SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stafford* [2009] QCA 407
PARTIES:	**R** **v** **STAFFORD, Graham Stuart** (appellant)
FILE NO/S:	CA No 101 of 2008 SC No 30 of 1992
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 672A *Criminal Code*
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2009
JUDGES:	Keane, Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, Keane and Fraser JJA concurring as to the orders made, Holmes JA dissenting
ORDERS:	**1. Appeal allowed** **2. Conviction quashed** **3. Retrial ordered**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where appellant convicted by jury of murder – where Crown case put to the jury at trial relied upon circumstantial evidence – where appeal to this Court dismissed – where special leave to appeal to the High Court against that decision refused – where Attorney-General referred appellant's petition to this Court in 1997 – where this Court dismissed appeal upon petition in 1997 – where special leave to appeal to the High Court against that decision refused – where Attorney-General further referred appellant's petition to this Court on instant appeal – where appellant adduced further evidence not led at trial or petition in 1997 – where further evidence undermined Crown case put to the jury at trial – where undermining of Crown case demonstrated procedural miscarriage of justice – where this Court must direct verdict of acquittal unless miscarriage of justice more adequately remedied by order for new trial – whether miscarriage of justice more adequately remedied by order for new trial

Criminal Code 1899 (Qld), s 668E, s 669, s 672A

Burrell v The Queen (2008) 238 CLR 218; [2008] HCA 34, cited
Chamberlain v The Queen [No 2] (1984) 153 CLR 521; [1984] HCA 7, cited
Conway v The Queen (2002) 209 CLR 203; [2002] HCA 2, cited
Davies and Cody v The King (1937) 57 CLR 170; [1937] HCA 27, cited
Dyers v The Queen (2002) 210 CLR 285; [2002] HCA 45, cited
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, considered
Nudd v The Queen (2006) 162 A Crim R 301; [2006] HCA 9, cited
R v Anderson (1991) 53 A Crim R 421, cited
R v Apostilides (1984) 154 CLR 563; [1984] HCA 38, cited
R v Butler [2009] QCA 111, considered
R v Soma (2003) 212 CLR 299; [2003] HCA 13, cited
R v Stafford [1992] QCA 269, considered
R v Stafford [1997] QCA 333, considered
Reid v The Queen [1980] AC 343, cited
Richardson v The Queen (1974) 131 CLR 116; [1974] HCA 19, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
Stokes v The Queen (1960) 105 CLR 279; [1960] HCA 95, cited
The Queen v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
The Queen v Taufahema (2007) 228 CLR 232; [2007] HCA 11, cited
Velevski v The Queen (2002) 187 ALR 233; [2002] HCA 4, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: D A Savage SC, with J P Crowley, for the appellant
M J Copley SC for the respondent

SOLICITORS: Swanson Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** The dead body of Leanne Holland ("the deceased") was found abandoned in bushland at Redbank Plains on 26 September 1991. On 25 March 1992 Graham Stafford was convicted on the verdict of a jury of her murder.

[2] Mr Stafford appealed against his conviction contending that there was insufficient evidence to connect him to the killing of the deceased. It was also argued that there were errors in the learned trial judge's directions to the jury. On 25 August 1992

this Court dismissed Mr Stafford's appeal.[1] Mr Stafford applied for special leave to appeal to the High Court but his application was refused on 4 March 1993.

[3] On 6 February 1997, on Mr Stafford's petition for a pardon, the Honourable the Attorney-General referred the "whole case" to this Court pursuant to s 672A of the *Criminal Code* 1899 (Qld). Upon such a reference, a case was required to be "heard and determined by the Court as in the case of an appeal by a person convicted". On 23 September 1997 this Court dismissed the appeal brought into existence by the reference.[2] Mr Stafford applied again to the High Court for special leave to appeal. On 17 April 1998 the High Court refused that application.

[4] In April 2008, on a further petition by Mr Stafford for a pardon, the Honourable the Attorney-General again referred the "whole case" to this Court under s 672A of the *Criminal Code*. It is the proceeding brought into existence by this latest reference which this Court must now determine "as in the case of an appeal" by Mr Stafford.

[5] The reference to this Court requires a consideration of evidence which was not previously adduced on Mr Stafford's behalf, either at trial or on the 1997 reference to this Court. It is argued that this new evidence is such that this Court should conclude that Mr Stafford's conviction involved a miscarriage of justice. It is also argued on Mr Stafford's behalf that, quite apart from the new evidence, this Court's 1997 determination should now be seen to be erroneous, particularly in light of the recent decision of the High Court in *Mallard v The Queen*.[3]

[6] In order to address these arguments, I will first summarise the cases presented by the Crown and Mr Stafford at his trial and the evidence adduced by them on that occasion. I will then discuss:

(a) the 1997 reference to this Court and the basis on which it was determined;
(b) the new evidence adduced before the Court on the 2008 reference and the associated arguments of the parties;
(c) the approach to be adopted on this reference in light of decisions of the High Court since the 1997 reference, particularly in *Mallard v The Queen*; and
(d) what this Court should do by way of determination of the reference.

The Crown case at trial

[7] The deceased was 13 years old at the time of her death. She died as a result of blunt trauma to the head. Her corpse was found at 1.42 pm on Thursday, 26 September 1991 in bushland about 150 metres from the intersection of Redbank Plains Road and Greenwood Village Road. This location was 8.9 kilometres from her home in Alice Street, Goodna.

[8] The case presented by the Crown against Mr Stafford was circumstantial. The most powerful strands in that case were that:

(a) the deceased was last seen alive by her father and sister, Melissa, on the morning of Monday, 23 September 1991 when Mr Holland and Melissa left home to go to work. Mr Stafford, who was living in a sexual relationship with Melissa, was alone in the house with the

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1 *R v Stafford* [1992] QCA 269.
2 *R v Stafford* [1997] QCA 333.
3 (2005) 224 CLR 125.

deceased that day: she was on school holidays and he was on a rostered day off from work;

(b) forensic examination of the bathroom in the house revealed traces of human blood;

(c) swabs of human blood were obtained from the lip and the lid of the boot of Mr Stafford's car, and DNA testing established that blood found on three items which were in the boot of the car, a blanket, a red and black sports bag in which Mr Stafford kept his tools and a Chux cloth, was the same type as that of the deceased but was shared by only .00005 per cent of the Australian population. There was also a hair on a sponge in the boot which was consistent with the hair of the deceased;

(d) only Mr Stafford and Melissa Holland had keys to the boot of his car; it was common ground that Melissa Holland had nothing to do with the death of the deceased;

(e) a hammer described by Melissa Holland as a silver hammer with a rectangular head belonging to Mr Stafford and which he kept in their bedroom was noted by her to be missing after 23 September 1991;

(f) a maggot found by police in the boot of Mr Stafford's car matched those taken from the corpse on 26 September 1991 in terms of species and age; and

(g) the nature of the injuries inflicted on her was such that whoever inflicted them intended to cause death or grievous bodily harm.

[9] On the Crown case Mr Stafford had the opportunity and means to kill the deceased, and the DNA and maggot evidence tended to establish a physical connection between Mr Stafford and the killing of the deceased. If he did kill her, there could be no doubt, having regard to the nature of her injuries, that he did so with intent either to kill her or to cause her bodily harm.

[10] The body of the deceased was found lying face down with the skirt pulled up above the waist. There were no shoes on her feet; it did not appear that any of her shoes were missing from her home. The evidence of Mr Holland, the father of the deceased, was that the deceased always wore shoes when she was out, even if only to go to the shops. This evidence supported the inference that she was abducted from her home. In cross-examination Mr Holland conceded that it was "possible" that the deceased might not have worn shoes if she was merely "running across the road to the shops".

[11] The Crown relied upon other matters: evidence of a comparison by police of tyre tracks made by Mr Stafford's car with tracks found in the dirt leading to the spot where the body of the deceased was found; and evidence of statements made by Mr Stafford as to his movement on the Monday, Tuesday and Wednesday which were said to be either false or suspicious so as to suggest a consciousness of guilt on his part.

[12] The Crown case was advocated to the jury using a scenario in which Mr Stafford killed the deceased in the bathroom of the house by repeatedly striking her on the head with the silver hammer. After the deceased had been killed, Mr Stafford cleaned up the blood in the house, took the body of the deceased down the front stairs of her house and placed the body in the boot of his red Gemini sedan. The car was at the time parked in the open in the front yard of the house in sight of passing

traffic and neighbours. The Crown Prosecutor invited the jury to accept that, after the body was left in the boot during the Tuesday, Mr Stafford dumped the body in the bush at Redbank Plains early in the morning on Wednesday, 25 September 1991.

Mr Stafford's case at trial

[13] Mr Stafford denied any involvement at all with the death of the deceased or in the concealment of her corpse. He gave evidence to that effect.

[14] Mr Stafford's denial did not stand alone. The Crown was not able to suggest any motive on his part for him to have killed the deceased. Mr Stafford was a man of good character. There was no evidence of blood on his clothes. And it was improbable that he would have attempted to remove the corpse of the deceased from the house to his car in daylight in full view of neighbouring houses.

[15] Importantly, Mr Stafford's opportunity to kill the deceased was limited: there was evidence of sightings of the deceased in the afternoon and evening of the Monday which, if accepted, would tend to rule out opportunity altogether given reliable evidence of Mr Stafford's movements on the Monday afternoon from sources other than Mr Stafford himself. There was also evidence that some time before her disappearance the deceased had cut her foot in the house and had gone outside the house dropping blood as she went. She used a cloth to wrap her injury.

The evidence against Mr Stafford at trial

[16] Dr Ashby, a pathologist, viewed the body where it was found. Dr Ashby was of the opinion that the deceased had not been killed where she was found: she would have expected to see more blood in that location if that had been the case. Dr Ashby noted bruising and lacerations on the face and forehead of the deceased. There was some evidence of an assault on the deceased of a sexual nature on her back and on one thigh. There were no vaginal or anal injuries but there was a wound near the anus which might have been inflicted with a knife. There were also wounds which could have been burn marks inflicted by lit cigarettes or a lighter.

[17] A post-mortem examination showed the deceased died as a result of injuries to the head. At least 10 blows had been struck to the head by a blunt instrument such as a hammer. The nature of the wounds to the skull of the deceased was such that blood would have seeped out rather than spurted out. Death was said to have occurred during the day or night of Monday, 23 September 1991.

[18] The Crown led forensic evidence that the bathroom of the house had been swabbed for blood and that three swabs with human blood were obtained.

[19] After the disappearance of the deceased, Mr Holland noted that a collapsible chair which he had seen in the boot of Mr Stafford's car had been removed. Mr Stafford told police that he removed it on Monday, 23 September 1991.

[20] A plastic bag, similar to plastic bags found at the deceased's house, was found under the body of the deceased.

[21] Mr Holland gave evidence that the deceased telephoned him at between 8.45 and 9.00 am asking for his permission to dye her hair. Melissa Holland said that between 10.00 and 11.00 am Mr Stafford telephoned her and told her that he was going to help the deceased dye her hair. The deceased's father telephoned home at

about 11.00 am at which time Mr Stafford told him that the deceased had gone to the shops.

[22] Belinda Collins, a witness who knew the deceased, saw her at shops near her home at about 10.00 am. Ms Collins said that the deceased was wearing a purple jumper and a black shirt. Katrina Castle, one of the deceased's friends from school, gave evidence that she was at the shops at Goodna at about 7:30 am on the morning of 23 September and saw the deceased walking in the direction of her home. Ms Castle said that the deceased was wearing a purple jumper over a long black t-shirt and black pants. According to Ms Castle, the deceased was not wearing shoes. There was also other evidence in the Crown case of sightings of the deceased on the Monday morning. There was evidence of a sighting of the deceased alive at the St Ives Shopping Centre (also known as the Goodna Shops) as late as midday on the Monday. As I have noted, the defence also called evidence from witnesses who saw a girl who was said to look like the deceased on the Monday afternoon and evening. I will refer to this other evidence of sightings in more detail in discussion of the arguments agitated on the current reference.

[23] I pause here to note that it has often been acknowledged by the courts that evidence of identification of a person by witnesses with no previous knowledge of that person and no real reason to note seeing the person, and where the identification has been prompted by a police investigation, is inherently unreliable.[4] This acknowledgment occurs in the authorities in the context of discussing the danger of convicting an accused on the basis of a mistaken identification, but the uncertainties which attend such evidence are apt to detract from the weight to be accorded to such evidence whether it is adduced by the Crown or by the accused. It is fair to say in this case that it was open to the jury reasonably to conclude that the most reliable evidence of a sighting of the deceased is that of Ms Collins who saw the deceased at 10.00 am at the local shops.

[24] Patricia Lynch, the deceased's best friend, phoned the deceased at her home at between 9.15 and 9.30 am. The appellant answered the phone. Ms Lynch asked him to tell the deceased when she returned home to go over to Ms Lynch's place.

[25] Mr Robert Neyndorff gave evidence that he telephoned the house some time between 9.00 and 11.00 am and invited Mr Stafford over to his house. Mr Stafford declined, saying that he had to work on his car.

[26] Mr Stafford's friend, Mr Arthur Power, gave evidence that Mr Stafford visited him at his home which was a short drive from Alice Street, Goodna just before 1.20 pm. Mr Stafford stayed for between 30 and 45 minutes. As will be seen, Mr Stafford's movements during the rest of the afternoon were largely accounted for by evidence independent of Mr Stafford.

[27] Melissa Holland said that she spoke to Mr Stafford on the telephone at about 3.30 pm and arrived home at about 4.30 pm. She asked where the deceased was and the appellant said that she had gone to the shops in the morning.

[28] When Mr Holland returned home from work on the Monday evening and asked after the deceased, Mr Stafford told him that she was probably at Patricia Lynch's because Patricia had telephoned.

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[4] Cf *Davies and Cody v The King* (1937) 57 CLR 170 at 182; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 604 – 605.

[29] Mr Stafford suffered an injury to his arm on the Monday. It was suggested by the Crown that this injury might have been suffered during the course of a struggle with the deceased.

[30] On Tuesday, 24 September 1991 Mr Stafford arrived at work and at about 7.00 am he spoke with the first-aid officer, Ms Luckman, and complained about a sore left arm. He told her that his car had fallen off the jack when he was putting new shock absorbers on it. Ms Luckman saw some swelling near Mr Stafford's elbow. It may also be noted here that a witness, Mr Radcliffe, said that he saw someone working on the appellant's red Gemini sedan in the yard of the house between 11.00 am and noon, but Mr Radcliffe said that he thought that he made this observation on the Tuesday or the Wednesday.

[31] On the Tuesday afternoon Mr Stafford arrived home from work before Melissa Holland and Mr Holland. When Melissa Holland arrived home, she and Mr Stafford went to Ms Lynch's place to look for the deceased but she was not with Ms Lynch. When Mr Holland arrived home, he asked Mr Stafford whether Mr Stafford had not said that the deceased was going to Ms Lynch's place after a phone call. Mr Stafford said that the deceased had not spoken to Ms Lynch and that Ms Lynch had told him that she would meet the deceased at the shops. Mr Holland, Melissa Holland and Mr Stafford then went to the police station and reported the deceased as missing. Mr Stafford gave a description of the deceased's clothing and said that she had been barefoot when he had last seen her.

[32] According to Melissa Holland, on Wednesday, 25 September, Mr Stafford left for work at about 6.15 am. She was sitting on the verandah of the house at about 6.40 am when she saw the appellant's car driving along Queen Street, Goodna from the opposite direction towards his place of work. She said that he rang her at about 7.10 am and told her that he had been sick and intended to come home after Jeff Russell arrived at work. Mr Russell gave evidence that he arrived at work at 6.30 am. He saw Mr Stafford who left work at 7.30 am. Melissa Holland said that Mr Stafford arrived home at 7.45 am. She told him that she had seen his car earlier and he told her that he had been going to Arthur Power's house because he was upset and wanted someone to talk to.

[33] At about 10.00 am on the Wednesday Mr Stafford told police that the deceased left the house at 9.30 am on the Monday. She told him that she was going to the shops. He said that he stayed at home until noon when he went to Arthur Power's house. He said that one to two hours later, he went home and worked on his car. He said that some time between 2.30 and 3.00 pm he hurt his left elbow when he pulled the vehicle off the jack. He said that he attended Dr Joosub's surgery at about 4.00 pm and then returned home. He said that on Tuesday, 24 September he finished work at 3.00 pm and went home and stayed there until Melissa Holland arrived home. The two of them went out to look for the deceased. Police searched the house later on the Wednesday. They found a doctor's prescription in a drawer beside the appellant's bed. The prescription was dated 24 September, ie the Tuesday.

