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1965

IN THE COURT OF CRIMINAL APPEAL

No. 38 of 1965

NOT FOR LOAN

CORAM: BRERETON, J.
WALSH, J.
MANNING, J.

Friday, 6th August, 1965.

REGINA v. McLEOD-LINDSAY

JUDGMENT

BRERETON, J.: In my opinion the appeal should be dismissed and I publish my reasons.

WALSH, J.: I agree. I publish my reasons.

BRERETON, J.: My brother Manning has authorised me to say that he has read the reasons which have now been published by myself and my brother Walsh, and agrees with them and agrees that the appeal should be dismissed.

We order that the time served pending the hearing of the appeal shall count as time served under the sentence.

McLeod-Lindsay

IN THE COURT OF CRIMINAL APPEAL

No. 38 of 1965.

CORAM: BRERETON, J.
WALSH, J.
MANNING, J.

Friday, 6th August, 1965.

R. v. McLEOD-LINDSAY

JUDGMENT

BRERETON, J.: The appellant was convicted on a charge of wounding with intent to murder and was sentenced to penal servitude for eighteen years. He now appeals against conviction, on a number of grounds, and against sentence.

The appellant was employed casually as a steward at a motel some 1-3/5 miles from his home and on the night in question was engaged there. He returned home shortly after midnight and found his wife unconscious; she had been severely battered about the forehead with a steel bar. This was the property of the appellant and was used by him to prop open his garage door. His son aged 4½ was also injured. When found, his wife was "half reclining in a propped position" in the angle made by a wardrobe and the bedroom wall. The Crown case was that the appellant had returned home earlier - in all probability between 9 p.m. and 10 p.m. - and had

then attacked his wife; that he had returned to work, come home in the ordinary course at midnight, and then given the alarm. The evidence against him was entirely circumstantial; the question for the jury was whether there was any reasonable explanation consistent with innocence, and they were so directed. In the Crown case the main emphasis lay on certain bloodstains on the appellant's clothing. Photographs tendered in evidence, showing damage done to the wardrobe by the steel implement, and bloodstains on the wall and on the wardrobe, suggested very strongly that when struck the woman was in a sitting position substantially where the appellant ultimately found her. Moreover, some of the marks (both on wardrobe and wall) were plainly made by droplets of blood moving outwards and in some cases slightly upwards from her head, and at some speed, for some left almost horizontal tracks behind them before congealing. The inference was also strongly suggested that anyone standing close enough to inflict the blows must have received on his clothing, certainly below the waist (if he was fully erect) and possibly higher, some part of the shower of droplets which caused the marks on the wall and wardrobe.

The appellant's clothing was impounded by the police about 7 a.m. It was the clothing he had worn at work, consisting of black trousers, white shirt, cummerbund, black bow tie and shoes, and a grey wind jacket. On the front of both legs of the trousers, from just above the ankle to about mid-thigh, numerous scattered and evenly distributed blood stains made by droplets were found. Similar marks were found on the tie. There was nothing on the cummerbund; two spots and a large patch of blood on the shoes. There

were large smears of blood on the shirt, but no similar small drops, and there was blood inside the windjacket in corresponding positions, as though it had been donned over the shirt when still wet with blood; there were no large patches in corresponding positions on the outside of the windjacket. On it, however, there were a number of splashes, especially on the right sleeve and right chest, some of which indicated (as had those on the wall and wardrobe) the direction from which they had come; and the direction was from wrist to shoulder. There were other larger stains in the form of smears on the left arm, but nothing on the left chest. A study of the distribution of drops on the trouser legs and windjacket might well have led to the conclusion that the wearer was, when spattered, standing with the right leg slightly forward, and the right arm extended in the direction in which the woman's head would appear to have been when she was struck.

The Crown's contention was that the appellant was wearing the windjacket at the time of the attack, thus explaining the absence of drops on the cummerbund, shirt and upper part of the trousers; that on returning to work he left it in his car; and that he did not thereafter resume it until he had carried his son from the house to the ambulance (at which stage the boy was bleeding from two scalp lacerations) - thus receiving the bloodstains on his shirt and later on the inside of the windjacket, unless they got there when, earlier, he moved his wife.

