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THE COURT OF CRIMINAL APPEAL

No. 346 of 1973

CORAM: * STREET, C.J.
NAGLE, J.
ISAACS, J.

Friday, 2nd August, 1974

REGINA v. Johann Ernst Siegried POHL

JUDGMENT

STREET, C.J.: In this matter the Court comprised * McClemens, C.J.at C.L., Isaacs J. and Lee J. I am authorised by McClemens, C.J.at C.L. and Lee J. to publish their reasons and to state that in their opinion the appeal should be dismissed and the conviction and sentence confirmed.

ISAACS, J.: I agree and I publish my reasons and add that I propose time spent pending the appeal should count as part of the sentence.

STREET, C.J.: The order, then, will be that the appeal is dismissed, and the conviction and sentence are confirmed. The time already served is to count.

POHL

IN THE COURT OF CRIMINAL APPEAL.

No. 346 of 1973.

CORAM: McClemens, C.J. at C.L.
Isaacs J.
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Friday, 2nd August, 1974.

REGINA. v. JOHANN ERNST SIEGFRIED POHL.

JUDGMENT.

McCLEMENS, C.J. at C.L., LEE J.:

We have read the transcript and examined the exhibits in this case with anxious care. We have also read the painstaking and detailed reasons about to be delivered by our brother Isaacs. In view of the detail into which His Honour has gone, it is not necessary for us to re-state the facts. Suffice it for us to say that there is here ample evidence to justify a finding of guilt beyond a reasonable doubt to the exclusion of any other hypotheses, even if one does not draw adversely to the appellant all the inferences open on the evidence. We concede that different minds could view certain of the facts in different ways and not draw some of the inferences to which His Honour has alluded. Nevertheless, the overwhelming effect of the evidence and the exhibits is to point the finger unerringly at the appellant as the man who killed his wife. Once it is seen that the death took place at a time when the appellant, on his own admission, could have been at the house, then the convincing evidence that someone altered the condition of the house after Mrs. Pohl visited it later on in the morning, leads inevitably to a conclusion that the possibility of a casual intruder being the killer is rationally not open. The appellant, on his own admissions, was in the premises either when, or shortly after, Mrs. Pohl was there. To the question, why would the appellant seek to alter the state of the premises - as well as the clothing on the deceased's body? there is

but one answer and that is that he had an interest to do so, an interest in making it appear that it was not he who was the killer. The conflict in so many places between his version of events and facts and those of other witnesses becomes in the overall context the strongest confirmation of the inference of guilt arising from the other evidence in the case. We are satisfied, as R. v. Hayes (47 A.L.J.R. 603) requires us to be satisfied, that in the administration of justice in Criminal matters, it would not be dangerous to allow this verdict to stand. The evidence upon which the Jury could convict, was in every respect cogent and compelling and convinces us that the accused was guilty and that the verdict should stand.

We agree entirely with His Honour's observations in regard to the alleged misdirections by the learned Trial Judge.

We agree that the appeal should be dismissed and the conviction and sentence confirmed.

I certify that this and the 1 preceding page is a true copy of the reason for judgment herein of The Honourable Mr. Justice [illegible] Chief Judge at Common Law, Supreme Court of New South Wales.

Associate

Date: 2 8.74

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IN THE COURT OF CRIMINAL APPEAL No. 346 of 1973

CORAM: McCLEMENS, C.J. at C.L.
ISAACS, J.
LEE, J.

Friday 2nd August, 1974.

REGINA v. JOHANN ERNST SIEGFRIED POHL

JUDGMENT

ISAACS, J.: The appellant appeals against the conviction on 2nd November, 1973, at a trial before Begg, J. and a jury for the murder of his wife Kum Yee Pohl, also known as Joyce Pohl, on 9th March, 1973, at her home at Queanbeyan.

The trial commenced on 29th October and proceeded through until 2nd November when the jury returned its verdict after deliberating for four hours and twenty minutes, and the appellant was sentenced to life imprisonment.

The grounds of appeal originally filed by himself were:

1. I am not guilty.
2. The sentence is too severe,

but amended and additional grounds were lodged on 25th March, 1974, which may be summarised as follows:

1. That the learned trial Judge erred by failing to direct the jury at the end of the Crown case that there was no proper evidence from which they could infer that the appellant was the person who had killed his wife.
2. That there were certain mis-directions by his Honour in his summing-up which at least should warrant a new trial.
3. The case being one of circumstantial evidence was so thin and unsubstantial as to make the verdict an unsafe one.

In elaboration of this Mr. Purnell, Q.C., for the appellant (who was not counsel for the accused at the trial) submitted that the state of the evidence at the end of the Crown case, though it might have justified a conviction, was so tenuous that his Honour should have taken it from the jury and as a

corollary that there was no proper, in the sense of legally acceptable, evidence to warrant the conviction, and that nothing had happened in the defence case which would have added to the weakness of the Crown case. He did not put the case as high as there being no evidence upon which reasonable men could convict.

The learned trial Judge in his report to this Court indicated that the case against the accused was based purely on circumstantial evidence as he had never confessed his guilt either in versions given to the police orally or in records of interview or in any statement he made to the Court. But his Honour reported that in his view there was sufficient evidence to support the conviction if the jury drew the inferences which the Crown invited them to draw. At the conclusion of his report he added that he thought it proper to indicate to this Court that whilst he was of opinion that there was evidence before the jury upon which they could convict he personally did not regard the Crown case as being a strong one and that, indeed, he felt surprise at the jury's verdict. He added:

> "However, I should also say that as it was the jury's responsibility and duty to make the factual findings, I did not, during the trial, form any real conclusion of fact in my own mind. Indeed, I refrained from so doing. There was in my view a great deal of evidence led which seemed to me to be completely immaterial, but the jury may have formed different conclusions. So far as the accuracy of the testimony of the three witnesses, Mrs. McGann, Mrs. Pohl and Mrs. Ley, is concerned, I should say I regarded them as being reliable witnesses in general."

The Crown case was, in broad outline, that the accused strangled his wife in their home between 9.30 a.m. and 9.45 a.m. on the morning of 9th March, 1973, concealed her body somewhere in the house, then went out and kept various appointments

establishing alibis for his movements, then returned to the house some time before midday, set about so as to make it appear that his wife had been alive after he had left the house and up to a time shortly before he returned, and that she had in that interval performed certain household chores, at the same time he disarranged and altered the appearance of certain things in the house so as to indicate the acts of some intruder, that he then purported to discover his wife lying on the floor between the bed and the wall of the bedroom where it would be concealed from view, and that he so arranged her clothing as to indicate a sexual attack having taken place. According to the Crown this appearance of sexual assault was fabricated since though he asserted that when he found his wife in that position her mini skirt was pulled up high on her body exposing the lower part, which was naked as her panties and pantyhose had been removed, and which he alleged had been found by him wrapped up together in a damp condition lying on the floor in the bedroom, yet this appearance was false because the medical evidence completely negatived any sexual assault. His version to the police was that he had lifted the body up and placed it on the bed with her clothes in the same position but with her legs dangling over the foot end of the bed, that he then noticed that around his wife's neck was a shirt of his which was tied tightly in a double knot, which he untied and then went for some help. The detail of this will be dealt with hereafter.

The appellant and his wife lived in Flat No.2, a ground floor flat, of a block situate at the corner of Booth and Atkinson Streets, Queanbeyan. Flat No.1 was occupied by a Mr. Victor Hoskins who was away and had left a master key to his flat, to the appellant's knowledge, with a friend, a

Mr. Meyer, who lived on the opposite side of Atkinson Street to the flats, and some seventy-five yards away from those flats. Flat No.3 was occupied by a Mrs. Ley who at that time was Miss Warwick, who shared her flat with her fiance, Mr. Ley, whom she subsequently married prior to the trial. The layout of the flats drawn to scale is contained in Ex. W. There are other copies in Exs. Q1, Q2 and Q3. Exhibit V is a map of Canberra but it has inset a map of Queanbeyan with an index to the various streets, and marked with a red dot on the intersection of Booth and Atkinson Streets is indicated the position of the block of flats in which the appellant and his wife lived, and a blue mark indicates on the opposite side of Atkinson Street approximately where Mr. Meyer lived. There was a telephone in both Flats 1 and 3 but none in the flat of the appellant. There was a common laundry between Flats 2 and 3 used by the occupants of those premises. The scale of the plan Ex. W, is one inch to four feet. The plan shows that there is an entrance from Booth Street via a curved path to a patio leading to the front door. The only other doorway in the premises providing ingress or exit is in the main bedroom shown in the plan which leads out into a courtyard and from which access to the laundry can be gained. The front of the flat, by measurement, is eight inches, i.e. thirty-two feet, and the full width from the front door through the bedroom to the windows at the back is approximately six inches, i.e. twenty-four feet. The front door, as one faces it from the patio, opens from left to right and leads directly into a lounge room on the right. The kitchen is immediately on the left. The doorstep is one and a half inches higher than the floor of the lounge. An endeavour had been made to create a small hallway in the rear portion of this lounge area by a room divider and the total

distance from the front door to the nearest wall of the bedroom, which is at the extremity of the lounge room divider, is twelve feet. There is then another hall which runs to the left at right angles from the room divider between the rear wall of the kitchen and down to the bathroom on the one side and the bedroom and a study on the other, terminating at a linen cupboard, and the length of that hall is approximately four and a half inches, i.e. eighteen feet. That hall was approximately four feet in width, and it had running down the centre a narrow carpet hall runner from the cupboard down past the study and bedroom doors for a distance of approximately fourteen feet. The distance from the back door to the laundry door in a direct line is approximately fourteen feet. The main bedroom is approximately twelve feet square.

The furnishings in this small flat are as depicted in colour on Ex. W. There are two photographs (Exs. E1 and E2) which show respectively the front of the subject flat with the kitchen window to the left and the small raised patio terminating prior to that window, and Ex. E2, the back of the premises as you face towards Booth Street, with the windows at the back being respectively the study window on the right and the bedroom window on the left. Exhibit G shows a small portion of the area inside the front door and is taken from the inside of the lounge room and shows the room divider, which has no shelving on the lounge side thereof and it also shows the kitchen and portion of the hallway opposite the end of the room divider with the hall door open. The evidence was that generally all the doors throughout the house were always open excepting occasionally the study when the appellant worked there at night, and the back door which was always kept locked by the deceased when she was alone in the house.

The plan, Ex. W, shows that the top of the divider was about six inches in width and at the end thereof nearest the bedroom wall there were shelves beneath it on the hall side and a flower box on the lounge side.

The Crown case was that the deceased met her death by strangulation somewhere between 9.30 and 9.45 on that morning and for this it relied upon the evidence of Dr. Gillespie, the Government Medical Officer, who made his examination of the body at 12.45 p.m. Before adverting to that evidence it is necessary to state some matters which appear from the evidence. The appellant was a builder who had a number of building projects under way in and around Canberra and employed subcontractors. He owned a green Valiant sedan car and his wife owned a small blue coloured Vauxhall. The evidence generally was that the couple got on well together; there was no evidence of anybody having heard them quarrelling; there was no suggestion that either she had some male friend or that he was interested in another woman, and there was evidence of the accused's good character. The deceased woman was a competent and capable housewife who was of clean and tidy habits, a good housekeeper and apparently a good wife. The deceased was of Chinese descent aged thirty-two. The appellant is from Yugoslavia aged thirty-four and they were married in Hong Kong in November 1971.

The accused stated to the police in a record of interview that on the morning of the day in question about 7 a.m. marital intercourse took place in bed and they had breakfast together somewhere between 7.30 and 8 a.m.. There was evidence that between those times a Mr. Furner called at the house - he says somewhere between 7.40 and 8 a.m. - and saw them having breakfast together. His object in so calling was

to inform the appellant that the bricklayers on one of the jobs had reached a stage when they required aluminium windows and that it was necessary for those to be obtained as early as possible so that their work could proceed. In order to obtain these the appellant had to go to a firm of Stegbars at Fyshwick in the Australian Capital Territory. Judging by the scales on the maps in evidence the distance from Booth and Atkinson Street to the shopping centre of Queanbeyan, which is in Monaro Street, it would take approximately by car five minutes to get there, and from there to Fyshwick the evidence is that it takes ten minutes, average driving.

A Mr. Wallace of Stegbars gave evidence that he arrived at the firm's premises to open them up at 8.30 a.m., that the appellant arrived at the same time and that he was there for about half an hour, which meant that he left for Queanbeyan about 9 a.m.. He would then have returned to the centre of Queanbeyan at about 9.10. From there the appellant told the police that he took the window frames to the job and then went home, arriving there at about 9.30 a.m., that he went to his study and collected some papers, was in the house for about ten minutes and left about 9.40, that his first place of call was at the office premises of a Mr. Curtis in Queanbeyan where Mrs. Ley worked, and she confirmed that he arrived there at about between 9.45 and 9.50..

The accused himself told the police that he left home somewhere about 7.30 for Fyshwick that on arriving home at 9.30, he saw his wife cleaning the kitchen stove, that he stayed for about ten minutes and then left and his wife was then still in the kitchen doing that chore.

It should be mentioned that both the deceased lady and the appellant had separately told different persons who gave

evidence, that they were going away to Queensland at the weekend for a holiday and he told the police that she wanted to clean the stove before they went away. Mrs. Pohl had been in employment and was on three weeks' holiday, and the day of her death was the Friday of the first week.

Although he had told Detective Sergeant Murray when interviewed on the day of the event of those times of arrival and departure, at a subsequent interview he altered the time of his departure from the house to 9.30 a.m. and said that he could give no explanation for the change in the time and that nothing had been suggested to him to cause such a change. However, in the course of cross-examination of Mr. Wallace, by the accused's counsel it was put to him that the accused may have arrived at 8.45 and not at 8.30 with which Mr.Wallace agreed and that he could have left Fyshwick then at about 9.15 a.m., which would have taken him back into Queanbeyan at 9.25 a.m. and could have been then back at home by 9.30 a.m., thus adhering to his initial information given to Sergeant Murray. In his second record of interview in answer to Question 220 he re-asserted 9.30 a.m. and 9.45 a.m. as the times of arrival and departure.

Before returning to Dr. Gillespie there are the events that took place from the time of the discovery of his deceased wife, which the accused put at round about midday. In oral conversations with the police and in records of interview he said that after placing her body on the bed, which up to that time was in a proper made-up condition, covered with a large blanket-type bedspread as is depicted on the photographs, and having untied the knotted shirt from around her neck, he went out of the front door to his car and drove the seventy-five yards down to Mr. Meyer's place,

leaving, as has been already stated, the body lying on the bed, legs dangling over the end and the skirt pulled up high exposing her naked lower body. His purpose in going to Mr. Meyer was to get him to come back to Flat No.1 and open it with the key which Mr. Hoskins had left with him so that he (Meyer) might ring for an ambulance and doctor. He told Meyer "Something has happened to Joyce and I want a doctor or the ambulance." Meyer said he walked back to the Hoskins' flat and waited for the appellant to arrive there, the appellant backing his car up the street, because Meyer wanted to know what message he should convey to the ambulance by way of details. He made a request to Pohl on Pohl's arrival outside Flat No.1 "Tell me what is the matter so I can tell the ambulance what to expect" and Pohl then invited him to come and have a look at his wife for himself. The appellant preceded Meyer into his flat and went first into the bedroom and pulled down his wife's skirt so that, in his words, "Meyer should not see everything." Meyer stood at the doorway to the bedroom and looked across at the body lying on the bed from that position; he would then be some eight or nine feet away (although he estimated it was twelve or thirteen feet) and he saw the condition of Mrs. Pohl and then left and rang for the ambulance. This call was received, according to the ambulance officer, at the ambulance station at 12.05 p.m. Meyer then remained outside on the footpath at the corner so as to be able to direct the ambulance when it arrived, leaving the appellant inside. Meyer, in standing in his position at the doorway to the bedroom thought he saw the deceased's lips move. He said:

> "It seemed to me that her lips moved slightly.
>
> Q. In what way? A. As though she was gasping for breath.
>
> Q. Can you tell us not what you think she was doing, but can you tell us in what way the lips moved? A. Well, just a very slight movement of the lips.

Q. Was it clear to you? A. Well, I cannot say that it was very evident, it was just a fleeting impression that I had.

Q. May I take it that you did not stay there long? A. No.

Q. Any idea of how long? A. Oh, I suppose might have been three, four, five seconds. It certainly was not very long.

Q. Then what did you do? A. I left No.2 flat and went in to No.1, and I rang the ambulance."

In cross-examination he was referred to a statement that he had made to the police in which he had said:

"She seemed to be gasping for breath as her mouth was open and her lips seemed to be moving"

and he agreed that he had said that, and then he was asked:

"Q. Looking back on it now, the fact is that she did seem to be gasping for breath, is that right? A. Yes, it seemed to me as though she was gasping for breath.

