

OATES v. THE QUEEN

1979. Court of Criminal Appeal: Green C.J., Neasey and Everett JJ.

May 24, 25, July 26, 1979.

Criminal Law—Evidence—Burden of proof—Reasonable doubt—Reasonable hypothesis consistent with innocence—Duty of judge to direct jury—Circumstantial evidence—Identification of accused.

Circumstances in which the jury should be warned of the dangers of relying on evidence of identification and of circumstantial evidence considered.

APPEAL.

Rickie Wayne Oates was arraigned before Crawford J. at Hobart Criminal Sittings in April 1979 on a charge of murder in that he near Strahan on 16th December, 1978, murdered Peter James Horsley, found guilty, and sentenced to imprisonment for life. It appeared that the accused, a man aged twenty who was very hard of hearing and whose speech and education were for that reason badly affected, had gone to Queenstown from Hobart in a stolen car, made friends with some boys, and driven out into the bush with one of them, that later alone he had got petrol and, having no money, left a gun as security for payment. Later the body of the boy with him was found and appeared to have been shot with the gun. There was evidence that the deceased and the accused had been seen together in a car but the evidence of what followed was circumstantial. The accused appealed on grounds later varied, as appears at this page, *infra*. Details of the evidence appear in the judgments of Green C.J. and Neasey J.

Ian Elliott and Murray Chambers for the appellant.

W. J. E. Cox Q.C., Crown Advocate, and *A. N. Hope* for the Crown.

Cur. adv. vult.

JULY 26.

GREEN C.J.: This is an appeal against the appellant's conviction for the murder of a fifteen-year old boy. The original grounds of appeal were abandoned. The essential grounds as developed by counsel for the appellant during his submissions to this Court were as follows:

- "1. (a) The Learned Trial Judge erred in that he failed to direct the jury that any inaccuracy in the Appellant's unsworn statement as to his whereabouts does not prove that the Appellant was where the identifying witnesses Louise Alison White and Carol Maree White say he was.

- (b) The Learned Trial Judge erred in inviting the jury to relate the Appellant's statement as to his whereabouts in his unsworn statement to the evidence of identity given by the witnesses Louise Alison White and Carol Maree White.
- "2. The Learned Trial Judge erred in that he failed to warn or adequately warn the jury in relation to the exercise of caution in accepting the evidence of identification of the witnesses Louise Alison White and Carol Maree White.
- "3. That the Learned Trial Judge erred in failing to direct the jury that it was their duty to acquit the Appellant if there was any reasonable hypothesis open to the jury which was consistent with his innocence."

Ground 2.

The substance of the evidence given by the Misses White is sufficiently set out in the reasons for judgment prepared by Neasey J. and I do not need to repeat it. I fully agree with his Honour's assessment of the importance of the evidence given by those two witnesses, especially the evidence of Louise Alison White.

There is no rule of law that in every case a trial judge is required to give a special warning to the jury about the dangers of relying upon identification evidence, but there is ample authority for the proposition that under some circumstances the failure by a trial judge to do so is capable of rendering a summing up inadequate: see for example *Davies and Cody v. The King* (1937) 57 C.L.R. 170; *Arthurs v. Attorney-General for Northern Ireland* (1970) 55 Cr.App.R. 161, at p. 169; *Reg v. Turnbull* [1977] 1 Q.B. 224; and *McCusker v. The Queen* [1977] Tas.S.R.(N.C.) 25. Detailed rules binding on this Court as to the circumstances in which such a warning should be given and as to the terms of such a warning have not been and, in my view, should not be laid down. However, in *McCusker v. The Queen* (*supra*), a decision of this court, it was said in the joint judgment of Neasey, Chambers and Nettlefold JJ.:

"Detailed rules have been laid down in *Turnbull's* case as to the manner in which identification evidence should be dealt with during a trial, and trial judges here should, we think, give careful attention to the content of them in appropriate cases."

What I take to be the primary rule laid down by the Court of Appeal in *Reg. v. Turnbull* (*supra*) was stated in these terms (at p. 228):

"... whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications."