[34] I have already mentioned the DNA evidence in relation to the blood on items in the boot of Mr Stafford's car. This evidence was given by Ms Van Daal, a forensic scientist.

[35] I have also mentioned other evidence from the boot of his car with which the Crown sought to connect Mr Stafford to the corpse of the deceased. Dr Ashby removed a

number of live maggots from the corpse of the deceased between 4.00 and 4.30 pm on the Thursday afternoon. These maggots were given to Sergeant Crick, a police scientific officer who was present at the scene. Sergeant Crick also found a maggot in the boot of Mr Stafford's car. An entomologist, Ms Morris, gave evidence that the maggot was of the same species and age as those removed from the corpse of the deceased.

[36] Sergeant Crick also gave evidence that tyre tracks similar to those left by Mr Stafford's car were found on the bushland track leading to the spot where the body of the deceased had been dumped.

[37] There was evidence that a red car was seen on either the Tuesday or Wednesday morning near where the body of the deceased was found. I will refer to this evidence in greater detail in the course of my discussion of the arguments advanced on the present reference to this Court.

[38] On the Thursday, before the body of the deceased was found, Mr Stafford told investigating police that he had visited the doctor on the Monday afternoon for treatment to an injury to his arm suffered while he was working on the shock absorbers on his car. Shortly afterwards, Mr Stafford acknowledged that he was mistaken, in that he did not go to the doctor to have his arm seen to until the Tuesday, after he had shown the injured arm to the first-aid officer at work. Mr Stafford told police he had visited a Tandy electrical store on the Monday afternoon; police confirmed that he had visited the Tandy store. Mr Stafford also said that he took his car to a nearby car wash; he was able to produce a receipt which showed that he had visited the car wash at 2.59 pm on the Monday. The car wash was about four kilometres from the place where the body of the deceased was found. Mr Stafford also visited a nearby Franklins store at 2.18 pm on the Monday.

[39] Police interviewed Mr Stafford again on Saturday, 28 September. In the course of that interview, Mr Stafford was told that blood found on a red and black canvas bag in the boot of his car, on a blanket in the boot of his car and in the bathroom of the house belonged to the deceased's blood group. He was asked to comment, and said: "What can I say. You tell me, I don't believe it. I know it wasn't me. What can I say." He said that he did not know how blood could have come to be on the canvas bag or on the blanket. He said that he had not had any rubbish in the boot of his car. Mr Stafford was also told that a Cyclone brand hammer which was painted black and had a wooden handle had been found in the red and black canvas bag in the boot of his car had blood traces on it. He said, "No way – no." He said that the hammer was his hammer. Mr Stafford said that he put the car through the car wash on the Monday because it was dirty.

The 1997 reference to this Court

[40] On the 1997 reference, forensic evidence which had not been adduced at trial was put before the Court. Mr Leo Freney, a forensic scientist, gave evidence to the effect that the amount of blood actually found in the bathroom of the house was not identifiable as that of the deceased and in any event there was far too little evidence of blood in the bathroom for it to have been the murder scene. This evidence was unchallenged. There was also new evidence from Ms Morris, the entomologist who gave evidence at trial, which cast doubt on the evidentiary value of the maggot as evidence that the body of the deceased had been in the boot of the car between the Monday and the Wednesday. On the basis of this evidence, it was demonstrably

unlikely that the deceased had been killed at her home and the bleeding body of the deceased put in the boot of the car as the Crown had suggested at the trial. It is convenient to refer to the detail of this evidence by reference to the reasons given by Davies JA in his determination of the 1997 reference.

[41] An attack was also made on the reliability of Sergeant Crick's comparison of tyre tracks by reference to the evidence of Mr Thomas and Mr Lee, employees of Bridgestone Tyres. That evidence, which was less cogent than the evidence of Mr Freney and Ms Morris, was also discussed at length by Davies JA in his reasons for judgment in the 1997 reference. I will refer to that passage directly.

[42] In determining the 1997 reference, a majority of the Court (Davies and McPherson JJA) concluded that the new evidence did not warrant setting aside the conviction because it did not give rise to a reasonable doubt as to Mr Stafford's guilt having regard to the other evidence in the case. Fitzgerald P dissented. His Honour would have quashed the conviction and ordered a retrial even though he considered that it was unlikely that the new evidence would have led to an acquittal. His Honour was of the view that the Crown could not, in fairness, sustain the conviction on the basis of a view of the facts so substantially different from that urged on the jury by the Crown at trial.

[43] Fitzgerald P considered that the propositions that the deceased was killed by Mr Stafford in her home, and that the corpse was kept in the boot of his car from the Monday afternoon until it was disposed of on the Wednesday were an integral part of the case presented to the jury by the Crown at trial. In his Honour's view, the conviction could not fairly be sustained on the basis that the totality of the evidence support a conclusion that Mr Stafford had killed the deceased, perhaps somewhere other than in her house and had perhaps disposed of the body at some other time.

[44] The leading judgment for the majority was delivered by Davies JA. His Honour began by summarising the most significant piece of new evidence then before the Court:[5]

> "New evidence by Mr Freney, a forensic scientist who had not given evidence in the trial, was to the effect that if Leanne's body had been placed in the boot of the appellant's car after she had sustained injuries of the kind observed on postmortem examination, and it had remained there until 25 September, then, unless she had been expertly wrapped in a way which would have sealed off the wounded areas, especially her head, there would have been substantially more evidence of blood in the boot of the car than was detected on forensic examination. There was evidence at the trial that a plastic bag, of a kind found in the house but also in many households, was found under Leanne's body but no other evidence of wrapping was found.
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> None of the blood found in the house was capable of being identified positively as Leanne's. Its main concentration was in the bathroom and Mr Freney directed his specific attention here. He concluded that it was unlikely that Leanne had been killed in the bathroom. Again given the extensive nature of her injuries, he said she would have bled profusely and, notwithstanding an attempt to clean the bathroom of any signs of blood, there would have been substantially more

[5] [1997] QCA 333 at 5 – 6 per Davies JA.

> evidence of blood in such areas as the indentations between tiles on the floor, had she been killed there, than was in fact found on forensic examination. This conclusion applies even more strongly to other parts of the house, such as the stairway, where evidence of blood was found.
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> Mr Freney's evidence stands uncontradicted. Curiously at the trial no questions were asked of the forensic biologist, Ms. Bentley, about what inferences, if any, could be drawn from the presence of blood, or the absence of more blood, in the bathroom or what inferences, if any, could be drawn as to the presence of Leanne's body in the boot of the appellant's car from the findings of blood, including that identified as hers, or the absence of more blood in the boot.
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> In one respect Mr Freney's evidence was supported by evidence sought to be adduced from Dr Ansford, a pathologist, who also did not give evidence in the trial, who said that if Leanne's body had remained in the boot of the appellant's car from 23 September to 25 September the boot would have emitted a strong odour when first opened and examined by police on Wednesday 25 September 1991. No evidence of odour had been given at the trial."

[45] Davies JA accepted that the evidence of Mr Freney effectively destroyed that strand of the Crown case which asserted that Mr Stafford killed the deceased at her home on the Monday. His Honour was also prepared to accept that Mr Freney's evidence cast substantial doubt on the proposition that the bleeding body of the deceased was placed in the boot of the car on the Monday and kept there for some time. Davies JA went on, however, to explain his view that it did not follow from the unravelling of these strands of the Crown case that the jury could not reasonably have concluded beyond reasonable doubt that Mr Stafford had murdered the deceased. His Honour said:[6]

> "Mr Freney's evidence, if accepted, together with the limited support which it received from the evidence of Dr Ansford, makes it unlikely that Leanne was killed in the house and her body placed in, and left for some days, in the boot of the appellant's car. Of course that says little about whether the appellant killed Leanne; it goes only to whether he killed her in the house and placed and left her body in the boot of his car. No doubt there are other scenarios, consistent with the appellant's guilt, which would explain the presence of Leanne's blood on the bag in the boot of his car. He may have enticed her to go with him to a remote location, perhaps at or near where her body was found, and killed her there. Her blood on the bag and, perhaps, other items in the boot, may be explicable as coming, after her death, from his person or from the instrument which he used to kill her. He may later have returned to the scene to move the body to a more remote location. This may also explain the presence of the maggot and the hair in the boot.
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> Certainly the appellant was unable to explain either the presence of Leanne's blood on the bag in the boot of his car or the presence, also

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6 [1997] QCA 333 at 6 – 7 per Davies JA.

in the boot of his car, of a maggot of the same type and roughly the same age as those found on Leanne's body. Moreover it is difficult to think of a credible explanation for the presence of Leanne's blood in the boot of the appellant's car which is consistent with the appellant's innocence. The jury would have been entitled to conclude that although they were unable to say how or where the appellant killed Leanne the presence of this blood established to their satisfaction beyond reasonable doubt that he had done so. The importance of Mr Freney's evidence, and to a lesser extent Dr Ansford's, is only that, if accepted, the scenario put to the jury by the Crown is unlikely to have been correct."

[46] Davies JA discussed the new evidence from the entomologist, Ms Morris:[7]

"There was evidence, which the appellant accepted was new but not fresh, from Ms Morris, an entomologist, who had given evidence at the trial about the maggot found in the boot of the appellant's car. Her evidence at trial was, it appears, relevant in two ways. The first was that because the maggot was of the same age and species as those found on Leanne's body it could be inferred, especially when taken together with the presence of her blood, and hair consistent with hers in the boot, that it came from her body. The second was that its age, and that of the maggots found on her body, was consistent with the eggs having been laid in the afternoon of 23 September before 4.45 pm and that, because the laying of eggs generally coincided with death it could be inferred that death occurred then. This latter evidence supported the inference that death occurred at a time when the appellant had, or may have had, an opportunity to kill Leanne. However the evidence on the second aspect involved elements of speculation, depending on a large number of variables, as the learned trial Judge pointed out at the time and the witness readily accepted.

The new evidence from Ms Morris was said to be relevant to this second aspect, the time of death. In it she expresses concern that too much importance may have been placed on her time estimates at trial; that it was important to understand that they were based on particular scenarios being considered; and that whilst egg laying and death usually coincide it is impossible to say whether this occurs in a particular case. Ms Morris describes her estimates of time as 'best guess' estimates and says in one of her reports that 'nobody should be led to believe that forensic entomology is capable of such a fine level of accuracy'. Another factor which she mentions as causing a variation is the number of maggots present which she describes as 'critical' and of which she was not informed. However, using the same methodology and a number of possible scenarios she gives new time estimates based on new evidence of ambient temperatures at the relevant time taken nearer to the house and the place where Leanne's body was found than those upon which she relied for her evidence at trial. But these scenarios are based on the assumption, upon which Mr Freney's evidence casted [sic] doubt, that Leanne's body had

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7 [1997] QCA 333 at 8 – 10 per Davies JA.

remained in the boot of the appellant's car from the time of death until 25 September. And the new evidence adds the factors of the car being left in the sun and the body in the boot being wrapped.

Ms Morris' new evidence does not affect the first basis upon which her evidence was relevant at trial; that from the fact that a maggot of the same age and species as that found on Leanne's body was found in the locked boot of the appellant's car together with Leanne's blood, it could be inferred that it came from her deceased body. And as the second basis upon which it was relevant was always speculative, the further evidence adds little. Moreover if Mr Freney's evidence is accepted it is based on an incorrect premise."

[47] Davies JA rejected the attack on Sergeant Crick's comparison of tyre tracks by reference to the new evidence from Mr Thomas and Mr Lee. His Honour said:[8]

"There was also evidence, which the appellant contended was fresh evidence from a Mr Thomas and a Mr Lee with respect to … the car tracks found on the track which led to the body. However in view of the facts that Mr Thomas, the Queensland Manager of Bridgestone Tyres, gave evidence on the question at the trial and that Mr Lee is Technical Field Service Manager of that company I cannot see any basis upon which it could be contended that the evidence of either of them was fresh evidence and Mr Macgroarty for the appellant did not advance any. Before us Mr Macgroarty sought mainly to rely on the evidence of Mr Thomas but it is plain, as Mr Macgroarty frankly acknowledged, that he defers to Mr Lee as the expert and that consequently the effect, reliability and probity of this further evidence should be gauged by looking at the evidence of Mr Lee. Mr Thomas but not Mr Lee gave evidence at the trial on this question as did Sergeant Crick, the police scientific officer. On the basis of their evidence the learned trial Judge told the jury that they might be satisfied beyond reasonable doubt that 'car tracks at the scene were comparable in design with two different sets of tyres on the car of the accused' although they could not exclude the existence of another car with similar tyres.

Mr Lee's recent statutory declarations and affidavit indicate that his Honour may have put the matter too highly. However Sergeant Crick, who gave the evidence at trial, compared inked impressions of the tread on the appellant's vehicle with the actual tracks in the soil. When Mr Lee came into the matter several years later he was able only to compare the inked impressions with photographs of the tracks in the soil and, as appears from one of his statements, the detail contained in those photographs was, as he described it, 'insufficiently clear'. He described one of them as 'especially inconclusive in its detail'. This made it difficult for him to conclude, one way or the other, that the patterns shown in the photographs were of tyres of the respective kinds made by the inked impressions. It is not surprising then that Mr Lee, in successive statements, underwent a number of changes of opinion. In the first place he

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8 [1997] QCA 333 at 10 – 11 per Davies JA.

> thought that, with respect to the front tyres, the tread [pattern] in the photograph was not made by the type of tyres fitted to the appellant's car and, with respect to the back tyres there was a lack of identicality between the photograph and the inked impression of the tyres fitted to the appellant's car. On the second occasion, which was in May this year, he was much less certain. He said that he could not, on the photographs, distinguish the tread pattern in sufficient detail to conclude, one way or the other, in respect of either the front or the back tyres. And on the third occasion, which appears to be less than a month after the second, he appears to revert in part to his earlier, first, opinion.
>
> This evidence, which is plainly not fresh evidence, lacks cogency. Mr Lee lacked the advantage of making a direct comparison between the tyre tread and the impressions made at the scene. He was left to make a comparison based on unclear photographs. This may well explain the uncertainty arising from his different conclusions."

[48] Davies JA went so far as to say that, principally because of the DNA evidence of the blood of the deceased on the items in the boot of Mr Stafford's car, there was no significant possibility that the jury could reasonably have concluded that Mr Stafford did not kill the deceased even if the new evidence had been put before the jury. His Honour said:[9]

> "As appears from what I said earlier, the strongest basis for the appellant's contentions that either a verdict of acquittal should now be entered or that there should be a new trial is the evidence of Mr Freney. However as I also said, it is difficult to think of a credible explanation for the presence of Leanne's blood in the boot of the appellant's car which is consistent with the appellant's innocence and none was advanced either below or before this Court. It is true that Mr Freney's evidence, if accepted, makes the Crown's scenario put to the jury unlikely to have been correct. But, as the passage from his Honour's summing up set out above makes clear, that does not render it at all less likely that the appellant killed Leanne. The evidence of Leanne's blood in the boot of the appellant's car at the relevant time, to which boot only the appellant and Melissa (who it is accepted could not have been involved) had access, is, in my view overwhelming evidence of the appellant's guilt when taken together with the other features of this case, referred to earlier, to which no submissions were directed in this Court. Nor does any of the other evidence referred to render it significantly less likely that the appellant killed Leanne.
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> Apart from the unreliable evidence of sightings of Leanne on or after the afternoon of 23 September 1991 there remains no evidence casting doubt on the opportunity which the appellant had to kill Leanne on that afternoon. There is no credible explanation for Leanne's blood being on the appellant's bag in the locked boot of his car, to which only he and Melissa had access, other than that he killed Leanne. And the evidence of other blood not capable of being

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9 [1997] QCA 333 at 14 – 15 per Davies JA.

> identified, the maggot and the hair also found in the boot, of the missing hammer, of the lies told to the police and of the car sightings near where Leanne's body was found add weight to this. Although the new evidence may make it unlikely that the appellant killed Leanne in the house and left her body in the boot of his car for two days I am satisfied that there is no significant possibility that a jury acting reasonably, even with that evidence before it, would have doubted that he killed her."