. . . . . .

Q. Looking back on it now, thinking of it, doing the best you can, in the light of what you told the police and thinking about it since, did it appear to you that she was breathing when you went into that room? A. Well, that was my impression at the time."

The appellant also stated that he thought he detected some movement, not of her lips, although he was standing near Mr. Meyer, but of her shoulder. Whilst Meyer was waiting in the street after having made the ambulance call the accused came out and said, "Joyce has stopped breathing" and Meyer then returned a second time to Flat 1 and telephoned the ambulance station again. This call was received at the station at 12.11 p.m.. The ambulance arrived at the premises shortly thereafter. The ambulance officer felt the pulse of the deceased woman - no pulse manifested itself, that is, on the wrist - and he then felt the carotid pulse at her neck, again there was no pulse felt and her body was cold. He then immediately left and went to Flat No.1 where he rang the police, and that call was received

at the police station at 12.20 p.m. At 12.30 p.m. Constable Gant of Queanbeyan police station received at his home a call and went to the accused's home. On arrival there he directed those present - the police, the ambulance officer and Pohl - to leave and Pohl was placed in his police car outside. Dr. Gillespie, the Government Medical Officer, arrived and commenced examination at 12.45 p.m. Dr. Gillespie practises in Monaro Street, Queanbeyan, where he had been in practice for nineteen years. In addition to specialising, amongst other things, in obstetrics and as a gynaecologist, he held the appointment of Government Medical Officer. He made an examination of the body of Mrs. Pohl while she was lying on her back on the bed in the bedroom. He described several large bruises around her neck and extending on to the front of the chest and said that these bruises showed some parchmenting complete. This parchmenting, from friction, was the tearing of the most superficial layer of skin so that it formed a hard surface. This does not involve much bleeding but has all the appearance particularly to a layman of open haemorrhage, vide Exs. N1-6 and 01-2. There were other lacerations and petechial haemorrhages on the face and in the conjunctiva, that is, in the whites of the eyes. The petechial haemorrhages were indications of asphyxiation. He saw there was no sign of any damage around the genital or anal region. The anus itself was patulous, that is, open, and he could see inside, but further up, some faeces. He examined the body for signs of rigor mortis and found evidence thereof in the facial muscles and the jaw muscles. The jaw was fixed, as were the eyelids. He detected muscular resistance in the abdominal muscles and chest wall which he felt was probably the early onset of rigor mortis in those parts, but rigor mortis was not present in her limbs at that

stage. He said that he had had considerable experience in the matter of determining rigor mortis and correlating that to time of death, and was asked these questions and gave these answers:

> "Q. Can you say what is the usual time that elapses in an asphyxiation or strangulation case before you expect to find signs such as you found of rigor? A. Three to four hours.
>
> HIS HONOUR: Q. That is, from the time of death? A. Yes."

That would put the time of death ranging between 8.45 a.m. and 9.45 a.m. He said that he did not detect any injury to the genital and anal regions and the significance of the anus being open was:

> "The sphincters - the sphincter of the anus in an asphyxial death would be likely to - the anal sphincter would be likely to dilate. The passage of urine and faeces in sudden, violent death, is a common occurrence.
>
> Q. Would you expect such an event if the patient had been strangled? A. Yes, I would."

He noted a bruising over the point of the left elbow and another indentation above the left knee and an abrasion below the right knee. Normal rectal temperature in an ordinary human he said was 37.2 degrees Celsius. He took a rectal temperature which was 35.9 degrees Celsius, and in explaining this said that:

> "In an asphyxial death it is likely that the body temperature could be considerably higher at the time of death. With any death in which the heat regulating centres of the brain are likely to be affected the body temperature can be much higher, to a variable degree it can be much higher at the time of death, and asphyxia is one of these conditions in which a higher body temperature can be present at time of death."

He said that the temperature of the body cools at a varying rate influenced by a considerable number of factors, such as the size of the body, the surrounding features, the medium in which the body was found, that is water or air, whether it was

clothed, and the temperature of the room; that the position where the body was said to have been lying was of some significance because there would have been less circulation of air around the body in a more confined space and that that would to some extent have caused slow cooling. He said that he considered that the bruises along the jaw line were due to the cloth being folded and twisted like a tourniquet. The parchmenting indicated that there was pressure between what was on the surface and underlying bone with some degree of friction which as a result of squeezing completely devitalised the tissue by pressure between something on top of the skin and the bone beneath the skin. He considered that the bruising on the neck could have been due to the knuckles of a hand turning the cloth around the neck, the pressure gripping it with the knuckles being pressed firmly into the neck, and that the bruising down the right side of the neck on to the chest was consistent with that situation. The marks that he saw inside the neck indicated a great deal of force. He also found two bruises under the scalp, one at the right mastoid region and one on top of the head. He thought that she was conscious at the time that she was being strangled because there was scratching on the jaw, on the right-hand side, indicating that probably she had attempted to pull off what was being tightened around her neck. He examined the vagina and it was closed, there was no smell of urine or faeces on the body in that region and no dirtying. Some part of the skirt was damp, and he said with the sphincter muscle dilated in the fashion in which he found it that if faeces had been passed it was likely that urine could have been passed as well, these being not uncommon consequences in asphyxiation cases. Questions were then put to him directly as to time of death:

"Q. Did you form an opinion as to the time of death? A. Yes.

Q. What was that opinion? A. I thought death had occurred at approximately three hours from the time I first saw the body, placing the time of death at approximately 9.45 a.m.

Q. When you say 'approximately' what margins would you allow, what tolerance? A. Oh, I think an hour, about an hour; an hour more than that, may be a little earlier. It is only an estimate.

Q. I appreciate that. A. But I think the most likely period of time was a minimum of three hours, possibly up to four, from my experience.

Q. That is before your first examination? A. Yes.

Q. When you talk of the tolerance of an hour, that is between three and four hours that you have referred to? A. Yes.

Q. Did it appear to you that the time of death could have been substantially later than 9.45? A. I think that unlikely.

Q. As to the three to four hours, it could have been earlier. Do you think substantially earlier, anything more than that hour? A. I don't think it would have been longer than four hours. Three to four hours, and I think most likely about three hours, principally on the early signs of rigor mortis, the significant degree of temperature fall, the circumstances of the clothing and the room, my own experience of these surroundings, I thought it was probably about three hours.

HIS HONOUR: Q. Is there likely to have been any twitching of the muscles present say, something up to three hours after death? A. No, your Honour, no.

Q. The body would be completely motionless? A. Completely motionless. By electrical stimulation of muscle fibres before rigor mortis has set in, they can be stimulated electrically.

Q. But in the ordinary run of events you would not expect any movement? A. No.

Q. Of the lips? A. No, not at all.

CROWN PROSECUTOR: Q. Can you think of any mechanical stimulus that would have such an effect, three hours after death? A. No.

Q. His Honour spoke to you earlier about unconsciousness. What is the progress of a strangulation, assuming a cloth to be round the neck and tightened as you say, would it have caused immediate unconsciousness? A. Very rapidly.

Q. Very rapid unconsciousness? A. Yes.

Q. If maintained after unconsciousness, what would you say about death, would it ensue? A. Very quickly.

Q. When you say 'very quickly' from the time of the application of the force until death, would that be a matter of minutes or hours? A. Minutes.

Q. Would you say, in the circumstances you saw her; what would you say would be the maximum? A. I think within five minutes. There was such massive haemorrhage into the tissues of the neck.

Q. It would have had a quick progress, five minutes through unconsciousness to death? A. Yes, I would think that is so."

In cross-examination he was referred to the evidence extracted ante given by Mr. Meyer as to the impression he had about her lips moving. It having been read to him he was asked:

"Q. In the light of those things and in the light of the answer that you have given me that at best the estimation of death in all these tests can only be approximate, does that help you at all in your estimation? A. It does not change my opinion.

HIS HONOUR: Q. At that stage, just to make the picture clear, there was nothing round her throat? A. Yes. I have seen bodies that have been moved and the movement of air in just moving the head can even make a sound. It is possible. I don't say that that took place in this case. All I am saying is that I think, from my examination of the body, it is very unlikely that the lips moved at all."

There was no medical evidence to the contrary of Dr. Gillespie's opinion. The ambulance officer who received the two calls at the time stated earlier said that the first message was, "My neighbour has collapsed", and that the second message was, "Please hurry, the patient requiring attention has apparently stopped breathing." Mr. Walton, the ambulance officer said that when he arrived at the flat the appellant said to him outside the premises, "I think my

wife has just stopped breathing" or something similar to that. He asked the appellant to show him in, they kept walking to just inside the front door of the house and the appellant then said that he thought his wife was dead. Walton said, "All right, show me where she is", and they then proceeded into the bedroom. He noticed that there was a woman lying on the bed in a supine position with her legs hanging over the foot end of the bed and apparently fully clothed. She was a Eurasian type of person, he felt for a pulse in the wrist, found none, and then checked the carotid pulse and it was absent. Breathing had ceased. He noticed the condition of her neck and he then went to leave the room and as he did so the appellant asked, "Is she dead?" or something similar to that. He said that he noticed a rigor in the face, the body was quite cold but there was no sign of rigor mortis in the arms and that the stiffness that he saw was in the chin. He said that he had handled bodies previously when he worked for the Government undertakers and he was doing that work for a period of about two years and held the position as an honorary and permanent ambulance officer for about fifteen years. He said that he had observed the condition of rigor mortis from time to time in the course of his work both as an ambulance officer or as a funeral contractor, but it appears that when he had handled bodies he had had information as to the time of death because it had been mentioned casually. His Honour asked:

> "Q. This is the situation, is it, as I understand what you are saying, that over the years you have been told on occasions somebody died at 1 o'clock which would be about an hour or so before you have seen them - sometimes people say that they died three hours ago? A. That is correct.
>
> Q. Or perhaps six hours ago, and you have accumulated over the period of years an experience of handling bodies having regard to when they were alleged to have died and noting their condition - is that right? A. That is right.

Q. You have had some experience in that over the years, have you? A. Yes.

CROWN PROSECUTOR: Q. Do you tell the Court what is your experience of the onset of rigor - is it fast or slow? A. It takes effect from the facial muscles and through its onset through the arms and legs and muscles similar to that. The rigor would take longer to set in in arms than it would in the face. The face is the first part that is more or less affected by the rigor.

Q. What is your experience of the facial rigor; is it immediate or what? A. Well, it is fairly rapid onset - probably one to two hours or something similar to that.

Q. One to two hours after death. Have you handled bodies of persons within half an hour or less of death? A. Yes, I have.

Q. In your experience are bodies in those circumstances warm or cold? A. Well usually warm, you might say to half an hour."

In cross-examination he was referred to his evidence given in the lower court on the subject matter of rigor in the face and counsel asked:

"Q. Do you remember saying this - being asked about the colour of the deceased - this question appears on p.28 (of the depositions): 'Q. What do you say as to the colour of the deceased, the subject of the present charge? A. It was very hard. The person was an Oriental. I did notice a slight rigor in the face, around the face' and so on? A. That would be right.

Q. A slight - A. That would be talking about lividity at that stage.

Q. I appreciate that but you did say that it was a slight rigor? A. That is right.

Q. As far as lividity is concerned, that is the situation that occurs sometimes in relation to the flow of blood to various areas when they have been at rest? A. Yes.

Q. You didn't notice anything about that? A. I couldn't say that."

In the light of the fact that the Government Medical Officer's evidence and opinion as to the time of death was about 9.45 a.m. and being uncontradicted, the jury were entitled to accept his evidence and to fix the time of death as being

between 9.30 and 9.45, and accepting his evidence that it would take five minutes from attack commencing with strangulation to death to conclude that the time of the attack was within five minutes of death and further they were entitled to accept what the appellant had first said to Detective Sergeant Murray, namely, that after going to Fyshwick he returned home at about 9.30 a.m. , his wife was then alive and that after being in the house for about ten minutes he then left about 9.40 a.m. That, of course, would put him in the house at the time of her strangulation and death. Any time of the deceased's death earlier than the period 9.30 a.m. to 9.45 a.m. would have to be excluded because there were not only the statements of the appellant that she was alive at 9.30 but there was other evidence from a Mrs. Reardon of her being alive between 9.10 a.m. and 9.25 a.m. The doctor's estimate of three to four hours from time of examination would include the period from 8.45 a.m. to 9.45 a.m., but, of course, the appellant's admissions that she was still alive when he left home at 7.30 and when he arrived home at 9.30 and the evidence of Mrs. Reardon having seen her between 9.10-25 exclude consideration of that period of 8.45-9.45 and confines the time of death to three hours approximately prior to 12.45 when Dr. Gillespie commenced his examination. This alone was strong, cogent and convincing evidence for the jury and there is no practical or other reason as to why it should not have been accepted by them. Other matters of significance develop once the time of death has been determined. It was a question for the jury, founded on reliable and cogent evidence, and it is a finding that could not be regarded by this Court in any shape or form as being unsafe.

As to the deceased being alive between 9 o'clock and 9.30 reference should be made to the evidence of Mrs.Reardon, who also lived in 38 Booth Street. She said, "It was only a matter of coming out of our drive and turning the corner and I was in Booth Street," and by that she meant she lived almost on the corner of Booth and Atkinson Streets. She had two boys and one girl and on the day in question she took one little boy to school in her white station waggon. She said she left home between 9 a.m. and 9.15 a.m., and the route that she travelled took her directly past the subject flats in Booth Street and she followed the same route coming home. School started at 9.20 a.m. She left home to get him there in time, dropped him, went straight home and it was five minutes each way. When taking the children to school she noticed that the door of Flat No.2 was wide open and on returning from the school the flat door was partly open. She said there was a Chinese woman on the front porch bending or crouching down more in a bending position. She had a bannister brush in one hand and either a watering can or bucket in the other and she seemed to Mrs. Reardon to be sweeping the dirt from the potplants or watering the potplants. She was facing with her back to the door of Flat No.3 and was opposite or in front of Flat No.2. She had never previously spoken to her but she always waved to her as she had driven past previously. They had exchanged waves. She said that she was dressed as follows:

> "She had a dark coloured mini skirt or shorts and she had a blouse which looked like a smock to me. It had a white background and it had blue and yellow and a little bit of pink pattern design in it. It looked like a pattern had been splashed and mixed. The colours had been splashed and mixed and it had short sleeves with a high collar."

She noticed the way in which it fitted, namely that it "sort of fitted tight on the bustline and fell loose to the waist";

she identified it when shown to her as the blouse and it was marked as Ex. U. She said she thought she was wearing thongs but she could not be definite and she either had a bracelet or a watch on her wrist. When asked as to the time when she first saw her she said between 9 a.m. and 9.15 a.m. and it would be about ten minutes later, about twenty past nine when she saw her again on the way back from the school. She also gave evidence relating to the soft drink man who called some time later in the morning. Reference will be made to that a little later. She identified the skirt which was part of Ex. B and this corresponds to the mini skirt which is shown in the photograph.

The evidence then deals with the various places which the appellant visited and the times at which he was present at those places. Mrs. Ley, whom it will be remembered lived in Flat No.3, was employed as a secretary at the business premises of Alan Curtis & Partners in Queanbeyan. They are real estate agents, whose premises are in Monaro Street, in the business centre of Queanbeyan. She left for work with Mr. Ley (there were not then married and she was then Miss Warwick) at about 8.25 a.m. and she said that morning tea was generally supplied around about 10 a.m.. She saw the appellant that morning at the business premises before morning tea time. When asked: "Q. Somewhere approaching 10 o'clock?" she answered, "Yes, about a quarter, ten to". He indicated to her that he wished to see Mr. Curtis, who was in his office busy speaking to two men. Mr. Curtis subsequently came out and spoke to the appellant and she said that that was quite a few minutes after the appellant had arrived. A cheque was made out by her following this conversation with Mr. Curtis for something in the vicinity of $600 and handed to the appellant, whereupon he left. She said

that he would have been there altogether about twenty minutes and that would take him down to about 10.10 a.m. to 10.15 a.m. Mr. Curtis corroborates that. He said he arrived at the business premises at Monaro Street, Queanbeyan, shortly after nine. He commenced an interview with Mr. Ottoway and Mr. Tolway somewhere between 9.45 and 10 a.m. and their discussion lasted for some time, he thought approximately half an hour. Whilst having this interview he received a message from his secretary that Mr. Pohl was waiting to see him, he was unable to attend him at that time, but he later went out of his office, leaving the two gentlemen still in his own room; he believed this was approximately 10 o'clock, but it could have been a little bit after or a little bit before, he spoke to Mr. Pohl and arrangements were made for a cheque to be drawn for him.