In *Reg. v. Goode* [1970] S.A.S.R. 69 Bray C.J., Mitchell and Zelling JJ. after reviewing the Australian authorities said (at p. 77):

"We have now reviewed all the recent authorities so far as we have been able to discover them. It may not be possible to deduce from them any more detailed principle than this—that where a vital part of the case for the prosecution depends on the identification of an accused person who displays on sight no extraordinary and peculiar characteristics by witnesses who have never seen him before, the circumstances of the case may make it necessary that an appropriate warning be given about the dangers of such evidence, and that the mere fact that there is incriminating evidence additional to that of the identifying witness or witnesses does not necessarily dispense with the need for such a warning."

See also the judgment of Bray C.J. in *Reg. v. Harm* (1975) 13 S.A.S.R. 84. In *Arthurs v. Attorney-General for Northern Ireland* (*supra*) Lord Morris of Borth-y-Gest said, at pp. 168, 169, in a judgment in which the other members of the House concurred:

"Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification."

His Lordship then went on to emphasize that the nature of the guidance required will vary with the circumstances of individual cases.

I think that the circumstances of this case were such that a warning was required. The evidence of Louise White could be fairly described as crucial: I very much doubt whether the appellant could have been properly convicted without her evidence. Further, there might have been a tendency, possibly unconscious, for Louise White to have been mentally predisposed to expect that the two men she saw in the brown and white Holden when it was being driven out of Strahan were likely to have been the same men whom she had already associated with that car by the observations she had made earlier in the day. In the same way she might have been mentally predisposed to expect or assume that the person she saw in the car on its return journey would have been one of the two men who were occupying it when she saw it on its outward journey. Finally, although apparently the light was adequate, the conditions under which she observed the occupants of the car were not good: her range of visibility was limited by the angle of her vision and the size of the car windows, the car was moving at about 30 to 35 m.p.h. on the outward journey and about 40 m.p.h. on the return journey and she must have had the faces of the occupant or occupants of the car in her view for only a very few seconds on the outward journey and for an even shorter period on the return journey.

The learned trial judge in the course of his summing up stressed the importance of the evidence of the Misses White and reminded the jury fully of their cross-examination and of the criticisms of their evidence made by counsel for the appellant. But in my respectful view, I think that in addition to those directions a specific warning to the jury of the dangers of acting upon that evidence was also required.

Ground 3.

In order to determine the question of whether it is necessary or desirable for a trial judge to give a special direction to the jury as to their function in cases involving circumstantial evidence and, if so, what form that direction should take, it is necessary to consider the antecedent question of what that function is. Although there may be some debate as to whether there is any "rule" about when such a direction should be given to the jury, there is no doubt about the nature of the jury's function in such cases. The rule is that "you cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances" (per Dixon C.J. in *Plomp v. The Queen* [1963] 110 C.L.R. 234, at p. 243). In *Barca v. The Queen* (1975) 133 C.L.R. 82, Gibbs, Stephen and Mason JJ. in a joint judgment stated the rule more fully in the following terms (at p. 104):

"When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v. The King* (1911) 13 C.L.R. 619, at p. 634. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v. The Queen* (1963) 110 C.L.R. 234, at p. 252; see also *Thomas v. The Queen* (1960) 102 C.L.R. 584, at pp. 605-606. However, 'an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence.' (*Peacock v. The King* (1911) 13 C.L.R., at p. 661.) These principles are well settled in Australia."

It might have been thought that the combined effect of those clearly established principles of law taken in conjunction with the obligation imposed upon trial judges by the common law and by s. 371 (j) of the *Criminal Code* to "instruct the jury as to the law applicable to the case" would be to require a judge to give a special direction in the terms of the passages I have cited in every

case in which the jury is asked to arrive at a verdict based on circumstantial evidence. But there is no such requirement because it is clear that the special direction is really only a particular application of the general direction that a jury must be satisfied beyond all reasonable doubt that the accused is guilty: that follows from the fact that if the jury hold the view that one of the conclusions which they can reasonably draw from the facts which they find established is inconsistent with the guilt of the accused then they cannot say that they are satisfied beyond reasonable doubt of his guilt.

