[2012] HCATrans 213

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Hobart

No H3 of 2012

B e t w e e n -

SUSAN BLYTH NEILL-FRASER

Applicant

and

THE STATE OF TASMANIA

Respondent

Application for special leave to appeal

FRENCH CJ
CRENNAN J

TRANSCRIPT OF PROCEEDINGS

FROM CANBERRA BY VIDEOLINK TO HOBART

ON FRIDAY, 7 SEPTEMBER 2012, AT 11.47 AM

MR M.J. CROUCHER, SC: May it please the Court, I appear with my learned friend, **MS K. CUTHBERTSON**, on behalf of the applicant. (instructed by Madeleine Ogilvie & Co Lawyers)

MR T.J. ELLIS, SC: I appear with my learned friend, **MR J.R. SHAPIRO**, for the respondent. (instructed by Director of Public Prosecutions (Tas))

FRENCH CJ: Yes, Mr Croucher.

MR CROUCHER: Your Honours, the special leave questions in this matter concern the appropriate tests to be applied by a trial judge upon considering an application that a witness be recalled and, in turn, how a Court of Criminal Appeal deals with a refusal thereof.

FRENCH CJ: What precisely was the application and what was the power under what was sought was to be made?

MR CROUCHER: It is fair to say that the application was not perfectly clear in that regard, but it seemed that, by one means or another, he was applying firstly for leave that the witness be allowed to be recalled because, of course, the witness had to be excused, or was excused.

FRENCH CJ: The witness was a prosecution witness. She had been cross-examined by defence counsel, I think re-examined and then released.

CRENNAN J: Who was getting the leave?

MR CROUCHER: That is a difficult question, I think, in the circumstances, your Honour, but in the end, in our respectful submission, it does not matter. What matters in the end is that his Honour made it clear that he would not allow the witness to be recalled in the circumstances.

CRENNAN J: The purpose of the recall was for cross-examination on the inconsistencies revealed by the subsequent evidence, evidence subsequent to her giving of evidence; is that right?

MR CROUCHER: Indeed. That is what it was about. In our respectful submission, where the Court of Criminal Appeal went wrong such that it was simply a manifestly wrong decision, putting aside the matters of principle I will come to in a moment, was, firstly – and this is at application book page 218; it is set out in paragraph 93 of the judgment of the Court of Criminal Appeal – where his Honour said that, as far as he was concerned, it seemed that what the witness was doing on the night of 26 January seems to be peripheral when her version of events unshakably, says his Honour, was that she was not on the boat or anywhere near anywhere like that and

that ultimately, he said, there is no realistic prospect of it making any difference if she were recalled.

The Court of Criminal Appeal effectively agreed in that view at paragraph 100 of the Chief Justice's reasons. But the fact of the matter is it was crucial. The Crown's case was that she murdered the deceased. The applicant's case was that she was not involved and she gave sworn evidence to that effect. The Crown case also, as part of that case, was that she had falsely put in her diary that there was some sort of break-in or unlawful entry to the yacht on 10 January, suggesting, of course, previous unlawful entries and therefore giving rise to the possibility something has gone wrong on this occasion.

That was said to have been a lie told to the police in order to put them off the trail – to lay a false trail, effectively. So that the fact that DNA of this witness was found on the yacht, on the walkway, was a very important consideration in the first instance because it pointed to a hypothesis consistent with her innocence, namely, that someone else was involved, or at the very least someone else had been involved in an unauthorised entry.

CRENNAN J: What was the expert evidence about the DNA?

MR CROUCHER: The expert evidence was that it could have got there by either transference or, of course, by the usual way, the more probable way. Now, of course, the expert said I cannot assign probabilities to these things, but again having regard to the burden of standard of proof even on that evidence, which it was a bit surprising given the way DNA is usually relied on by the prosecution, there is still the hypothesis consistent with innocence that it was deposited there by the girl's presence.

FRENCH CJ: Now, that was all evidence given before she was called.