[49] Davies JA referred to the circumstantial scenario put by the Crown to the jury at trial and noted that the learned trial judge had told the jury that the Crown was not restricted to the scenario presented to the jury by the Crown Prosecutor. In this regard Davies JA said:[10]

> "Although, as I have said, the case against the appellant was a circumstantial one, those circumstances were presented to the jury by the prosecution, and by the learned trial Judge as the prosecution's contentions, as circumstances from which they could infer that the appellant had killed Leanne in the house, placed her body in the boot of his car and cleaned up the house, all on 23 September, and that, the body having remained in the boot of his car from that time until 25 September, he disposed of it in bushland early on 25 September. It was put to the appellant by the Crown prosecutor that on 23 September he attacked Leanne with a heavy instrument like a hammer, that he cleaned up the blood in the house and that he took her down the front stairs and put her in the boot of his vehicle. The Crown prosecutor accepts that he may have told the jury in his final address, as an explanation of possible scenarios, that a possibility was that the body may have been put in the boot after killing and kept there until disposal. It appears likely from his Honour's summing up to the jury that the Crown prosecutor also suggested as a possibility that the accused killed Leanne in the house, cleaned up the house and disposed of the body before Melissa came home; and that he did this by probably wrapping the body in some material, carrying it down the stairs in broad daylight and putting it in the boot of his car. And his Honour told the jury that it was the Crown's contention that from the presence in the boot of her blood and of a maggot of the same type and age as those later found on her body they should conclude beyond reasonable doubt that her body was in the boot of the car.
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> His Honour made it clear to the jury, however, that, this being a circumstantial case, the Crown was not restricted to this scenario. First of all he said to them, generally:
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> > 'You have to remember that the Crown does not have to prove to you every detail of the offence, not even the time that it took place. It has to convince you beyond reasonable doubt as to the guilt of the accused. And there are some of these matters where it says proof of the matter is just beyond it, but at least the proof that it has is sufficient. Whether it is or not is for you to decide.'

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10 [1997] QCA 333 at 4 – 5 per Davies JA.

A little later his Honour dealt specifically with the proposition that the body may not have been placed in the boot of the car. His Honour then said:

> 'But, of course, the question then arises as to where that gets you. Does that raise a reasonable explanation consistent with innocence? Because, does it make any difference, taking into account that it was the accused man who had virtually total control of the boot at the relevant time - apart from Melissa, who could not have been involved? What difference would it make to the question of his guilt as to whether the body was put into the boot or whether the body bled on these items in some way and then these items were put in the boot? Who could have put the items with blood on them in the boot? How could they have been put in the boot with blood on them without the accused's participation in it?
>
> So the proposition that the blood on these items in the boot does not necessarily mean that the body was in the boot is a matter that you are entitled to take into account. But you mustn't stop there. You must consider further that if that were the case, what flows from it? Is there still a reasonable explanation consistent with innocence in that respect?
>
> Now, you might feel that there is a reasonable explanation consistent with innocence, notwithstanding all the other features as well, notwithstanding the maggot and so forth - that is a matter for you. But simply because an explanation is offered as to how the body might not have been in the boot, that does not necessarily mean that the blood on these items in the boot must therefore be discarded. You will then say, well, if that were a reasonable possibility how is it that these bloody items were put in the boot of his car? How could there be an hypothesis of his innocence consistent with that? That is what you have to consider. I don't offer an explanation one way or the other and I don't say to you for one moment that the question I have raised for you is unanswerable. They are questions for you to consider. I only am trying to extend for your consideration propositions that are put up to you, so that you have the opportunity of considering these matters fully.' "

[50] It is necessary to pause here to explain the distinction between "fresh evidence", ie evidence which could not with reasonable diligence on the part of the defence have been adduced at trial, and evidence which is merely "new", in the sense that it was not, for whatever reason, adduced at trial. In the case of fresh evidence, a new trial may be ordered on appeal against conviction if there is a significant possibility that the evidence might have led to an acquittal, whereas evidence which is merely

new will only demonstrate a miscarriage of justice if it is apt to engender in the appeal court a reasonable doubt as to the appellant's guilt.[11]

[51] Davies JA was inclined to doubt that the new evidence was fresh evidence, but reasoned to his conclusion on the assumption that Mr Stafford be given the benefit of the less onerous test applicable to fresh evidence:[12]

> "However even if all of the evidence now sought to be adduced were viewed as fresh evidence I do not think that the appropriate test for a miscarriage of justice would be satisfied; that is I do not think that if the jury, acting reasonably, had had this evidence before it at the trial there would be a significant possibility that it would have acquitted the appellant. As appears from what I said earlier, the strongest basis for the appellant's contentions that either a verdict of acquittal should now be entered or that there should be a new trial is the evidence of Mr Freney. However as I also said, it is difficult to think of a credible explanation for the presence of Leanne's blood in the boot of the appellant's car which is consistent with the appellant's innocence and none was advanced either below or before this Court. It is true that Mr Freney's evidence, if accepted, makes the Crown's scenario put to the jury unlikely to have been correct. But, as the passage from his Honour's summing up set out above makes clear, that does not render it at all less likely that the appellant killed Leanne. The evidence of Leanne's blood in the boot of the appellant's car at the relevant time, to which boot only the appellant and Melissa (who it is accepted could not have been involved) had access, is, in my view overwhelming evidence of the appellant's guilt when taken together with the other features of this case, referred to earlier, to which no submissions were directed in this Court. Nor does any of the other evidence referred to render it significantly less likely that the appellant killed Leanne.
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> Apart from the unreliable evidence of sightings of Leanne on or after the afternoon of 23 September 1991 there remains no evidence casting doubt on the opportunity which the appellant had to kill Leanne on that afternoon. There is no credible explanation for Leanne's blood being on the appellant's bag in the locked boot of his car, to which only he and Melissa had access, other than that he killed Leanne. And the evidence of other blood not capable of being identified, the maggot and the hair also found in the boot, of the missing hammer, of the lies told to the police and of the car sightings near where Leanne's body was found add weight to this. Although the new evidence may make it unlikely that the appellant killed Leanne in the house and left her body in the boot of his car for two days I am satisfied that there is no significant possibility that a jury acting reasonably, even with that evidence before it, would have doubted that he killed her."

[52] In agreeing with the reasons of Davies JA, McPherson JA said:[13]

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11 Cf *R v Butler* [2009] QCA 111 at [40] – [42].

12 [1997] QCA 333 at 14 – 15 per Davies JA.

13 [1997] QCA 333 at 16 – 17 per McPherson JA.

> "In the present case it is possible on the evidence before the jury at the trial and before this Court to arrive at more than one possible explanation or theory of how the appellant might have murdered the girl and disposed of her body. In reaching their verdict the jury may have been drawn to any one or more of such hypotheses. In the end, however, the question for them to decide was not whether any particular hypothesis was correct; but whether there was any reasonable possibility that on the evidence, and not the addresses of counsel, the appellant was not proved beyond reasonable doubt to have been guilty of this murder. As is demonstrated in the reasons of Davies JA, there was evidence on which the jury were justified in reaching that conclusion.
>
> For my part I agree that on the evidence now before the Court there is no reason to doubt that their verdict was correct, or to suppose there has been a miscarriage of justice. In those circumstances there is no justification for ordering a new trial, the more so as it is, I gather, the opinion of all members of this Court that on all the evidence now available a properly instructed jury would probably, and, it is accepted, reasonably, again find the appellant guilty of this offence of murder. Once that conclusion is reached, it ceases to be legitimate to speak of a 'significant' possibility of acquittal whether by the trial jury in this case or by any other jury in the future. It is not, in my respectful opinion, the function of the criminal trial and appeal procedure to ensure that an accused person goes through a series of retrials on the off-chance of meeting a jury who arrive at a verdict of acquittal which is unreasonable: cf *R v Gudgeon* (1995) 133 ALR 379, 397."

[53] It can be seen that Davies and McPherson JJA were focused upon the substantive justice of the conclusion that Mr Stafford was guilty of the murder of the deceased. For their Honours the relevance of the new evidence was limited to the attempt to suggest a possibility that, on all the evidence, Mr Stafford might have been acquitted. Fitzgerald P was more concerned with an issue of process relating to the effect of the new evidence on the scenario on which the Crown invited the jury to acquit.

[54] Fitzgerald P in his reasons for judgment set out a number of passages from the learned trial judge's summing-up to the jury in the course of which the trial judge referred to the scenario presented by the Crown. While it is correct to say, as did Davies JA, that the learned trial judge instructed the jury that they could properly come to the view that Mr Stafford was guilty beyond reasonable doubt without accepting the scenario presented by the Crown Prosecutor, it is also true that the learned trial judge did refer to the Crown's scenario on several occasions in the course of his summing-up as presenting a view of the facts available on the evidence. Fitzgerald P said:[14]

> "… it is essential to a decision of the issues which are before this Court to understand the circumstances relied on to prove the appellant's guilt. At the very least, the prosecution submission '... that this case was not put to the jury on the basis that in order to prove the

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14 [1997] QCA 333 at 24 – 25 per Fitzgerald P.

> guilt of the appellant the prosecution had to establish a particular scenario' confuses the theoretical legal position with the actual manner in which the prosecution case against the appellant was conducted at his trial. The prosecution case involved the appellant killing the deceased at their residence on the afternoon of Monday, 23 September 1991, placing her body in his car, cleaning up the premises and subsequently disposing of her body in bushland. Emphasis is given to what is otherwise manifest by the prosecution argument in rebuttal of the defence suggestion that the deceased might have been killed where she was found; the pathologist called by the prosecution, Dr Ashby, gave evidence directly negativing that possibility."

[55] It can be seen that the concern of Fitzgerald P was not with the soundness of the jury's verdict as a matter of substantive justice, but with the fairness of allowing the verdict to stand on a basis substantially different from that actually advocated by the prosecution at trial, given that the new evidence was destructive of integral aspects of that case. Fitzgerald P went on to say:[15]

> "I have had the advantage of reading the reasons for judgment of Davies JA. I agree with his Honour that, if accepted - and I can discern no reason not to do so - Mr Freney's evidence, together with the limited support which it received from Professor Ansford, makes it unlikely that the deceased was killed in the house and her body placed, and left for some days, in the boot of the appellant's car. I also agree with his Honour that, if accepted, the evidence of Mr Freney and Professor Ansford makes the 'scenario' put to the jury by the prosecution unlikely to have been correct.
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> Further confirmation that the prosecution 'scenario' was incorrect is to be found in the evidence of Ms Beryl Morris, an entomologist, who gave evidence at the trial. Ms Morris gave additional evidence in which she said that her opinion at the trial concerning the age of the maggots found on the deceased's body and in the boot of the appellant's vehicle was based on incorrect information, and that, although the estimation of age of maggots by reference to their state of development is imprecise, the maggots found indicated that it was more likely that the deceased died on the morning of Tuesday, 24 September than the afternoon of Monday, 23 September. The importance of this evidence for present purposes is that the reliance by the prosecution at trial on the evidence of Ms Morris to support its 'scenario' is demonstrated to have been misplaced.
>
> None of the other matters raised by the appellant would warrant a new trial if the evidence of Mr Freney, Professor Ansford and Ms Morris does not do so. …
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> As I earlier stated, on all the evidence now available a jury, properly instructed, might and probably would, reasonably convict the appellant. However, the prosecution case against him will be deprived of considerable impact if the deceased was not killed at the time and place nominated by the prosecution 'scenario'.

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15 [1997] QCA 333 at 29 – 32 per Fitzgerald P (citations footnoted in original).

> In my opinion, the jury could not have properly convicted the appellant by a process of reasoning which was not referred to by the trial judge, the prosecutor or defence counsel, and involved a 'scenario' quite different from that advanced by the appellant which the defence did not have an opportunity to meet or debate; for example, on the basis that the appellant killed the deceased at an unknown location, neither the residence nor the place where her body was found, and perhaps at a different time from the appellant's period of opportunity on the afternoon of 23 September 1991. Such a course would have involved an unfair trial and a miscarriage of justice (cf *Davies and Cody v R* (1937) 57 CLR 170, 180). Contrary to the submission for the prosecution in this Court, the starting point is acceptance that the jury convicted the appellant on the basis upon which it was asked to do so by the prosecutor as revealed by the trial judge's summing up.
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> The foundation of the prosecution 'scenario' has been substantially eroded by the evidence of Mr Freney, Professor Ansford and Ms Morris, and the scenario was wrong in critical respects. It seems to me impossible to avoid the conclusion that the jury convicted the appellant on the basis of evidence which presented a significantly mistaken version of events. The prosecution case against the appellant on all the evidence is not so strong as to make his conviction inevitable or to eliminate the possibility that the appellant lost a chance of being acquitted which was fairly open to him. It is unnecessary to consider whether there would, in any event, have been a miscarriage of justice because of the central importance, in the context of the prosecution case, of the circumstances which have been demonstrated to be unreliable (Cf the dissenting judgment of Murphy J in *Chamberlain & Anor v The Queen [No 2]* (1984) 153 CLR 521).
>
> I would allow the appeal, quash the conviction and order that the appellant be retried."

The 2008 reference to this Court

[56] In this Court Mr Stafford was represented by Mr Savage SC and Mr Crowley of Counsel. Mr Copley SC appeared on behalf of the respondent.

[57] It is now argued in this Court on Mr Stafford's behalf that recent decisions of the High Court, and in particular *Mallard v The Queen*,[16] mean that, at the least, this Court should accept as correct the approach of Fitzgerald P which focuses upon the possibility of a miscarriage of justice because of "the central importance, in the context of the prosecution case, of the circumstances which have been demonstrated to be unreliable". If it be accepted that the new evidence made the Crown's scenario which was put to the jury unlikely to be correct, then, so it is said, the conviction should be set aside because of a substantial failure of due process.

[58] Of course, in 1997, Fitzgerald P considered that a new trial should have been ordered. In this Court, Mr Stafford's Counsel recognised that a new trial was a possibility if the conviction were to be set aside, but it is fair to say that their

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16 (2005) 224 CLR 125.

support for a retrial was equivocal, their principal contention being that a verdict of acquittal should be entered in Mr Stafford's favour. I will discuss this point further in due course, but at this point I should summarise the new evidence which was put before this Court and the arguments agitated in relation to it.

[59] On the 2008 reference to this Court, the principal focus of the evidentiary challenge made on Mr Stafford's behalf is again upon the propositions that the deceased was killed at her house and that the deceased's body was kept, for some substantial period of time, in the boot of Mr Stafford's car.

The new evidence

[60] New evidence has been adduced from Mr Luke, Dr Wallinan and Dr Vance relating the implications of the evidence concerning the maggot to the "body in the boot" issue. The new evidence to which I shall refer was, in the end, adduced without objection from the Crown. I will discuss the new evidence in detail in due course, but for present purposes, it is sufficient to sketch only its broad outline.

[61] Mr Luke says that it is "unwise" for an estimate about the time of death to be based on the state of development of a single maggot collected from a site where there was no obvious source of food. Mr Luke considers that a more reliable estimate of the time of the death of the deceased would have been based on the state of development of the oldest maggots removed from the corpse. In this regard the evidence given by Ms Morris acknowledged that more immature maggots had been removed from the body of the deceased. Ms Morris' evidence that the maggots were from eggs laid at first light on the Tuesday morning was based on evidence recovered from the corpse.

[62] Dr Wallman's evidence is to the effect that a maggot is unlikely to survive in the boot of a car from the Monday until the Wednesday if the temperature in the boot exceeded 42^{o}C.

[63] Dr Vance's opinion is that the maggots removed from the corpse were laid well into the Tuesday. It was extremely unlikely that they were from eggs laid on the Monday.

[64] Mr Robin Napper provides a criticism of the chain of custody of the exhibits tendered at trial.

[65] In the present reference, a further complaint was made on Mr Stafford's behalf that at trial the Crown had failed to disclose to the defence a statement by a Mr Malcolm Harper to investigating police which was to the effect that at 3.40 pm on Tuesday, 24 September 1991 he saw a young girl who might have been the deceased walking along Redbank Plains Road. At the hearing in this Court, it was conceded on Mr Stafford's behalf that the police job log disclosing this statement was disclosed to the defence at the trial. Mr Harper's statement was in no way likely to have been regarded as compelling evidence. I have already noted the scepticism which attends this kind of evidence. One can easily accept the reasonableness of the forensic judgment by Mr Stafford's counsel at trial not to seek to call Mr Harper.

[66] I do not consider that Mr Harper's absence from the witness box made any difference to Mr Stafford's prospects of acquittal at his trial.