However, notwithstanding that it is subsumed under the general direction as to the burden of proof, in some cases a failure by a trial judge to give a special direction to the jury as to how they should apply circumstantial evidence can render his summing up inadequate. In *Grant v. The Queen* (1975) 11 A.L.R. 503, Barwick C.J., in a judgment in which all the other members of the Court concurred, stated the law to be as follows (at p. 504):

"In support of the first ground, counsel for the applicant presented two alternative arguments. In the first place, he submitted that it was necessary as a matter of law in every case which depended upon circumstantial evidence for the jury to be told not merely that they must be satisfied beyond all reasonable doubt, but that the circumstantial evidence must be not merely consistent with the guilt of the accused but inconsistent with his innocence. The alternative argument was that this case was one in which such a direction in point of practice ought to have been given, and that the failure to give it resulted in the summing up as a whole being inadequate to the point that the conviction resulting from it ought to be set aside.

"In my opinion, there is no rule of law that a direction such as is suggested in this case must be given in every case in which the prosecution relies upon circumstantial evidence. Further, in my opinion, there is no invariable rule of practice that such a direction should be given.

"It must be remembered that the direction suggested by Baron Alderson in *R. v. Hodge* (1838) 2 Lew. C.C. 227 is an amplification of the direction that the Crown must prove its case beyond all reasonable doubt. Unquestionably, there are cases which depend upon circumstantial evidence in which it would be proper and, indeed, there are cases in which it is necessary, for the trial judge to assist the jury by way of some such direction as is now being sought. Whether or not it is either proper or necessary is a matter which, in the first place, the trial judge must resolve for himself. I use the word 'proper' because I can well understand that in some cases the direction might confuse more than assist the jury, depending on the nature of the case and of the evidence given in support of it.

"Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It may none the less be concluded from the terms of the summing up that the jury were fully instructed.

"The trial judge, therefore, in the case where circumstantial evidence is relied upon by the prosecution, must consider whether or not the case calls for the assistance of the jury by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence."

I think that it can be said that as a matter of practice such a direction is given in many if not most cases in which the Crown case consists substantially of circumstantial evidence and that such a practice has judicial approval: in *Plomp v. The Queen* (*supra*) Menzies J., at p. 252, referred to the giving of such a direction as being "customary"; in *La Fontaine v. The Queen* (1976) 136 C.L.R. 62, at p. 80; 11 A.L.R. 507, at p. 521, Gibbs J. said that the giving of such a direction was "usual" and in the same case Stephen J., at p. 85; p. 524, referred to "the desirability, in most cases involving circumstantial evidence, of the jury being directed that the circumstantial evidence must be not merely consistent with the accused's guilt, but inconsistent with his innocence". In *Reg. v. Grant* [1975] V.R. 809 the Full Court of the Supreme Court of Victoria whilst emphasizing that there was no rule of law or of practice requiring the giving of such a direction, nevertheless said, at p. 812, that they did "not wish to suggest that it is not very often desirable that the jury should have the task of evaluating circumstantial evidence explained to them in terms similar to those used in *R. v. Hodge* (1838) 2 Lew. C.C. 227". Insofar as the judgment of Lord Morris in *McGreevy v. D.P.P.* [1973] 1 W.L.R. 276; [1973] 1 All E.R. 503 indicates to the contrary, it should be read subject to the judgments of the High Court in the cases which I have cited and, in particular, it should be read in the light of the observation made in the joint judgment of Gibbs, Stephen and Mason JJ. in *Barca v. The Queen* (*supra*, at p. 105) that the effect of the decision in *McGreevy v. D.P.P.* (*supra*) may be that the practice as to the giving of such a direction is less rigid in England than it is in Australia.

In *Grant v. The Queen* (1975) 11 A.L.R. 503 Barwick C.J. said, at p. 504, that it is a matter for the trial judge to consider whether the case calls for the assistance of the jury by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence. I turn to some of the factors which I think would be relevant to such a consideration.

Although the direction given to the jury in *Reg. v. Hodge* (*supra*) has little weight as a formal authority, the warning given

by Alderson B. to the Liverpool jury then has just as much validity today. After stating the facts, which incidentally bear some resemblance to those in the present case, the reporter recorded (at p. 228):

"Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, 'not only that those circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*'

"He then pointed out to them the proneness of the human mind to look for—and often slightly to distort the facts in order to establish such a proposition—forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

When he is deciding whether a special direction is required a trial judge should be alert to the danger referred to by Alderson B. and the main factors to which he should have regard are the extent to which the Crown case consists of circumstantial evidence, the number of different conclusions which might be drawn from that evidence and the remoteness of the facts to be proved from the evidence from which it is sought to infer those facts.