The evidence as to the time at which the offence was committed was this. The doctor who admitted the victims to hospital estimated that it was three quarters of an hour to an hour or more

before he saw them at 12.50 a.m.; the doctor who operated later put it at a few hours before he first saw them about 2.30 a.m. Neighbours had been called in by the appellant before 12.35 a.m. About 9.30 a Mrs. McLachlan saw a man in the street outside her kitchen window. The back fence of her property formed part of the side fence of the appellant's and his was the last house in a dead-end street. He was walking in a direction away from the appellant's house, and carried a large torch similar to the appellant's. "There was enought light to distinguish it was a man and not a woman". He had a loose fitting jacket on; at first she thought it was the appellant and then thought he did not look tall enough, and called her husband. She fixed the time by reference to a Television show; "it was somewhere near the end of that show or the beginning of the next"; she had found out since that it finished at 9.30, "so it was round about 9.30 I could seem to put it down to". She later said it could be five minutes either way of the end of the show. Mr. Dawn, who had been at Gymea Technical College until 9.30, drove to his home in the same street as the appellant's but on the opposite side, and further from it than Mrs. McLachlan's. Reference should be made to the plan in evidence. He said it would take him about five minutes to reach his home. He saw a vehicle parked on the same side as the appellant's home, but further away from it than his own home, and outside a house which was under construction. It was a red and white Standard sedan; the same make, model and colour as the appellant's. There was someone sitting in it, wearing a white shirt. About 15 to 20 minutes later he heard a car door close and he saw the car proceeding, in reverse, from where it had been in a

direction away from the accused's home. However, he could not remember seeing a luggage rack on the roof. The appellant swore that his car had a roof rack at the time, and that it was removed a few days later; this was corroborated by another defence witness. Mr. Gladwell, a Crown witness, however, who undoubtedly saw the appellant's car on the night of the offence, did not notice any roof rack on it.

Constable Jarvis said that between 7.50 p.m. and 8.45 p.m. the porch light in the appellant's home was on, and he saw no one enter or leave. Mr. Baldry, a neighbour, had driven home between 9 and 9.30 and did not see the appellant's car.

It is necessary now to turn back to the matter of the windjacket. The Crown called the two neighbours summoned by the appellant, about 12.20 a.m. Mr. Baldry's back fence, like Mrs. McLachlan's, formed part of the appellant's side fence; she was on the corner. The appellant aroused him, called out to get an ambulance, and left. He was not wearing a windjacket. Mr. Baldry passed the message for an ambulance to his son, put on a dressing gown and went down. On entering the appellant's house there were no lights on; the appellant was kneeling beside his wife. Mr. Gladwell, another neighbour, arrived shortly after. The injured woman was lying in the angle between the wardrobe and the wall, her shoulders against the wardrobe. She was uncovered, except for a garment on the top part of her body. The appellant was still not wearing the windjacket; he was supporting the boy. When Mr. Gladwell arrived they went to the fuse box and found that the lights had been switched off there; Mr. Gladwell turned them on. On their return a blanket had been placed over the woman and the boy

was on the bed; the injured woman had been moved to a lying position. The ambulance arrived and she was placed on a stretcher, the ambulance man substituting a blanket of his for the one previously over her. At no time did Mr. Baldry see the windjacket. The appellant carried the boy out; Mr. Baldry did not think there was anything wrapped around him. After placing his son in the front of the ambulance the appellant disappeared around the back (it was parked nearly back to back with his own car) and "reappeared putting on a jacket".

Mr. Gladswell gave the same account; but noticed that the appellant had blood on his shirt (no doubt from moving his wife). There was nothing around the boy when he was being carried out; the ambulance man got a blanket for him. Then Mr. Gladswell suggested to the appellant that he should get a coat; he got one from behind the front seat of his car - a windjacket - and put it on.

The ambulance man, Mr. Kinross, said that on arrival he found the appellant kneeling beside his wife, near her head, on her right hand side. His version corresponded with that of Mr. Baldry and Mr. Gladswell. When the boy was brought out a blanket was taken from the back of the ambulance and the boy was wrapped in it and placed in the front seat; when the appellant got into the ambulance he had put on a windjacket.

It is convenient here to deal with the second ground of appeal, namely that the witnesses Baldry, Gladswell and Kinross were wrongly allowed to give certain evidence in reply. As has been noted, the Crown case was that the appellant must have got the blood on his windjacket (or at least, the drops, as distinct from the

smears) before he returned home shortly after midnight, because when he did return at that time he left it in his car till he went off in the ambulance.