[67] To the extent that some of the arguments advanced on Mr Stafford's behalf go to the question whether Mr Stafford's trial was flawed, they add little to the reasons for

concern raised by Fitzgerald P in 1997. I will now discuss the arguments agitated on this reference. By way of preliminary observation I note that insofar as the new evidence supports a renewal of the attack made in 1997 on the propositions that the deceased was killed in the bathroom of her house on the Monday and that her dead body was kept in the boot of Mr Stafford's car until the Wednesday, this evidence does not raise a new point of substance. These points, which are concerned with the place where the killing occurred and the likelihood that the body of the deceased was kept in the boot for any length of time, were accepted as well-made by the majority of this Court in 1997. Mr Stafford's position on this reference is hardly materially advanced by setting up the same straw men as were demolished in 1997 in order to demolish them again.

Mr Stafford did not have the opportunity to kill the deceased or to dispose of her body

[68] It is common ground on the present reference that if Mr Stafford killed the deceased, his only opportunity to kill her arose on Monday, given the entomological evidence and that Mr Stafford's whereabouts were accounted for during Monday evening and Tuesday morning.

[69] Mr Copley argues that there were two brackets of time during which the appellant had the opportunity to kill the deceased: 10.00 am (or 12.00 pm) to 1.20 pm and 3.00 to 4.30 pm. Mr Copley concedes that Mr Stafford's whereabouts on the Monday evening and the Tuesday morning until he left for work are satisfactorily accounted for. He observes that Mr Stafford complained to the first aid officer at his workplace about an injury to his forearm, which Mr Copley argues might have resulted from a struggle with the deceased. Mr Stafford explained that the injury occurred when his car fell off the jack whilst he was fitting new shock absorbers, but although a police examination revealed new shock absorbers had been installed, there were no physical marks to indicate that the car had so fallen. If one accepts Mr Stafford's explanation for the injury, one must accept that Mr Radcliffe's evidence has Mr Stafford working on his car on the Monday with the consequence that the earlier bracket of opportunity runs from 12.00 pm to 1.20 pm. Mr Radcliffe's evidence is corroborated by Mr Bui, another neighbour. In contrast to Mr Radcliffe's evidence and that of Mr Bui, however, stands Mr Stafford's statement to the police on the Wednesday that on the Monday he had worked on the car between 2.30 and 3.00 pm.

[70] Mr Savage relies upon evidence from various witnesses who claim to have seen the deceased during the course of the Monday and/or the Tuesday. Mr Copley argues that the evidence of Belinda Collins should be preferred. Ms Collins gave evidence that she saw the deceased at about 10.00 am walking away from the St Ives Shopping Centre (also referred to as the Goodna shops), which was approximately 300 to 400 metres from the deceased's house. With respect to the witnesses relied upon by Mr Savage, Mr Copley asserts that their evidence was obviously unreliable.

[71] At the trial Kevin Radcliffe gave evidence that he saw someone working on a red Gemini, which was the colour and model of the car owned by Mr Stafford, between 11.00 am and 12.00 pm. Mr Copley points out that Mr Radcliffe thought he made this observation on the Tuesday or the Wednesday. Mr Savage's chronology assigns this observation to the Monday, in order to argue that any bracket of opportunity for Mr Stafford to have killed the deceased must have commenced at 12.00 pm rather than 10.00 am (based on Ms Collin's evidence).

[72] Mr Savage draws attention to the fact that at trial the prosecution was in possession of statements made by Ms Tyman who worked at the Commonwealth Bank at the shopping centre that she thought that she had served the deceased between 11.00 and 11.30 am on Monday, who had made a withdrawal. Ms Tyman was not called as a witness at trial. Mr Copley suggests that this may have been a result of genuine doubts about the reliability of her evidence. In this regard, Mr Herbert Holland testified that he had attended upon the bank at approximately 10:00 am on Monday and was served by a male teller who processed the account in question. There was also evidence that Ms Tyman could not identify the deceased based on photographs shown to her by the police on 25 September 1991, but she claimed to be able to identify the deceased from a photograph shown on a television news bulletin.

[73] Mr Copley submits that Ms Tyman's evidence was unreliable, particularly given that the other evidence as to the deceased's whereabouts on Monday morning was provided by those who knew the deceased. There is force in Mr Copley's submission. It is difficult to say that any disadvantage was suffered by Mr Stafford by reason of the Crown's failure to call Ms Tyman to give evidence at the trial. In any event, acceptance of Ms Tyman's statement would not deny Mr Stafford an opportunity to kill the deceased.

[74] Mr Savage relies upon evidence from other witnesses who testified that they saw the deceased alive at times inconsistent with the two brackets of opportunity put by Mr Copley. Ms Stark, who owned a store at the shopping centre and claimed to know the deceased by her appearance but not by her name, gave evidence that she saw a person who she believed to be the deceased at 3.00 pm and again between 3.30 to 4.00 pm on the Monday. Ms Stark described the person she saw as "wearing a white skirt with a collar and a black vest and dark pants or skirt" as though she was "dressed up", but noted that her view of the person was obscured by the store counter. During cross-examination, Ms Stark conceded that she may have seen the person on the previous Friday, and not the Monday. Mr Copley emphasises that the clothes Ms Stark described were consistent with those the deceased had worn on the Friday evening when she attended a party.

[75] Ms Rogers, who lived in the Goodna area and gave evidence that she was at the St Ives Shopping Centre with her sister on the Monday, claimed that she saw a girl walking down a flight of stairs at the shopping centre in the company of two young men. She described the girl as wearing a plain purple, knitted sleeveless top and a black skirt. Ms Rogers gave evidence that the girl, who was not wearing shoes, tripped walking down the stairs, but was caught by one of her male companions. Ms Rogers said that she witnessed these events at approximately 12.00 pm. During cross-examination, the witness stated that she did not see the face of the girl in question.

[76] Mr Marwick gave evidence at the trial. He said that he had known Mr Stafford for approximately 15 years, and the deceased for many years. He gave evidence that he saw the deceased between 3.00 and 4.00 pm on the Monday afternoon walking out of the Cecil Hotel on Alice Street. During cross-examination, Mr Marwick stated that he saw the deceased for about two seconds from about 20 metres away. He claimed that he saw the deceased wearing a black sweat shirt over a white shirt and black pants that were flared at the top and tapered down to the ankles. Mr Marwick conceded that he had consumed approximately six 10 ounce beers whilst at the

Cecil Hotel before he allegedly saw the deceased between 3.00 and 4.00 pm. The prosecutor was also able to point to inconsistencies between Mr Marwick's evidence at the trial and the statements he made to police around the time of their investigation.

[77] Robert Baker, who was almost 14 years old at the time of trial, claimed that he was the deceased's boyfriend, and that he saw the deceased at 8.30 pm on the Monday evening at the "pink pub", the Cecil Hotel. He described the deceased as wearing a black tracksuit. During cross-examination, however, Mr Baker was uncertain as to the day that he saw the deceased.

[78] Mr Savage focuses attention on the various locations where the evidence of third parties placed Mr Stafford on the Monday afternoon. Ms Holland gave evidence that Mr Stafford called her at approximately 3.30 pm on the Monday, and that she returned to the house at 4.30 pm that afternoon.

[79] Mr Copley sought to demonstrate that, even in the light of the evidence, Mr Stafford can be seen to have had the opportunity to kill the deceased. Mr Copley referred to a compilation of street directory maps from 1998, which was said to depict the roadways as they appeared during 1992. This compilation was not in evidence at trial. Mr Copley sought to show the relative geographic proximity of the relevant sites in the narrative, including the house where Mr Stafford and the deceased lived, the bushland where the body was found, the premises of the business where Mr Stafford and Ms Holland worked, the shopping centre where the deceased was last reliably sighted, the car wash where Mr Stafford was said to have washed his car and other locations where Mr Stafford was said to be seen on Monday afternoon, and the home of Mr Stafford's friend, Arthur Power.

[80] At trial Mr Spinaze claimed to see a car off the track on Redbank Plains Road. Mr Copley relies upon Mr Spinaze's sighting of a car, which was possibly a Gemini (the model of Mr Stafford's car), on Redbank Plains Road at approximately 6.10 am on either Tuesday or Wednesday, as a circumstance to support the Crown's suggestion that Mr Stafford travelled from the bushland site to his home on the Wednesday morning. Mr Savage argues that this evidence was not reliable. There is force in Mr Savage's argument. Mr Spinaze was uncertain with respect to the model of the car that he saw, whether he saw the car on the Tuesday or the Wednesday morning, and he claimed to see the car at 6.10 am on the relevant day; that is, five minutes before the evidence suggests Mr Stafford left his house on the Wednesday for work.

[81] There was also evidence at trial from Ms Mende, who claimed to see Mr Stafford's car parked off the side of the road on Wednesday at approximately 8.45 am, near the bushland where the deceased's body was discovered. Ms Mende identified Mr Stafford's car by reference to a photograph shown to her during examination-in-chief. Mr Savage contends that Ms Mende based her identification on particulars apparent in the photograph in circumstances where she was unlikely to have been able to witness those particulars given the distance she claimed to be from the car.

[82] The evidence of Melissa Holland was that at around 6.40 am on the Wednesday, she saw Mr Stafford's car driving along the road from the opposite direction towards his workplace. As Mr Copley points out, the direction of travel described by Ms Holland was consistent with the notion that Mr Stafford was returning from the

bushland site. Ms Holland gave evidence that upon Mr Stafford's return home from work at 7.45 am, 15 minutes after a colleague saw him leave his workplace, she informed him that she had saw his car earlier that morning. She said that Mr Stafford told her that he was upset and had visited Arthur Power. Mr Copley describes Mr Stafford's explanation for his whereabouts on the Wednesday morning as "unconvincing".

[83] In the upshot the arguments advanced on Mr Stafford's behalf on this point do not lead to a conclusion that Mr Stafford did not have an opportunity to kill the deceased or to dispose of the body.

The deceased's body was not in the boot of the car

[84] The majority of the Court in 1997 decided that reference against Mr Stafford on the basis that the blood of the deceased was found on three items in the boot of Mr Stafford's car in circumstances where Mr Stafford was relevantly in exclusive control of his car. On this reference, Mr Savage argues, first, that this evidence was insufficient to sustain Mr Stafford's conviction and, second, that the probative value of this evidence is reduced as the probative force of other aspects of the Crown case is diminished.

[85] In advancing the first argument, Mr Savage maintains that although each of the items were in Mr Stafford's exclusive control insofar as each was found in the boot, the bathroom of the house contained "significant but usual amounts of blood" and there was evidence that family members (including the deceased) had cut themselves in the recent past, so that there was opportunity for the items to be contaminated during those periods when they were outside the boot of the car.

[86] In relation to the blanket, Mr Savage argues that it was established that the blanket belonged to Melissa Holland, that it was stored in either the backseat or the boot of the car, and that it was removed from the car from time to time. The red and black canvas bag was identified by Mr Savage as Mr Stafford's tool bag, which was removed from the boot on occasion. Mr Savage advanced the argument that the blood on the Chux cloth was referrable to an earlier incident where the deceased had cut her foot and wrapped it with a cloth, but resiled from this position in his oral submissions in light of the small quantity of blood on the Chux cloth, which was not consistent with the cloth having been used to dress a wound.

[87] Mr Savage relies upon the evidence of Mr Freney that was put before this Court in 1997 to assert that the blood on the items in the boot was from contact with a body prior to decomposition. Mr Savage concedes, however, that Mr Freney's evidence was not apt to exclude the blood being transferred by contact by the body of a freshly killed deceased, such that the decomposition processes had not yet set in.

[88] In contrast to the blood on the items found in the boot, Mr Savage draws attention to the absence of significant blood in the boot itself, and suggests that if the deceased's body was in the boot, the body must have been hermetically sealed. In this regard, he argues that neither the forensic ability of Mr Stafford nor the plastic bags at his disposal were apt to achieve this result.

[89] There was also the evidence of blood on the lip and the lid of the boot from swabs taken by Crick that Ms Bentley identified as human blood, but the swabs were not dispatched to Ms Van Daal with the bloodied items from the boot for DNA analysis. Mr Savage maintains that this blood was not referrable to a particular person and, as such, cannot advance the Crown case against Mr Stafford.

[90] But as I have said, these points do not advance Mr Stafford's position beyond that achieved in 1997. On that occasion the majority of the Court were satisfied on the evidence of Dr Ansford and Mr Freney that it was unlikely that the deceased's body was stored in the boot from Monday to Wednesday, which was the case put to the jury by the Crown at the trial. On this reference, Mr Copley did not attack that conclusion but rather argued for alternative scenarios in which Mr Stafford:

> "Dumped the body where it was found, or dumped the body somewhere else on Monday, and then be either going back to the scene to where he had dumped it to move it or going back to the scene where he had dumped the body to remove something from it because he feared it might incriminate him."

[91] Mr Savage also advances arguments with respect to the items in the boot under the rubric of challenges to the chain of custody (particularly in relation to the strand of hair on the sponge), and in relation to Mr Stafford's explanation for removing the fold-up chair. I will consider these arguments separately in due course.

The maggot was not in the boot of the car

[92] Mr Savage submitted that the entomological evidence before this Court in 1997 was unreliable to the extent that it purported to establish the time of death of the deceased. In this regard, Mr Savage relies upon the evidence of Mr Luke with respect to the undesirability of relying upon a single maggot to determine time of death, and the evidence of Dr Vance to the effect that the eggs that produced the maggots were laid into the Tuesday.

[93] Mr Savage makes the further argument that the maggot that Sergeant Crick allegedly located in the boot of Mr Stafford's car, which was said to be "a live, dark coloured maggot", could not be from the same genus as the maggots found on the body of the deceased. Mr Savage relies upon the new evidence of Mr Wallman to the effect that if a maggot of the kind found on the deceased's body was "dark coloured", it would be either inactive or dead; otherwise, the maggot must be from a different genus. In this regard, Mr Savage asserts that because the alcohol used to preserve the maggot caused the identifying particulars on the label on the vial to disappear, the maggot that was produced for analysis was not the same maggot collected from the boot of the car at the bushland site.

[94] In addition, Mr Savage relies upon the evidence of Mr Wallman to demonstrate that the absence of sustenance and the temperatures in the boot rendered it an inhospitable environment for maggots to survive the three-day period required under the "body in the boot" theory advanced by the Crown.

[95] Mr Copley highlights the unchallenged evidence of Ms Morris that the maggot said to be found in the boot of the car was the same as those found on the deceased's body. Ms Morris had the benefit of access to the maggot itself for the purposes of her analysis, rather than relying upon descriptions from police records of the maggot.

[96] Once again, even if Mr Savage's arguments are accepted, they do not advance Mr Stafford's position beyond that achieved in the 1997 reference.

The deceased was not killed in the house

[97] Mr Copley does not abandon the proposition that the deceased was killed in the house, which was central to the Crown case at trial, notwithstanding the expert

evidence before this Court in 1997 and the findings of their Honours. He makes the point, however, that if the deceased was murdered at a different venue that the cleanup would have been easier, which might have facilitated Mr Stafford's appearance of normality at Arthur Power's house (on the first bracket of opportunity) or upon the Hollands' return home on the Monday evening (on the second bracket of opportunity).

[98] Mr Savage, by contrast, maintains that irrespective of where it is said that the deceased was murdered, the cleanup would be at least equally time-consuming.

[99] In my view, neither argument is apt to alter the position established on the 1997 reference, ie that the evidence does not support the conclusion that the killing occurred in the house.

The tyre tracks were not made by Mr Stafford's car

[100] Although Sergeant Crick took the photographs of the tyre tracks at the bushland site where the body was found, he compared the inked impressions of the tyres on Mr Stafford's car with the photographs and not the tyre tracks at the scene. Mr Savage sought to criticise Sergeant Crick's assessment of the tyre tracks on the ground that it was "a generalisation which was inaccurate because … he'd compared the … inked impression that he'd made of the tyres on Mr Stafford's car, with a photograph of tyre tracks taken at the scene." In this way, Mr Savage sought to align the opinion evidence of Sergeant Crick with that of Mr Lee, whose new evidence was put before this Court in 1997. On the 1997 reference, this Court held that Mr Lee's evidence "lacks cogency", which it was said was possibly a consequence of the fact that Mr Lee compared the inked impressions with "unclear photographs"; that is, the same comparison performed by Sergeant Crick.