I do not consider that the fact that the special direction about circumstantial evidence is subsumed under the general direction as to the burden of proof should dissuade a trial judge from giving both directions. With great respect I do not agree that that relationship between the two directions is a matter of "common sense" (cf. *McGreevy v. D.P.P.* (*supra*, at p. 285; p. 510)). I do not think that it is safe to assume that that relationship would be readily apparent or generally known to the ordinary juror who is unused to the processes of adjudication and to the evaluation of evidence particularly when he is in the stressful and unfamiliar environment of a criminal trial.

However, as opposed to the foregoing considerations, a trial judge is also required to bear in mind that a special direction should not be given if it is likely to confuse the jury or unduly complicate their task: *Grant v. The Queen* (*supra*, at p. 504). I turn to the facts and circumstances of this case.

The Crown sought to prove most of the elements of the crime by asking the jury to draw a number of inferences from evidence which was largely circumstantial. In order to establish that the crime had been committed, the main facts upon which the Crown relied and the inferences which the Crown asked the jury to draw from those facts were as follows:

- (a) the deceased's body was found in low scrub in a pine plantation 3 or 4 kms from Strahan;

- (b) the deceased was killed in the vicinity of the place where his body was found;
- (c) the fatal wounds were caused by shot gun pellets discharged from cartridge cases found near the body;
- (d) the nature of the wounds and the circumstances were such that the jury should reject the possibility that the wounds had been self-inflicted or had been caused by accident;
- (e) the jury should infer that whoever shot the deceased had done so intending to cause his death or intending to cause bodily harm to the deceased which he knew was likely to cause death.

The main facts and inferences relied upon by the Crown to show that the crime had been committed by the appellant were as follows:

- (a) the appellant was in the company of the deceased during the afternoon of Saturday, 16th December, 1978;
- (b) at about 7.15 p.m. on that day the appellant and the deceased drove out of Strahan on a road which provided access to, amongst other places, the place where the deceased's body was found;
- (c) no witness was produced who had seen the deceased again between that time and the time when his body was discovered on 30th December, 1978;
- (d) at about 8.15 p.m. on Saturday, 16th December, 1978, the appellant approached an employee at a garage in Queenstown, a town near Strahan, and handed over a shot gun which had been on the back seat of the car he was driving, in payment for or as security for petrol;
- (e) the fatal shots were fired from that gun; and
- (f) the appellant told lies to the police about some of the events of 16th December, 1978.

The evidence from which the Crown asked the jury to make those findings and draw those inferences consisted of evidence given by witnesses who had seen the appellant and the deceased together and who had later seen the appellant alone; evidence of the discovery and the location of the body; evidence provided by the appellant in an unsworn statement he made to the jury and expert evidence as to the nature of the wounds, the cause of death and the identification of the murder weapon. There was no confessional evidence.

In my view this was plainly a case in which the Crown case rested very substantially upon circumstantial evidence as that expression is used in the authorities. The only essential element of the crime about which there was direct evidence was the fact of the death. There was no direct evidence that the deceased's death was caused by injuries suffered as the result of the discharge of a shot gun, that the shot gun was fired by the appellant or that if he did fire the gun that he did so deliberately and whilst he had

the requisite state of mind. In order to be satisfied that those essential parts of the Crown case had been proved the jury would have had to rely upon inferences drawn from whatever facts they found established by evidence which in the main only indirectly related to those parts of the Crown case. Further, it is obvious that more than one inference was capable of being drawn from much of the evidence. In particular the crucial inference that the appellant was the person who fired the gun was obviously not necessarily the only inference which could have been drawn from the evidence. This was not the sort of case in which the evidence excluded other possibilities such as suicide or accident and established that the deceased was killed by someone and also established that the accused was the only person in the vicinity at the material time, which evidence by a deductive rather than by an inferential process could without more justify the conclusion that the accused had killed the deceased. In this case the evidence did not conclusively establish that the appellant was in the vicinity of the deceased when he was shot, nor did the evidence conclusively demonstrate that no one else was in that vicinity at the material time. It is true that apart from the appellant's unsworn statement there was no evidence affirmatively showing that a third party who might have committed the killing was in the area at the time but, of course, such a mere absence of evidence does not positively demonstrate that no third party was in the area. I am not saying that it would not have been open to the jury to have concluded on all the evidence before them that no one other than the appellant and the deceased was in the vicinity at the material time and to have concluded that the appellant shot the deceased. However, it is clear that that was not the only logical inference that the jury could have drawn from the evidence.