Having left Curtis' office the appellant then went to the business premises of Auto Spare Parts, conducted by a Mr. Edwards. Those premises are almost directly opposite Curtis' office. Mr. Edwards gave evidence that having opened at about 10 a.m. the appellant was one of his first customers, he estimated the time at which he arrived as being about ten past ten, that he was there concerned with making arrangements to pick up some parts relating to his car, which was a green Valiant, which the appellant had ordered earlier in the week some of which had been picked up and there were others to be picked up, he paid his account, something in the vicinity of $147, and he said that the appellant was there for only four to five minutes in all. It would appear that thereafter the appellant then went to the Council Chambers where he transacted some business relating to some plans. Evidence of this was given by Miss Wall who started work at 9 a.m. but who opened the office for business somewhere about half past

nine. She could not be precise as to time, but she said it was somewhere between five minutes to ten and twenty past ten. She actually saw him there on two occasions in that period; he came in, transacted some business, came back inquiring about another officer of the Council to whom she directed him, then he returned and the last time she would have seen him was somewhere about twenty past ten, but she could not say exactly. She said that she fixed the time at about twenty past ten by working it out by the people who had been in prior to the appellant and a young lady that she knew came in about half past ten after he had left.

The appellant was using that morning the blue Vauxhall because the green Valiant was undergoing some repairs at premises known as Uriara Motors in Queanbeyan. This is about a quarter of a mile away from the Queanbeyan Hotel and this is shown on a district road map which was shown to us purely as a means of fixing the positions of the various streets and places in Queanbeyan. He told the police that he called at those premises for his car, it was not ready, he left to go down to the hotel to pick up a couple of cans of beer, which he brought back to the workshop, had a drink with the manager, took delivery of his car after a short wait and left there somewhere towards midday and arrived home at about 12 o'clock.

No evidence was given at the trial of his visit to the Uriara Motors other than what he himself had said in the record of interview and during the hearing of the appeal this fact was adverted to by the Bench. There was then a short adjournment and during it Mr. Kemp, who appeared for the Crown but who was not the Crown counsel at the trial, informed Mr. Purnell that the person who could give that evidence had in fact given evidence of the appellant's visit to his premises at the Coronial proceedings and the reason that he

had not been called at the hearing was that he was overseas. After some discussion it was agreed that Mr. Purnell with the consent of the Crown should tender before us this deposition and we received it in those circumstances. The name of the deponent was Nicholas Szczerbiak, who described himself as a motor mechanic living at 66 Uriara Road, Queanbeyan, and a partner in the firm of Uriara Motors, Uriara Road, Queanbeyan. He said he knew the defendant then before the Court, he owned a motor car, a Valiant, which he left at his workshop to have certain repairs carried out. He could not remember the day. He thought it was some time in April but upon being referred apparently to something he had written in a statement to the police he fixed the date as being 8.3.73. The deposition proceeds as follows in-chief:

"Q. Recall the defendant returning to your workshop to collect his car? What day was that? A. 9.3.73.

Q. What time was it? A. I don't remember.

Q. Morning or afternoon? A. Morning.

Q. When he returned in the morning to collect his car was it ready? A. No, it was not ready.

Q. Did he remain at your workshop or did he leave? A. He left.

Q. Did he again return to your workshop? A. Yes.

Q. Did he have something with him? A. Yes, some beer, cans of beer.

Q. Did you have anything to drink with him? A. Yes, a can of beer.

Q. Know what time it was he returned with the beer? A. Not exactly. It was after 11.

Q. Was his car ready when he returned with the beer? A. No, it was another few minutes.

Q. Did he remain in the workshop until the car was ready? A. He remained.

Q. Eventually the car was ready and he took delivery? A. Yes.

Q. I take it then that he left your workshop?
A. Yes.

Q. Approximately what time was it? A. It was close to 12."

Pausing there, the appellant told the police that when he picked up his car he left his wife's car at that garage. The deponent went on to say that Uriara Motors was about a quarter of a mile from the Queanbeyan Hotel and on a Friday between 10.30 a.m. and 12 noon it would not be busy there on a normal day and in cross-examination he was asked:

"Q. I take it that between 10.30 and 12 noon on 9.3.73 you were busy in your workshop?
A. Yes.

Q. No spare time between 10.30 and 12 noon to go and see what parking conditions were at the hotel? A. No."

That subject matter was directed to the question whether it would not have been more convenient for the appellant to have parked his wife's car not at the Queanbeyan Hotel whilst waiting to pick up his own car but at some other hotel nearer to Uriara Motors. He said also that he had known the defendant (appellant) for five or six years and when he saw him that morning there was no difference in his demeanour to the way in which he was on previous occasions - "there wasn't any difference. He was the same like any time before".

The evidence as to times is somewhat vague. He could only remember that it was after 11 a.m. that he returned with the beer, that he was only there for a few minutes after such return and then left with his own car and the best he could do with regard to the time at which he left was that it was approximately close to twelve. Just what was meant by "close to 12" or how close to twelve was "approximately close to 12" remained unexplained.

As against that material there was the appellant's own statement to the police while the record of interview was being

taken, when he was asked directly how long he was in the house before he discovered his wife's body. In his first record of interview taken on 9th March, which commenced at 1.55 p.m., he was asked from Question 46 et seq as to what he did after he left the Council Chambers, where he said he had been for three-quarters of an hour. He said that he went straight up to Daly Street where he had been working on a factory, had a look to see if the plasterers were finished and from there went to Uriara Motors and that the most he would have been at Daly Street would have been a quarter of an hour. When asked what time it would have been when he arrived at Uriara Motors he said, "I wouldn't have a clue", but he went on to say that he had a look to see if the Valiant was finished that Mike said that it would take a couple more minutes to finish tuning the car up, so he went down to the Victoria Hotel, bought six cans of beer and went straight back to Uriara Motors. On returning to the garage Mike was still attending to the car and he waited a long time talking with Nick (the deponent). He said, "I don't know the exact time. I think it was about 12 o'clock when I left there", and that he drove straight home from Uriara Motors, leaving the Vauxhall there. In a second record of interview taken on 15th March he said that Uriara Motors was the last call made by him prior to returning home and he was asked at Question 126 of that interview:

> "Q.126. How long did it take you to find the body of your wife after you entered your front door? A. I don't know.
>
> Q.127. Could you estimate approximately how long? A. Maybe fifteen or twenty minutes. It could be a bit longer. I don't know.
>
> Q.128. How long was it from when you found the body of your wife until you went to get assistance from Mr. Meyer? A. I run straight out, knocked on her flat (that refers to Mrs. Ley's Flat No.3) and when there was no answer I got in the car and drove over to Mr. Meyer.

Q.129. Would you care to tell us what you were doing in the fifteen or twenty minutes between the time you entered your front door until you found your wife? A. Looking for her.

Q.130. Would you care to tell me in detail where you looked? A. I walked in the door and went past the bedroom into the study and then through the bedroom out to the laundry, had a look over to the Hills hoist and then I called out to my wife. I went in through the bedroom to the kitchen then I seen the hole in the door and then I heard the rotisserie and I switched it off. I went into the bedroom again and then I saw her pantyhose. I lifted them up and put them on top of the washing and then I saw the feet of my wife, the skirt was up.

Q.131. And to do that occupied fifteen to twenty minutes? A. Yes.

Q.132. How long was it from the time you entered your house after looking in the laundry and towards the clothesline until you found the body of your wife? A. I don't know."

Earlier in that interview at Question 9 he was asked:

"Q.9. Would you care to tell me . . . everything that happened in your home at Flat 2, 30 Booth Street, Queanbeyan, from the time you arrived there after delivering the window frames to the job in Foster Street until you left your home? A. I walked in the house at about half past nine. When I came in I had been talking to my wife. Picked up three plans and picked up the Esky underneath the house, put it in the kitchen because my wife would like to clean it and then I left the house and my wife was still all right when I left there.

Q.10. How long were you at your home on this occasion? A. Ten minutes approximately.

Q.11. What was your wife doing when you entered the front door of your house? A. Starting to clean the stove. She took she shelves out.

Q.12. Did she continue doing that while she was talking to you? A. Yes.

Q.13. What did she do with the shelves? A.Lifted them up to the sink.

Q.14. What was your wife doing when you came back out and put the plans on the shelf? A. Still cleaning the stove.

Q.15. What part was she cleaning then? A. I don't know. The shelves are wire."

As indicated earlier the measurements of this flat show it to be a small compact flat and accepting what he said as to

his movements when he came in the jury were entitled to the view that it could not possibly have taken more than a few minutes to walk through the house, go out the back, go to the laundry and return through the bedroom up the hall to the front door and then proceed back from the front door and into the bedroom. The jury were entitled to say that this could have only taken a very brief period of time and that three minutes at most would have sufficed. The total distance covered can be worked out from the measurements which are earlier adverted to. The jury were entitled to accept his admission to the police that prior to discovering the body he was in the house for fifteen or twenty minutes and even longer. If one takes the time at which the first ambulance call was made, namely five past twelve, and works back from that, it was open to the jury to find that he left his premises to go first, as he alleges to Flat 3, knock on the door, wait for an answer and on receiving no reply, then went to Mr. Meyer somewhere about five to twelve. True it was that he travelled by car the seventy-five yards. He had to make a U-turn, stop outside Meyer's flat, go and find him, explain to him as he did that something had happened to Joyce and that he wanted Meyer to come up to Flat No.1 so that the telephone could be used. Meyer was somewhere in the back of the premises where he was moving furniture from his own flat into a garage at the rear and that required him to be at the rear of the premises where the appellant had to go looking for and finding him. He said that the appellant came down the side passage to where he was just in front of his garage and said that something had happened to Joyce and that he wanted a doctor or the ambulance. Meyer told him that he would use the 'phone"in Vic's place," that is Mr. Vic Hoskins who lived in

No.1 Flat alongside the appellant. Repeating for the purpose of estimating the time element involved Mr. Meyer said that he went across the road to that flat, that is walked across the road and waited there for Mr. Pohl to drive over in his car from outside Meyer's place. He then asked the appellant outside No.1 Flat, "Tell me what is the matter so I can tell the ambulance what to expect". He was asked, "Did he say anything or do anything?" and he answered, "He said to me come and have a look". He then followed Mr. Pohl in through the front door and through the lounge room into the hall and stood at the door of the bedroom and saw Mrs. Pohl lying on the bed on her back with her legs dangling over the foot end. He stood at the door which he estimated twelve or thirteen feet away from where the body was lying. He looked at her face, it seemed to be discoloured. He thought it was dirt of some kind but it seemed to him that she was in need of medical help and he added, "And I didn't wait". He then went out of the Pohls' flat into the No.1 Flat next door and used the 'phone to make the first ambulance call. So, calculating the time as the jury would be entitled to do from the time of that first call at 12.05 p.m. back to the time when Pohl left the flat to go to obtain Meyer's assistance, the time could well have been somewhere around about five to twelve. Then if one adds to that the quarter of an hour or twenty minutes which he admitted to having spent in the flat before he found her body, and of course that on his version was just before he left to get Meyer, it was open to the jury to find that he was in the flat between twenty-five to twelve and twenty to twelve. If the time that he discovered the body was 12 o'clock the time that he was in the flat was between twenty to twelve and quarter to twelve, but he had added that it could have been longer and so there was ample material

from which the jury could have found and were entitled to find that he was in that flat at least from between twenty and quarter to twelve and probably longer. What then was he doing in that interval other than the few minutes that it would take to go through the premises and into the laundry and back again looking for his wife and finding her?

He said some significant things about the state of the premises when he first entered the premises about midday. Firstly that he heard the rotisserie buzzing, that is the rotisserie which is part of the electric stove in the kitchen, and he said he turned it off. He is not, as we understand it, referring to that piece of the equipment which revolves with the meat on it when it is being roasted in the oven, because that would have been removed when the shelves were taken out. That is a steel rod with an arrow point at one end and a piece of metal at the other end shaped like a head of a hammer which fits into a slot at the back of the oven and the pointed end fits into a yoke which is clipped on to the top tray of the oven whilst the roasting process is going on and it is driven by the motor in the recessed slot. When that oven shelf is removed there is of course nothing to hold the rotisserie piece in position and it comes out, but the rotisserie switch, if switched on, will set the rotisserie motor going so as to heat up the element which is in the ceiling of the oven. The object of that exercise as we understand it is that if a person is cleaning the oven with detergents and liquids some assistance will be obtained from the fact that the heat so produced will soften up the grease which is on the oven parts and which are required to be cleaned off. This is what he is referring to when he says that he heard the rotisserie on and when he says he switched it off. He said that at 9.30 a.m. his wife had removed the

oven shelves and at least one was in the sink. He also said that when he went through the premises looking for his wife the bed was in its normal position, made up with a bedspread over the top and it was quite flat and undisturbed. He said further that on his way out from his study the door of which was open before he entered, he almost tripped over a gas heater which was in the hallway between his study and the bedroom. It was connected, he said, to the gas cock fitting which is on that side of the hall and which receives a gas supply from two gas cylinders or bottles which are outside the back of the premises. If one looks at Ex. E2 they can just be discerned behind the latticework where it adjoins the bedroom; and so he then bent down and disconnected the lead from the cock and shifted the gas heater into his study. The evidence was that this disconnection only involved a matter of seconds because it is a bayonet fitting and only involves stooping down, twisting and lifting up. He said in a record of interview however, that when he left home that morning after half past nine the gas heater was not connected and it was under the shelf which is at the end of the hall underneath the divider.

The Crown alleged that the appearance which he had endeavoured to make out by this assertion was that after he had left home that morning (9.30-9.45 a.m.) someone some time later brought the heater out from under the shelf, connected it up, placed it in a position near his study door and had used it and that this setting up implied that no one else except his wife could have done this. Likewise that the rotisserie had been either left on from between half past nine to quarter to ten until his arrival about twelve or his wife had after his departure some time during that morning switched

it off and on again and the defence relied on this and as will be seen the kitchen sink contents and the oven door and the gas heater as being material from which it could be inferred that whilst he was keeping his various appointments she was attending to various household chores and duties and that whilst so engaged someone entered the house prior to his return and strangled her and hid her body.

However, he was unaware of the fact when he made those observations to the police on that day about the rotisserie and gas heater that his sister-in-law, Mrs. Margaret Pohl, had called in the interim at the flat and this had happened in a quite unexpected way.

Mrs. Margaret Pohl's little boy that morning had had a sudden and acute attack of tonsillitis and it necessitated her, without consulting her husband, the appellant's brother, rushing him to hospital where he underwent an operation and as she had not as yet informed her husband, she decided first to call in on her sister-in-law, the appellant's wife, whom she called Joyce. She drove a Mercedes car, greyish colour, and arrived at the premises in her words, "about a quarter past eleven". She came to the front door, parking her car out in Booth Street, and knocked at the door as it was closed but she received no answer. She walked off the patio past the kitchen window and she looked through the window into the kitchen. The window was open but there was a flyscreen. She said that she saw that there were dishes in the sink and she heard the radio playing. This refers to a small transistor which was on the shelf, which constituted the top ledge of the divider. So, thinking that her sister-in-law may be somewhere around the back she went around the back, that is she walked around past Flat No.3, around the back of it and found her way to the back door of the flat No.2. She found it was closed,

which was not unexpected. She knocked at the door, tried the handle, found it was not locked and finding this unusual she went straight in. She called out to Joyce but received no answer. She said that she went through the flat up to the front door because she thought that perhaps as she herself was going around the back her sister-in-law Joyce might have come out and gone around the front. She looked closely at the front door to see if it were now open or ajar and saw that it was closed and she looked into the kitchen which is adjacent, as the sketch plan shows, to that front door. There she saw the oven door of the stove half open and the dishes in the sink. She said there may have been parts from the stove in the sink as well "but there was stuff in the sink". This was unusual and out of character with Joyce's usual clean and tidy habits for her to go out and leave the kitchen in that untidy state. There was no noise from the rotisserie motor which she said makes a pronounced buzzing noise when switched on. So there being no answer she went down to the hall near the bedroom, and looked towards the bathroom, thinking that her sister-in-law might be there washing her hair, but as that door was open she concluded she could not be in there, otherwise she would have answered her call and so being satisfied that there was nobody in the premises she left through the back door. She said that the study door, which is opposite the bathroom, was closed. She could see from where she was standing looking towards the bathroom that this was so and she did not trouble to go into that room. She was asked whether, when she went to the front door as she had earlier said in order to see if it was open and if her sister-in-law had gone out through it whilst she was going around the back of Flat 3 to the rear of Flat 2, there was any mark on the inside of the front door corresponding with

the mark which was on the front door, Ex. K then in Court, and she said:

> "I can say ninety-nine per cent it was not there because I particularly looked at the door if it was open or not because I thought she went out the front and I would have noticed that hole for certain if it would have been there when I was there".