The accused, in the course of several interrogations, had given varying accounts. In his first account he described his return home, finding the house in darkness. He found his torch and then found his wife in the bedroom. He tried without success to pick her up. He picked his son up and put him on the bed - either before or after he went for Mr. Baldry. He placed a blanket over his wife. Later he picked the boy up and placed him in the ambulance. There was no reference to the windjacket. Later the same day he was asked how he was dressed when he returned home, and said he had the windjacket on, but was starting to take it off as he entered the house. He was asked whether he covered the boy after placing him on the bed and said: "I took my coat off in the ambulance and put it over him". He was asked had he had it on all the time since he came home and replied:"No, somebody said it is cold, put a jacket on, I think my jacket was over Pam at some stage and I took it off her and put it on", and that was after he returned from Baldry's. At the end of the interrogation he volunteered that, in the ambulance, he had the jacket over his shoulders, the boy being wrapped in a blanket; at the hospital he put his arms in the sleeves. A fortnight later he was again questioned. He was shown his previous statements and asked about the windjacket. He said he wore it home, took it off before he went for help, and put it on again in the ambulance. He was not sure whether, when he took it off, he put it over his wife or hung it on the door. When he

put it on, someone handed it to him. The blood on it was from either his wife or the boy. He was shown a statement made by Baldrey, and said: "Someone handed me the windjacket, I didn't pick it up". Shown Gladswell's statement, he said the same, and denied having placed the coat in the car. "It was only on the stretcher as far as I know". He did not place it on the stretcher, or see it on the stretcher.

In their evidence in chief the witnesses Baldrey, Gladswell and Kinross collectively or individually contradicted each of these accounts of the whereabouts of the windjacket. When he gave evidence, the appellant said he was wearing his windjacket when he entered the house, and had started to undo it when he found the torch; it was still on when he found his wife and tried to pick her up, before calling for Mr. Baldrey. He picked the boy up, threw his coat over his wife, and then went for help. On his return the boy was standing beside the bed; he put him back and put the coat over him; put a blanket over his wife, and moved her to a lying position. Later, he carried the boy, wrapped in the coat, to the ambulance. At the ambulance, someone took the jacket and substituted a blanket. "It was either thrown on to the car or someone took possession of it". Someone handed it back to him as he was running back to the house for a coat, or indicated where it was.

Up to the point where he carried the boy out, this was merely an elaboration of earlier versions known to the prosecution and not really inconsistent with them; and it squared substantially with the accounts given by the three witnesses, allowing for their respective times of arrival and occasional absences. But the

suggestion that he himself had carried the coat out, around the boy, and that it had been taken from him, was quite new. Baldry had been asked whether there was anything around the boy and had said: "I did not notice; I do not think there was ". Inferentially, he did not take the coat from the appellant, or give it back, but he had not said so expressly. Gladswell had said that when the boy was on the bed he was not covered with anything; and when asked whether there was anything around the boy when he was being carried out, replied "Not that I could see". And he described in detail how the appellant got his coat from the car. Again, inferentially, he denied having taken the coat from the appellant or having told him where it was; but not expressly. Mr. Kinross merely said that someone got a blanket from the ambulance to wrap the boy, and noticed that the appellant had put on a jacket. To none of the three was the appellant's new version put in cross-examination; after he had sworn to it, therefore, he was in a position to say that although apparently inconsistent in some respects with the evidence of the three, it was not expressly denied by any of them.

In reply, Baldry's attention was drawn to the appellant's evidence of the exchange of windjacket for blanket, and was asked a series of questions in which he denied, in detail, that he had done it. Gladswell was asked substantially the same questions, and the answers were the same. Kinross said he did not remember if he put a blanket around the boy, but denied taking a windjacket from him.

I do not think the learned Trial Judge erred in allowing this evidence to be given. There was no reason why the prosecution should have anticipated the new version given for the first time in

the appellant's evidence. Indeed, where an accused person has made a statement, the making of which is not in any way disputed by him, and later in sworn evidence or in a statement from the dock gives a different account, which has not been put in cross-examination to the Crown witnesses, I would think it could ordinarily be said that special circumstances had arisen entitling the Crown to give evidence in reply. If it has no such evidence, the defence is strengthened by comment on its failure to reply, a comment which could not be made if it is not permitted so to do.