MR CROUCHER: No. The DNA evidence was given after she was called. But the importance was that, of course, the witness who had declined to make a written statement to the police and declined to be interviewed was called cold on a *Basha* inquiry in order to see what she had to say and then gave evidence. The essence of her evidence was: no, I have never been on that yacht, nor have I been in these areas where the yacht might have been around that time or subsequently. She also gave two different versions of her address at that time. To be fair to her, she also said, "Look, you know, I was homeless and I'm not quite sure".

CRENNAN J: Did she not also say, "Look, I'm sorry, I just don't remember" several times?

MR CROUCHER: She did. That is true enough, but none of that changes the fact that subsequently for the first time it is learnt in the course of the evidence of Detective Sinnitt that he has information that not only was she not at either of those addresses that were mentioned but rather at the relevant time she was supposed to be residing at a place called Mara House.

Secondly - and this is around the relevant time – on the particular night in question that she had asked to go and stay, or said that she was going to stay elsewhere at an address in Onslow Place in Mount Nelson. Thirdly, she was asked to give a phone call when she got there to let the people at Mara House know of the telephone number; she never did that. Fourthly, it was subsequently discovered after the application to recall that Detective Sinnitt made inquiries and discovered that that address just did not exist.

Armed with that information, that would have been very powerful information to put to the witness to explain, or to ask her, "Well, what were you doing? What were your whereabouts?" because, you see, the hypothesis being a hypothesis in favour of the accused, namely, that at least at some point she was on the yacht – that was very important – and to the extent that she had denied it, well, her credit in making that denial would have been affected by the further cross-examination of her upon realising this new information.

FRENCH CJ: I am sorry, I put a question to you before which was based on a wrong premise. Counsel for the defence was aware of the nature of the DNA evidence before he cross-examined her because he made some reference to that.

MR CROUCHER: Yes.

FRENCH CJ: Yes. What is new is the material that comes out of - - -

MR CROUCHER: Detective Sinnitt.

FRENCH CJ: And the folder. Yes.

MR CROUCHER: Yes. That had never been seen before by the defence. Of course, you will remember the order of things is Ms Vass gives her evidence then the DNA expert and then Detective Sinnitt and in the middle of that evidence it is discovered that he has this further information, the matter is stood down, the file is examined and then counsel says, "Well, I now apply to have your Honour recall her", or whatever that application was.

CRENNAN J: The Chief Justice's point is an important one, though, is it not, in the context of the Chief Justice below taking a view that questions could have been put to Ms Vass but she was asked very, very few questions. Defence counsel was in a position to put further questions to her.

MR CROUCHER: But he was not armed with this further information that showed, on another view of things, her true whereabouts, which were different from those which she had told the jury and to the extent that that further cross-examination would have affected her credit and therefore her denial of ever being on the boat that was very, very powerful information relevant to the applicant's defence, both the defence proper and to rebutting the Crown's submission or assertion that she had somehow bodgied up her diary and sought to lay a false trail by putting in an intrusion on 10 January.

CRENNAN J: Having regard to the fact she gave evidence she had no real memory of her whereabouts at the time, how is the cross-examination really going to go beyond credit issues?

MR CROUCHER: But it is enough that it goes to credit. That is the point, your Honour, though. It is enough that it goes to credit – to her credit – because you start from the premise that the Crown has the onus of proof to the criminal standard. Her defence was, "Not me". It must be someone else, therefore, because the man is missing. This DNA turns up which suggests someone else has been there. This person comes along and says, "Well, I've never been there. In fact, I was living at this particular place".

CRENNAN J: She says, "I can't really remember my whereabouts at the relevant time".

MR CROUCHER: No, but we then learn, though – the information from Mara House says that she was at a different place, what is more, that she asked to be at yet a different place again on that night in circumstances which were, in our respectful submission, at least suspicious and warranting inquiry of the witness as to what she was doing. Her memory may well have been jogged upon this information being put to her. The other thing that happened, as well, was that the - - -

CRENNAN J: There was a lot of evidence, was there not, about seacocks and pipes being cut and whoever scuttled the boat must have had intimate knowledge of - - -

MR CROUCHER: There was that evidence, but that is not in issue, your Honour. That is just part of the circumstantial case. The point I was just about to make was that all of that evidence which came from Detective Sinnitt before the jury about her movements that he had

discovered from speaking to the people at Mara House, in the end the judge told the jury, "You can't take any regard - - -

CRENNAN J: It was ruled inadmissible at a certain point, was it not?