I accept that some of the inferences which the Crown asked the jury to draw, for example those indicated by the expert evidence, would have been more logically persuasive and more readily drawn than others. I also accept that because some reliance is placed upon circumstantial evidence in almost all cases, to some extent the inferences which the jury were asked to draw in this case were of the same kind which juries are asked to draw in almost all criminal trials. However, the fact remains that in this case almost the whole of the Crown case depended upon the drawing of inferences from circumstantial evidence.

In my view the circumstances of the case were such that the jury should have been explicitly warned that they could not be satisfied beyond reasonable doubt that the appellant was guilty if they thought that an inference inconsistent with guilt could reasonably be drawn from the facts which they found proved.

I do not consider that the giving of such a warning was rendered unnecessary by the careful and full examination which the learned trial judge gave in his summing up to the unsworn statement made by the appellant and by his invitation to the jury

to regard that as a possible version of the facts. Even assuming that, taking the summing up as a whole, the learned trial judge by implication conveyed to the jury that they should acquit the appellant if they thought that he had raised a reasonably acceptable hypothesis inconsistent with guilt, I do not think that it could be said that that would amount to an adequate direction. In those cases in which a special direction as to circumstantial evidence is required the trial judge's direction should not be confined to hypotheses raised by the accused in his evidence or in his unsworn statement or in his counsel's address to the jury: the direction must be given generally so that it is made clear to the jury that whenever they are considering what conclusions they should draw from circumstantial evidence they should consider all the possible rational inferences which can be drawn from that evidence, whether or not they have been mentioned in evidence or by counsel, and they must acquit if an inference inconsistent with guilt can reasonably be drawn. I think that that follows from three basic propositions. First, confining the direction to hypotheses raised by the defence would tend to derogate from the rule that the onus of proving guilt beyond all reasonable doubt remains with the Crown throughout the trial. Secondly, a limited direction of that kind could result in the jury engaging in the impermissible process of concluding that the rejection of the accused's version tended to establish the Crown case. Finally, allowance must be made for the fact that apart from the relatively rare cases in which the accused makes formal admissions in court, all the facts in a criminal trial are at large: no one can properly predict what parts of the evidence or the accused's unsworn statement the jury will accept and what parts they will reject. Thus a trial judge's summing up must make allowance for the fact that a large number of possible findings and permutations of findings will be open to the jury and that when the evidence is circumstantial a correspondingly large number of possible inferences will also be open to the jury.

I do not find it necessary to consider grounds 1 (a) and 1 (b) as distinct grounds.

I do not consider that "no substantial miscarriage of justice has actually occurred" and I therefore do not consider that the *Criminal Code* s. 402 (2) should be applied.

The appeal should be allowed, the conviction should be quashed and a new trial should be ordered.

NEASEY J.: The body of the deceased, a fifteen-year old boy, was found by police in a badly decomposed state in sandy soil in a pine plantation about 3 to 4 kilometres from the small West Coast port of Strahan. The body was found not far from the junction of two roads called respectively Crane Two Road and the Zeehan Line. In order to reach the place where the body was found, from Strahan, the normal or at least a convenient route is to go *via* the Zeehan Line. The appellant, a young man twenty

years old, was tried and convicted of the murder of the deceased. He appeals against conviction on grounds related to alleged defects in the summing-up by the learned trial judge. At the trial, the body of the deceased was identified by dental evidence and by reference to certain clothing, and there was no dispute about its identity.