I now resume the summary of the Crown case. Evidence was called to show that there was no sign of forcible entry into the house; that there were no identifiable fingerprints other than those of members of the family; and that on examination of the injured woman no indications were found of a sexual attack. That possibility was not completely excluded. Her pyjama trousers were found, blood-stained, in another room; she had only the coat on when found. The Crown offered the suggestion that they had been removed after the attack to make it look like a sexual assault. Otherwise there was no suggestion of any motive for the offence on the part of the appellant or of any one known to the appellant.

The Crown also called evidence as to the possibility of the appellant absenting himself from his place of employment for a sufficient interval of time without his absence being noticed; and as to the time of incidents at his work that night to which the appellant had referred in his statements. Sgt. Wild said he saw and spoke to the appellant there before 9 p.m. The motel manager

described the appellant's duties. Mrs. Keir, who was employed there, saw the appellant at about 7.30 p.m., at 8 or a little after, and between 8.30 and 9 p.m., "but closer to 9 than 8.30". She next saw him when the warning bell rang at 9.55 p.m., and thereafter frequently until 11.50 p.m. When they left, he was wearing a blue-grey jacket. In cross-examination she said she saw no stains on his shirt during the period after 9.55 p.m.; it was possible that she had seen him on occasions she did not recall between 9 and 10p.m. She had been given a bottle of wine and when she left asked the appellant to carry it out for her: he was wearing a windjacket and put the bottle in his trouser pocket. She was only a foot away, had no doubt the windjacket in evidence was the one he was wearing, and said there were no stains on it at that time. She was asked whether she saw marks on his trousers and said: "No, I did not scrutinise them in any way" but did not see any marks on them. Mr. Price was present when the bottle of wine was handed to the appellant. He said the appellant then had a jacket in his hand and wrapped it around the bottle. The jacket was fawn coloured, and was not the one in evidence, although he had seen it before worn by the appellant at the hotel. Mr. Price saw no stains on his clothing. He had seen the appellant fairly constantly between 10 p.m. and 12. Mr. Keith had seen the appellant at about 8.30 p.m. and "about an hour later, approximately 9.30", and from 10 p.m. to 12 frequently. He was present with Mrs. Keir and Mr. Price shortly before 12 and left with them and the appellant. The appellant was then wearing a fawn-grey windjacket. He saw nothing of the bottle of wine. He saw

no stains on the appellant's clothing. Mr. Hoyle saw the appellant at 8.15 p.m. He was then wearing a fawn coat, a three-quarter length car coat, not the coat in evidence. Previous witnesses who saw the appellant about this time said that he was not wearing a coat at all before midnight. Mr. Hoyle saw the appellant "on and off" "most of the time" during the evening. Mr. Jarvis saw him about 8 p.m. and he was then wearing a fawn type of windjacket or coat, not the one in evidence, which latter he had seen the appellant wearing previously. At other times during the evening he was not wearing any jacket. Mr. Jarvis put the incident to which Sgt. Wild had deposed at "possibly between 9 and 9.30","it would be very approximate".

The defence also called evidence on this matter. Mrs. Morgan, a member of the staff, had seen the appellant quite often during the evening. She placed the incident to which Sgt. Wild deposed at about 9 p.m. and she spoke to the appellant about ten minutes later. The conversation continued until 9.20 p.m. or 9.30 p.m. Mr. Stringer also saw him but could not recall the times with any precision. Mr. Tucker, who had gone to the hotel on a night when the appellant did not usually work there, on the chance of talking to him about some repairs to his motor vehicle, arrived at 9.30 p.m. He said he saw the appellant just after he arrived and again five to ten minutes later, and that he spoke to him at about 9.55 p.m.

The first ground of appeal, as stated in substituted grounds, is that the verdict was unreasonable or could not be supported having regard to the evidence. Counsel for the appellant,

however, intimated that what he proposed to argue was that the verdict was "against the weight of evidence" - i.e. the ground taken in the original notice of appeal, for which the other was later substituted. He did not contend that the verdict was unreasonable, and it ultimately appeared that the basis of his argument was that the verdict was unsatisfactory having regard to the evidence, upon which, it was contended, it was unsafe to convict. The ground afforded by s.6 of the Criminal Appeals Act is that the verdict "cannot be supported, having regard to the evidence" and what this means is, upon any view of the evidence reasonably open to the jury. If, upon a view of the evidence which the jury could reasonably take, they could be satisfied beyond reasonable doubt, the appeal fails.