[101] Mr Savage attacks the probative value of the tyre track evidence on two grounds. First, he asserts that it was "extremely unlikely" on the evidence that the tyre tracks were identical, in contrast to the learned trial judge's direction to the jury to that effect, because Sergeant Crick's assessment was vulnerable to the same criticisms levelled at the evidence of Mr Lee by this Court in 1997. Second, Mr Savage asserts that even if one accepted the criticisms of Mr Lee's evidence by this Court in 1997, including that he changed his opinion from being that the tyre tracks were not identical to being that it was impossible to determine whether the tyre tracks were identical, Mr Lee's evidence nonetheless cast doubt on the proposition that the tyre tracks were identical as put to the jury by the learned trial judge.

[102] Mr Copley maintains that the jury were not misled by the trial judge's instructions with respect to the tyre tracks, however, because the question of whether the tyre tracks at the bushland site were identical to the tyres on Mr Stafford's vehicle "would never have troubled the jury". In this regard, Mr Copley submits that Mr Savage states the matter too highly in suggesting that Sergeant Crick gave evidence that the tyre tracks were "identical" and that the jury was instructed in those terms. To the contrary, Mr Copley suggests that the jury were made aware of the circumstances surrounding Sergeant Crick's comparison of the tyre tracks that meant that his analysis could not be "categoric". Those circumstances included that the tyre tracks were made in sandy soil, that Sergeant Crick did not know the width of the tyres, and that Sergeant Crick analysed the tracks on Saturday morning when the tracks had been left some days before.

[103] Mr Copley argues that, in any event, the trial judge instructed the jury that they could not convict on the strength of the tyre tracks alone because thousands of such tyres had been sold in the nine months prior, but that taken in conjunction with the proximity of the tracks to the deceased's house and the alleged sighting of Mr Stafford's vehicle by Ms Mende, the weight that could be afforded to the tyre tracks as evidence against Mr Stafford was strengthened.

[104] One may accept that the evidence of the tyre marks is of little weight against Mr Stafford. On the other hand it is also not apt to exonerate him.

The alleged murder weapon, the hammer, was in the custody of the police

[105] Mr Savage argues that a hammer was tendered at Mr Stafford's committal and so was in the custody of the police. Mr Savage complains of the failure of the prosecution to tender that hammer at trial.

[106] Mr Stafford gave evidence that he owned a hammer, which was normally kept in the boot of his vehicle, but that was in the bedroom at the relevant time. He described the hammer as "a square headed mallet about so big with a black handle", which had a black head. Ms Holland gave evidence that she recalled that Mr Stafford owned a hammer, which she described as having a rectangular and silver head with a black handle. Mr Stafford refused to concede that the hammer had a silver head during cross-examination.

[107] Mr Savage's complaint stems from the possibility that the jury may have concluded from the failure by the Crown to produce the hammer at trial, in conjunction with the way the case was put to the jury, the hammer had been disposed of by Mr Stafford. Mr Savage contends that this was particularly prejudicial in light of the way the Crown case was presented: "This is a critical feature of the case because this is supposed to be the murder weapon that's in the house by his beside table a little way from the bathroom where she's bludgeoned to death."

[108] Mr Copley argues that the evidence of Ms Holland gave rise to the possibility that there were two hammers, and that the police took possession of the one which was not the murder weapon. Mr Copley argues that there was evidence capable of showing that there were indeed two hammers.

[109] The learned trial judge summarised the evidence for the jury in his Honour's directions to the jury having regard to the manner in which counsel at trial presented their cases. This summary was accurate. I do not consider that there is any support for Mr Stafford's argument in this point.

Mr Stafford did not lie to the police

[110] In oral argument, Mr Savage addresses the three lies said to be material: that Mr Stafford lied about who put out the wheelie bin after the supposed murder in the house, that Mr Stafford lied about attending upon his GP on the Monday when he actually attended on the Tuesday (as evidenced by a prescription for medication), and that Mr Stafford lied about a phone call with one of the deceased's friends, Melissa Lynch.

[111] Mr Savage argues that even if Mr Stafford did lie about those matters that nothing follows from establishing those lies. As to the wheelie bin, it is contended that in the absence of any controversial contents of the bin it is inconsequential who put the bin out after the supposed murder in the house. As to the attendance upon his GP, it

is contended that Mr Stafford corrected the misstatement with the police, and that Mr Stafford's whereabouts on Monday afternoon were explained by his movements elsewhere. As to the phone call to Melissa Lynch, it is contended that the phone call took place early in the morning on the Monday, before any opportunity that Mr Stafford had to kill the deceased.

[112] Mr Copley engages only with the possible lie with respect to Mr Stafford's attendance upon his GP. Mr Copley indicates that two inferences are open in this regard: first, that Mr Stafford made an honest mistake and, second, that Mr Stafford was attempting to create evidence tending to establish an alibi. Mr Copley argues that the removal of the fold-up chair was another "unfortunate coincidence", and rather that "he needed to make room in the boot for something and that is why he took out the fold-up chair."

[113] Mr Savage sought to explain Mr Stafford's removal of the fold-up chair by reference to the evidence of both Mr Stafford and Ms Holland that the chair, which was kept in the boot for attendance at netball games during the school term, was not needed for the two weeks following the Monday because school was on vacation. Mr Savage argues that the removal of the fold-up chair from the boot should not be taken as evidence of Mr Stafford's guilt in light of the explanation, corroborated by Ms Holland, put forward by Mr Stafford.

[114] One may accept Mr Stafford's argument on this point, but it makes little difference in weighing the question of his guilt.

The Crown cannot prove the chain of custody of exhibits

[115] It is argued by reference to the new evidence from Mr Napper that the Crown failed to prove the chain of custody in relation to certain exhibits, but most significantly with respect to the Chux, the sponge that was said to have the deceased's hair on it, and the sports bag, which had blood on it with DNA that Ms Van Daal confirmed to be consistent with the DNA profile of the deceased, and the blood swabs. In this regard, it is argued that because of doubt about the integrity of the custody of these exhibits, this evidence ceases to hold any, or little, probative value.[17]

[116] With respect to the notion that the reliability of the result of DNA analysis might be open to doubt because of questions about the chain of custody, the question is "whether there is reason to doubt whether the product of the processes of investigation and testing is what it is said by the Crown witnesses to be by reference to admissible evidence."[18] In *R v Butler*, it was said that:[19]

> "… whether or not there is reason to doubt the accuracy of the DNA result … because of the possibility that security or continuity of samples was not maintained is a question of fact (*Anglim & Cooke v Thomas* [1974] VR 363; *Dimitriou v Samuels* (1975) 10 SASR 331; *R v McNair*, unreported, Supreme Court of Victoria Court of Appeal, Brooking and Callaway JJA and Ashley AJA, 8 May 1997; *DPP v Spencer* [1999] VSC 301 at [27])."

[117] Mr Savage argues that consideration of new evidence from Mr Robin Napper, an independent forensic investigator, suggests that Sergeant Crick did not adhere to

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17 *R v Butler* [2009] QCA 111 at [106].

18 [2009] QCA 111 at [107].

19 [2009] QCA 111 at [109] (citations footnoted in original).

operating procedures designed to prevent contamination of the crime scene. Mr Napper's observations with respect to operating procedures derive from the European Crime Scene Management Good Practice Manual, which he contends are of general application. In particular, it is argued that Sergeant Crick potentially contaminated the crime scene because he did not wear gloves during his investigation and, further, because of what Mr Napper describes as "a small wound on the back of the middle finger".

[118] With respect to the items in the boot, including the sports bag, but not the blood said to be on the sports bag, Mr Napper states:

> "The items should have been laid out on brown or white protective paper. This is both to prevent these items being contaminated by the floor and to collect any evidence that falls from them onto the floor. In circumstances where a body was said to be in the boot care should have been taken to collect small pieces of evidence such as hair, flesh, or maggots."

[119] In addition to the concerns about trace evidence located on the items, it is said that:

> "There are many questions relating to the red and black sports bag which remain unanswered. For example, where was the red and black sports bag held between being found and having a piece cut from it? Why wasn't it given an exhibit number? Who handled it? Was it kept in a sealed plastic bag to avoid contamination? Why was it not further tested if Senior Constable Crick's initial test on it was positive for blood?"

[120] Mr Napper says that the failure to observe what he says was appropriate procedure resulted in the possibility of contamination of the sponge with the hair said to belong to the deceased. He states:

> "It is difficult therefore to place any significant [sic] on the blond hair on the sponge. Besides the potential for contaminate [sic] from placing the sponge on the floor, the hair is not even found when first inspected by Officer Crick. It is found on a second inspection by Kristine Bentley which suggests that the sponge was contaminated."

[121] In relation to the hair said to be on the sponge, Mr Savage asserts in the petition that "the chain of custody for the Hair was inadequate to eliminate the possibility of contamination."

[122] Mr Savage argues in relation to the Chux that:

> "It is not clear how [the Chux] was packaged or labelled, where it was stored overnight or who had access to it. Like several items above, the Chux was collected on a day when Senior Constable Crick moved between three crime scenes without wearing protective clothing. There is evidence that some exhibits were taken between crime scenes. In the absence of sufficient evidence of continuity contamination of the Chux cannot be ruled out." (Footnotes omitted.)

[123] With respect to the blood swabs, Mr Napper states:

> "I note that the Schedule of Scientific results clearly demonstrate that many of the preliminary swabs taken by Crick resulted in no blood

> being detected when subjected to the secondary test by Kristine Bentley. This fact heightens my concern that Officer Crick may have contaminated his own tests by not wearing gloves, and a possible cut on the back of his hand."

[124] Mr Copley submits that this Court should not receive the evidence as it was available to the petitioner at trial, and in any event that "[t]he evidence does not establish that [Mr Stafford] should not have been convicted. It does not give rise to a reasonable doubt about the [Mr Stafford]'s guilt." Mr Copley argued in his written submissions:

> "… Napper wrongly asserts that the items examined by Van Daal were not shown to have been the subject of a satisfactory chain of custody. They were, and the evidence established that: Van Daal said that Bentley gave her a sample of blood from the deceased, a sample from the deceased's jumper, a sample from the blanket removed from the appellant's boot, a sample from the chux cloth removed from the same boot and as ample of fabric from the red and black bag which was also found in the boot. … Bentley testified that she took each of those items to South Australia and gave them to Van Daal. … Bentley said that Dr Ashby gave her a sample of the deceased's blood on 27 September 1991. She said that on the same day Crick gave her the blanket, the piece of fabric cut from the bag and the chux cloth. … She said that on 1 October 1991 Crick gave her the deceased's clothing. … Dr Ashby said that she removed the deceased's clothing from her body. … She also obtained a sample of blood from the deceased. … She gave that sample to Bentley on 27 September 1991. … Crick testified that on 27 September 1991 he gave Bentley the items which had been removed from the appellant's boot. … He said that on 2 October 1991 he took possession of the deceased's clothing from the morgue and delivered the clothing to the John Tonge Centre that day. …"

[125] Mr Copley also attacks the statements by Mr Napper with respect to contamination resulting from the small wound said to be on Crick's hand: "The evidence is completely speculative in its conclusion and in its foundation."

[126] In relation to the argument that Mr Napper's evidence demonstrates that there was little or no procedure for chain of custody for exhibits in the investigation, as the passage from this Court's decision in *Butler* cited above shows, it is not sufficient to demonstrate the absence of what might now be thought a desirable procedure. It is also insufficient merely to speculate that any such absence of procedure might render the results of scientific analysis "liable" to contamination. The evidence of Mr Napper does not give rise to a reason to doubt the DNA analysis of the blood on the items in the boot. Further, the supposition that underlies Mr Savage's speculation as to the potential for contamination falls short of demonstrating that as a matter of fact, contamination may actually have occurred.

[127] None of the points raised by Mr Napper satisfactorily explain how blood of the deceased could have been transferred to the items in question so that those items were not delivered to Ms Bentley or Ms Van Daal in the state they were in at the crime scene. In addition, there was no suggestion from the forensic analysis of the blood on the items that the blood belonged to Sergeant Crick. Mr Napper's

evidence gives no reason to doubt that the blood on the items was the blood of the deceased, that the only blood on the items was the blood belonging to the deceased, and that that blood was on the items in the state that they were found at the crime scene.

[128] Mr Savage also refers to evidence from Dr Ashby, the pathologist, that an autopsy of the deceased's body revealed marks that looked like burn marks from a cigarette. Mr Savage drew this Court's attention to a cigarette lighter that was located in the immediate vicinity of the deceased's body at the bushland site, and suggested that the person who inflicted the burn marks upon the deceased's body using a cigarette had lit that cigarette using the lighter. Mr Savage makes the point that Mr Stafford was a lifelong non-smoker.

The Crown failed to present its case fairly and completely

[129] Mr Savage asserts that the Crown failed in its duties at trial by not disclosing all relevant material to Mr Stafford's legal representatives and, further, by running arguments at trial which were not fairly open on the evidence. Mr Copley pointed out in oral argument that Counsel for Mr Stafford at the trial took advantage of the forensic opportunities presented by the manner in which the Crown presented its case insofar as he chose not to object. Mr Savage maintains that the conduct attributed to Counsel for Mr Stafford at trial by Mr Copley meant that Mr Stafford was denied a fair chance of acquittal by virtue of the incompetence of his legal representation.

[130] These arguments are best considered in the light of the decision of the High Court in *Mallard v The Queen*. I now turn to a consideration of that case.

Mallard v The Queen

[131] The argument advanced for Mr Stafford is that this Court, instructed by recent decisions of the High Court, and in particular *Mallard v The Queen*,[20] should hold that the conviction of Mr Stafford involved a degree of procedural unfairness, amounting to a miscarriage of justice, which warrants quashing his conviction and the ordering of a new trial. In my respectful opinion, this argument is more compelling than those which I have canvassed to this point.

[132] On an Attorney-General's reference to this Court, pursuant to s 672A of the *Criminal Code*, this Court is obliged to consider and come to its own conclusion on the "whole case". As the High Court said in *Mallard v The Queen*,[21] this Court may "derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it …" But that is, of course, quite different from saying that this Court is bound by its previous decisions in the case. On the contrary, this Court is not bound by its previous decisions. In *Mallard v The Queen*, Gummow, Hayne, Callinan and Heydon JJ endorsed:[22]

> "an approach by a court on a reference of a petition by the Attorney-General to it, of a full review of all the admissible relevant evidence available in the case, whether new, fresh or already considered in earlier proceedings, however described, except to the extent, if any, that the relevant Part of the Act may otherwise require."

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20 (2005) 224 CLR 125.

21 (2005) 224 CLR 125 at 131 [10].

22 (2005) 224 CLR 125 at 129 [6].

[133] By virtue of the 2008 reference by the Attorney-General to this Court, this Court became duty-bound to reach its own view of the case on the whole of the evidence now before it. This Court's earlier decisions in 1992 and 1997 do not stand as an obstacle to this Court discharging its obligation to determine the case for itself.

[134] Nevertheless, the requirements of the orderly administration of justice, not to mention a proper respect for the opinions of the eminent judges who constituted the majority of the Court in 1997, requires that this Court should have good reason to come to a different view of the case. Especially is this so where, as I think, the only improvement in the challenge to the evidence which supported the original conviction which has emerged since the 1997 determination is the entomological evidence which casts some further doubt, of marginal materiality, on the likelihood that the maggot found in the boot of Mr Stafford's car was connected to the deceased. The principal evidence which in 1997 was held to warrant the rejection of Mr Stafford's arguments is the DNA evidence that the deceased's blood was found on items in the boot of Mr Stafford's vehicle. The new evidence, particularly that of Mr Napper, does not cast doubt on the reliability of that evidence.

[135] In *Mallard v The Queen*, Gummow, Hayne, Callinan and Heydon JJ went on to explain that this Court, on a reference under s 672A of the *Criminal Code*, must consider:[23]

> "the facts, not only as they emerged at the trial, but also as they emerged in [this Court], no matter what descriptive term the evidence adduced there might be given [that is to say whether the evidence be 'fresh' or merely 'new']. It is elementary that some matters may assume an entirely different complexion in the light of other matters and facts either ignored or previously unknown."

[136] Of particular importance here is the point that a reconsideration on a reference under s 672A of the *Criminal Code* of a circumstantial case presented by the Crown at trial may be necessitated by new evidence which tends to unravel important strands of the case presented by the Crown, and on which the jury convicted. In this regard, in *Mallard v The Queen*, their Honours said:[24]

> "It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case … The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded."

[137] Accordingly, where a circumstantial case is put to the jury and new evidence unravels strands in that case, the issue for this Court on a reference under s 672A of the *Criminal Code* may not be simply whether the balance of the evidence was sufficient to sustain a conclusion of guilt beyond reasonable doubt on the part of the appellate court required to determine the reference.