The evidence against the appellant at the trial was wholly circumstantial in so far as the act of killing the deceased and the necessary intent for murder are concerned. There was medical evidence relating to the injuries to the body, and other physical evidence such as spent cartridge cases and the like, found in the vicinity of the body, from which the jury could and probably did conclude that the deceased was killed a few paces away and then his body was dragged to where it was found and a rough attempt was made to hide it there. The number and nature of the injuries to the body were such as practically to preclude any question of death by accidental shooting or suicide. But there was no direct evidence or physical evidence which placed the accused at any relevant time at the place where the body was found, nor any direct evidence that he fired any of the fatal or indeed any gun shots at the deceased. There was also no confessional evidence.

There was however no dispute that the appellant had been in company with the deceased in Strahan during most of the afternoon of Saturday, 16th December, 1978, and evidence that no one had seen the deceased after that day until his body was found on 30th December, 1978.

Four witnesses at the trial identified the appellant as having been in the company of the deceased during the afternoon of 16th December. They all spoke of the appellant and the deceased being together at a parked and apparently broken down Holden car of somewhat distinctive appearance and colouring at a particular point in the main street at Strahan. Two of these witnesses, a garage proprietor and a taxi driver who worked at that garage, said that the appellant and the accused came to the garage during the afternoon at a time unspecified and the appellant then obtained a coil for use in the Holden car.

However, by the time the evidence ended all of that was common ground because the appellant, who did not give evidence on oath, tendered a written unsworn statement in which he said that on 16th December he had gone to Strahan in the Holden car, which he had "taken", and had there met the deceased, Peter Horsley. He said that "the boy called Peter" and he had gone to a garage and had got a coil, telling the garage man that they had no money and would pay next day.

The case against the appellant centred upon the following evidence. Two sisters named Louise and Carol White were called. Their ages were not given in evidence, but they are both apparently young girls. Louise was a bank officer working in Devonport at the time, and Carol was a high school student. They both knew the deceased Peter Horsley well as he lived at their

hometown, Strahan. The house where the White girls lived was in Andrew Street, just on the outskirts of the town. Andrew Street a short distance past the girls' house as you come out from Strahan intersects with the Zeehan Line, which then proceeds in the direction of the area where the body of the deceased was found.

Louise White gave evidence that during the afternoon of 16th December she had occasion to drive her car in Strahan several times, and in the course of doing so passed and re-passed a point in the main street where the Holden car was parked, apparently broken down. She described, it would appear, seven different occasions of being near that car on that afternoon. On the first five of those occasions, she said, the deceased Peter Horsley and the appellant were standing at or in its vicinity. On the last two occasions, which were when she took her sister to a baby-sitting appointment and then returned at about 6.00 p.m., the car was still there, but she did not say that the deceased and the appellant were there then. In her evidence she described the car and the appellant, whom she had not seen before. Her descriptions appear to have been reasonably accurate of both the car and the appellant.

Louise White's evidence continued that at about 7.15 p.m. or 7.20 p.m. on the evening of 16th December she and her sister Carol were sitting watching television in their lounge-room in the house at Andrew Street, about 3 ft. from the window, which in turn was about 16 ft. from the street. She heard a car coming at that time, and looked up and saw go past, away from the direction of Strahan, the same Holden car which she had seen earlier that afternoon. It approached and passed from her left to right. She said there were two persons in it, the deceased Peter Horsley and the driver; the latter being the same man who had been standing near the car during the afternoon in the company of the deceased. The car continued on in the direction of the Zeehan Line. It was still full daylight at the time and the light was clear. They were still watching television when the same Holden car passed their window again, this time going in the opposite direction, towards Strahan. The time of its second passing was between 7.30 p.m. and 7.50 p.m., and in the car at that time there was only one person — the same man who had earlier driven the car in the opposite direction. The deceased Peter Horsley was not in the car on the return journey.

The younger girl, Carol White, gave evidence that she was picked up from work (having been working apparently outside school hours on a tourist vessel named 'The Denison Star') by her sister Louise in the late afternoon. They went for a drive around the town, and in the course of it went past the point earlier described by Louise. She there saw a Holden car which she described. She recognized Peter Horsley standing near it, and another person leaning over the side of the car. She said she could not describe this person, but he would be about eighteen or twenty years old. At about 5.00 p.m. she and Louise went out

again to take her other sister to the babysitting appointment earlier described by Louise. However, Carol put the time of that journey at about 5.00 p.m. whereas Louise had said 5.50 to 6.00 p.m. She said that on the second occasion the Holden car was still there, and Peter Horsley was also, and "there was another person there, but I don't know who".