I do not imagine that every jury would have been satisfied beyond reasonable doubt, but that is of no more relevance than the fact, if it were the case, that we ourselves did not feel so satisfied. It is not our function to retry the case.

The strength of the Crown case lay in the evidence as to the bloodstains, as indicating that the appellant was present at the scene of the crime when it was committed. Its weakness lay in the evidence tending to show that he was not. The weight of that evidence depended entirely on the accuracy to be attributed to (a) estimates of length of time necessary for the appellant to leave his place of employment, commit the offence, and return; (b) estimates of times at which he was seen at work and (c) estimates of times to which Mr. Dawn and Mrs. McLachlan deposed. As to item (a), and leaving out of account the evidence of these two witnesses, it could

not have been less than 15 minutes or on the appellant's estimate of travelling time 25 minutes. If, however, it was the appellant in the car seen by Mr. Dawn and if he remained in it till the car drove away (although Mr. Dawn heard a car door close when it left), it could not have been less than 30 minutes, on Mr. Dawn's estimate of the interval which had elapsed; and as to item (c), if these two witnesses were accepted, his absence from work must have been between 9.25 p.m. at the latest and 9.55 p.m. at the earliest.

There was also evidence, basically that of the appellant's wife, that the offence was committed in fact by an unknown intruder. There was a means of access, through the floor of the enclosed back verandah where floor boards had been cut and could be lifted to give an aperture about 12" x 12", and this could be reached from outside by going under the house. Moreover Mr. Gladswell, on going round the house, noticed that a side door was open; but there had been much activity in the house by this time. It was thus contended that the lack of evidence of forcible entry, and of fingerprints, was of no weight; there was on the evidence the possibility of a sexual attack although there were no relevant signs of violence; and the explanation suggested by the injured woman's evidence must therefore have been considered to be a reasonable one. What she said was that she was awakened by a thump of wood against wood in the back verandah, and heard the family dog walk across the lino. She heard a man's voice speak to the dog, but could not hear what was said; however, it was not her husband's voice; he had a marked Scots accent; it was an Australian voice. She heard the dog whimper, but it did not bark; the man spoke and the dog gave a loud whimper; she heard the man

push it out the door. "By this time", she said, "I was very annoyed so I decided to get up and have a go at the man". She did not call out; "I was being sneaky about it" "I was being very quiet and was going to catch him." She started to walk towards the door, and woke up in hospital.

She had admittedly suffered a substantial retrograde amnesia but said that some four weeks after the attack her memory had partially returned.

It was contended for the appellant that because of the nature and strength of the alibi, and because of his wife's evidence, it was necessary for the jury to give credence, as a reasonable hypothesis, to the explanations of the bloodstains offered by the appellant consistent with his innocence. I do not think that this is so. It was the jury's duty to place the three sets of material side by side and consider them together; and so far as the alibi was concerned they might well, as reasonable men, have concluded that the evidence as to the times at which the appellant was seen was of its nature less reliable than the evidence of the bloodstains and the inferences to be drawn therefrom; for the former depended on memory and reconstruction of things not especially noteworthy at the time, and the latter did not. The alternative explanations were these. The accused said thatwhen he went tomove his wife he felt blood on his face, and there was evidence that movement in such a case could cause arterial bleeding to recommence. As to this, there was the evidence of Sgt. Merchant, of the Scientific Bureau, who on this matter was treated as an expert by both sides,

and by Dr. Cramp, that blood jetting from an artery could not have produced the spray of droplets exhibited on the wall, wardrobe, trousers and windjacket. Sgt. Merchant in cross-examination, and in reply to some theoretical and hypothetical questions, showed perhaps some understandable lack of conviction, but Dr. Cramp was positive and adamant. The jury was entitled therefore to reject this explanation. In any case, so far as the windjacket was concerned, there was direct evidence, which the jury was entitled to accept, that the appellant was not wearing it at the time; that it was left in the car outside when the appellant returned homeat 12.20 a.m.

Of the stains on the shirt and the smears on the left arm of the windjacket, and inside it, there were obvious explanations consistent with innocence. The spots on the tie were very few in number and perhaps, alone, not of great significance. For the spots on the trousers several explanations were offered.

(1) Recurrence of arterial bleeding when the appellant moved his wife. There was, as noted, evidence upon which the jury could reject this.