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23 (2005) 224 CLR 125 at 132 [13].

24 (2005) 224 CLR 125 at 135 [23].

[138] At trial the jury were told by the learned trial judge that they were not required to accept the scenario presented by the Crown in order to be able to convict Mr Stafford, but they were nevertheless invited to consider the question of Mr Stafford's guilt on the basis that the Crown's scenario presented a fairly arguable view of the facts supported by the evidence. The evidence which has subsequently emerged shows that the jury should not have been invited to regard central aspects of that scenario as fairly open on the evidence. The prosecutor's obligation is to put the case against the accused fairly.[25] It is inconceivable that the scenario would have been advocated to the jury by the Crown Prosecutor, or presented by the learned trial judge as a view of the facts which was open to the jury, if the new evidence had been led at trial. The question is whether this irregularity in the course of the trial is sufficient to warrant the quashing of Mr Stafford's conviction and the making of an order for a new trial even if the Court were itself satisfied of Mr Stafford's guilt beyond reasonable doubt.

[139] It was in the nature of the scenario presented by the Crown, as it is of any circumstantial case, that the individual strands of the scenario presented by the Crown tend to draw persuasive support from the other strands in the scenario. It is true that proof of the charge beyond reasonable doubt did not oblige the prosecution to prove when and where the deceased met her death in order to satisfy the jury beyond reasonable doubt that she met her death at Mr Stafford's hand. Nevertheless, the Crown Prosecutor suggested answers to these questions. And the Crown Prosecutor's suggestions were addressed by the learned trial judge to the jury on the basis that these suggestions presented a view of the case which was open to be accepted by the jury on the evidence. It is now clear that these suggestions should not have been made.

[140] The unfairness of these suggestions lay in presenting the jury with a coherent theory as to when and where the deceased was killed by Mr Stafford. Together with the evidence of the deceased's blood in the boot of Mr Stafford's car, these suggestions might have overcome the scepticism as to Mr Stafford's guilt which would necessarily have been engendered by the consideration of the limited opportunity available to Mr Stafford to kill the deceased and dispose of her body, the improbability of his brazenly removing her body from the house in broad daylight and in full view of neighbouring houses, the absence of a motive for Mr Stafford to kill the deceased and the absence of any evidence of blood on his clothing.

[141] The potency of the circumstantial scenario advocated by the Crown as an instrument of persuasion should not be underestimated – it offered a seemingly coherent, internally consistent theory of the case. Coherence and consistency gave the Crown case a strength in the important areas of opportunity and means which was apt to compensate for its weaknesses in the area of motive and in explaining how the body was disposed of. And it was apt materially to mislead the jury. Thus, for example, the circumstance that the body of the deceased was found without shoes was inconsistent with the hypothesis that the deceased was abducted while at or walking home from the shops. That is because of Mr Holland's evidence that the deceased always wore shoes when she was out of the house. The jury might have been inclined to regard this inconsistency as of little moment because of Mr Holland's concession that it was possible that the deceased might not have put on her shoes

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[25] *Richardson v The Queen* (1974) 131 CLR 116; *R v Apostilides* (1984) 154 CLR 563 at 575; *R v Soma* (2003) 212 CLR 299 at 309 – 310 [31].

just to walk across the road, or because of Ms Castle's evidence that at 7:30 am on the Monday morning the deceased was walking home from the shops barefoot, or because of the possibility that the deceased's abductor removed her shoes before dumping the corpse. But these possibilities, and the need for the jury to assess their respective strengths, vanished entirely from view in the scenario that the killing occurred in the house. As I have said, it is inconceivable that the learned trial judge would have directed the jury in this way had the new evidence put before this Court in 1997 been adduced at trial.

[142] In *The Queen v Hillier*,[26] Gummow, Hayne and Crennan JJ emphasised that "neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal". Their Honours referred to the statement by Gibbs CJ and Mason J in *Chamberlain v The Queen (No 2)*[27] approving the view that the jury must consider "the weight which is to be given to the united force of all the circumstances put together". Absent the seemingly coherent theory presented by the Crown, the jury may have been persuaded to regard the possibility that the DNA evidence of the blood of the deceased on the items in the boot of Mr Stafford's car was coincidental or unreliable as a possibility that could not be entirely discounted.

[143] Not every case where it appears on appeal that a factual aspect of a circumstantial Crown case is unsustainable will warrant the conclusion that there has been a miscarriage of justice on the ground that the accused has been denied a fair chance of an acquittal. But in this case the unsustainable aspects of a circumstantial Crown case were central to the case presented by the Crown to the jury. And importantly, in this case the jury were allowed to proceed on the basis that the evidence supporting these central aspects of the Crown case was reliable.

[144] Where, as in this case, it turns out that crucial aspects of a circumstantial case advocated by the Crown to the jury are unsound, it is a strong thing to conclude that the points made by the Crown with the evident intention of persuading the jury to convict did not actually influence their decision to do so. In such a case it is difficult to conclude that the misdirection of the jury was "of such a nature that it could not reasonably be supposed to have influenced the result" so that a new trial need not be ordered.[28]

[145] In this case, if the jury had not been presented with a seemingly coherent Crown case to the effect that the killing had occurred in the bathroom of the house and the body kept in the boot for sufficient time for maggots of the same kind found on the corpse to grow, the jury may well have found more compelling the possibility that there was an innocent explanation for the discovery of the blood of the deceased on the items in the boot to which reference has been made. And the jury's assessment of whether it was reasonable to entertain such a doubt might be affected by the consideration that the Crown, while under no obligation to unravel the mysteries in the case, was unable to suggest where the killing occurred, the mechanics of the disposal of the corpse or any motive in a man of previous good character for carrying out such a brutal murder. And importantly, so far as the fairness of the trial process was concerned, Mr Stafford's Counsel would have had the opportunity to focus the jury's attention on the Crown's inability to explain where Mr Stafford

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26 (2007) 228 CLR 618 esp at 637 – 638 [46] – [48].

27 (1984) 153 CLR 521 at 535.

28 Cf *Stokes v The Queen* (1960) 105 CLR 279 at 284 – 285; *Conway v The Queen* (2002) 209 CLR 203 at 217 – 220 [32] – [39]; *The Queen v Hillier* (2007) 228 CLR 618 at 630 – 631 [21].

killed the deceased and the mechanics of the disposal of her corpse in addition to its inability to assign a motive to explain his actions.

[146] It will be appreciated that the focus of present concern is upon the fairness of the trial process rather than the substantive justice of the outcome. So far as substantive justice is concerned, however, it cannot be said that a verdict of acquittal at a fair trial is entirely unthinkable. One cannot proceed on the footing that the jury might have reached a fantastic or far-fetched conclusion. But as McHugh J said in *Stevens v The Queen*,[29] juries:

> '"themselves set the standard of what is reasonable in the circumstances' (*Green v The Queen* (1971) 126 CLR 28 at 33). … Nor is a reasonable doubt 'confined to a "rational doubt", or a "doubt founded on reason" in the analytical sense' (*Green v The Queen* (1971) 126 CLR 28 at 33). Jurors may have a reasonable doubt about the guilt of the accused although they cannot articulate a reason for it other than they are not satisfied beyond reasonable doubt that the Crown has proved its case."

[147] In truth, the Crown case against Mr Stafford lacked an explanation as to where he killed the deceased, or how he disposed of her body, or why he would have wanted to kill her. The jury may have found these points, if they had been made to them, together with Mr Stafford's good character and the absence of evidence of blood on his clothing, as sufficiently persuasive to entertain a doubt as to the absence of a strong innocent explanation for the evidence of the blood of the deceased on items in the boot of the appellant's car. It may be that the jury might have come to the view that the traces of blood were possibly the result of contamination or that the DNA evidence (that it was the deceased's blood on the items in the boot) was unreliable. The latter possibility cannot be said to be entirely fanciful: it was one which the learned trial judge mentioned to the jury. It may also be that the jury would have been significantly troubled by the consideration that if the deceased's blood on these items was deposited from her bleeding body when it was placed in the boot much more blood would have been found in the boot.

[148] In some cases there may be only one reasonable verdict on the evidence; any other view may be seen to be perverse. But in some cases it may not be possible to say that there is only one reasonable verdict. In such cases the matters which lead the tribunal of fact to entertain a reasonable doubt as to the guilt of an accused are "matters upon which minds can differ".[30] Such cases are likely to be the most difficult cases. In such cases it is of fundamental importance that the determination be made by the constitutionally ordained tribunal of fact. The jury is the constitutionally ordained tribunal of fact.[31] The confidence of the public in the administration of criminal justice depends largely on the wisdom and experience of the jury as the best means of resolving difficult matters of evidence on which reasonable minds may differ of the kind which arise in this case.[32]

[149] In this case the jury were, in my respectful opinion, misled (albeit unintentionally) by the Crown Prosecutor and the learned trial judge as to the case which the Crown

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29 (2005) 227 CLR 319 at 331 [30].

30 *Velevski v The Queen* (2002) 187 ALR 233 at 277 [191].

31 *Brown v The Queen* (1986) 160 CLR 171 at 196 – 197, 201 – 202; *M v The Queen* (1994) 181 CLR 487 at 502.

32 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 598, 601.

could fairly make against Mr Stafford. It must now be accepted that where there has been an irregularity of this kind in a criminal trial, the issue for the appellate court is not merely whether that irregularity deprived Mr Stafford of a significant possibility of an acquittal. That is because the kind of miscarriage of justice which has occurred is not a miscarriage of justice in the substantive sense that the evidence cannot reasonably sustain the conviction: it is a miscarriage of justice in the procedural sense that there has been a failure of process which departs from the essential requirements of a fair trial. This distinction was explained by Gleeson CJ in *Nudd v The Queen* in a passage which, though lengthy, deserves citation in full. Gleeson CJ said:[33]

> "In this context, the concepts of justice, and miscarriage of justice, bear two aspects: outcome and process. They are different, but related.
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> In *Davies v The King* (*Davies v The King* 1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ), this Court said:
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> > From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled.
>
> This emphasis upon outcome and process as requirements of justice according to law is fundamental and familiar. It informed the explanation of miscarriage of justice given by Barwick CJ in *Ratten v The Queen* (*Ratten v The Queen* (1974) 131 CLR 510 at 516):
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> > Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the court of criminal appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any

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33 (2006) 162 A Crim R 301 at 304 – 306 [3] – [7] (citations footnoted in original).

> reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.
>
> That is one instance of a miscarriage: another is where the appellant has not had a fair trial. There is no need here to refer to the various circumstances in which a trial may become unfair. Some of these are mentioned in the reasons of the Full Court. But it may be that even where there have been irregularities at the trial there may be no miscarriage of justice if the court forms the opinion that no jury of reasonable men, properly instructed and alive to their responsibilities, would fail on the evidence to convict the accused.

The common statutory provision governing criminal appeals, of which s 668E of the Queensland Code is an example, covers matters of both outcome and process, referring to jury verdicts which are unreasonable or cannot be supported having regard to the evidence, to wrong decisions (of a judge) on any question of law, and to any other ground for concluding that there was a miscarriage of justice. These grounds for allowing an appeal are followed by a qualification, often referred to as a proviso, to the effect that, even if a point raised by the appellant has been made out, the appellate court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The proviso was considered recently by this Court in *Weiss v The Queen* (*Weiss v The Queen* (2005) 80 ALJR 444). The concluding sentence in the passage from the judgment of Barwick CJ in *Ratten* adopted a formula sometimes used to explain the practical effect of the proviso. What is significant for present purposes is the qualified manner in which Barwick CJ expressed himself. Some irregularities 'may' involve no miscarriage of justice if the appellate court forms a certain opinion about the strength of the case against the appellant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to state exhaustively, or to define categorically, the circumstances in which such a defect will occur. In *Mraz v The Queen* (*Mraz v The Queen* (1955) 93 CLR 493 at 514), Fullagar J said that 'every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed' and that, if there is a failure in any of those respects 'and the appellant may thereby have lost a chance which was fairly open to him of being acquitted', then there is a miscarriage of justice. That well-known passage relates the failure of process to the loss of a chance of acquittal. Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a miscarriage of

> justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed.
>
> The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirements of a fair trial."

[150] For the reasons set out above, I consider that there was in the trial of Mr Stafford a "failure of process which departs from the essential requirements of a fair trial" in that the jury were misled in a material way as to the case that could fairly be made by the Crown. That failure was apt to deprive Mr Stafford of the benefit of the jury's verdict at the conclusion of a fairly conducted trial. In *Weiss v The Queen*,[34] the High Court stated:

> "… [n]o single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind."

[151] In the light of the recent decisions of the High Court to which I have referred, it can now be seen that the focus of the majority of the Court in 1997 on the substantive effect of the "fresh/new evidence" obscured the point that the procedural defect which gave rise to a miscarriage of justice involved in the presentation by the Crown of a scenario substantial elements of which were, as the new evidence showed, apt to mislead the jury in performing their function.

[152] The trial was unfair in a way which was apt to deprive Mr Stafford of the consideration by the jury of the real case which could fairly be made against him

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[34] (2005) 224 CLR 300 at 317 [45].

rather than a theoretical case important aspects of which were not sustainable on a fair view of the evidence. In my respectful opinion, in this case there was a significant denial of procedural fairness in that the Crown case was presented to the jury in a way which can be seen in retrospect to have unfairly deprived Mr Stafford of "the chance to have the favourable response of the jury"[35] on the question of his guilt.

What orders should this Court make?

[153] Section 668E(2) of the *Criminal Code* provides that:

> "[s]ubject to the special provisions of [Ch 67 of the *Criminal Code*], the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

[154] Section 669(1) (a provision found in Ch 67 of the *Criminal Code*), provides that:

> "the Court may … order a new trial … if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make."

[155] In *R v Anderson*,[36] Gleeson CJ, speaking of the New South Wales analogue of s 669(1) of the *Criminal Code*, said that one of the important "circumstances" to be taken into account in assessing whether a new trial is an adequate remedy is "the public interest in the due prosecution and conviction of offenders". In *The Queen v Taufahema*,[37] Gummow, Hayne, Heydon and Crennan JJ referred to this observation with evident approval. Their Honours also referred, again with evident approval, to the statement by Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel in *Reid v The Queen*[38] that it is in "the interest of the public … that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury".

[156] As I have emphasised, the flaw in the trial of Mr Stafford was one of procedural fairness. That being so, an order for acquittal as an automatic adjunct to an order quashing Mr Stafford's conviction would conflict with "the desirability, if possible, of having the guilt or innocence of [Mr Stafford] finally determined by a jury which, according to the constitutional arrangements applicable in [Queensland], is the appropriate body to make such a decision".[39] It is in the interest of the public, of the relatives and friends of the deceased, of Mr Stafford himself and of justice, that the question of guilt or otherwise be determined finally by a verdict of a jury.[40]

[157] I am respectfully of the opinion that there is still much force in what Fitzgerald P said in this regard in his reasons in 1997. His Honour said:[41]

> "The Court was asked to quash the appellant's conviction and order a verdict of acquittal. It is convenient to say immediately that, if the

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35 Cf *Stevens v The Queen* (2005) 227 CLR 319 at 346 [82].

36 (1991) 53 A Crim R 421 at 453.

37 (2007) 228 CLR 232 at 254 [49].

38 [1980] AC 343 at 349.

39 *R v Anderson* (1991) 53 A Crim R 421 at 453; *The Queen v Taufahema* (2007) 228 CLR 232 at 254 [51].

40 *Reid v The Queen* [1980] AC 343 at 350; *The Queen v Taufahema* (2007) 228 CLR 232 at 255 [51].

41 [1997] QCA 333 at 25 per Fitzgerald P (citations footnoted in original).

> conviction is quashed, a retrial should be ordered. There is no doubt in my mind that, even with the additional evidence, there is ample evidence against the appellant upon which a reasonable jury, acting reasonably, could convict the appellant. The appellant's conviction of murder on the evidence adduced at his trial and the evidence now available would not be unsafe and unsatisfactory in the administration of justice (*M v R* (1994) 181 CLR 487). It is probable that he would have been, and if retried will be, convicted on all the evidence. Further, the prosecution case against the appellant would not be so different from the prosecution case upon which he was convicted as to warrant acquittal rather than a new trial on the basis of fairness (Contrast *Parker v R* (1997) 143 ALR 293)."