MR CROUCHER: Yes, on the basis of hearsay. Therefore, the only way in which it could be rendered admissible, that information, was to ask the girl herself and say, "Where were you? We have information that suggests you were here and that you went and did this. What do you say about these things?" That then leads to an argument that undermines her credit and, therefore, undermines her denial that she was ever there in the first place. This is not a civil case. This is a criminal case, which is a purely circumstantial case, where her defence was it is not me. It was very powerful in the running of a trial to have been able to put that material to her, and ought to have been.

FRENCH CJ: Is your complaint able to be elevated above the level of a complaint about the trial judge's exercise of a discretion?

MR CROUCHER: Yes.

FRENCH CJ: How?

MR CROUCHER: Because what happened in the end was the Court of Criminal Appeal simply applied the wrong tests in any event, as did the trial judge. The proper test is that which is spelt out on pages 322 to 323 of the application book. In paragraph 25 we have extracted a passage from the judgment of Justice Hunt in *Fleming* where his Honour says:

> Just as, in a civil case, a judge should always exercise his discretion to grant an amendment – no matter how negligent or careless the party had been who seeks it – unless there is created prejudice which cannot be cured by an order for costs …, **so, generally speaking, should a judge always accede to a request to have a witness recalled for cross-examination upon a point of substance which has been overlooked – however incompetently – unless real and incurable prejudice is created for the party calling the witness. The attitude should be the same where something arises for the first time at a stage of the trial after the witness has given evidence.**

This case; plainly this case. Now, neither the trial judge nor the Court of Criminal Appeal adverted to that correct statement of principle. Rather, the Court of Criminal Appeal applied the wrong tests and, in consequence, came to the wrong conclusions and made the wrong orders.

FRENCH CJ: Can you take us to the passage where the Court of Criminal Appeal you say applied the test, or the wrong test?

MR CROUCHER: Indeed; in Chief Justice Crawford's judgment at page 219 of the application book, at paragraph 97 and 102. In paragraph 97 - - -

FRENCH CJ: I think we have got a numbering issue. There is paragraph 96.

MR CROUCHER: I am sorry; I said 219. It is page 279 of the application book.

FRENCH CJ: Yes, I have that and it is paragraph 97?

MR CROUCHER: Paragraph 97. You will see in the middle of the paragraph there his Honour refers to *Apostilides* at page 575 and says:

> the High Court held that a decision by a prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

I should stop there, to be fair to his Honour. That is correct, with respect, but then his Honour goes on:

> At 577 – 578, the court said that the central question becomes whether in all the circumstances, the verdict is unsafe or unsatisfactory. Therefore, it becomes necessary to focus on the objective consequences that the failure to call the witness, or in this case the failure to recall the witness, has had on the course of the trial and its outcome.

He cites *Walsh* at paragraph 69. In *Walsh* precisely the same error is made. In *Walsh*, which is in the joint materials at page 187 of that book of materials, in paragraph 69 of the judgment in *Walsh*, which of course was a different case, but nevertheless in the second-half of that paragraph there is a reference to *Apostilides*. Then in the last sentence:

> The critical question is not whether the prosecutor's decision not to call a witness was erroneous or constitutes misconduct, but whether in all the circumstances the verdict is unsafe or unsatisfactory –

With the greatest respect, that is simply wrong. Where the error arises or how it came about, it seems, is that there is a reference in *Apostilides* to that

notion, but what that was about was simply a reference to the court's earlier decision in *Whitehorn* where the absence of evidence from the complainant in that case, whom the Crown had declined to call in a sexual assault case, was the basic reason, in light of such evidence as was called, for the conclusion that the verdict was unsafe and unsatisfactory so, in the *M v The Queen* sense, a completely different issue.