Carol White's evidence continued that at about 7.15 or 7.20 p.m. she was sitting in the lounge-room with Louise when the same Holden car which she had seen earlier went past the house, that Peter Horsley was then a passenger in it, and it was being driven in the direction of the Zeehan-Strahan road by a person whom she could not describe. She said the same car returned past the house about twenty-five minutes later, and there was then only one person in it. That person was not Peter Horsley, but she could not describe him, and could not say whether it was the same person who had earlier driven the car in the opposite direction.

The White girls were, on their evidence if it was to be accepted, the last Crown witnesses to see Peter Horsley alive, fourteen days before his body was found. Louise White's evidence was of particular importance because she purported to identify the Holden car, and also to identify its driver both on the outward and the inward journeys past the house as a person who, if her identification was correct, could only have been the appellant. One of the two principal grounds of appeal centred upon the argument that the learned trial judge in his summing-up gave the jury no warning or appropriate guidance as to the danger inherent in Louise White's evidence as to the identity of the driver of the Holden car on the two occasions when it passed the house.

The remainder of the evidence which comprised the prosecution case against the appellant lay in the following. First, there was evidence which the jury must be taken to have accepted that at about 8.15 p.m. on the evening of 16th December, and thus about half-an-hour or so after the White girls said they saw the Holden car return past the house from the direction of the Zeehan Line, the applicant left a firearm, namely a single barrel shotgun, dismantled in three pieces, with a garage proprietor at Queenstown as a pledge or security in exchange for \$6.95 cents' worth of petrol, promising to return in a fortnight to collect the gun and pay for the petrol. The appellant was alone at the time and driving a Holden car of the same description as seen earlier in the day at Strahan. The evidence was that this gun remained in the possession of the garage proprietor and another person until it was taken possession of by the police. Further, evidence was given by a police ballistics expert, based upon examination of this weapon and of two empty cartridge cases found in the vicinity of the body of the deceased, and of other material, from which the jury could have concluded that this gun was the weapon used to kill him.

Lastly, evidence was led by the Crown of numerous lies

having been told by the appellant to the garage proprietor at Queenstown and his son at the time the gun was left with them, and to various police officers when these officers questioned the appellant on and after 20th December. Whether these lies (for it was common ground at the trial that they were so) were told from a consciousness of guilt over the death of the deceased or from the fact that the Holden car driven by the appellant at the relevant times on 16th December had been stolen by him at Hobart was an issue which the jury were invited by the learned trial judge to consider.

The appellant did not give or adduce sworn evidence, but he did tender a written unsworn statement. This statement is couched in short and unusually truncated sentences, due to the fact that the appellant has a substantial hearing and speech defect. His handicapped condition, however, has no direct relevance to the issues argued on this appeal.

The appellant's unsworn statement contained in substance the following narration. It stated that the appellant on 16th December had gone to Strahan in a brown and white Holden which he had taken. ("I take car and go to Strahan by myself".) In Strahan he had met a boy named Peter Horsley, whom he had met once before but only knew a little. He described the boy's clothing, and then said that the car would not start and the boy called Peter and he had gone to a garage to get a coil. They had told the garage man that they had no money and would pay next day. When the car was fixed they drove the car up and down past the garage a few times. Then the statement continued:

"Some time late in afternoon I don't know what time Peter say he want to see some boys with me. We drive off to see boys. We drive to bridge and boys tell us to stop. One boy asked me to roll cigarette for him. There was Peter and other three boys from other car at river. I rolled cigarette and green stuff was in the cigarette. I lit cigarette with lighter. I smoke. It tastes funny and think it marihuana. After 5 or 10 minutes I cannot see out of my eyes. I feel like I drunk too much beer and I go to sleep in car in back. This same car I took from Hobart. Next thing I know I woke up at near Queenstown airport. I was only one in car. My throat feel very sore and I go near water and have drink, feel better, go in car, start car and go to Queenstown. Go to garage. I go out and look at money — \$5.00 — money gone. I have no money. I tell boy I have no money. Ask boy, 'You want gun?'. I don't know what boy say. He get mother. Mother comes. Mother look and she say she don't know and she go to get father. Father came and I tell 'You want that gun, I have no money.' I say 'You take gun and look after I come back two more weeks'. I gave the man gun, man tell boy, give Rickie for petrol. Man take my gun into house and look after my gun and then boy give me for petrol \$6.95. Me drive to Hobart. I leave car near the school."