She was then asked:

> "Q. So you did not notice it at all? A. No.
>
> Q. And you say you looked hard enough at the door to think that you must have seen it if it were there? A. Yes, I must have seen it.
>
> Q. Did you look all over the door or did you look at any particular part of it? A. I was looking at the lock more or less to see if she went out the front door."

The significant relevance of this is that the appellant said that on returning to the premises after going to the laundry to look for his wife he went up towards the front door and then noticed a hole in that door which made him think there may have been a forced entry and robbery. It was a very prominent hole. The door has been exhibited to us in the Court. It is painted a creamy white colour and it consists of a hollow frame with a solid front representing the outside portion facing the street but the inside face is made up only of either masonite or plywood. The hole is shaped like a sword upside down, the long piece being about four and a half inches in length, the cross-piece about three and a half inches and there is quite a substantial hole in the middle where these fractures appear to intersect. That hole, as now seen and as it was before the jury, is larger than when it was first observed by the police on the day of the murder because a small piece had been taken from the broken section for examination by the scientific people who said that there were no grains or powder or splintered parts on the floor near the door, but that some broken parts were found inside the

hollow door. At a later point of time when the appellant was discussing this damaged door with his sister-in-law and also another person on a separate occasion, the appellant ventured the opinion that the door must have been pushed open violently and banged against the corner of a chair in the lounge room, which is shown on the sketch and which itself was tendered in evidence. We also saw that chair; it was brought down from Queanbeyan by truck. The cloth material around that corner was somewhat chafed but it was explained to us that this particular corner had rubbed against the vehicle in which it was brought down from Queanbeyan and that there was no marking of any sort on it when it was before the jury. The door and the chair were taken to the police station and because the doorstep was one and a half inches higher than the floor of the lounge it was placed on a piece of wood one and a half inches high and the chair placed against it and the corner of the chair fitted into the hole. It is quite a noticeable hole and Mrs. Margaret Pohl was close to it when she inspected the door to see if it was open and she did not see it and the jury were entitled to accept her evidence that it was not there at that time and conclude that, if it was not there at that time it had come into existence between the time that she left the flat and the time when the appellant said he discovered it. She also said that she did not observe any gas heater in the hall when she was in the premises and there was nothing untoward about the carpet runner which ran down that hall. The appellant told the police when shown the disturbed state of the carpet runner as is shown in the sketch plan and Ex. J, that he could have done that. It will be observed that it is pulled back in folds down to the gas jet connection. There is a linen cupboard at the end of

that passageway and it shows the cupboard doors open a little and the end of the carpet jammed in the bottom of the cupboard, that is it is partly lifted up from the floor on one corner, inserted into the cupboard and the cupboard door pushed up against it but not closing. The jury were clearly entitled to say that obviously any woman standing in the passageway looking up towards the bathroom and the study door would have seen that if such had been the state of affairs when she was there. Mrs. Pohl said when she saw that runner it was lying on the floor the way it should be, straight, and she did not notice anything about the lounge room at all in any disorder. She said that when she went through the bedroom she looked at the bed because she thought Joyce might have been in it, but the bed was straight and made and it had a blanket type of bedspread on it and she described the eiderdown which was underneath that bedspread as a feather eiderdown which did not straighten out if someone or anything was placed on it but that such placing would leave a hollow or dent. It was level and straight when she saw it as if a housewife had made it and the top bedspread was lying over it in a normal fashion. She made it quite clear when looking at Ex. N that the striped underneath one was the eiderdown and that it was covered over by a blanket-type spread and she said that if the blanket is over it and you touch or press on it and do not straighten it out, it stays hollowed that way. At no time did she see the pantyhose and panties on the floor. Detective Sergeant Murray said the position in which the appellant claimed he had found them wrapped together with the panties outside was indicated by the appellant to the detective as being a foot or so out in front of the bed at its foot end and about the centre thereof and it was then in a direct line with the doorway leading from the hall into the bedroom, so that

it was there for anybody to see who went from the hall into the bedroom.

In cross-examination these questions were put to her:

"Q. I suggest to you that when you went into the kitchen the stove door was in a different condition to what it appeared to be in the photograph you were shown in the lower court. Do you agree with that? A. The picture? The photograph? The stove door was half open.

Q. When you went in that morning the stove door was half open? A. Yes, that is right."

Then, shown the photograph Ex. L, she was asked:

"Q. Do you agree the stove door appears to be fully open? A. Yes."

And she said that the upper ~~part~~ of the two doors on the stove was the grill:

"Q. Do you see that what appears to be an element. Was that in position when - A. No. (That refers to the element which was lying on an angle on top of the inside of the oven door which is fully open).

Q. It was not? A. No."

A little later she was asked:

"Q. When you looked through the window that morning about 11.15, through the kitchen window, I think you told the Magistrate's Court there was some stuff in the sink? A. Yes.

Q. Can you see the sink in the photograph Ex. L? A. Yes.

Q. Did there appear to be anything in the sink in the photograph? A. It is not in the sink.

Q. You could see part of the sink in Ex. L. That part of the sink you would have been able to see something in it? A. Yes, that is right. The kitchen window is near the table. You see a bit of the window in the photograph.

Q. You can see the window on the left of the table? A. Yes, that is the kitchen window.

Q. That is where you looked? A. Yes.

Q. There is nothing in the sink as far as you could see in Ex. L, but there was something in the sink when you looked through the window? A. Yes.

Q. Do you remember what it was in the sink? A. No."

In re-examination shown Ex. L she said she thought the oven shelf shown therein on the wire tray on the draining board was in the sink when she saw it, and "stuff" in the sink. The appellant had said to the police that when he left at 9.30-9.45 a.m. there was one oven shelf in the sink.

In-chief she had said "dishes". Looking at the photograph it is clear that there is nothing in the sink. There are things standing on the edge of the sink and there is also on the sink a wire tray and in it can be seen two of the shelves which came from the stove and there can also be seen the rotisserie comprising the metal piece at the top and the piece that revolves attached to it and lying also on top of those shelves. Exhibit E1 shows inter alia the kitchen window and the sink which appears empty.

If Mrs. Pohl's observations of the kitchen when she looked through the window and also at the time that she was there inside at the kitchen entrance are correct, and it was for the jury to say whether they accepted her or not, then some compelling, cogent and strong circumstantial inferences result which the jury were entitled to conclude implicated the appellant as the murderer and exclude anyone else.

As mentioned earlier the learned trial Judge in his report said of Mrs. Pohl that he regarded her as well as the other two women there mentioned as being reliable witnesses in general. There was no evidence of any animosity or hostility or bias on the part of Mrs. Pohl towards the accused. She appeared to believe him, that it was not him but somebody else that had entered the flat after she had been there and had murdered her sister-in-law Joyce. She was sympathetic towards the appellant; she never pressed him for any explanations. She thought that he was genuinely upset and from the day of the death as the appellant was not allowed by

the police to return to the place he lived with his brother and sister-in-law for the best part of three weeks; so she had no axe to grind and the jury were entitled to accept her, as they undoubtedly did, as a reliable, truthful and observant woman. And so it follows that somebody in the interval between her departure and his arrival must have done the washing up and put away the dishes that were in the sink for they are nowhere in the photograph Ex. L, and taken the oven shelf which was in the sink and put it on the wire tray, removed the other wire shelf, washed it and put it on the wire tray on the side of the sink or if it was already in the sink washed it and put it with the other one put the rotisserie piece on top of both wire trays, opened the oven door fully from half open and placed on the oven door the element from the griller. All or substantially all this the jury were entitled to conclude had happened between the time Mrs. Margaret Pohl was there and left and the time when the appellant alleged he returned home.

Once it is accepted, as the jury were clearly entitled to accept from Dr. Gillespie's evidence, that the deceased died between 9.30 and 9.45 a.m. that day, it is impossible to attribute to her any of this activity and of course likewise it is impossible to attribute to the deceased any suggestion that between the time that Mrs. Margaret Pohl left the flat, and the time of her husband's discoveries, the deceased had anything to do with the switching on of the rotisserie, because Mrs. Pohl said it was not on when she was there and had it been on it made such a buzzing noise that she obviously would have heard and noticed it. And, if Mrs. Pohl is to be accepted, then as she did not see any gas heater in the hall connected as the appellant described it on his returning home the deceased did not have anything to do with its connection

and positioning up the hall and of course the deceased woman could not have anything to do with the alteration of the hall runner so as to leave it in the folded and distorted condition in which the photographs show it. The jury were entitled to reason that if it was not the deceased woman who did the washing up of the things in the kitchen sink or putting the wire shelves and rotisserie piece on the wire tray and who altered the kitchen stove door or switched on the rotisserie connected the gas heater or opened the study door or folded and distorted the hall runner then either the husband had done these things after he returned or an intruder had entered the premises and done these things in the interval between Mrs. Margaret Pohl's departure and 12 o'clock. If it was some intruder they were entitled to conclude that it could only be the person who had strangled her to death at 9.30-9.45 a.m. for there was no other person who rationally could be pointed to or conceived as having entered the premises two to two and a half hours later and done any of those things. They were also entitled to conclude that it was likewise impossible to believe that this cleaning up of the kitchen, that is of the washing up and straightening out of the position of the stove doors and the other matters would have been done by the murderer and her husband together, and that it was not possible to believe or rational to suppose that this could have been done by the murderer whilst the appellant was wandering through the house looking for his wife and unknown to the appellant. It was open to them to hold the view that it was not rational to suppose that the supposed intruder who committed the murder between 9.30 and 9.45 a.m. would have any interest in hiding the body in the house coming back two to two and a half hours later and altering the laycut of the premises in the fashion that has been described. The jury were entitled to draw the

inference that there was only one person who would have any interest and be interested in attending 2-2½ hours later to these matters and creating these false appearances of the deceased having done them after 9.30-9.45 a.m. and that was the husband, the appellant, and nobody else.

What purpose was there, one might ask, in hiding the body and coming back and doing these various things in the kitchen or even hiding the body at all if it was not for the purpose of coming back and making it appear that the deceased had died so much later than 9.30-9.45 a.m. and that she was alive and well all the time the appellant was out during that morning keeping his various appointments and making it appear that she herself had done these household chores and had turned the rotisserie on and positioned the gas heater and opened the study door and distorted the hall runner. The jury were entitled to conclude that all this was for the benefit of the appellant so that his alibi might hold and so that he would be able to present a story of his wife having been alive after 9.30-9.45 until some time before his alleged return at 12 o'clock and then being attacked by some unknown prowler, together with a pretence that she was still breathing when he brought Meyer to his house.

The jury were entitled to say that it was impossible to conclude that she must have been alive at the time of his alleged return or could have been alive at that time because the doctor's evidence, which was open for them to accept and was uncontradicted, was that death resulted within five minutes of the strangulation in this case and that would mean that if she were breathing after he returned home her death would have been somewhere close to 12 o'clock in which event there would have been no signs of rigor mortis and the body would have been warm. The jury were entitled to conclude that

the only rational inference was that it was the husband who did all these things after Mrs. Margaret Pohl had left and that there is no other rational hypothesis on the evidence pointing to anybody else.

Once it is accepted, as the jury were entitled to accept, that the deceased met her death between 9.30 and 9.45 a.m. then there is no rational or viable theory available upon the evidence of her being alive after then and certainly not after 11.30 a.m. and in the house to perform the chores and make the changes to which Mrs. Pohl deposed or which are to be inferred from her evidence.

Implicit in this, of course, is the acceptance by the jury of Mrs. Pohl as to these various matters and her powers of observation, and, as indicated earlier, there was nothing which affected her credit or credibility in any way in relation to these matters. Indeed, the cross-examination of her on the differences between what she saw of the kitchen and Ex. L was accepted by the defence and relied upon to suggest that a stranger or prowler must have entered after she had departed. The acceptance by the jury of the time of death and of Mrs. M. Pohl as an observant honest and credible witness also disposes of any theory that the hole in the door was created at a time when the deceased was alive or before she (Mrs M. Pohl) left the premises and of the theory that it was caused by somebody opening the door violently against the corner of the chair in the lounge room at the time of the strangling of the deceased. For, as is emphasised, if Mrs. Pohl is accepted then there was nothing wrong with the door when she left the premises and of course the strangling took place at 9.30-9.45 a.m.

Once these positions are reached then the jury faced the problem of determining on the evidence who was the person who did these things, namely, the chores in the kitchen including

the alteration to the stove, the washing up, the turning on of the rotisserie, the connecting up of the gas heater and placing it in position in the hall between the study and the bedroom, the opening of the study door and the dis-arrangement of the carpet in the hall as depicted in Ex. J.

It is absurd to think that all this was the work of some stranger different to the strangler who murdered the deceased between 9.30 and 9.45 a.m. It must have been the same person for if it was some strange prowler that came in from the street the jury were entitled to ask themselves: "How would he know the importance, relevance and significance of making it appear that the deceased was alive after 9.30-9.45 or after about 11.30 and the particular significance of the very things that were done to indicate that she had performed these household chores after that time?". "How would such a strange prowler know the significance and importance of what was done in the kitchen, namely, the washing up of the dishes and putting them away, the removal of the oven shelves from the sink on to the draining board, emptying the sink, the opening fully from half open the oven door and the placing of the griller element on the flat oven door when so open?". "How would he know the significance of turning off or on the rotisserie or of the putting of the radiator in the hall or of putting a hole in the door?". "And if the 9.30-9.45 strangler hid the body, how would another prowler after 11.30 know where to find her or even know it was hidden?". Once the jury came to the conclusion, as they were entitled, and that the 9.30-9.45 a.m. strangler and the alleged after 11.30 a.m. prowler are identical then common sense would dictate that it would have to be somebody who knew and appreciated the significance and importance of these matters, and the only person who would so know would be the husband. If the

9.30-9.45 a.m. strangler were some stranger or prowler how could he have known the significance of matters so urgently compelling as to hide the body in the house and return two to two and a half hours later and go through the motions of all these acts? And what of the problem of getting in again without a key and without forcing the front door? And how would he know that the body would still be where he hid it if he was proposing to return some hours later unless he were self-assured that no one else would be there before his return?

So the jury were entitled to conclude that the person who did the dis-arranging of the kitchen stove and the household chores after Mrs. Pohl left, as well as making the hole in the door and dis-arranging the hall carpet, was none other than the appellant and that the appellant had returned to the scene of the crime for the purposes of creating a scene and setting up the place in a manner which would indicate that whilst he was away from between 9.30-9.45 and about midday his wife was alive performing household duties and was sexually attacked and strangled shortly before midday. His defence was that he left her between half past nine and twenty to ten, she was then alive and his alibi for a couple of hours thereafter was that he was attending to his various business appointments.

So the two factors, namely, the medical evidence of the time of death and the evidence of Mrs. Pohl, which were open to the jury to accept would enable the jury to reject any theory as irrational based on the evidence that these household chores and other matters were done by the deceased after Mrs. Pohl left the premises and before the appellant came back to them; and the rational inferences supra they were entitled to draw could and would lead to the inevitable conclusion that the one and only person who could have done these things was the appellant. The time of death alone necessarily excludes any

suggestion that the deceased could have done anything at all after Mrs. Pohl's departure.

There is, however, a matter which was put forward as affecting the weight of Mrs. Margaret Pohl's evidence. This relates to the time at which she says she was there and to the time other evidence establishes she was there. Her arrival at the premises was as has been seen quite fortuitous on that day. The details need not be repeated. She said that she arrived at the premises at about 11.15 and having gone through the premises from the back in the fashion previously described and not finding her sister-in-law, she left after about four or five minutes which would make the time of her departure somewhere about twenty to twenty-five past eleven. When she was leaving she noticed the soft drink man coming from the premises across the road in Booth Street and she noticed that he wore a company uniform consisting of shorts, a red shirt and a blue towelling hat.

Now there is other evidence that this was about 11.40 a.m. and it comes about in this fashion. The driver of the soft drink vehicle, Mr. Connell, said that this was his first day on this run, which had apparently been two runs merged into one, that he was not very familiar with the streets that he had to visit or the customers upon whom he had to call and he was dressed in the company uniform as Mrs. Pohl described. The best that he could say was that he was there between 10.30 a.m. and 11.30 a.m. and that when he was leaving the premises on the opposite side of the subject flats in Booth Street he saw a woman whom he could not identify coming from the flats and she proceeded to a car, entered it and drove off. He could not recall particularly the type of car but thought it could have been a Holden or a Valiant or a Mercedes.

However, Mrs. Reardon, to whom reference has been made earlier, said that after she had taken her little boy to school she remained at home for some time waiting for Sharpe Bros., the soft drink ~~people~~ man, to call and she recalled speaking to him on that day. She was asked then the following questions and gave the following answers:

"Q. Do you see him in Court now? A. Yes, he is over there. (Indicating Connell).