FRENCH CJ: Just going back to his Honour's ruling at 54, he is deciding it on the basis which would seem to be informing the exercise of a discretion that what she is likely to be able to contribute if recalled does not merit the making of a direction that she be recalled.

MR CROUCHER: Well, it is true enough that his Honour does, but we say he is manifestly wrong.

FRENCH CJ: Well, you say that he is wrong in his characterisation?

MR CROUCHER: Yes, that is right.

FRENCH CJ: That is, the significance of her evidence?

MR CROUCHER: Indeed. Secondly, he is wrong in that he fails to advert to the point that I made before that, having only just previously in the order of things in considering this application ruled that it was now hearsay what Detective Sinnitt had said, there was no longer any admissible evidence before the jury as to her movements at that time. As I say, the only way that could get before the jury, realistically speaking, was to ask the witness herself and he was denied that chance.

CRENNAN J: It is put against you in the respondent's submissions that you have not proffered any reason why Ms Vass could not have been recalled by the applicant and leave sought to cross-examine.

MR CROUCHER: Yes, that is said and that is not a submission which should be accepted, with respect. The fact of the matter is *Apostilides* is a case like that itself. *Armstrong* in the Victorian Court of Appeal is the same sort of thing. It is no answer to say that when the Crown had a duty to call someone that the defence could have done it themselves. That is the first point. But the second point is that what his Honour the learned trial judge was doing was considering it in the broad. He was saying this witness is not allowed to be recalled. That is what he was saying. It would have been in defiance of his Honour's ruling for defence counsel to have then sought to have called the witness.

CRENNAN J: But he has clearly got in mind whether the evidence sought to be led is likely to affect a jury verdict.

MR CROUCHER: That is true enough but, with respect, he was simply wrong in that regard for the reasons I have already put.

CRENNAN J: You have put those reasons about the significance of the cross-examination on credit in all the circumstances of this case.

MR CROUCHER: Yes. If the jury believed that she was in fact lying or could not exclude the possibility that she was lying about her whereabouts and were very suspicious about her movement from the shelter to an unidentified person's place where she was supposed to ring and advise that she was staying and she never did, and it turns out that that place is false, it is very powerful in the jury's mind to think, well, she may well be lying because she is trying to cover up in fact where she was on that night. That is the very sort of reasoning that is used against an accused person every day of the week in criminal trials, to say that there is a consciousness of guilt, you are not telling us the truth about your whereabouts because to reveal the truth would implicate you in the crime.

Well, the jury is allowed to think the same way about a witness, particularly in circumstances where a DNA is found on the boat, unexplained, in circumstances where she does not dispute that she is in the vicinity generally of the town, of Hobart, on the night, and subsequent material shows that in fact she was supposed to be going to a place called Mount Nelson which is just near Sandy Bay – very, very powerful information – and defence counsel and therefore the applicant were shut out from developing this. It is no answer to say - - -

CRENNAN J: There were some strong aspects of the circumstantial case, were there not, not only the evidence about the scuffling, but evidence in relation to a female figure being in a dinghy about the relevant time, evidence about – as I understood it anyway – the applicant having a conversation with another person about somehow dealing with her brother on a very similar basis?

MR CROUCHER: Ten years earlier – hotly disputed, your Honour. The point was taken in the Court of Appeal that that should not have been admitted, but it was not thought to be a special leave point. That is why it is not taken here. If this were a visitation case, I would be taking it, your Honour. It was in the end but a circumstantial case. That is why it was so important, when there is DNA there, that defence counsel be allowed to exploit that issue fully armed with the knowledge of what the policeman knew about it but did not notice until after she had given evidence – very unfair. It could well have affected very much the way he went about the case and the way in which the jury reasoned. Our learned

friend refers to cases like *Hellicar* as being against the applicant but that, with respect, is misplaced. That was a case - - -

FRENCH CJ: That had to do with a duty to call a particular witness.

MR CROUCHER: Yes. It was a civil case, not a criminal case. There was a complete failure in *Hellicar* to point to what might have been said. Here we know what the issues are that could have been raised because there is other evidence about it. As well, there was a misplaced reliance by the Court of Criminal Appeal on fresh evidence principles. In that regard it is like *Grey v The Queen* where this Court set aside the New South Wales Court of Criminal Appeal's orders in circumstances where a fresh evidence test was applied when it was a failure to disclose-type case.