(2) People walking in wet blood on the carpet causing it to splash. An examination of the pattern of drops, of the photographs showing the location of the blood pools on the floor, evidence as to its state of congealment, and a consideration of the inherent probabilities would have justified any jury in rejecting this out of hand.

(3) Contact with the pile of the bloodstained carpet when the appellant was kneeling beside his wife. A study of the photographs

coupled with the absence of any large stains, and the presence of many spots above the knees, could justifiably have led the jury to regard this as imposing too great a strain on their credulity.

(4) Bleeding from the boy's head in the ambulance, or on the way to it. In the ambulance, the boy was wrapped in a blanket and was sitting on the appellant's knees, so that this possibility could obviously be rejected. He was carried in the appellant's arms to the ambulance, and had been picked up and put on the bed in the house by him. At none of these times was the appellant wearing the windjacket; and there were no drops on his cummerbund, or on the upper part of the trousers. There were extensive patches on the left arm and right shoulder of the shirt. These considerations, coupled with the nature, size and distribution of the drops on the trousers, would have justified a jury in rejecting this explanation.

Over and above these individual answers to individual hypotheses, there was the dominating fact that the pattern and nature of the drops on windjacket and trousers was in complete conformity with what appeared on the walls and wardrobe. It was exactly what one would expect to find on the attacker.

As far as the hypothesis of an intruder is concerned, the significance to be attached to the evidence of absence of forcible entry and of fingerprints depended very much on the jury's assessment of the likelihood of any intruder finding his way through the trapdoor. Knowledge of its existence had to be assumed - it was certainly not likely to be found otherwise. Acceptance of the injured woman's evidence required, not only acceptance of this, but

acceptance also of the fact that the intruder in the dark found the weapon, found the fuse box, located the trapdoor from under the house with the lights in the house out, and replaced the boards at some time before leaving. Moreover, we have before us only a transcript. The jury saw her and heard not only what she said but also her manner of saying it. She had suffered brain damage, and had sustained a period of retrograde amnesia; it was very much in the jury's province to assess what weight should be given to her evidence. Even, of course, if they disbelieved her, it was still necessary to consider whether the sort of thing she described was a reasonable possibility; but it was in my opinion open to them to be satisfied that it was not. Accordingly, I do not think it could possibly be held that it was unsafe to convict; that on the evidence there must have been a reasonable doubt; or that it was not open to the jury, on any reasonable view of the evidence, to be satisfied of the appellant's guilt.

The third ground of appeal related to the calling in reply of Sgt. Inglis. The appellant's wife had said that when she interviewed her husband in gaol, on all but one occasion there was a policeman present. Sgt. Inglis was asked a question about this, and according to the transcript his answer, "No", was followed by an objection which was upheld. The answer went to her credibility, but no further application was made, nor was any direction sought. The objection appears to have been belated, and I can see no reason for ordering a new trial on this ground.

The fourth ground of appeal is, in effect, that the learned Trial Judge did not deal in sufficient detail with the evidence that the appellant had been seen at the hotel between 9 p.m. and 10 p.m. The importance of this evidence has already been stressed and there can be no doubt that counsel for the defence directed the attention of the jury to it in his address. The learned Trial Judge dealt with it comparatively briefly and in general terms, but certainly reminded the jury of it. At the conclusion of the summing up counsel requested a fuller exposition, and the learned Trial Judge then dealt with it in somewhat more detail. No further request was made, and the defence had the advantage of the relative prominence it was thus given. Anything more would have required a fairly full summary of the evidence of each witness and some reference to the considerations to be applied, in each case, in determining the reliability of the times stated. I do not consider that this was called for, or that the Trial Judge erred in taking the course he did.

The fifth ground is that the learned Trial Judge erred "in failing to direct the jury that there was no onus on the appellant to establish an alibi, and that the onus was on the prosecution to establish beyond a reasonable doubt that the appellant had an opportunity to commit the offence". It is sufficient to say that the learned Trial Judge correctly, and repeatedly, instructed the jury as to onus of proof. The second part of this ground was based on the contention that the inferences to be drawn from the bloodstains were not of themselves sufficient to establish opportunity, which had to be proved, beyond reasonable doubt, aliunde. With this con-

tention, in the circumstances of this case, I am unable to agree. No exception was taken to the summing up on this ground at the time.