Q. What time do you say it was that he called? A. Between 11.30 and 20 to 12.

Q. How do you place that time? A. He usually calls between 10 and 10.15, round about that time, and this Friday he was late and my little boy had asked if he could watch television and 'Play School' does not commence until about ten past 11.

Q. That is the name of a programme? A. A children's programme on Channel 3.

HIS HONOUR: Q. What time does that start? A. 10 past 11.

CROWN PROSECUTOR: Q. You turned the TV on to that channel for the boy, did you? A. That is right.

Q. Had the drink man come before that? A. No.

Q. Was the programme still on the air. Had it reached the end? A. They were just saying, 'Goodbye'.

HIS HONOUR: Q. Who was just saying 'Goodbye'? A. The man on television.

Q. The programme was just about over? A. Yes, at the finish of the programme they say 'Goodbye', you know.

CROWN PROSECUTOR: Q. So it had reached just to the end of the programme? A. Yes.

Q. When you say the drink man came? A. Yes.

Q. You did say the programme usually ended about what time? A. Twenty to twelve.

Q. You bought some drinks? A. Yes, one dozen bottles.

Q. How long was he at the place? A. About five minutes."

The time of twenty to twelve, however, was corroborated by a Mr. Simpson who was the Presentation Officer engaged at the

date of the trial in the presentation of television programmes at the Australian Broadcasting Commission but who was "press assistant" on 9th March, 1973, the duties being substantially the same with a couple of variations and they included keeping the station on air and making certain the programmes were put on at the correct time, as well as keeping a record of the times individual programmes ran, and having to enter those details on a particular document. He said that on 9th March in the course of his duty he made out an operation sheet which included the presentation of "Play School" broadcast from Channel 2 in Sydney and which in Queanbeyan would be on Channel 3, namely ABC3 Canberra. He produced the records, refreshed his memory from them in relation to the programme "Play School" and was asked:

> "Q. Refreshing your memory from your own notes can you tell us what time the programme Play School commenced on 9th March, 1973? A. Ten past eleven.
>
> Q. What time did it conclude? A. At 11.3905.
>
> Q. You take it to the nearest second? A. Yes, we have to.
>
> Q. 11.3905. I think the wind-up of that programme involves the participants saying 'Goodbye', making a farewell of some sort? A. Yes, and then they go into the theme of the programme, musically played out.
>
> Q. How long is it before the actual end of the presentation, the players make their final goodbye? A. It does vary, within 30 seconds would be pretty long I would say. On Fridays it could be a little longer, but it does vary from programme to programme. It would be hard to average it.
>
> Q. Would it be one minute? A. It would be pretty unlikely I would think.
>
> HIS HONOUR: Q. What does 11.3905 mean - 5 seconds - 11 o'clock, 39 minutes .05 seconds. That is the actual change of programme? A. That is when the programme actually finishes."

Then Mr. Simpson said that the programme moved into a schools' programme after that, and that the programme was run twice a day Monday to Friday, one at ten past eleven and one at 3.30.

Now that evidence was not challenged in any way and that would be material from which the jury could infer that the time at which Mrs. Margaret Pohl left the house when she saw the soft drink man opposite and when he saw her was about twenty to twelve or within a couple of minutes thereafter. It has been submitted to us as undoubtedly it was to the jury that this is a matter which so affects the evidence of Mrs. Pohl as to make the whole of her evidence unsafe to act upon. But it was quite open to the jury to accept Mrs. Pohl's evidence as to part, namely, as to what she observed in the house and of the garb of Connell and not to accept her evidence of having arrived there at "about 11.15 a.m." and leaving "after about five minutes" and to accept the other more positive evidence of about 11.40 a.m. as being the time she left the flat. Nextly, the appellant can get little comfort from this space of time between 11.20-11.25 a.m. and 11.40 a.m. because the later it was that she left after 11.20-11.25 and the closer that gets to 11.40 a.m. the worse the situation becomes for the appellant. On his version as previously analysed he had discovered the body at round about five to twelve and had informed the police that he was in the house alone for a quarter of an hour or twenty minutes and even longer before he discovered the deceased's body and the jury were entitled to the view that this destroyed any suggestion that somebody else was in the house in that period before his discovery of the body, who could have done the household chores and the alterations to the carpet, et cetera and created the hole in the door in that period after the time of her departure. A quarter hour back from 11.55 a.m. is 11.40 a.m. and twenty minutes back from twelve is about 11.40 a.m., "Even longer" in either case could become 11.30 to 11.35. These times not only cover the 11.40 of Mrs. Reardon and Mr. Simpson but support an

inference open to the jury that the appellant was actually in the house - probably in the study - whilst Mrs. Pohl was there. She actually discussed with the appellant on the Saturday the possibility of the murderer being in the house whilst she was there and they both agreed how lucky she must have been to escape a similar fate.

The soft drink man was also seen according to Mrs. McGann in the vicinity between 11.20 and 11.30. She lived further down in 38 Booth Street, on the same side as the flats but further back from the Atkinson Street corner. She said that she lived a few doors up from the flats, about four houses, on the corner of Booth and High Streets. She was asked:

> "Q. Did you remain home practically throughout the morning? A. Yes.
>
> Q. Did you see the Sharpe Bros. drink man? A.Yes.
>
> Q. On his rounds? A. Yes.
>
> Q. Whereabouts did you see him? A. I seen him at the front door of Mrs. Reardon's flat.
>
> Q. I think her - A. - address is the same. It is a flat in our backyard and from where I was sitting in the kitchen you can see up on to the verandah and I seen him call because I was waiting for the babysitter to arrive.
>
> Q. What time do you say that was? A. Well, it was somewhere in the vicinity of 11.20 and 11.30.
>
> Q. You cannot place it more accurately than that? A. No, I would not try.
>
> Q. Did you see the man come out of the - the delivery man come out of Mrs. Reardon's house? A. I just seen him on the verandah. I don't know what time he left."

That evidence of course must be read along with the evidence of Mr. Simpson and of Mrs. Reardon as to the termination of the television programme coinciding with the soft drink man's arrival.

It does not seem to me that Mrs. Pohl's evidence as to times can be of any material assistance to the appellant.

If she was there "about 11.15" and left "about four or five minutes later" there would be an additional quarter of an hour from about twenty-five past eleven to twenty to twelve for a theory that some stranger or prowler entered the premises and did all the things previously adverted to before the appellant's alleged arrival back with all the attendant improbabilities (ante) of such intruder being anyone other than the appellant. The weight of the evidence which the jury was entitled to accept was that Mrs. Pohl left there in the vicinity of twenty to twelve. Thus the gap is narrowed against the appellant as being the sole person who came to the house after Mrs. Pohl left or was already there and who alone set out to falsify appearances of the deceased being then alive and of then being attacked and strangled. The jury were entitled to come to this view.

Passing now to the scene in the bedroom, which is depicted in the photographs Exs. A1-4, M and M1, which the police took after they arrived that morning, it was well open to the jury to conclude (a) that it was a fake, and (b) that the appellant had so faked it.

It will be recalled that Mrs. Pohl said that when she went through the bedroom the bed was made with the bedspread over it and it was flat, and she explained the meaning of that by saying that neither the appellant and his wife nor she and her husband used blankets but that they used a feather eider-down. The two brothers came from Yugoslavia and counsel informed us that this type of bed covering is familiar on the Continent and in some countries is known as a "dak". When it is placed on the bed it extends from the foot end of the bed right up over the pillows and does not overhang the sides. A very good photograph of that is Ex. M, it being the striped covering on top of the sheet-covered mattress, and it can be

seen extending over the pillows on top of the sheet as previously set out. It will be recalled that the nature of this eiderdown is such that the slightest pressure on it will leave a hollow or dent which cannot be straightened out unless the eiderdown is shaken up again. Over this eiderdown when the bed is made up is placed a large blanket-type bedspread which has some trimming on the edge, also shown in the photograph Ex. M, and that when placed over the feather eiderdown overhangs, not only the foot end of the bed but the sides of the bed, and it of course goes right up over the top end of the eiderdown, that is over the place under which the pillows are lying. This bedspread was quite flat when Mrs. Margaret Pohl saw it, the bed was made up in its normal fashion and she added that any slight pressure on that bedspread would have the same effect as if the pressure were only on the eiderdown, namely, that it would leave a dent or hollow which would have to be straightened out. Everything was normal and there were no signs of hollows or dents when she went through the bedroom. She looked at the bed because she thought her sister-in-law might have been in bed and she saw the bed on the two occasions, once when she came through the back door, which was unlocked, and the second time when she went out the same way.

The plan Ex. W shows the way in which the bed ran, and on the wall opposite the foot end of the bed there is a long wardrobe. The appellant's story to the police was as earlier recounted, and that he ultimately having seen the hole in the door went back and entered the bedroom peering behind the doors on the way to see if she was hiding from him. On entering the bedroom and moving towards the bed he saw lying on the floor at about the centre of the foot end of the bed

and about a foot out from it her blue panties in which were wrapped her pantyhose, they were all wet, he picked them up and placed them on the chair in the corner, which is shown on the plan Ex. W and which is also shown pictorially in the photograph Ex. A4. He placed them on top of the basket which is shown on that chair and having done that he turned to his right and saw the feet of his wife between the bed and the wall which is near the window. He said that the body was lying there, her skirt was pulled up high over her body exposing the naked lower part. He lifted the body up and placed it on the bed with the mini skirt still as he had discovered it and in placing her on the bed he placed her towards the foot end so that her legs dangled over it from the knees. It was then he said he observed that a blue shirt belonging to him was knotted around her neck, the knot was tight and damp, he endeavoured to undo it and ultimately got it free and then left the body lying so exposed while he went in his car across the road down the street to get Mr. Meyer as previously recapitulated. Before Mr. Meyer rang up for the ambulance the appellant had invited him in to have a look at the body so that he could see for himself that she needed attention, but he preceded Mr. Meyer saying that he went in and pulled her skirt down so that "Mr. Meyer would not see everything". The carpet was light brown with yellow flecks, the panties were blue with the pantyhose inside and although they were in the direct line of vision to anybody standing at the doorway and looking in, Mrs. Pohl said she did not see anything of them when she was in the bedroom. Detective Sergeant Murray in addition to saying that the accused indicated to him the spot where they were lying, and that spot was in a direct line from the hallway door of the bedroom which he marked with a circle which can be seen on Ex. A2, said that

this wet bundle was found by him underneath the chair in the bedroom which has the basket on it and which he marked likewise with a circle in photograph A4, and both his evidence and other scientific evidence was to the effect that there was no dampness or wet spot on either the carpet in front of the bed or underneath the chair. The photographs which have marked on the front of them in a white circle the letters in black C, D, E and F, which are respectively Exs. A1, A2, A3 and A4, were all taken by the police and scientific men before the body was removed from the bed. Afterwards and in the presence of the appellant the body was put into the position on the floor between the bed and the wall near the window as indicating the position where he said he found it (vide Ex. M1). It will be observed that the photographs show that after he had pulled down the skirt before Mr. Meyer entered nevertheless her white singlet and her top garment were disarrayed exposing a bare midriff, the singlet which normally would be tucked in the skirt being pulled up so as to expose that portion of her body.

Now the appellant said in his record of interview that when he picked up his wife's body, put her on the bed and saw the shirt around her neck he was standing in this narrow space beside the bed where she had been lying and if that were so his back would be towards the wall and window.

The jury were entitled to infer that this would involve him lifting her up with his left hand towards her head which he said was underneath the drawer extension on that side of the bed and his right hand under her legs and that in so doing and putting her on the bed he very likely would have leaned over a bit of the edge of the bed on that side in placing her on it and that might well cause some dis-arraying of the bedspread on that edge and overhanging that side of the bed,

that is the side nearest the wall and window apart altogether from the depression made by the body of the bed. It would not be unexpected that with the body then placed on the bed there would be some dis-arrangement again of the overhang of the bedspread on that self-same side. Indeed, one could expect it to rise a little from its previous position. This is fairly clearly shown by the photograph A3 which shows the bedspread on that side still hanging over the edge but slightly lifted and dis-arrayed. But neither his action in picking up the body and laying it on the bed and the slight dis-arraying which appears on that side of the bed as depicted in Ex. A3 can explain all the disarray on the other side of the bed which for convenience we term "the wrong side". Looking at Exs. E2 and E3 the opposite side of the bed shows the top blanket disarrayed and lifted well over and on to the top of the bed and pulled up from the wrong side, that is not the side alongside which he was standing and is packed up and around the whole length of the body on the bed and exposing well beyond her head a substantial portion of the striped eiderdown. Exhibit A4 shows how the bedspread is all lifted and folded over on this wrong side, as I term it, and that folding over is from the nearest corner of the bed right up over the bedspread and packed around the body. Exhibit A4 is taken looking directly at the wrong side of the bed; Ex. A1 taken from the corner which would be the corner nearest the doorway shows how the bedspread is lifted up and folded and arranged in disarray, A2 shows that virtually half the bed on the wrong side is disarrayed on the deceased's left side. Exhibit M1 as earlier indicated is the position in which the body was placed by way of demonstration after the earlier photographs had been taken, and Ex. M2 shows

the bed after the body had been so removed. The jury were entitled to conclude that the whole of that disarraying of the bedspread on the wrong side was effected by the appellant and only by him because (a) when Mrs. Pohl left the bed was flat and made up in proper order and was not ruffled or rumpled or disarrayed in any way, (b) the appellant himself said that was the condition of the bed when he looked through the bedroom the first time and when he found his wife when she was still on the floor, (c) he himself lifted the body and placed it on the bed so that any disarrangement which followed that was done by him, (d) the substantial arrangement and re-arrangement and uplifting on the whole of the wrong side of the bedspread could not have been achieved simply by the lifting up of the body from the opposite side and putting it on the bed, (e) the only explanation of the re-arrangement, dis-arrangement and exposure of the wrong side of the bed and the way it is packed around the body is that it was done deliberately, (f) as nobody else had touched that bed the disarrangement, and the other matters supra was wholly the work of the appellant and, (g) with the result that the whole appearance of the bed with the body lying on it was faked.

In the light of the medical evidence that the deceased woman had not been sexually interfered with, the jury were entitled to infer that the supposed finding of the body with the panties and pantyhose removed and the mini skirt pulled high up so as to expose her private parts was also fabricated so as to give a false impression that she had been sexually assaulted, and if the jury concluded, as they well could, that the setup on the bed was faked by the appellant they could likewise conclude that it was the same hand that faked

the appearance of the body, particularly in the light of the fact that when he picked the body up from the floor according to him he left it on the bed in exactly the same posture without any attempt to cover her up until just before Meyer seeing it that is with the skirt pulled high up perpetuating the simulated appearance of sexual attack. Dr. Gillespie it will be recalled had said:

> "Q. I think you told us about the unclothed condition of the body? A. Yes.
>
> Q. And the fact there was no injury? A. I did not detect any injury to the genital region the genital and anal region."

It will also be remembered that he had referred to the anus being open, that is the sphincter, as being a likely or common occurrence in asphyxiation cases resulting in sudden faeces where the death is violent and with a concurrent passage of urine, and that he had said a little later in his evidence:

> "Q. Did you examine the urinary system? A. I examined the vagina and the vagina was closed, it was not open, and there was no smell or urine or faeces on the body in that region, no dirtying. Some part of the skirt was damp, I cannot remember exactly where but some part of the skirt had dampness on it."

He said however that if faeces had been passed it is likely that urine could also have been passed.

In cross-examination he was asked whether when he looked into the deceased's anal passage there were faeces. He said that he could see faeces further up that passage. He made no note of whether there was an evacuation of the bladder at the time of post mortem, and he said in relation to that:

> "As I have said, I don't remember. I would have thought I would have made a note of it because I was satisfied with the finding.
>
> Q. What does that mean? A. That there was not much urine in the bladder.
>
> Q. But you do not know one way or the other? A. As I have said, I can't remember.

Q. The fact that there were faeces in the anal passage would that indicate that the deceased had in fact passed some or not? A. All it would indicate is that the sphincter was open. You can presume that she had possibly passed some faeces and been cleaned up.

