of a discretion. Notwithstanding that the appellant in fact gave evidence admitting that he had struck the blows which killed the deceased, if a miscarriage of justice occurred by reason of the confessional evidence being wrongly admitted he would be entitled to a new trial. The

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fact that the question of fresh evidence here relates to the voir dire issue is immaterial. The rules remain the same in principle. That is to say, it is a question whether the fresh evidence is so cogent that, being believed, it would be likely to produce a different verdict.

The proposed evidence does not begin to meet that standard. Mr. Murray's evidence would tend to show only that Constable Brush did not make the time entry, "8.45" on the top right hand corner of entry No. 276 in the charge book. I agree with the learned trial judge that it is virtually immaterial whether Brush made that entry or not. It is clear that even if he thought Brush had not made the entry, his Honour would still have found that he was an "honest and credible" witness, and his finding as to Brush's credibility cannot be disturbed.

Mr. Stanley's affidavit (Mr. Richman's affidavit is merely confirmatory of it) has little if any cogency for the purpose of disturbing the finding that the appellant was charged at about 8.45 p.m. Mr. Stanley agrees that the fact that his newspaper next day published a report that the appellant had been charged at 9.30 p.m. belies the impression he received. In any event, if the fullest effect be given to the contents of Mr. Stanley's affidavit, it would have little persuasive effect as against the considerations mentioned earlier concerning the time factor. Having regard to those conclusions, Mr. Smith's affidavit becomes immaterial.

The appeal should be dismissed.

Serial No. 59/1983

List "A"

RANDALL LUDLOW ASKELAND v. THE QUEEN

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL:

NETTLEFOLD J.

3rd November 1983

I have read the reasons for judgment of my learned brother Neasey J. I agree with them and do not wish to add anything.

Serial No. 59/1983

List "A"

RANDALL LUDLOW ASKELAND v. THE QUEEN

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL:

EVERETT J.

3rd November 1983

I have considered in draft form the reasons for judgment of the President of the Court (Mr. Justice Neasey). I completely agree with them and with the order proposed by his Honour.