FRENCH CJ: Where do you say the Court of Criminal Appeal has relied upon fresh evidence principles?

MR CROUCHER: At paragraph 102, which is page 279 of the application book. In the final paragraph the learned Chief Justice says:

> The appellant has failed to establish that there is a significant possibility, one greater than a merely speculative one, that the jury would have acquitted her –

the applicant –

> if Ms Vass had been recalled.

That is a fresh evidence test.

FRENCH CJ: That is what you call the fresh evidence principle?

MR CROUCHER: Yes. Then the next sentence:

> It cannot be concluded that the verdict was unsafe or unsatisfactory –

That is the unsafe test, which is a misapplication of *Apostilides*. So with the greatest respect, both the learned trial judge and in any event the Court of Criminal Appeal simply applied the wrong tests and acted on the wrong question of principle, and in any event, we say, got it plainly wrong. That is why it is a good vehicle to test this issue. If this judgment is allowed to stand, it supports an erroneous test for the consideration of when a witness should be recalled; secondly, it supports an erroneous consideration by the Court of Criminal Appeal of the test to be applied in considering a trial judge's failure to recall, or exercise a discretion to recall.

FRENCH CJ: Now, what is the source of the power?

MR CROUCHER: The source of the power to?

FRENCH CJ: Recall. There is a statutory provision, is there not, as well as the question of inherent power?

CRENNAN J: Section 46 of the *Evidence Act*?

MR CROUCHER: Yes, but that is just a general provision to do with *Jones v Dunkel*-type situations. This is just governed by the court's inherent power to control its own proceedings; that is all. That is the way I read section 46. It is really about when you have a witness you call and then later on there is evidence that contradicts that in some way and it was not put to the witness.

CRENNAN J: Is the power to recall conditioned on the earlier evidence that has given rise to the application of recall having been admissible?

MR CROUCHER: No.

CRENNAN J: It is not conditioned on that?

MR CROUCHER: No. In fact – and this is the point – part of Justice Hunt's judgment makes clear - - -

CRENNAN J: Have we got section 46 in the materials?

MR CROUCHER: No, you do not. You have got section 38 but not section 46. I see the red light is on, your Honours, but can I just make a point quickly about what Justice Hunt had to say. He makes the point that it does not matter – it could have been done differently; it does not matter. The question in the end is whether or not a miscarriage of justice has occurred, effectively, or at the trial level whether or not you would be denied in some way. Plainly, it is submitted that this applicant was denied properly to defend herself against the Crown case.

CRENNAN J: You talked about tests and what the correct test is. I think in *TKWJ* Justice Hayne said the correct question to ask in a case of this kind is whether the jury would have been likely to entertain a reasonable doubt about guilt if all the evidence had been before it.

MR CROUCHER: That is really a variant of the fresh evidence test. *TKWJ* is a different issue again.

CRENNAN J: And you do not wish to - - -

MR CROUCHER: Well, these are the things that really need to be litigated or agitated upon an appeal, your Honour, as to what the appropriate test is. *Apostilides* itself was about a failure to call a witness at all. It might be that the *Apostilides* reasoning should be adapted to a failure to recall a witness. To the extent that it should be then it would plainly, in our submission, result in the setting aside of this conviction. If it is a variant of the *TKWJ* test or some sort of fresh evidence test, then we would say, again, that plainly they are met anyway. But these are the questions that really this Court ought to consider, in our respectful submission. That is part of the reason why it is an important matter to come to this Court. I have gone over time so I will sit down.

FRENCH CJ: Thank you, Mr Croucher. Yes, Mr Ellis.

MR ELLIS: The case against the accused was not a mere circumstantial case. It was a very rich circumstantial case which involved the sheeting home to her of intimate knowledge of the vessel which was attempted to be sunk after the murder of the deceased. The removal of the body of the deceased, motive – there was quite a deal of evidence of motive, of the relationship being over and, as was accepted by the trial judge in sentencing, a financial motive. There were lies, not just mistakes but provable lies, told by the applicant as to her whereabouts.