Q. Or you can presume that she had only got down as far as you saw it? A. Yes, that is possible.

Q. So we do not know one way or the other whether she had actually passed faeces? A. That is correct.

Q. And then cleaned up, do we? A. That is correct."

But the jury did not leave their common sense at home. He was not positively able to say if she had passed faeces and had passed urine but that the body did have the appearance of this possibly happening and being cleaned up. The jury had the evidence of the panties and pantyhose which were found tangled up in a ball with the panties outside and the pantyhose within them all thoroughly wet as though they had been immersed in something. As there was no such strong smell exuding from them of either faeces or urine to attract the doctor's attention and no visible sign of faeces on her body or panties the jury were entitled to draw the inference as a matter of high probability that faeces and urine had been passed at the time of strangulation and that the wet bundle of panties and pantyhose had been used for the purpose of cleaning up the body and clothes of any sign or indication of faeces or urine and then rinsed in water. It was well open to the jury to conclude that if the appellant faked the appearance of the body so as to simulate a sexual attack and also faked the appearance of the bed by its disarrangement, that he had also cleaned the body up so it could be presented as a partly naked body.

Some hairs of the deceased woman were found by the scientific people on the floor of the bedroom right where

the spot had been indicated to Sergeant Murray as being the place where the appellant said he found the wet panties and pantyhose before he picked them up.

There was also scientific evidence that hairs of the deceased were found in the hallway near the door as depicted in Ex. H1, which is taken from the lounge room looking towards the kitchen, in which faint curly black lines, being her hair, can be seen on the woodwork, and Ex. H2 is a closeup of the wooden floor of this area showing the hairs that were on the floor as found by the police in that vicinity. On Ex. G there is a red biro or ink mark shown on the left-hand corner thereof over a corner of the carpet square which was in the lounge room, adjacent to which is the chair which was said to be the chair with which the door came into contact. The significance of the red mark is that it was a mark placed there by Detective Sergeant Walsh attached to the Scientific Investigation Section and stationed at Goulburn, who said that when he went there with other police on that day, the body of the deceased was still lying on the bed, and:

> "I also observed a number of long dark hairs on the floor inside the door and the corner of a carpet square in the lounge room was damp.
>
> Q. Which corner was that, nearest or furthest away from - A. Nearest to the door."

Then when he was shown the photograph Ex. G he said that that showed the carpet:

> "Is that the carpet that you say was wet in the corner? A. It is, yes.
>
> Q. Was it you that tried to mark it in the Magistrate's Court or in the Coroner's Court, the area that was wet or damp? A. I don't recall whether I did or not.
>
> Q. Do you see a red marking on that, the corner of the carpet there? A. Oh, on the photograph, yes, I did.

> Q. Does that red marking indicate so far as the photograph shows the area of dampness on that carpet? A. The approximate area, yes."

And when his Honour was explaining the photograph to the jury, his Honour said:

> "He said that there was a damp portion of a loose rug on the floor of the lounge and there is a round sort of half-circle marked there.
>
> Q. Is that intended to indicate the corner of the rug which was damp? Is that what you say? A. Yes.
>
> Q. The whole of that carpet was damp? A. Yes."

He added that the dampness was ascertained not visually but by feeling that corner.

It was he, incidentally, who also said that there was no sign of forced entry into the house so far as the front door was concerned, nor any sign of tampering with the lock or any portion of the architrave or door near the lock.

In addition there was evidence that a mop was usually kept outside lying across the valves of the two gas cylinders in a horizontal position and that it had a plastic covering which went over its head when not in use and that that mop was discovered also with the mop head wet and the plastic cover pushed away from the head down the handle when lying in a horizontal position on those cylinders.

This the jury were entitled to conclude, was all part of evidence that some cleaning-up processes had taken place and taken in conjunction with the other matters (ante) warranting the inference of a high and strong probability that what had been cleaned up on the body of the deceased was faeces and urine and likewise from the skirt, the panties and pantyhose being used as a cleaning cloth or sponge, and that something probably faeces or urine stain had been cleaned up which had to be cleaned up from the corner of the lounge room carpet nearest the door and close to where the deceased's

hairs were found on the floor and that it was the appellant who did all this. It would be unreasonable for the jury to think that this had been done by some stranger who entered the premises at about 9.30 to 9.45, intending only to strangle the deceased, in fact strangling her with considerable violence likely to produce the passage of faeces and urine simultaneously, in a situation where there was no motive of sex or robbery, neither being committed, then hiding the body in the house and either then or returning some hours later and after Mrs. Margaret Pohl had left clean up the body and any evidence of carpet staining.

When asked by the police whether anything was missing from the house the appellant said that on the top of the room divider in addition to the small transistor there was a gold watch of his and a chrome metal watch lying alongside it, which he subsequently changed in his record of interview to a silver watch, and that the silver watch had been stolen leaving the gold watch intact as well as the transistor. He also originally said that there appeared to be missing a tin which at one time held peanuts but in which his wife kept about eighteen 50¢ coins. Those were kept in the tin in a drawer in the wardrobe which, upon examination by the police showed valuable jewellery both in that drawer and in the drawer beneath which belonged to the deceased and which was untouched, nothing was missing from her collection of jewellery and there was also some money amounting to a few dollars also found in the drawer. The jury were entitled to believe that his story of the theft of his allegedly silver watch and his reference to the disappearance of the tin with the coins was false and faked.

He later modified his story about the coins by saying that perhaps he was mistaken about these, that they could have been banked by his wife, but he had told the police that he himself had seen them in the tin the day before in that wardrobe drawer. Her bank account, (Ex. JJ) on p.3 shows her last transactions were on 5th March when she deposited by cheque $173.40 and on the same date withdrew $20.

In respect to the disarranged hall runner, the appellant did say to the police in a record of interview that he could have done that but beyond that he said nothing more. He did not explain how or why or when he could have done it or why it had been so disarranged by him. The jury were entitled to conclude that it was highly improbable having regard to the folds of the carpet and the termination of it in the cupboard that its distorted appearance could have been caused at the time when he says he nearly fell over the radiator and the folding-back of the carpet to just where the gas cock in the hall for the connection of the gas heater is situated is likewise unexplained. But the fact remains that he admitted that he himself could have done that. This, of course, was a further factor which the jury were entitled to consider in conjunction with the matter of the fabricated bedroom scene with its disarrangement of the bed on its wrong side.

The next matter which involves a direct act or acts by and implicating the appellant relates to the clothing of the deceased other than the panties and pantyhose and skirt to which we have previously adverted. Mrs. Reardon, as has already been stated, took her boy to school that morning. Her evidence in relation to the attire of the deceased is here repeated as follows:

"Q. How was she dressed on this occasion when you saw her apparently attending to the plants? A. She had a dark coloured mini skirt or shorts and she had a blouse which looked like a smock to me. It had white background and it had blue and yellow and a little bit of pink pattern design in it. It looked like the pattern had been splashed and mixed - the colours had been splashed and mixed.

Q. Long or short sleeves? A. Short sleeve with a high collar.

Q. Did you notice anything about the way it fitted the body? A. It sort of fitted tight on the bustline and fell loose to the waist."

She was shown a blouse that had a mixture of colours, predominantly yellow, pink and mauve of different shades which she identified as the one that the deceased was wearing at this time, and it became Ex. U. After Mr. Meyer had been called into the premises round about midday by the accused and had then telephoned for the ambulance, firstly at five past twelve and secondly at eleven past twelve, the ambulance officer arrived and he was the first person, after that time, to see the body lying on the bed. It will be recalled that he felt for the pulse on the wrist without success, and then felt for the carotid pulse in the neck. In order to do so he had to pull down a little the garment which was around her neck, (not the shirt with which she was strangled because the appellant had already removed it) and it was not this blouse of many colours but it was a sky blue jumper, which became Ex. B. This jumper has a high neck with a ribbed design running vertically, and the same design is on the hem and on the sleeves which are long.

Mr. Walton, the ambulance officer, deposed to the fact that when he came in it would be in the vicinity of 12.15 to 12.20, he entered the bedroom and saw that there was a female lying on the bed in a supine position with her legs hanging over the edge of the bed, fully clothed.

"Q. When you say the edge of the bed, do you mean the foot or the head or side? A. At the foot. A Eurasian type of person. That is about all I noticed at that time. I made an examination.

Q. Did you notice how she was dressed? A. A skirt and jumper type of - a woollen jumper.

Q. What about the neckline of that jumper? A. I had to roll the neckline back to examine the patient's carotid pulse as there was no radial pulse at the time - -

Q. When you rolled back the neck of the jumper, did you notice something about the condition of the neck? A. Yes."

And he went on to describe the contusions and abrasions around the lower part of the chin and extending down the neck. Then later he was asked:

"By the way, do you remember the colour of the jumper at all?

and his answer was:

"It was a darkish bluey type of thing, as I saw it."

And he was referred to the photographs which had been tendered and marked Exs. A1 to A4. He then before the jury identified the clothing that the deceased was wearing when he saw her, and which was marked Ex. B, and that included the subject jumper and the skirt.

Constable Gant came to the premises shortly after receiving a call at 12.30 p.m. on that day and went with the ambulance officer and another police officer into the bedroom where he saw the deceased lying on the double bed on her back with her legs dangling over the foot end of the bed. He said:

"She was wearing a brown skirt, a white singlet and a blue jumper. The brown skirt and jumper were pulled up exposing her stomach and the blue jumper was around her neck, concealing her neck."

And then, shown Ex. B, he said:

"That is the jumper and the skirt that was on the deceased when I first saw her."

Then he was shown the four photographs A1 to A4 and he identified that that was how the deceased was lying on the bed when he first saw her, with the midriff being bare.

Detective Sergeant Walsh, attached to the Scientific Investigation Section at Goulburn, went on that day to the bedroom. He said:

> "I saw the body of the deceased, a female person, lying on the double bed. The body was clad in a blue pullover, a dark brown skirt, brassiere, but there were no shoes, stockings or panties worn",

but there was also a singlet. He was not asked to identify specifically the blue jumper, but he took some photographs. There seems to be no doubt and no dispute that what he was referring to was Ex. B. He was asked:

> "Q. We have been told - I am sorry, we haven't been told but expect to be told about a multi-coloured garment, a blouse. Did you handle that at all? A. No."

Dr. Gillespie, the Government Medical Officer, when shown the photographs A1 to A4 identified the photographs as showing the position of the body as he saw it. It is clear from those photographs that she is not wearing the multi-coloured blouse but the garment which corresponds to Ex. B. He was also shown Ex. M1 which shows the deceased as having been placed on the floor between the side of the bed and the wall wearing the jumper and skirt the accused indicating that that was the position in which he found the body. Exhibits D1 and D2 show Ex. B quite distinctly, the neck having been pulled forward, and that is also shown on Ex. A4.

Detective Sergeant Murray, of Queanbeyan, went to the premises shortly after 12.30 p.m. and described the deceased as:

> "She was clad in a dark brown mini skirt, singlet and a blue top."

And he identified the four photographs A1, A2, A3 and A4 as indicating her position and the clothing that she was then

wearing. He was shown the two articles (i.e. the mini skirt and the blue jumper, Ex. B) and said that he recognised those as being "the brown mini skirt which the deceased was wearing when I first saw her and the blue top which I previously described and which she was wearing when I first saw her." A piece was cut from the blue jumper and passed on to Mr. Horton, the Senior Forensic Biologist at the Division of Forensic Medicine, for examination and he said that he detected a small blood stain on the upper front of the jumper (that is from where the piece was cut, and it is shown at present with a red pencil ring about it) but he was unable to group the blood, there not being sufficient of it.

So that it is perfectly clear from all this evidence that from the time the ambulance officer arrived the deceased was wearing Ex. B, the blue jumper. The appellant had told the police that he was in the premises for a quarter of an hour to twenty minutes, and even longer, before he found his wife, and so from the time of the finding of his wife right up till the time when the ambulance officer arrived he had been alone with the body. The only person other than he and that ambulance officer who had seen the body up to that time was Mr. Meyer, who stood in the doorway some 8-9 feet away and whose description of the clothing was somewhat vague. He was asked:

> "Q. Did you notice her clothing? A. I didn't pay very much attention to her clothing but she seemed to be wearing - she seemed to be wearing a shift. It was something unusual. I hadn't seen her wearing any clothing like that before.
>
> Q. What, in colour or shape or what? A. I cannot remember exactly the colour but my impression is that it was a dark colour.
>
> Q. Can you say whether it was a one-piece frock? A. Yes, it looked to me to be a one-piece - I am speaking from memory. I didn't pay very much attention to her clothing.

Q. Your impression is that it was a one-piece frock of some dark colour? A. Yes."

It would appear that from his position he was only looking at the brown mini skirt.

The appellant was interviewed and a record of interview taken commencing at 1.55 p.m. on that day, 9th March. It was recorded by Detective Sergeant Murray. He was asked a number of questions about his movements and he said that he had been out to Canberra to a firm of Stegbar at Fyshwick and picked up some window frames, took them to a job at Foster Street in Queanbeyan and came back home. He fixed that time as being about half past nine. In Question 29 he detailed how he arrived at that time. Then he was asked (Q.30):

"What did you do when you arrived at your flat? A. I opened the front door with my key and I was just talking with my wife. She was in the kitchen just starting to take the shelves out to clean the stove.

Q. How was she dressed then? A. In the brown skirt, a blouse on.

Q. Was she dressed the same then as when you left home <u>earlier</u>? A. Yes." (That refers to 7.30-8 a.m.)

Pausing there, this corresponds with Mrs. Reardon who had seen her similarly dressed between approximately 9.10 a.m. and round about twenty to twenty-five past nine. Then he was asked a number of questions as to his movements after he left home and then as to his returning home and he said (in answer to Question 52) that he thought it was about 12 o'clock when he left Uriara Motors and he drove straight home, and he had earlier said that he arrived home somewhere about midday. He then described how he went through the place looking for his wife and ultimately found her.

"(Q.60) In what position was she then? A.She was lying on her back straight out with her arms beside her. Her dress was up (demonstrates by putting hands on stomach) and she had nothing on under her dress.

(Q.61) What else could you see? A. The blouse she had on before was still on and I picked her up and put her on the bed and I could see that she had something around her neck.

(Q.62) What was the object around her neck? A. It was a blue shirt of mine."

Then he went on to describe how it was tied and knotted and how he lifted her on the bed and then went to Mr. Meyer's place. But there is no doubt that that is what he said - that the blouse she had on before was still on when he picked her up. It is important to remember that from the time the police arrived after the ambulance man had telephoned for them everybody was ordered off the premises, the appellant was taken outside and put into a police car and from there he was ultimately taken to the police station, and that he was forbidden to re-enter the premises until further approval by the police, who placed a constable in charge of the premises so that nobody could enter without authority and so that nobody would interfere with anything. In fact, as previously mentioned, the appellant went to live with his brother and sister-in-law, Mr. and Mrs. Pohl, and did not return to live there for some three weeks. On 23rd March, 1973, Detective Sergeant Murray had a conversation with Mrs. Reardon and following that conversation he went with Detective Sergeant Gay to the Flat No.2 at 30 Booth Street, arriving there about 2 p.m. The appellant was not present at the flat and was still living elsewhere. He said:

"Sgt. Gay and I made an examination of clothing inside the flat and I saw Sgt. Gay go to a basket of clothing which was on a chair in the bedroom beside a large wardrobe, the same basket which I previously indicated on a photograph in an exhibit" (A4). "I saw the sergeant remove a multi-coloured blouse amongst the clothing in that basket. We then left the flat to return to the Queanbeyan police station and during the journey I saw Mrs. Reardon . . .
I took the jacket to her and I had a conversation with her."

And he then identified Ex. U as being "the jacket I saw Sgt. Gay remove from the basket of clothing". When asked where it was in relation to the top or otherwise of the basket he said, "It was beneath other clothing in the basket".

Detective Sergeant Gay gave corroborative evidence of accompanying Detective Sergeant Murray, interviewing Mrs. Reardon, going to the flat, making the search and in the clothes basket finding a multi-coloured blouse and then showing it to Mrs. Reardon. He was asked:

> "Whereabouts precisely did you find that in the bedroom? A. It was in a clothes basket which was in the corner alongside the wardrobe and -
>
> Q. Was it on the floor or standing on any article? A. I think it was on a chair.
>
> Q. On a chair. Yes? A. And there were some folded articles and it was immediately below that on top of other unfolded or unpressed clothing."

And he added, "there were some folded articles, then the unfolded, and that was on top of the unfolded". Shown Ex. U he said it appeared to be "the identical one I took possession of".

The appellant was further interviewed and a record taken by Detective Sergeant Tupman on 8th April, and in Question 36 he was asked:

> "Mr. Pohl when you were interviewed by Det. Sgt. Murray on 9th March, 1973, in answer to his question No.61 which I now point out to you (handed record open at p.5) you said 'The blouse she had on before was still on and I picked her up and put her on the bed'. Do you agree with that? A. Yes.
>
> (Q.37) Would you care to tell me what you mean by 'blouse'? A. Well, a man has a shirt, a woman has something like that. I call it a blouse.
>
> (Q.38) I am now going to show you this garment (shown blue crew-neck sweater) which I have been informed was taken from the body of your wife. Would you care to tell me what you refer to that as? A. That is a jumper.