The sixth ground was that the learned Trial Judge's view of the evidence was too strongly expressed. No such complaint was made at the time, either generally or in relation to the specific matters relied upon. The summing up in my opinion was quite evenly balanced, and offered no suggestion whatever to the jury as to how they should find on any question. Indeed in one or two instances it was unduly favourable to the appellant. The specific matters relied upon were these:

(a) A passage of the summing up commencing "Gentlemen, you heard the cross-examination..." and concluding "was returned to the family", gave a wrong impression of the evidence. In fact "two days" should have been "two weeks" but the substance of the complaint is that all the witness was shown not to have told the police, on that day, was that the dog had been put out of the house, and that it might well be inferred that she had then given them the whole of the rest of her story, although, of course, the defence could have proved this, if it were the case. But there was still open the comment that she had told the police nothing of it before February 15th and its weight was substantially the same. If the words "before February 15th" had been expressly included after "not revealed" no exception could be taken and none in fact was taken at the trial, when it could easily have been remedied.

(b) The learned Trial Judge said "The Crown has led evidence of the opportunity of the accused to absent himself". This was alleged to be an overstatement but appears to me to be perfectly

correct. He continued: "....proof of opportunity is not an essential.. if from other evidence it can be inferred beyond reasonable doubt that the accused committed the crime". The objection is along the same lines as the second part of ground 4, and is there dealt with. In any event the two sentences which immediately follow, in the summing up, and the final paragraph of the addendum, put the matter beyond criticism. No objection was taken at the time.

(c) The learned Trial Judge referred to the evidence that there was no sign of forcible entry, no fingerprints, and no physical sign of a sexual attack. The contention is that it should have been omitted, or if included, the jury should have been told that it was of no weight. Its weight has already been discussed and it was proper to refer to it. The learned Trial Judge told the jury that it was proper to be considered with other evidence in the case "if that other evidence directly links the accused with the crime", as, indeed, it was. No objection was taken at the time.

(d) After dealing with the evidence given by the appellant's wife, the learned Trial Judge said: "If you think that there is a reasonable hypothesis....that there was an man with an Australian accent who came into that house.....it would be your duty to acquit the accused". Counsel objects now, though he did not at the time, to the use of the word "hypothesis" of this evidence. What he omits to notice is the preceding sentence; what the learned Trial Judge is doing in the passage complained of is telling the jury, correctly, that even if they do not believe the witness, they must still con-

sider it as a possible explanation.

(e) In two passages the learned Trial Judge dealt with absence of motive. I was unable to follow the objection to these passages; no complaint was made at the time; and they appear to me to be perfectly proper.

The remaining ground of appeal is that fresh evidence is available. Certain witnesses gave evidence that, both before and after 10 p.m., the appellant was wearing a fawn windjacket. Mrs. Keir had said that at 12 he was wearing the one in evidence, and that it was not bloodstained. The evidence of the others may have suggested that Mrs. Keir's powers of observation were at fault. There was evidence, of course, also, that the trousers were not seen to be bloodstained after 10 p.m. and before 12. The appellant denied having any other wearable windjacket, and said the fawn one he wore at the committal proceedings was given to him after his arrest. His wife swore that he had no other wearable windjacket. The relevant question is whether Mrs. Keir was mistaken either as to the identity of the windjacket or as to the presence of blood on it; the defence now seeks to call the person who gave the fawn windjacket to the appellant after his arrest. This does not prove that he had no other, and is in any event on the outer periphery of the case. It would merely corroborate a partial answer to a question relevant to a fact in issue, for Mrs. Keir may have been right about the windjacket and have merely failed to observe such stains as were then on it, i.e. the drops and not the larger smears. There was no argument about the identity of the trousers, and I do not think that

a new trial ought to be ordered on this ground. Even though I appreciate that little additional evidence might be necessary to raise a reasonable doubt, this particular basis for doubt in one form or another was well before the jury.

In any case the evidence was clearly available at the hearing. The witness was contacted after Mrs. Keir gave evidence, but was not brought to Court until the last day. No application was made to reopen the defence case.

As to sentence, the learned Trial Judge was in the difficult position which always arises where an alibi fails; he knows nothing of motivation; nothing of the circumstances of the crime. Viewed objectively, it fell short of murder by no more than a hair's breadth, and I can see no reason for reducing the sentence he imposed.

In my opinion the appeal should be dismissed.