FRENCH CJ: How does the strength of the case against her meet the particular concern that is raised on the application?

MR ELLIS: In my submission, whenever it is raised that there is new information there has to be a qualitative assessment carried out as to what effect that will have. That was done in *Mallard*; it was done in *Fleming*. It is only in the cases where you can say procedurally, like perhaps *Apostilides* was, there was not a fair trial or a trial according to law that a qualitative assessment is not carried out, although, even in *Apostilides* it was carried out. This is all the Court of Criminal Appeal has done and it is all the trial judge did.

The trial judge says what difference will it make to know that this person to whom one swab of DNA can be traced – what difference does it make to know where she was on that evening? What difference does it make when she is a homeless young person with none of the specialised knowledge exhibited by the murderer of Mr Chappell? No connection with Mr Chappell; no means to operate the tender that seems to have gone out to the yacht and back again in order either for him to be murdered or his body to be disposed; indeed, nothing else to connect her or make her a remotely possible suspect except for the presence of a swab of DNA, which is,

contrary to what my learned friend has tried to say, no more explicable by her being on the yacht at any time than being off it.

Moreover, it is dressing it up to say that her whereabouts is powerful on the night in question when the fact is that she was never at this address, apparently, for five nights and not thereafter. She is a young person with, one would think, a chaotic lifestyle – homeless since 13 – who is asked to recall more than a year later her whereabouts on a date that has no special import for her, unless she was guilty. The trial judge has had the advantage of seeing her. She is called in a *Basha* inquiry and she was bashed – she was bashed by trial counsel. It was put to her most unfairly that she - - -

FRENCH CJ: Just a minute. Let us stay with what is relevant to the special leave question. We have read all the trial judge's comments and so forth.

MR ELLIS: That is relevant because there is also a question of the interests of justice involved in the recall of this young girl. She showed herself prone to bullying. She showed herself far too agreeable with propositions that were put, not just in the question of had she said I was not sure when it was put to her but you asserted that you were somewhere else but also it was put to her in a steering way, "You could have said to the police I wasn't on the boat". She said, "Yes". "But you didn't, did you?" She agreed with that. But the fact was when the file was produced that she had said that to the police. She had spoken to the police. She had denied her whereabouts and yet she agreed that she had not.

Now, that could not have been put had the material been – it could not have been ethically put had the material been disclosed. So there is a real problem in the interests of justice. *Fleming* itself realises or acknowledges – the case of *Fleming* acknowledges – the question of prejudice to the witness. Here was a witness it was sought to bring back in order to give her that sort of cross-examination again, in order to bully her, in order to get her to agree to propositions that she ought not to have agreed to.

In my submission, the trial judge may well have taken that into account – taken into the account the nature and tone of the cross-examination which had already taken place. The core evidence was, despite that propensity to be bullied, she was not on the boat. She had no way of being on the boat. There was nothing credible suggested as to how she could be on the boat.

My learned friend says time and time again it was powerful evidence. It was not. The only evidence that it was was that police could not ascertain her exact whereabouts that night or any other night. The policeman,

Detective Sinnitt, agreed in re-examination that it was not unusual in the case of Ms Vass to be completely unable to find her whereabouts, as one would expect. That, in my submission, does not make her credible as a suspect and the qualitative assessment that needs to be undertaken as to the point of her recall begins there and ends there, in my submission. When it is complained that in the Court of Criminal Appeal the wrong test is applied, it is overlooked, but in fact his Honour the Chief Justice – and this is conceded, correctly – said:

> the ground of appeal cannot succeed unless the appellant is able to persuade the Court that a miscarriage of justice occurred because Ms Vass was not recalled for further cross-examination.

In a phrase not read to your Honours at 102, page 279 – that is, a qualitative assessment of what might have been achieved – his Honour concluded:

> It cannot be concluded that the verdict was unsafe or unsatisfactory –

which my learned friend complains of –

> or that a miscarriage of justice resulted.