[158] In my respectful opinion, the miscarriage of justice which occurred in this case cannot adequately be remedied by an order which involves entering a verdict of acquittal. An order involving the entering of a verdict of acquittal would not recognise that in this case the miscarriage of justice was procedural. It would also not recognise the importance of the consideration that the question of Mr Stafford's guilt should be determined by a jury, and that a jury could, acting reasonably, convict him of the murder of the deceased.

[159] As to whether a jury could reasonably be satisfied of Mr Stafford's guilt beyond reasonable doubt, Mr Stafford had sufficient, albeit limited, opportunity to kill the deceased. Reliable sightings of the deceased put her at the local shops between 10.00 am and midday. Mr Stafford visited his friend, Mr Power, at 1.20 pm on the Monday. Mr Stafford's opportunity to take up with the deceased, kill her, dispose of the body, clean himself up and present himself to Mr Power was thus confined to a timeframe of between one and a half to three hours. This timeframe is tight, but it is not so tight as to make it impossible for Mr Stafford to have had a sufficient opportunity to kill the deceased. And the fact that the deceased was not wearing shoes when her corpse was discovered, together with the evidence of Mr Holland that she always wore shoes when she was out of the house, supports an inference that she was taken from her home rather than abducted on the street. Whether or not that inference should be drawn, bearing in mind the possibility that the killer might have removed the deceased's shoes before dumping her body, is the sort of question which should be left to determination by the collective wisdom and experience of a jury.

[160] The absence of a motive for the killing and Mr Stafford's previous good character are circumstances which are cause for disquiet as to the likelihood that Mr Stafford committed this heinous crime. Nevertheless, a consideration of the evidence that the deceased's blood was on the Chux cloth, the red and black sports bag and the blanket which were in Mr Stafford's exclusive control, the absence of the silver hammer of which Melissa Holland gave evidence, and the curious explanation by Mr Stafford of his non-visit to Mr Power on the Wednesday morning prevents me from concluding that a reasonable jury could not be satisfied of Mr Stafford's guilt beyond reasonable doubt.

[161] The most important piece of evidence to which I have referred is the DNA evidence of the deceased's blood on the items in the boot of his car. On Mr Stafford's behalf it was suggested that there was evidence that the deceased had cut her foot in the house and had used a cloth to wrap her injury. This explanation is not particularly

compelling as an innocent explanation of the presence of the deceased's blood in the boot of Mr Stafford's car. It is possible that the deceased's blood may have accidentally come into contact with these items by reason of any number of mundane incidents. One can accept that it might be possible for this to occur. One can even accept that the circumstances in which such staining might occur would be so unremarkable that no-one could be expected to notice or recollect the occurrence. But, here, there are three separate contaminated items: their collective presence in the boot of Mr Stafford's car after the disappearance of the deceased who is later found to have been bludgeoned to death is a remarkable coincidence. A jury could reasonably consider that its credulity was being stretched too far by the suggestion that there was an explanation of these facts consistent with Mr Stafford's innocence.

[162] Whether a jury would so conclude might depend on the jury's view, as a matter of common sense and experience, of the extent to which a person's blood may unremarkably, accidentally and innocently find its way onto the different items in question in the ordinary course of daily life. That kind of assessment is quintessentially the kind of assessment which should be made by a jury.

[163] Whether Mr Stafford's responses to questioning by the police officer in relation to the disappearance of the deceased should be regarded as reflecting a conscience of guilt or innocent bewilderment and distress is also a matter for assessment by a jury with the benefit of seeing and hearing Mr Stafford in the witness box. That is not an opportunity enjoyed by this Court.

[164] For these reasons, I conclude that a verdict of acquittal would not be an adequate remedy for the miscarriage of justice that occurred in this case. On the contrary, such a remedy would be an excessive response to the nature of the miscarriage of justice that occurred and might replace one injustice with another. I consider that this Court should order a retrial.

[165] Whether the public interest requires a retrial, given the lapse of time since the original trial, and the circumstance that Mr Stafford has served the custodial element of his sentence are, no doubt, matters which the prosecuting authorities will consider in deciding whether a new trial should proceed. In my opinion, the decisive consideration here is that it was indeed reasonably open to the jury to conclude that Mr Stafford was guilty of the murder.

[166] In *Dyers v The Queen*, Gaudron and Hayne JJ, after rejecting the appellant's contention that on the evidence at trial the jury should have been left with a reasonable doubt as to his guilt, went on to say:[42]

> "It is, however, necessary to deal with the further contention of the appellant that the evidence led at his trial should have left the jury with a reasonable doubt as to his guilt. Substantially for the reasons given by Callinan J, that contention should be rejected.
>
> In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases where this Court has

[42] (2002) 210 CLR 285 at 297 [22] – [23] (citation footnoted in original).

> quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal (See, eg, *Callaghan v The Queen* (1952) 87 CLR 115). To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant. That being so, there should be an order for a new trial despite it being probable that the prosecution will not proceed further."

[167] Callinan J was of a similar opinion to that of Gaudron and Hayne JJ.[43]

[168] Kirby J was of a different opinion:[44]

> "Where an appellate court has not accepted an argument that a verdict is unreasonable, but has found a material error of law, the proper order is normally to provide for a retrial. Where the prosecutor's discretion is exercised in favour of a retrial, such an order permits a verdict to be taken from a jury accepted as representing the community. This is why, normally, it is left to the Director of Public Prosecutions to evaluate the competing considerations for and against a retrial.
>
> This said, an order for a new trial remains 'within limits, a discretionary remedy' (*Balenzuela v De Gail* (1959) 101 CLR 226 at 243-244; cf *Hocking v Bell* (1945) 71 CLR 430 at 499; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 499 [55]). It is no less so in criminal appeals, although the considerations of the public interest involved in criminal proceedings are somewhat different to those in civil cases. It is a judicial act and therefore not an automatic or unthinking one.
>
> In the special circumstances of this case, I have concluded that a new trial of the appellant should not be ordered. The most telling circumstances are: (1) the age of the appellant and his proved medical condition that moved the Court of Criminal Appeal to substitute a non-custodial sentence; (2) the absence of any challenge by the prosecutor to that substituted sentence; (3) the fact that the appellant has fully served that sentence and that principles of double jeopardy would restrain any increase in the sentence following conviction after a retrial; (4) the absence of any reason to require a retrial in the appellant's case and the fact that the appellant does not ask for a retrial (Such as existed in *MacKenzie v The Queen* (1996) 190 CLR 348 at 376-377 and *Stanoevski v The Queen* (2001) 202 CLR 115 at 128 [51], 130 [61]); (5) the relatively confined nature of the assault alleged; (6) the undesirability of subjecting the complainant and her mother to the ordeal of giving evidence on a further trial; (7) the fact that a further trial would be the third occasion on which the appellant had been put on trial for the offence; and (8) the public costs and inconvenience of a further trial so many

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43 (2002) 210 CLR 285 at 331 [134] – [135].

44 (2002) 210 CLR 285 at 317 [88] – [90] (citations footnoted in original).

> years after the alleged events and the likelihood that the prosecution might, on a new trial, be obliged to call the witnesses upon whose absence it commented in the second trial, thereby presenting its case in a different way."

[169] It may be that there is good reason for not allowing a jury to decide whether Mr Stafford was guilty of the murder of the deceased which is not apparent to the Court, but if that is so then that may be determined by a court properly and fully informed of those matters on an application for a stay of proceedings. The lapse of time which has occurred in this case may make a new trial a practical impossibility, but that is not necessarily so. The issue was not the subject of argument in this Court. This Court should not decline to order a retrial on the basis of speculation as to the inability of the parties at this time to conduct a fair trial.

[170] On the whole of the evidence before this Court, a jury could reasonably have been satisfied beyond reasonable doubt of Mr Stafford's guilt, but the question of his guilt was very much a jury question. That being so, in light of the opinion of the majority of the High Court in *Dyers v The Queen* and *The Queen v Taufahema*, I would order a new trial. It may be that the authorities will decide that the prosecution should not proceed further, but that is a matter for the prosecuting authorities. It may be that the effluxion of time has involved a loss of evidence which would make a fair trial now problematic. Whether that is so is first a question for the prosecuting authorities, and if it is to become a question for the courts, that will be a question for another day.

Order

[171] I would allow the appeal, quash the conviction and order a retrial.

[172] **HOLMES JA**: I have had the advantage of reading the judgment of Keane JA, and am grateful indeed for his comprehensive and clear review of the evidence. I agree with him that Mr Stafford has not had a fair trial on the charge of murder, the Crown case as put at trial having been fundamentally undermined by evidence since adduced. However, I have reached a different view about whether a re-trial should be ordered. I do not consider that, on the evidence which remains, a jury could be satisfied beyond doubt of Mr Stafford's guilt.

[173] Mr Freney's evidence, given for the purposes of the 1997 pardon petition, comprehensively demolished the theory that Leanne Holland was killed at her Goodna home. Dr Ashby, the forensic pathologist who went to the site where the body was found, did not accept the possibility that the fatal injuries were inflicted at that location; she would have expected far more blood. That was consistent with Mr Freney's view, that there would have been an "enormous" amount of blood around. The uncontradicted expert evidence on those points means that if Mr Stafford killed Leanne Holland, he did so at a location away from the Hollands' house in Alice Street, and then or later used his car to move the body to where it was found.

[174] Accordingly, it becomes necessary to identify a time period at least sufficient to allow Mr Stafford to take the girl from the house to the place where she was killed, murder her there and make his return to Goodna. It is important to remember that the physical acts involved in the killing were not confined to the ten or so blows to the head delivered with a curved, blunt instrument. Dr Ashby's evidence was that

the body showed signs of sadistic activity: four crusted marks produced by a hot object held against the skin, made while the victim was still alive; and areas of scratched tracery, made with an implement such as a pin, scalpel or the point of a knife, on her back and one thigh. Those tracing marks were likely to have been inflicted when the girl was close to death. They were outlined with a substance Dr Ashby thought was dried blood, which had not come from the scratches themselves, the inference being that the murderer had taken the trouble to apply it. In addition, the crotch of her underpants was cut and there was a wound adjacent to the anus, possibly made by a knife. Whoever killed Leanne Holland used a variety of implements and took at least a little time about it.

[175] Belinda Collins saw Leanne Holland walking away from the Goodna shops at about 10 o'clock in the morning of Monday 23 September. (I agree for the reasons discussed in Keane JA's judgment that later purported sightings of Leanne Holland should not be regarded as reliable.) At that stage she was dressed in a purple jumper and black skirt; Ms Collins did not say whether or not she was wearing shoes. Assuming that Leanne reached home some minutes after being seen by Ms Collins at 10 am, Mr Stafford might then have abducted her and killed her. But he had first to speak to Melissa Holland and Terry Holland.

[176] To put those conversations in context, Leanne Holland had telephoned her father at work, probably at about 9 am, and got his permission to dye her hair. Mr Stafford at some point in the morning rang Melissa Holland to tell her that her sister wanted to dye her hair, and she later rang her father to discuss it with him. Ms Holland was vague about when those telephone conversations were. In an interview on 29 September 1991, she said she thought Mr Stafford rang her between 9.30 am and 10.00 am; in evidence at the trial she put it between 10.00 am and 11.00 am. Some time after that – "it could have been an hour later" – she rang her father at his work to discuss it with him. She telephoned him, she thought, "between 10 and 11 o'clock", or before she went to lunch, which she did at 12 o'clock.

[177] Mr Holland, on the other hand, was more precise in his early statements as to the time at which Melissa rang him. In a statement on 25 September 1991 (the Wednesday following the Monday on which Leanne Holland went missing), he said that his daughter Melissa had telephoned him at approximately midday about the hair dying subject and he then telephoned Graham Stafford, who told him Leanne had gone to the shops. Mr Holland repeated in an addendum statement made on 28 September that he had received the phone call from Ms Holland at 12 o'clock and immediately after it had telephoned Mr Stafford. At the trial, he said he was unable to say when approximately he had telephoned Mr Stafford, but thought it would have been in the vicinity of about two hours after he had first talked to his daughter Leanne; that is to say, at about 11 o'clock. (He was not asked about the later timing of the call in his previous statements, probably because it was not thought material: the Crown case at trial was put firmly on the basis that the killing occurred in the afternoon, not the morning.)

[178] If Mr Holland's earliest statements were correct, Mr Stafford was plainly at home at midday. That leaves a window between shortly after 10.00 am (assuming he rang Melissa Holland sooner rather than later) and midday, when he was home to take Mr Holland's call, for him to abduct and kill Leanne. A second interval, between the midday phone call and Mr Stafford's arrival at Arthur Power's house at 1.20 pm, seems far less feasible. Alternatively, of course, Mr Holland's initial

recall may have been wrong, and his estimate at trial better; on that basis, he rang Mr Stafford at about 11 am, so that the events occurred between then and 1.20 pm.

[179] But there is a further complication which impinges on the timing of the Monday morning scenarios: the neighbours' observations of Mr Stafford working on his car. Mr Radcliffe (who gave evidence) and Mr Bui (who was interviewed in 1993) described essentially the same activities: Mr Stafford's working on a sheet of board under the car for about 15 minutes and then driving it away. Mr Bui said that this happened on the Monday; Mr Stafford also gave an account of working on his car on the Monday. (In his first statement, he originally put it as having happened after the call from Patricia Lynch in the morning, but later in the same statement placed it as having occurred before his visit to the car wash.) Mr Radcliffe, however, said that he saw those activities, not on the Monday but on the Tuesday or the Wednesday. But Mr Stafford was at work on the Tuesday and with Ms Holland on the Wednesday. Given those facts, and Mr Bui's support for the car work having occurred on the Monday, it seems reasonably clear that Mr Radcliffe's evidence in fact related to events on the Monday.

[180] Mr Radcliffe put his observations of Mr Stafford's activities with the car as occurring between 11.00 am and 12 pm. They lasted for about three quarters of an hour, including Mr Stafford's brief absence in his car, returning close to midday. Mr Bui said that he saw Mr Stafford working on the car at some time between 10.30 am and 11.00 am, before driving it away. Mr Bui had earlier seen Leanne leaving in the direction of the shops. Neither Mr Bui nor Mr Radcliffe saw her return, and it seems probable that if she had been bundled into the car before Mr Stafford's departure in it, they would have noticed. On that evidence, any abduction by Mr Stafford did not occur until, on Mr Bui's account, after his return from driving away at 11 am, and after midday on Mr Radcliffe's evidence.

[181] On those various timings of events, in the first half of the day, Mr Stafford had, at best for the Crown, a little over two hours, at worst, not more than an about hour and a quarter, for abduction, killing and return. In one of those time intervals, he put the girl in his car as a passenger, or, possibly, alive in the boot, and drove her to another location. There is no suggestion that there was any other house or building to which he had access in which he could have killed her, so it was, presumably, an open air location somewhere in the vicinity. There, he got her out of the car and, using (on the Crown case) the silver hammer Melissa Holland described as having been kept in their bedroom, delivered some ten blows to her head. He then engaged in the further acts already described on her body before she died.

[182] Next, he either moved her body to the track off Redbank Plains Road, or left it where it was until the Wednesday morning. Unless the hammer, or other murder weapon, was left at the murder scene, which seems inconsistent with the thesis that Mr Stafford took the trouble to move the body from there, it had to be disposed of somewhere on his return journey. Mr Stafford then either returned home in time for Mr Holland's call, or if he acted after Mr Holland's call, arrived at Arthur Power's house at 1.20 pm and carried out the everyday activities established by the evidence for the balance of the day.

[183] As already mentioned, the Crown case at trial was that the killing occurred in the afternoon of the Monday, not the morning; indeed that position was maintained on the 1997 hearing of the pardon application. It is worth mentioning that part of the

reason for the Crown's positing an afternoon killing was probably the evidence of Ms Morris, the entomologist called by the Crown. She used her observations of the maggots, both those on the body and that found in the car, to place the time of death as between 4 pm and 6 pm on the Monday. After the trial, Ms Morris revised her views in favour of a later time. For what it is worth, at no stage does she, or any of the other entomological experts whose opinions were obtained post-trial, seem to have entertained a view that the time of death could have been earlier than Monday afternoon.

[184] Alternatively, the series of events I have outlined might have occurred on Monday afternoon. But the prospect of the killing having occurred in that window of opportunity, between a little after 3 pm (when Mr Stafford left the car wash) and 4.30 pm to 4.45 pm (when Melissa Holland came home and found him there) seems slight. Firstly, for that entire period to be available, Leanne and the murder weapon had to be in the car at Redbank Plains, where Mr Stafford obtained a ticket for the car wash at 2.59 pm. That immediately meets with the inherent implausibility of anyone proceeding to a murder via the car wash. But if, instead, Mr Stafford returned home from the car wash to collect Leanne, it makes the time available for the murder even shorter. Secondly, at 3.30 pm, the period was broken by a telephone conversation between Melissa Holland and Mr Stafford about whether the latter had been to Franklins and bought dog food. Either he was in fact at home at that point, or he had to make his way to a public telephone box to place the call.