(Q.39) Do you say that your wife was wearing that when you found her or not? A. I don't know.

(Q.40) I am now going to show you this coloured blouse (shown blouse). Do you recognise that? A. Yes. It was something similar like this my wife had on.

(Q.41) Mr. Pohl, do you agree that you have told police you found your wife lying between the bed and the wall and you picked her up and put her on the bed? A. Yes.

(Q.42) Do you say that when you found her that she was wearing this blouse? A. As far as I remember.

(Q.43) Did you remove that blouse from your wife, that is take it off her before the ambulance arrived? A. No.

(Q.44) Had you made a thorough search of your flat before you found the body of your wife on 9th March, 1973? A. Yes.

(Q.45) Did you find any other person in the flat? A. No.

(Q.46) Mr. Pohl, I asked you whether you removed that blouse from your wife, by that I mean from her person when you found her and you have told me that you did not. Do you agree with that? A. Yes. I did not take it off.

(Q.47) Did you remove any other article of her clothing? A. No."

It is as clear as crystal, and it was open to the jury to infer, that the deceased had the blouse on round about between 9.10 and 9.25 a.m., that it was a distinctive blouse of many bright colours, worn smock-like and that she was also wearing a garment which had a background something white; that when the appellant left the house firstly between 7.30-8 and then between half past nine and quarter to ten she was still wearing that blouse with the white undergarment; that when he finally returned, whatever the time, she was still wearing that blouse and the white undergarment, which the jury were entitled to say, looking at the photographs, was her singlet; that he was alone with the body in the house for some appreciable time before he went and obtained Mr. Meyer's help

to ring the ambulance; that from the time when the ambulance officer arrived, and continuously thereafter, she was not wearing the blouse but a different garment, namely the blue jumper; that the one and only person who could have removed the blouse and effected that change was the appellant; that this was indicative of a guilty mind; that there was something either on the blouse which incriminated him, or that this removal and change of clothing was part and parcel of his course of action in setting up the body and the other simulations on the bed to which reference has been made previously, so as to give a false appearance that she had changed her clothing after he had left earlier in the morning; that, if he was the person who removed the blouse, he was the person who hid it in the basket to ensure its non-discovery and of course that if he interfered with and changed her clothing before the ambulance officer arrived, by the removal of the blouse and/or by the substitution of the blue sweater, it would not be difficult for the jury to take the next step and conclude that he was the person who removed her panties and pantyhose and placed her body in the position in which he said it was placed on the floor between the bed and the wall with the mini skirt high up exposing her lower body. This evidence of the change of clothing and the hiding of the garment was cogent and strong evidence of positive acts on the part of the appellant which the jury could well have concluded could only be consistent with the acts of a guilty person and directly implicating him in the murder and no one else.

The learned trial Judge did not emphasise this aspect and indicated that he himself would draw no conclusion from it, but the matter was one for the jury and they of course may well have taken a more emphatic view. He said in the course of his summing-up:

"When you read the record of interview you will find that there were some questions to the accused as to whether she was in fact wearing that" (Ex. U) "when he found her, and the Crown suggests that there are some answers there that you may think indicate that she was wearing this. Precisely why it is suggested he would remove this article from her and put on a blue article I am not quite sure, and nothing has been said about it. It may be he remembered seeing this article during the day or perhaps she was wearing it when he was there during the morning. Mrs. Reardon says she was wearing it in the morning. She might have changed it and put it in the washing, it could have been there for two weeks until Sgt. Gay picked it out. Certainly if you look at it, it seems to be clean. It has never been put to any examination by the forensic specialists, there are nodbvious marks on it, you may think. Whether or not it could have had some marks on it and been washed and put away, one does not know. To my mind it does not have a great deal of factual significance, but it is a matter for you to make up your own minds what you think about it. When I say it does not have a great deal of factual significance, I am discussing fact, and I am quite frankly expressing my view on this particular fact. You remember what I told you before, I do not have to decide the facts, you do. I am only analysing these facts to try and help you get some idea of what is involved in the case.

If the accused had in fact murdered his wife, the fact she was strangled was not going to be concealed, there were blood spots on the shirt" (i.e. the shirt around her neck). "I suppose the only possible thing that could induce a murderer, if it was him, to take it off would be if there was anything on that that identified him.". (His Honour is now referring to the blouse). "To me it seems a pretty long shot. Factually it does not seem to make much impression on my mind, having considered the matter, but you make up your own minds, you have heard the evidence, and you have heard counsel address about it."

In my opinion his Honour would have been justified in expressing views less favourable and in accordance with what I have indicated were open to them. But his Honour had specially charged the jury that questions of fact were for them, and even in this particular matter they had to make up

their own minds as to the significance and weight to be attached to it. He had specifically charged them at the outset in these terms:

> "It is important that you should know that it is your sole duty to decide what the facts are and not think that of the Judge, because in a summing-up the Judge of necessity has to review the evidence and deal with some of the alleged facts, and either consciously or unconsciously, sometimes he expresses a view, an opinion, about the facts. Of course, the Judge is quite entitled to express an opinion about the facts to the jury for their assistance or guidance, as long as he makes it abundantly clear to the jury that it is not his opinion which is critical on the question of fact, it is the jury's opinion, and if you think I say or appear to say anything indicating my view of any particular fact or factual situation, you remember that it is your duty to make your own findings of fact and not to accept any view I might express, unless you happen to agree with it."

The matters so far reviewed deal with those aspects of the evidence which directly relate to acts of the appellant implicating him in the commission of the crime which, summarised, are: the time of the offence and his presence at the house at a time when the strangulation took place; his movements thereafter creating alibis for the next couple of hours; the evidence relating to his presence in the premises for a quarter of an hour or twenty minutes and even longer before his alleged discovery of the body; the evidence relating to the disturbance of the carpet in the hall which he himself conceded he may well have done; the evidence relating to the difference in appearance of the state of the house when his sister-in-law, Mrs. Margaret Pohl, was there and when he came to the premises after she had gone; the attempts made to show that, notwithstanding death between 9.30 and 9.45 a.m., the deceased was alive and had attended to kitchen chores after Mrs. Margaret Pohl had left; the matters of the rotisserie being on and the gas heater having

been on which could all on Mrs. Margaret Pohl's evidence and as a matter of logic, only be explicable on the basis that it was he who had done all these things; the faked appearance of the body and of the scene in the bedroom by the mussing-up and careful disarranging of the covers on the wrong side of the bed after he had placed the body on the bed, part of which scene included the falsifying of an apparent sexual attack, including the removal of her panties and pantyhose; the story of their finding and where they had ultimately been found; the evidence of the cleaning up of the body and other cleaning up in the premises which the jury could find could only be attributable to him; and the falsifying by him of another scene, namely the changing of the garments, the removal of the multi-coloured blouse and substituting the blue crew-neck jumper. From all these matters the jury would be entitled to conclude that he was the murderer and that there is no other reasonable or rational hypothesis on the evidence pointing to any other person. There were vital and critical matters in the Crown case:- (1) The time of death between 9.30 and 9.45 a.m. and (2) the evidence of Mrs. Pohl. The acts of the appellant above summarised coupled with his admissions relating to the times of 9.30-9.45 a.m. and to the time he spent in the house before discovering his wife's body then fall into place and point unerringly to him as the murderer and rationally excludes anyone else. Once these decisions were reached by the jury - and it was certainly open to them to reach them - then other matters in respect of which falsehoods were told by him now lend stronger colour to and reinforce the above conclusions based upon his own acts. This will involve an examination of some of that evidence, but not all, as well as reference to the various things that he said in the course of the three records of interview that were taken.

In addition to versions which the jury could rationally conclude as false there are also matters relating to his conduct in respect of which the jury could form views which strengthen the conclusions previously referred to. I only mention some of these matters. In the first place, the whole of his story is highly improbable and it was well open to the jury to conclude that in going for Meyer and through the process of having the ambulance sent for, telling Mr. Meyer that she had just stopped breathing, and telling that to the ambulance officer and saying that he thought she was dead, and then asking the ambulance officer was she dead, was all part of an act and charade put on by him so as to present a story of being surprised on coming home, to find it difficult to locate his wife and ultimately finding her hidden, strangled and apparently the subject of a sex attack. The jury were entitled to conclude that his story of the alleged theft of the watch and of the 50¢ pieces was also a false story. The matter relating to Mrs. Ley is also of importance. She was the next door neighbour who worked at Curtis's where her husband also worked. She normally would not have been expected home till about 6 o'clock that evening, but an unexpected event happened, because prior to half past eleven she was informed that their dog had found its way round to her husband's place of work, he was away somewhere else, and she was asked to come and take it home, which she did. She arrived at her husband's place of employment, Crazcos, somewhere in the vicinity of 11.30 a.m. and brought the dog home without a lead, taking about fifteen minutes. The dog was of a playful type and she came up Atkinson Street. When she reached the flats the dog went on to the patio of Flat No.1 and at first would not come down and she had to call out to

it in a very loud voice - she described it as rousing on the dog - and it then came down and she walked round and kennelled it in the laundry which was common to Flats 2 and 3. This the jury could infer would only occupy a couple of minutes. She placed it in the laundry and placed a bucket of water behind the door, which was left ajar, so as to provide air and so as to prevent the dog from opening the door. She then went into her flat, visited the toilet this only taking a couple of minutes and left going back the same way as she had come down Atkinson Street. But on the way out she noticed the appellant's green Valiant car in the street outside his place with its back towards Atkinson Street. She heard no noise of any sort whilst in her flat. She noticed the time when she left as being approximately five minutes to twelve.

Now the appellant said that when he came home it was about 12 o'clock - we have already referred to his admission that he spent a quarter of an hour to twenty minutes, or even longer, in the flat before he found his wife - but his version to the police was that he went through the flat calling out for his wife and looking for her, having come through the front door, went to the study, from the study passed through the bedroom to the back door and through the back door out into the open air, went to the laundry, the door was open and there was nobody in it and there was no dog. This visitation to the laundry could, of course, be correct, had he done this before Mrs. Ley brought the dog home. But he told the police that when he came in the front door he heard her calling out to the dog. The jury were entitled to accept this and thus the above story of going to the laundry and finding the door open and nothing there would be false because she would by

that time have already kennelled the dog. He said later to the police that when he ultimately found his wife in the bedroom - this is after going through the house a second time after returning from the laundry - and having put her on the bed and removed the knotted shirt from her neck, he heard the dog barking and her calling out to the dog and he then rushed out the front door, went to her flat, knocked on the door, but got no response. This, of course, is atcomplete variance with his earlier story of having heard her call out to the dog immediately as he entered the flat and before he had gone out to the laundry. The jury were entitled to take the view that this was a deliberate lie. He continued to maintain it after the police had told him that Mrs. Ley had told them that she had spent about five minutes in the flat and heard no knock on the door whilst she was there. (In evidence she said the door knocker was a loud one.) Incidentally when recapitulating on 15th March to Detective Tupman in detail all his movements from the time he returned home he omitted altogether any reference to hearing Mrs. Ley or the dog, or going next door to Mrs. Ley's flat and knocking on the door. When informed of what she had said and of the fact that she had seen his car parked in front of his flat as she left, he said to the police that he had in fact noticed Mrs. Ley but only when he arrived by his car outside Meyer's place and she was then walking a little distance ahead towards the town. Had he been anxious to contact her it would only have been a matter of seconds for him to have driven a little way forward and stopped her and brought her back to use the 'phone in her flat, which, he said, was the purpose of him knocking at her door. His purpose in going to Meyer was to get Meyer to come back with him so as to use the 'phone in Flat No.1, and when he pulled up outside Meyer's place he still had to go round and find him, trusting to luck that he was still home and was able to come around and still had

the key of Flat No.1. His conduct in not proceeding immediately forward, when he had the opportunity stopping Mrs. Ley, telling her of his discovery and bringing her back for the purpose of ringing the doctor, the ambulance or the police, was a matter that the jury could consider as revealing no anxiety or hurry on his part to find somebody to whom his discovery could be related, and that his story of knocking on her door was false. Then there is the evidence of Mrs. McCann who lives in Booth Street, a few doors up from the flats, who did not know the appellant personally and had never spoken to him, but she had occasion to pass the flats in her Volkswagen car somewhere around about five to twelve and identified him as not hurrying or running, walking between Flats 2 and 3 across a path near some trees which are on the footpath outside the subject flats. She said that there is a kind of dip or pothole in the road which caused her to slow down, change gears and take it slowly, and looking up she saw the appellant walking as above described; that he stared at her and she stared back at him, and she identified him both in the Court below and at the trial as the appellant. In respect of her his Honour reported that he regarded her as being a reliable witness and that in his view the appellant was a very distinctive man and he could understand a jury readily accepting Mrs. McCann's evidence that it was the appellant she saw that day. Her evidence and the matter of seeing Mrs. Ley walking towards town when he was outside Meyer's house are matters upon which the jury were entitled to take the view that if he was concerned as he should have been about reporting his discovery of his strangled wife that Mrs. McCann, at least, was the first person that he met right outside his house and could have spoken to her, but avoided doing so, and the same observation applies with regard

to Mrs. Ley. There is no acceptable explanation for his failure to speak to Mrs. McGann, or his failure to drive the car a few seconds up the street to stop Mrs. Ley.

Another matter in respect of which the jury were entitled to conclude that he lied was in relation to the rotisserie, ~~which~~, He said on more than one occasion to the police that when he came into the flat, according to him, in the vicinity of 12 o'clock, he looked into the kitchen, heard the rotisserie on and switched it off. This in itself would, if true, be a strange and inexplicable act at a time when he had not started to go through the place and did not know that his wife was not in some other part of the house, the kitchen being immediately on his left as he entered the front door. The jury would be entitled to conclude this was false and he already knew his wife was dead. He repeated on more than one occasion in his record of interview that that was the sequence of events; but in a much later record of interview he sought to change it. In the interview which commenced on Thursday 15th March, in Question 130 he was asked to detail where he looked for his wife and he said:

> "I walked in the door and went past the bedroom into the study and then through the bedroom out to the laundry, had a look over the Hills hoist and then called out to my wife. I went in through the bedroom to the kitchen. Then I seen the hole in the door and then I heard the rotisserie and I switched it off."

This was completely different to the earlier versions which he had given. In the first record of interview taken on the day of the event, when he was being asked as to what he did at this particular time, in the answer to Question 75 he said:

> "I just remember one other thing. When I went into the flat and opened the door I heard the rotisserie in the oven making a funny noise and I switched it off".

Incidentally he was asked in Question 79:

"Q. Did you notice any other noise when you entered the flat at this time? A. Yes, I heard the next door girl calling out for her dog. The flat where I knocked on later and there was no one there."

The next morning he was interviewed by Detective Sergeant Tupman and his version to him was when asked to detail precisely what had happened on his arrival at the premises:

"I opened this door (that was the front door which he indicated). I saw everything there in the kitchen the same as when I left. The radio was on here (and he indicated a little shelf near the room divider in the hall). "

He said that the rotisserie motor was on and that he switched it off and walked along "here" and looked into the bedroom. Then he went on to describe going into his study, out to the laundry, back through the bedroom and the ultimate discovery of his wife.

Next when interviewed in the house by Detective Sergeant Murray he made no mention of going out the back door when he had returned home at half past nine and leaving the door unlocked, and he made no mention of an Esky. It will be recalled that Mrs. Pohl had come in through the back door in the interim and before he finally returned, the back door being unlocked. His version to the police was that when he arrived home at about half past nine he had spent about ten minutes in the place before leaving. He made no mention at that stage of him having gone outside to get anything and no mention of him having left the back door unlocked, no mention of the fact that when he later returned he went through the house and went out the back door to go to the laundry - that that door was still unlocked. The police had directed him not to live at the premises and had placed a police officer in charge so that nobody could enter without authority, and the appellant was directed that if he wanted anything from the house he had to call at the police station and be accompanied

by one of the detectives, and he accordingly went to live with his brother and sister-in-law for about three weeks. But on the Monday, 12th March, he called at the police station in order to have someone accompany him to the house to get some change of clothing and he was accompanied by Detective Sergeant Murray. On arriving at the front of the house he saw an orange coloured Esky standing between Flats 2 and 3. Incidentally, that was included in a photograph (Ex. E1) taken on the Friday by the scientific officers, but it was only there by chance, when they took photographs of, amongst other things, the front and the back of the house. He then told Detective Sergeant Murray he remembered now that when he returned at half past nine and his wife was busy in the kitchen cleaning up the stove, she asked him to go and get the Esky so that she could clean it out, because they were going to go away, either the next day or at the weekend, north on a holiday, that he then went out through the back door to get it, obtained it, brought it back, put it in the kitchen, took the bottles out, left the bottles on the floor and left the Esky for his wife to wash. He said that in order to get it he had to go to Mr. Hoskins' Flat No.1 and it was underneath the kitchen of that flat at the rear, access to which was through an inspection door, that it had been there for twelve months and that he must have forgotten to lock the back door when he brought it in, because he brought it in via the back door of Flat No.2. The police marked on the plan (Ex. W) where this inspection door was situated to which he took them and showed them the spot and it is marked with a red oblong with the letter "C" on the right-hand wall towards the rear of Flat No.1.