So he has applied the right test, or what my learned friend claims is the right test, that this is not a case where it can be seen, because of the complete absence of a vital witness, that there is a miscarriage of justice, that there is not a trial according to law. The case is not even sought to be argued, as I can see anything in the written submissions or anything you have heard, on the basis that the prosecution had a duty to disclose this matter because it was material evidence. It happened to be disclosed, it happened to be disclosed late, but in terms of a *Mallard*-type duty to disclose, it is not even argued to this Court that there was a breach of such duty in the failure to give to defence the information that police had found nothing, in effect; it is a nothing. They had not found where the witness was.

FRENCH CJ: The question is whether the defence was deprived of the opportunity to elicit evidence which might have been supportive of a hypothesis consistent with the innocence of the accused.

MR ELLIS: It would only work on the basis in an unfair way. Through the written submissions of my learned friend it is asserted that the witness had lied to the court about her whereabouts. There is just no basis to say that. You can see from that the tenor of what would have been in court. A young girl says, "I'm not sure, I'm homeless and have been since 13, I'm confused". "You have lied".

Now, the only question of her credit that could arise was did she or did she not tell the institutional accommodation where she was to be that night correctly? Had she done it in the past? When it is in the course of, clearly, several days of absence and never returning to that accommodation, in my submission, it is a nothing piece of evidence. But her credit as to that insofar as it might be affected would not advance her to be a reasonable alternative suspect to this crime in these circumstances. There is just no other connection besides DNA, one piece of DNA; no fingerprints, nothing else, and a piece of DNA found in a common walkway, not in relation to the real scene of the crime which was below decks and in the manipulation of winches and so on – the winch, incidentally, having been taken from a place where a person with intimate knowledge of a yacht would know but others would not – winches to remove the body; the manipulation of a tender, a dinghy, to remove the body.

The question of break-ins was, in my submission, a furphy. Although the submissions claimed that the applicant told others about it, the fact is that she did not tell others about it until after the murder. When she did come to, she sought to link this supposed break-in to one earlier in Queensland where she said the exact same thing happened, which she knew was not a break-in, which she knew was legitimate entry by a tradesman. When you get a diary produced in two shades of ink it is reasonable to say that that is not our evidence and may suggest the laying of a false trail – although that was not relied on as an *Edwards*-type lie; no direction was given as to it and no direction was sought as to it. It was certainly not the linchpin of a very strong case, a very strong case where all the circumstances pointed to the applicant and to the applicant only. They did not point to a homeless 15-year-old girl.

In my submission, there is no argument that there was an improper failure to disclose such as might trigger some consequence. There is simply no evidence that on a qualitative assessment of what might have been produced you have anything but my learned friend saying it was powerful, it was powerful. There is a series of questions posed which, I make the point, are in the main inadmissible questions, but in any event they go in a series that seem to depend on some sort of positive answer. Maybe one would have been given, maybe not, but it is surely incumbent, in my submission, on the applicant in this Court and in the court below to show that it is more than a mere fanciful possibility that on the question of whether she had told her institutional accommodation where she was going to be, she told them the truth. That is not powerful evidence, in my submission. That would not advance any case. But what it would do was given the spectacle, yet again, of a young girl being bullied by counsel in a serious trial. Those are my submissions, unless there is anything I can assist the Court with.

FRENCH CJ: Thank you, Mr Ellis. Yes, Mr Croucher.

MR CROUCHER: Your Honours, firstly, our learned friend says that where the witness was on that night was not relevant. Plainly it was relevant both in terms of the fact of where she was and, secondly, insofar as she might be thought to have lied or told untruths about her movements, that was relevant to her credit and therefore in both ways relevant to the applicant's defence and to the very point my learned friend was talking about a moment ago about the so-called lies about break-ins – very important.

Secondly, he said that the DNA being deposited as it was on the boat was no more explicable as to presence than it was elsewhere. That is not to the point. The point is the Director's own witness conceded that it was possible that it was deposited there in the usual way. That is a reasonable hypothesis, a starting point. The onus of proof is on the Crown, not on the defence.