[185] If Mr Stafford moved the body immediately after the killing, the time needed, of course, increases considerably; he had then to put the body in the boot, drive it to the track off Redbank Plains Road where it was found and take it out of the car there, before returning to Goodna. But Mr Freney's evidence about the very limited amount of blood on the items in the boot - a canvas tool bag, blanket and Chux wipe - and the absence of blood in the boot itself, weighs strongly against that possibility. Mr Freney would have expected considerably more blood in the boot if the body were in it even for as little as five minutes, unless it were wrapped in a medically sealed plastic bag; a plastic garbage bag would not have sufficed. And, of course, if the body were moved at that stage, the presence of a maggot in the boot on Wednesday is simply inexplicable.

[186] According to Mr Freney's evidence, the blood on the bag was, at the most, two or three ml in volume. It was at the top of the bag, but it was consistent with the bag having touched the blood or being turned over on top of it; there was no pattern consistent with blood flowing from another source, such as a bleeding head. The blanket similarly had two or three ml of blood on it, somewhere near the centre, again with no sign of a blood flow pattern. The Chux had "a very small amount of blood indeed" on it; it was diluted blood. That amount of blood and mechanism of staining was not consistent with what would be expected had a freshly killed body been moved with those items present in the boot. But if that is so, it becomes very difficult to account for the blood stains on those items at all.

[187] It is possible, of course, that if Leanne Holland were put in the boot at a time when she was slightly injured but still alive, some blood might have found its way onto them. That raises the question of how Mr Stafford could have removed Leanne alive from the house and placed her in the boot unobserved. The property had an open front yard which was visible from Alice Street (which Mr Holland described as a busy street); the back yard was visible to the neighbours. In any case,

Mr Freney did not think that the blood on the tool bag or the blanket was consistent with blood flow patterns. The blanket was found to be on top of a sponge, but the latter showed no sign of staining. If the tool bag were, as Mr Freney suggested, stained by being placed upside down on blood, and that occurred while the girl was in the boot, one would expect some blood to be found on the floor of the boot itself. And contact with wounds does not account at all for the blood on the Chux, which was dilute. On the other hand, if it had been used wet to wipe up blood, one would expect it to be more comprehensively stained than it was.

[188] The three items might, however, have got blood on them outside of the boot. But it seems unlikely that they were out of the boot and became stained at the murder scene; if they were, it is probable that they would have had much more blood on them. The small blood stain towards the centre of the blanket is particularly difficult to explain.

[189] No innocent explanation was offered of the blood stains on the three items, but it may be just as difficult to account for them by way of a guilty explanation. It is at least possible that the very small amounts involved got on those objects in some domestic and unremarked way. The blood stains, not surprisingly, could not be aged. There was evidence that Leanne Holland some five or six weeks prior to her death had come to her father, having cut her foot on a piece of glass in the house. Her foot at that stage was tied round with a towel and there was some blood; she told him there "had been a lot" of bleeding. There is at least a chance that there was some contact between her blood and the items if they were for some reason out of the boot, or that there was a transfer of blood to them in some other unnoticed way. Those possibilities, it must immediately be said, are no more than speculative. Against that, however, is the challenge of explaining how, if those objects were stained in connection with a savage killing, so little blood was deposited.

[190] If Mr Stafford did not move the body on the Monday but left it in situ, his only other opportunity to move it was on the Wednesday morning. Melissa Holland said that he left home for work at about 6.15 am and she saw him at about 6.35 or 6.40 am, 25 minutes later, driving down Queen Street from a direction consistent with his having come from the place at which the body was found. (Mr Stafford said that he had been to his friend Arthur Power's house, but had left again because the latter was not up. Ms Holland accepted that his return journey from there could bring him along Queen Street.)

[191] No consideration was given at trial to the scenario that the body was moved on the Wednesday from where the killing occurred, so the evidence is limited. Dr Ansford, the forensic pathologist who gave evidence on the 1997 pardon petition, said that severe head injuries would leak blood for periods ranging from 48 hours to 72 hours after death, while, as the body decomposed, decomposition fluid would leak from wounds and from the body's orifices. No sign of post-mortem blood or any product of decomposition was found in the boot. The one piece of evidence supportive of the body's being transferred on the Wednesday was the maggot.

[192] But the maggot and its finding were the subject of some controversy, and the evidence about it was not entirely satisfactory. Although two police officers, one a scientific officer, said that they had seen it when looking in the boot on the Wednesday morning, neither noted it in any fashion. Although the contents of the

boot were then being photographed and video taped, the maggot appeared in neither medium. And although the scientific officer mentioned in his statement that he found it the following day, when the car was taken back to police headquarters for examination, he made no reference to having seen it the previous day.

[193] The other police officer who found the maggot described it as alive and wriggling and dark in colour. But an expert who gave an affidavit for the purposes of this hearing, Dr Wallman, said that a live maggot of this genus would be cream in colour unless it were at the pupal stage of its life cycle, in which case it would be motionless. The maggot had been delivered for examination to a police scientific officer with some experience and qualification in forensic entomology. He said that found it shrivelled and dark, but Ms Morris, the entomologist who gave evidence for the Crown, said it did not have that appearance.

[194] Finally, the maggot was said to have been taken from the car at midday on Thursday 26 September, while maggot samples were taken from the body at about 4 pm on that day. But it was delivered to Ms Morris, and to the police scientific officer who examined it, in a phial numbered 3, while the maggot samples which were said to have been taken later from the body were delivered in phials numbered respectively 1 and 2. At the least, there was room for question as to whether the maggot about which Ms Morris gave evidence did emanate from the car boot or was the product of some confusion of exhibits with those from the death scene.

[195] More problems arise when one considers the time available to Mr Stafford to move the body on the Wednesday morning. The site at Redbank Plains was 8.9 kilometres from Alice Street. On the hearing before this Court, counsel for the Crown produced a 1998 Refidex map which shows two sets of traffic lights and a roundabout along the route. One cannot be sure that they were there in 1991, but at least it is apparent that all but the last couple of kilometres of the Redbank Plains end of the route was suburban. Averaging 80 kilometres per hour along its entirety, that component of the journey alone would have taken up at least half of the 25 minutes available. To that had to be added the exercise of going to wherever the body was originally left; retrieving it, now (between 38 and 43 hours after death) in a state of decomposition with some maggot infestation; taking any precautions to avoid contamination of the boot surfaces; placing the body in the boot; removing it at Redbank Plains; and clearing the boot of any obvious residue. And if Mr Stafford used wrappings round the body to shield the boot surfaces, he must have disposed of those wrappings somewhere on his return journey. It seems improbable that all that was necessary could be achieved in the 20 or 25 minutes between Mr Stafford's departure from Alice Street and his return past it.

[196] And, on any view, whether the removal of the body was on the Monday or the Wednesday, it is extremely difficult to fathom why Mr Stafford, having killed the girl in an open air location which one assumes was sufficiently secluded so that his activities were not obvious to passers-by, then shifted her body to another open air location where it was not far off a main road, with no attempt at concealing it. The spot where the body was found was some 50 or 60 metres off Redbank Plains Road, on a track which gave access to some bee hives. A car or a person standing up at the point at which the body was found would, the investigating police officer said, be clearly visible from the main road over a distance of about 100 metres. One can see that if the girl had been abducted and murdered at the killer's house, it was necessary to remove her body, and the track might be a convenient dumping point;

but if Mr Stafford were the murderer, that explanation does not hold, and one has to question why he would engage in the apparently pointless and extremely risky effort of shifting it.

[197] The murder weapon posited on the Crown case was the hammer Melissa Holland said had recently been kept in the bedroom, to enable some paintings to be hung. She was vague about when she had last seen it there. Mr Stafford similarly said that his hammer, which was usually in the boot of his car, had been in the bedroom to enable him to put things up. He thought it was still there when asked about it on 23 September, but agreed with the police in his interview that the black "Cyclone" hammer which they had found in the boot of his car was the hammer in question; he had only one hammer. That hammer was examined by a forensic scientist. It had no human blood on it.

[198] Ms Holland described the hammer she had seen as having a solid, silver rectangular head, with a black handle. Mr Stafford, on the other hand, said that his mallet, the one taken from the boot, had a square black head and a black handle. The forensic expert who examined it gave the measurements of its head as 108 mm x 40 mm; a rectangular shape, rather than square, as Mr Stafford had described it. That hammer was not shown to Ms Holland, so the possibility of her recognising it as the one which had been in the bedroom was not explored, and she was not asked if she was aware of the existence of two hammers. There is a strong possibility that she and Mr Stafford were describing a single hammer, and that Ms Holland's recollection of the detail of colour of the head was wrong. And it is worth mentioning that the significance in the existence of a hammer in the house diminishes considerably once one rejects the theory that the killing had occurred there. If the killing occurred after the girl had been taken elsewhere by car, the point of Mr Stafford's retrieving a hammer from the bedroom, when there already was one in the boot, becomes elusive.

[199] There was a number of other circumstances to which the Crown pointed to support an inference of guilt. Individually, they were all readily capable of an innocent explanation; taken as a whole, while they lent some support to the Crown case, their potence was not great. Mr Stafford had removed a collapsible chair from his car boot; Ms Holland agreed that it was used for watching netball and would not be needed for the next two weeks. The tyre tracks left at the scene showed a similar tread to that of the tyres on Mr Stafford's car; but thousands of those tyres were sold annually in Southeast Queensland. The body was found lying on a plastic garbage bag of a kind which could be found in the Holland household; but there was no suggestion it was a kind not commonly used.

[200] There were two claimed sightings by passing motorists of a vehicle near where the body was found. The first witness claimed to recognise Mr Stafford's vehicle from a photograph of it she was shown at trial; her claimed recognition extended, somewhat improbably, to a sticker on the car. But her purported sighting was at 8.45 am on the Wednesday, well after Mr Stafford had gone to work and returned home. The second sighting of a vehicle was at 6.10 am on the Tuesday or the Wednesday; the witness saw a small car whose colour he could not remember. He had identified it in his statement as a Charade or a Laser; it was a hatchback. That sighting might have been more reliable, but since Mr Stafford's car was a Gemini sedan, there was not much about it to connect it to him.

[201] Human blood which could not be grouped was detected in swabs taken from where the locking mechanism met on the lid and base of the boot. Also in the boot was a cleaning rag on which there was blood; it was Mr Stafford's, so it seems at least equally possible that the findings from the swabs were the result of whatever injury caused him to leave the blood on the rag as that they were anything to do with Leanne Holland's death. There was a blonde hair found on the scouring surface of a sponge in the boot, which the forensic scientist looked at against one of Leanne Holland's head hairs and found similar in length, colour and texture. But, she said, hair examination was "hardly very precise"; it was merely a subjective assessment. Assuming, in any event, that it was Leanne Holland's hair, it had no blood on it (as opposed to her hair when her body was found, which was so infused with blood that the pathologist thought that it was actually Titian red rather than blonde). There was nothing to connect it with her killing, and the sponge on which it was found was underneath the blanket belonging to her sister. One could easily enough conceive of one of Leanne's hairs being on the blanket, and becoming caught on the scour side of the sponge.

[202] The Crown relied on what was said to be a lie: that Mr Stafford said in his first police statement that he had attended his general practitioner on the Monday rather than the Tuesday. He corrected that in an interview the following day. He seems in his accounts to police to have been consistently confused about the timing and sequence of events on the Monday, and not in any way obviously to his advantage. In any event, it seems improbable that he would seek to create an alibi by reference to something so easily checked.

[203] Mr Holland's evidence that his daughter always wore shoes when she left home was relied on at trial as supporting an inference that her body had been taken from the house, because no shoes were found with it. Given the recognition now that the evidence does not support her having been killed at the house, the alternative inference might be that she was taken live from there to her death. But the weight of Mr Holland's evidence as to her general practice is very much diminished by the actual evidence of her walking barefoot on the morning in question. One of her school friends, Katrina Castle, was at the shops at Goodna at about 7.30 on the morning of 23 September, when she saw Leanne Holland walking uphill in the direction of her house. She described her as wearing a purple jumper with under it a long black T-shirt and black pants, and she had no shoes on. One can have some confidence that she identified the right day, because another friend of Leanne Holland spoke to her outside her house about 20 minutes later and she was wearing the black T-shirt and black trousers. She said she was about to go to the shops; it seems that before doing so she changed from trousers to a skirt.

[204] Apart from the specific matters already discussed, there are general aspects of the Crown case which make it difficult to credit. Mr Stafford, if he killed Leanne Holland in the first window of opportunity in the morning, did so not long after he rang Melissa Holland and they discussed Leanne's wanting to dye her hair. Either he had at that time no intent to kill or was so foresighted and adept at playing a part that he prefaced the murder with an utterly mundane conversation in order to deflect suspicion. And if he had murdered Leanne in the later part of the morning, he showed considerable sangfroid on his arrival at Mr Power's house, where he seemed "perfectly normal", afterwards carrying on everyday activities for the balance of the afternoon. Equally, if he killed Leanne in the afternoon, having got home ahead of Ms Holland, he managed to greet her and spend the evening with her without showing any sign of agitation.

[205] Mr Stafford also showed extraordinary competence in managing a brutal murder without leaving evidence of it on his clothing or shoes, which were seized by the police. Mr Freney and Dr Ansford said that there would be impact splatter from the blows to the girl's head; Mr Freney described it as "massive splashing". Melissa Holland's evidence was, consistently with Mr Stafford's, that he was wearing "Broncos" shorts when she left for work that morning and was wearing them still when she arrived home in the evening. There was no obvious staining on them, nor on the Reebok shoes that Mr Stafford wore. No human blood was found in the interior of Mr Stafford's vehicle, particularly the driver's seat or the steering wheel.

[206] The evidence was that Mr Stafford had always had a normal and affable relationship with Leanne. The sudden killing of the girl, with indicia of sadism, with no clue to be found in Mr Stafford's previous blameless and unremarkable history and no suggested motive, simply seems, although not impossible, unlikely.

[207] It is possible that Mr Stafford killed Leanne Holland. It is also possible that after Ms Collins saw her and before she reached home she was abducted and murdered by some other person. In my view, a jury presented with the Crown case as it now stands would experience a reasonable doubt as to Mr Stafford's guilt.

[208] I would enter a verdict of acquittal.

[209] **FRASER JA:** I agree with the reasons of Keane JA, which I have had the advantage of reading. I wish only to add some brief remarks.

[210] As Keane JA has pointed out, *Mallard v The Queen*[45] decided that on a reference by the Attorney-General the Court is required to conduct a full review of all of the available evidence, whether or not the evidence was considered in the earlier proceedings or is "new" or "fresh". That is not to say, however, that a demonstration on the whole of the evidence that there was a flaw in the Crown case as it was put at the trial necessarily would justify this Court in setting aside a conviction. In particular, I would emphasise that it should not be assumed that the Court would readily conclude that there was a miscarriage of justice where the evidence presented in a reference merely cast doubt upon some aspects of a circumstantial case. Such an approach would tend to undermine both the respect traditionally afforded to jury verdicts and the important principle of finality in litigation, which serves as the "sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time."[46] In this case, as Keane JA has explained, the evidence presented in the reference was more significant: it undermined the coherence of the Crown case as it was put to the jury to such an extent as to demonstrate a "procedural" miscarriage of justice that requires this Court to set aside the conviction.

[211] There are, as Holmes JA has cogently explained, difficulties in understanding exactly how the blood that (on the evidence) was found on items in Mr Stafford's car came to be in the particular areas in the form in which it was found. Furthermore, the time available to Mr Stafford to carry out the offence and related activities was constrained and there are other issues which might lead to a jury forming a reasonable doubt that Mr Stafford was guilty. Even so, in the context of the whole of the evidence, the evidence that the deceased's blood was found on

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45 (2005) 224 CLR 125.

46 *Burrell v The Queen* (2008) 238 CLR 218 at 223 [16].

three separate items in the boot of Mr Stafford's car persuades me that it would be open to a reasonable jury to find Mr Stafford guilty of the offence beyond reasonable doubt. For the reasons given by Keane JA, I agree that the Court should order a new trial.

[212] I agree with the orders proposed by Keane JA.