He told the detective sergeant that he had forgotten all about having done that and his memory was only revived about it when he saw the Esky on that Monday morning. He repeated

this in a record of interview which was taken on the following Thursday, 15th March, by Detective Sergeant Tupman and that record contains a number of references to this Esky. He went through the matter in considerable detail to Tupman and agreed that he had not told Detective Sergeant Murray about it on the Friday and that his first mention of it was on the Monday and he had likewise forgotten to tell Murray on the Friday that it was he who had left the back door unlocked.

There was other evidence from Mr. and Mrs. Ley that that Esky had not been under that flat for twelve months but had been frequently out and visible between their flat and the appellant's and that they had seen it from the time they came back from holidays at the end of January or early February, and Mr. Ley saw it for probably from two to three weeks prior to 9th March, to date of death. But that is not the only significance of the Esky story, because the appellant had a conversation with Mrs. Margaret Pohl about it at her home on the Monday 12th March after he had spoken to the police about his recollection of the Esky and why he went to get it. She was asked in-chief as to any conversation that she could recall that she had with him and in particular:

> "Q. Was there any discussion about what you told the police or what he told the police? A. There could have been but I am not sure about that."

Shortly after there was the luncheon adjournment and then the Crown Prosecutor asked:

> "Just before lunch I was asking you about any conversation between you and the accused? A.Yes.
>
> Q. About what had happened to his wife? A. Yes.
>
> Q. Have you given any further thought to it during the lunch hour as to what was said, anything that was said? A. I did think about it and I remember, I think it was Sunday or Monday my brother-in-law told us that he just remembered that he didn't bring in the Esky from, I think, under the flat or the house for her to wash out, to clean out, because

they go on a holiday, and he remembered the Esky had been cleaned out. I think it was on the Sunday or the Monday he said that.

Q. You cannot remember which of the two days he told you? A. No."

As the matter was not mentioned to the police until the Monday it could not have been the Sunday and so the jury were entitled to draw the inference that having told the police earlier that day this version of suddenly remembering going to get the Esky so that it could be cleaned out, bringing it back and putting it in the kitchen and taking the bottles out, he recalled to his sister-in-law Mrs. Pohl that evening that this was all wrong, that it had already previously been cleaned out. Notwithstanding this discovery, instead of going back either that day or the next day, or contacting Detective Sergeant Murry at the earliest opportunity and telling him that that version was wrong and that he now remembered differently, he continued to maintain the false story and repeated it in detail, as it appears in the second record of interview taken on the Thursday by Detective Sergeant Tupman and this is contained in questions which are from 19 to 40, again referred to in Question 70 and again in Question 90:

"Q. Was the only real difference in the kitchen to when you had seen it earlier the fact that the Esky you had placed there was no longer in the kitchen? A. Yes, and the long grill plate was lying on the oven door."

If he did not go out on that occasion to get the Esky, then the jury were entitled to ask themselves, "What did he go to obtain?" and the only answer would be, "The shirt which was used to strangle his wife." He told the police that this shirt was usually kept in the cupboard at the end of the hall and was used as a sort of duster or wiping-up cloth, to wipe up the floor of the bathroom if it was wet. He said that it

was a shirt that was not in use by him. The maker's tag on the shirt indicates it is Bri-nylon and it has the appearance of a brush wool. He said he had last seen that used by his wife the preceding Saturday when she used it as a duster to dust out the front lounge and the hall. He said that when it was used to wipe up the bathroom floor and was dirty it was left in a bucket in the bathroom until she did the washing, and no doubt it was then hung out to dry. Mrs. Ley, however, said that the shirt had been hanging out on the gas cylinders by the collar continuously for a fortnight before the day of the murder. The appellant said that when he removed the shirt from her neck the knot was tight and he had a bit of difficulty in undoing it, and in the first record of interview in answer to Question 66 he said that the knot was very tight and it was wet:

> "Q. How wet was it? A. Very damp you could say.
>
> Q. Was the shirt damp in the vicinity of the knot or on the rest of the shirt? A. Where the knot was."

None of the police who handled the garment said anything about there being any wet or dampness on any part of it, but it will be remembered that there had been some cleaning-up process going on by means of the wet panties and pantyhose. If the inference was open to the jury, as I think it is, that he went outside and brought in the shirt round about the half past nine mark, and left the back door unlocked in the process, the jury would be entitled to draw a very strong inference of guilt against the appellant, because the story of the strangling with this shirt reeks of improbability that it could have been done by a stranger. If, as was a view, that he discussed with other persons that the door must have been pushed open violently and banged against the corner of

the chair so as to damage the door to the extent which it was damaged, then the suggestion is that the intruder came in via the front door. As the intruder was only bent on strangling her and there was no sexual assault and no theft, and if the murder weapon was the shirt, then that would involve the intruder having gone round the back to where the shirt was hanging on the cylinder, finding it, deciding it was an appropriate article with which to strangle the deceased, then proceeding round the front with the shirt persuading the deceased by some device to open the front door pushing it violently against the lounge chair and strangling her in the hall in the vicinity of the front door, where hairs of the deceased were found by the scientific police officers. That, of course would not account for the injury to the back of her head and would mean that she would have been face to face with her assailant. The medical evidence indicated that the shirt could have been used to strangle her, it was tightened and used as a tourniquet, that such tightening was on the right-hand side of her chin and neck with the haemorrhaging as revealed by the photographs and by the medical description, and that some of the injury was consistent with it having been caused by the knuckles of the assailant tightening the shirt around her neck on the right-hand side, the striations or lines shown on her neck indicating that that was where the strangling pressure was applied. This could leave open an inference to the jury that she was attacked from behind by a right-handed man and, incidentally for what it is worth it is noticed that the handwriting of the appellant on the record of interview, where he signed his name, is in my view indicative of the handwriting of a right-handed person. If the shirt was not hanging out on the cylinders at the back but was inside the

house, it would have to be either in the bucket in the bathroom or in the cupboard at the end of the hall where the accused said it was usually kept when clean, and who but the appellant would know where to go and look for it and find it. One could certainly not attribute that knowledge to any stranger. The appellant said that his wife did not have the shirt in the kitchen when he left at half past nine and the only other possible theory is that she had either obtained it from within the house or had gone out the back, brought it in, forgetting to lock the back door and had used it to wipe up something wet. But significantly enough, the only place where it was wet was where the accused said he found it wet, namely, on the knot, and nowhere else. These theories involve either that the intruder after pushing the door open violently, fortuitously found the shirt nearby and strangled her with it or that he came through the back door, found the shirt near the kitchen and then used it on her. These theories do not stand up to examination, the latter could not explain the hole in the door for if the intruder came through the back the appellant's explanation of its possible occurrence is false and the former involves the proposition that the strangler came in the front without the murder weapon - the shirt - or anything else with which to strangle her and fortuitously found the shirt lying handy and close by. So the closer this is analysed and examined, the more the jury were entitled to infer that it pointed to the appellant as having obtained the shirt and being the user of it. All this derives from the inferences which the jury were entitled to draw from the lie that he told and persisted in and maintained after discovering that it was a lie about him going out the back to get the Esky on the request of his wife, finding it under the house next door and bringing it into the kitchen

for her to clean and to the answer to the query that if it was not the Esky the only thing that could have been procured was the shirt and the only purpose of the appellant going out the back way to get it, was for the purpose of using it upon his wife. In my view the jury were entitled to conclude he did this by waiting behind the open front door until she returned from watering the pot plants in which Mrs. Reardon had observed her, and attacking her from behind as she entered. No other purpose was suggested or indicated by the appellant for going out the back door on that morning after he had returned at about 9.30 a.m. and the jury were well entitled to conclude that the story of getting the Esky was an invention, as was the story of the bottles being taken out of it and placed in the kitchen in his wife's presence. The jury were entitled to accept that he did put the bottles in the kitchen, but that this was only part of the setting up of the place to show that there had been some activity and life on her part after he left the house at 9.30-9.45 a.m. so as to indicate that she was still alive when he so departed, and actively engaged about the house thereafter.

The jury were entitled to view with disbelief his story about the hole in the door. Mrs. Margaret Pohl had not seen it and had every opportunity of seeing it and was ninety-nine per cent sure that it was not there when she was at the premises. If it had been caused by the front door being pushed upon violently and banging against the corner of the chair in the lounge room, one would not have expected that event to have happened without dislodging, disturbing or upsetting, the chair itself or even the loose lounge carpet. It is not a heavy chair; it is constructed of tubular steel which was covered over by an appropriate material, and this corner was in no way damaged; nor was there any sign of the

paint flaking off paint which was on the inside of the door being found on the floor or on the chair. If the strangler had come in through the front door and had pushed the door so violently with that resultant disturbance, then he was a very polite and tidy sort of individual because the chair was back in position when Mrs. Pohl saw it and when the police saw it, and it is still shown in the position by the officer who drew Ex. W, showing everything as it precisely was found in the premises, and it is drawn to scale.

Finally it is worthy of note that when he was told by the police that Mrs. Margaret Pohl had said that when she walked through the bedroom there was no sign of the panties containing the pantyhose lying on the floor in front of the bed, and as has already been observed, would have been in the direct line of vision of anybody standing at the doorway of the bedroom, he said in the second record of interview:

> "She says that they were not there, so it must be right. When I came home the pantyhose be there, so."

The jury were entitled to draw the inference that he was not denying the truth of her observation that it was not there, but was prepared to accept her observation as being accurate, and if she said it was not there that must be so, but nevertheless maintaining that it was there when he came home. It is, I think, unnecessary to refer to any other matters of difference in the evidence in relation to various and different versions that he gave in regard to a number of matters, and I have indicated sufficient to show that the jury were entitled, once they came to the conclusions of his active participation in the matters earlier mentioned, to take these other matters into consideration as strengthening those conclusions.

With deference to the learned trial Judge, I am of the opinion that this was a strong case of circumstantial evidence and I have applied the tests recently laid down by the High Court in Hayes v. The Queen, 47 A.L.J.R. 603 at 604-5. There the Court was dealing with the situation of the Court of Criminal Appeal when it is considering a submission that it would be dangerous in all the circumstances to allow a verdict of guilty to stand. The Court referred to the statutory provisions in various Criminal Appeal Acts of the States which contain the formula "if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". Such a provision is contained in our own Criminal Appeal Act. Barwick, C.J. ibid p.604 said:

> "In exercising its powers under such a formula, the court of criminal appeal must, of course, act on that view of the facts which in its opinion the jury were entitled to take, having seen and heard the witnesses.
>
> . . . . . .
>
> Occasions when a verdict can be set aside upon such considerations as I have mentioned will no doubt be relatively rare. But, in my opinion, the Court of Criminal Appeal under the formula in the Criminal Appeals Acts or provisions obtaining in Australia has the responsibility to which I have referred, taking the facts to be as the jury were entitled to accept them, that is to say, of satisfying itself on the facts as so found that in the administration of justice in criminal matters it would not be dangerous to allow the verdict to stand."

Applying these tests I have examined the facts for myself and have taken the facts to be as in my view the jury were entitled to accept them as well as the inferences which the jury were entitled to draw and I am of the view that on the facts and inferences as I think the jury could have found them, there would be no miscarriage of justice if the verdict were allowed to stand. I am of the view that it would not be dangerous to

allow the verdict to stand; on the contrary, I am firmly of the view that the verdict was one properly arrived at and should be confirmed. I have no qualms or misgivings as to the correctness of the verdict.

Before passing, however, I should deal with two matters of alleged mis-direction. The first arises in respect of the direction by the learned trial Judge to the jury in relation to the circumstantial evidence. His Honour gave proper directions as to circumstantial evidence and repeated them several times without exception and, indeed, no exception is taken to all such directions, save when his Honour was repeating them at the finish, in which he said at p.46 of the summing-up:

> "I remind you that the onus is on the Crown to prove the guilt of the accused beyond reasonable doubt, that in a case of circumstantial evidence if there is any hypothesis reasonably open consistent with the innocence of the accused, then the Crown has failed to prove beyond reasonable doubt that he was the one who did it . . . "

Pausing there: that is impeccable. His Honour then went on:

> " . . . and if you find that the case has not been proved to that degree of completeness, excluding any reasonable hypothesis of innocence, it is only then that you could convict, if you find that the case had been proved to that extent. If you find that it is not proved to that extent, your duty would be to acquit."

Now, the word "not" in the first line of this last portion as underlined clearly should not be there and its presence is erroneous. It should read, "If you find that the case has been proved to that degree of completeness, excluding any reasonable hypothesis of innocence, it is only then that you could convict . . . ". In the light of what had gone before and even in the light of what followed, this was a slip of the tongue, and although it makes this direction, to that extent, inaccurate, no objection was taken by either the

counsel for the accused - well experienced in the criminal courts - or by the learned Crown Prosecutor, and it must have passed completely unnoticed by them and I do not think that the jury would have been affected by this slight error or that it caused them to misinterpret what his Honour had more than once previously correctly said. No request was made by counsel to correct it and this has only been discovered by a close examination of the summing-up by learned counsel on the hearing of this appeal and I do not think that there should be any new trial granted on this basis. The jury could not possibly have been misled.

The other matter arises in relation to motive and refers to the direction given by his Honour at p.42 of the summing-up. His Honour said:

> "There does not appear in the Crown case to be the slightest evidence, by direct evidence, of motive for the accused to kill his wife; not the slightest evidence by direct evidence. There appeared to all intents and purposes no reason at all why he should kill her."

Then follows the passages to which exception is taken.

> "On the other hand, it is not unknown in human relations that sudden quarrels do sometimes flare up between man and wife. One factor, and I am not going to emphasise it unduly or otherwise, just to point to it, that appears in the case is that she had $700-odd in the bank. The accused was asked whether or not they had had a talk when he was with her at 9.30 or whatever time it was on that morning about what they were going to do later in the day, and he did say that they were going to draw some money out of the bank later on that day. A possible view may be that she decided not to. It would be very difficult to draw that as an inference because to draw it as an inference you would have to assume that there was in fact a quarrel between the husband and wife, and then you would be pulling yourself up by your bootstraps and saying therefore the quarrel may have been about her drawing money out of the bank, because she was really intending to go off home to Hong Kong or somewhere else, and she did not want to spend her escape money, as it were. If you could find in the case, without that type of logical deduction, what in fact

there was strong circumstantial evidence that he killed her apart from that, then the fact that there may have been a ground for a quarrel might fill a place in the overall picture. Just be very careful the way in your deliberations you use that evidence. You could have in a case pretty good evidence that in fact a man killed his wife, and then you get a letter that indicates that there was a possible ground for a quarrel, and then you might perhaps readily infer that there was in fact a quarrel and that he killed her because of it. It is a factual matter and it will be a matter for you. If there is not sufficient evidence to conclude that he killed her, you could not imagine there was a quarrel and then say 'Because we imagine there was a quarrel, therefore he killed her'. You would have to be very careful in the way you used that at all in the case. It would only be if the chain of circumstances, apart from that letter, indicated that he did do something, and it would be purely a matter of fact, and it is for you to decide what the factual matter was, together with that statement by him that they were going to draw money out of the bank later that day."

I find that direction unexceptional and it contained a proper warning as to the one and only way in which any such a suggestion of quarrel could be used as supplying motive, viz. if and only if there was strong circumstantial evidence that he killed her, apart from this particular matter of alleged quarrel. It is true that there was no evidence of motive, but that is not fatal to a Crown case, and one might refer to an extract from "The Judges and the Judged", by Edgar Lustgarten as follows:

"Mr. Justice Cassels tries Daniel Raven.

. . . . . .

'But when the facts point ineluctably to a prisoner's guilt, what do people really mean when they say "he had no motive"? Merely that he had no apparent motive; no motive that they are able to ascertain. Who can tell, though, all that passes in another's mind? And what murderer voluntarily lays bare the springs of murderous action? Mr. Justice Cassels made this point with telling simplicity in his summing-up. "Men kill", he said, "for many reasons. They do not kill and leave statements of motive by the body".'"

In the result, I am of the opinion that the appeal against conviction fails and I would propose that the appeal should be dismissed, the conviction and sentence confirmed but that time spent pending the appeal should count as part of the sentence.