Thirdly, another unfairness in all of this is that, extraordinarily, in the re-examination of Detective Sinnitt by my learned friend, despite the judge having declined to allow the witness, Ms Vass, to be recalled, my learned friend asked whether or not Detective Sinnitt had been told anything about the witness's movements by her around the relevant time and he said yes and then gave a hearsay answer about her possibly being in Goodwood. The point of that was it was designed to explain in some sort of "innocent fashion" as to how her DNA might have got there, that is to say, after the murder. That in and of itself just shows how unfair this trial became because of the failure to recall the witness.

The next point, my learned friend says, well, the argument is not based on a duty to disclose. A duty to disclose only has any meaning when the evidence that is relevant or the information that was relevant, namely, what Detective Sinnitt knew, was disclosed before the witness gave evidence. Plainly that happened afterwards and in that regard that is why we say this is one of those cases where the duty-to-disclose-type cases are relevant to a question of what principle is to be applied, and that is something this Court, in our respectful submission, needs to consider.

Second last, my learned friend says, well, it is all speculative. The remarks of this Court in *Mallard* are apposite, in my respectful submission. In *Mallard*, at paragraph 23 of the joint reasons, the Court said this:

> It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome

inconsistencies which an accused has been denied an opportunity to explore and exploit forensically.

That is this case. Of course she was denied that opportunity. Finally, this is a case like *Grey*. It is different in one sense, but in *Grey* this Court had no trouble setting aside a conviction where there was a failure to disclose in circumstances where the Court of Criminal Appeal had wrongly proceeded on fresh evidence principles rather than failure to disclose. So much is apparent from paragraph 8 and following of the joint judgment in *Grey*, which is at page 149 of the joint materials.

This is a case that really requires a grant of special leave so that the principles concerning a failure to recall a witness in circumstances where there has been a failure to disclose the material until afterwards need to be considered, and how it fits with *Apostilides*, how it fits with *Grey*, how it fits with *TKWJ* and related cases. What is more, there was a fundamental miscarriage of justice in this case. This applicant was denied, if you like, procedural fairness in meeting the Crown case because her counsel was not armed with very relevant information, relevant to her defence, until after the witness had gone, and the judge would not allow a recall. If the Court pleases.

FRENCH CJ: Thank you, Mr Croucher. The Court will adjourn briefly to consider what course it should take.

AT 12.30 PM SHORT ADJOURNMENT

<u>UPON RESUMING AT 12.33 PM</u>:

FRENCH CJ: I will invite Justice Crennan to give the decision of the Court.

CRENNAN J: This application concerns the applicant's conviction for murder contrary to section 158 of the *Criminal Code* 1924 (Tas). The Court of Criminal Appeal of the Supreme Court of Tasmania (Crawford CJ and Tennent and Porter JJ) below dismissed the applicant's appeal against her conviction.

At her trial in the Supreme Court before Blow J, the case against the applicant was mainly circumstantial. DNA evidence had been found at the

scene of the crime that matched another person, Ms Vass. The latter was 15 years old at the time of the deceased's disappearance, and had been homeless since she was 13. After Ms Vass gave evidence at trial, further evidence was given by a police officer suggesting that there were certain inconsistencies in Ms Vass' account of her location on the night of the deceased's disappearance. That evidence was ultimately ruled inadmissible.

The applicant contends that there was an application to the trial judge for leave to recall Ms Vass for the purposes of further cross-examination on the inconsistencies. On appeal to the Court of Criminal Appeal, the applicant contended, among other things, that a miscarriage of justice resulted from the prosecutor's failure to recall Ms Vass. The Court of Criminal Appeal unanimously rejected that ground of appeal. The applicant now applies for special leave to appeal from that decision.

In our view, this application does not give rise to a question suitable to a grant of special leave as the applicant has not shown that she was denied an opportunity to produce evidence on a point of substance which can be shown to have had a significant possibility of affecting the jury's verdict. Accordingly, special leave is refused.

FRENCH CJ: I agree with that order. The Court will now adjourn until 10.15, Tuesday next, 11 September.

AT 12.35 PM THE MATTER WAS CONCLUDED