Thus the statement described, with reasonable accuracy, the nature of the meeting at the Queenstown garage where the appellant exchanged the gun for petrol, and the return to Hobart and leaving the stolen car near a school, where it was in fact found by a police officer on 17th December, with a fingerprint on it which evidence showed was that of the appellant.

The evidence in the case being of this nature, the learned trial judge's method of summing-up to the jury was as follows. First, he gave the jury the usual directions as to issues of fact. His Honour told the jury then and repeated several times in strong terms throughout the summing-up that they were free to accept or reject any comments on questions of fact made by him. Then he directed the jury in orthodox terms as to onus of proof and the elements in law of the crime of murder. He gave the jury no direction in respect of manslaughter. None of his Honour's directions to the jury up to this point was challenged on appeal.

The learned trial judge then passed to deal at some length with the unsworn statement. He began by giving the jury a direction derived from *Peacock v. The King* (1911) 13 C.L.R. 619, at pp. 640, 641. That is to say, he told the jury that they should take the accused's statement as *prima facie* a possible version of the facts, giving it such weight as it appeared to be entitled to in comparison with facts clearly established by the evidence. He then reminded the jury of and commented upon the contents of the statement. His Honour began by saying:

"Well, obviously, the evidence of the White girls is the all important evidence. I won't say the all important, but is one of the pieces of all important evidence in this case. If you find from those girls that the facts are clearly established to you that a car went past with the deceased and the accused in it, came back 20-25 minutes later with only a driver, and no sign of the deceased, well if you found that clearly established, when you consider the unsworn statement, what weight would you give it in comparison with the facts clearly established by the evidence? It is for you to say, of course, whether the evidence of the girl — any evidence at all — is clearly established by the evidence."

He then proceeded to read out the unsworn statement, section by section, making comments as he went. Much of the comment was directed to the point that many parts of the unsworn statement dealing with what happened in Strahan were confirmed by evidence called by the Crown. In this part of his direction, his Honour, dealing with that part of the statement where the appellant mentions speaking to a boy in Sandy Bay, came to the only part in the summing-up where he referred specifically to the nature of the defence. The passage is as follows:

"Well it seems to me that he is telling you of a conversation clearly before he told the policeman from

Queenstown, that he should tell the police that he, the accused, has met Peter in New Norfolk."

"I frightened of boy".

"When I woke up in car in Queenstown near the airport gun in three parts. I had three bullets in back of car. 3 bullet gone."

"I told Policeman from Queenstown later, I leave that boy Norfolk. That not right other boy tell me on time before I see Policeman, in Queenstown, to say I drop boy off in Norfolk."

"I see boy Sandy Bay, Policeman tell my Mother they look for Peter Horsley. Mother tell me. I see boy. I say boy. 'You know where Peter, Police looking for Peter'."

"Boy tell me tell Policeman that I leave Peter Norfolk. I frightened of boy."

"I not kill boy."

"I not kill boy."

"No doubt meaning either the one in Queenstown, or more probably the one in Sandy Bay, and then his defence is 'I not kill boy, I not kill boy.'"

His Honour next warned the jury not to use the fact admitted by the defence that the appellant had stolen the Holden car as evidence tending to prove his guilt on the charge of murder. Then he said he would refer to arguments which counsel for the Crown had made to the jury. He reminded the jury that the appellant had been in Strahan on 16th December in a car of distinctive appearance, in company with the deceased boy Peter Horsley, and that the two were apparently not accompanied by other persons; and that these facts were virtually common ground.

His Honour then said:

"Now, the next point put to you by Mr. Cox" (for the Crown) "was that the two youths, the accused and the deceased, were seen driving this car towards the Strahan-Zeehan Line, the road off which, Crane Two Road, is a side road, and he reminded you of the evidence of the two girls. Now, I propose, because particularly of the importance of it, to read much of this evidence to you. Now, as I read, you will bear in mind Mr. Elliott's criticisms were that the girls are certain of certain matters, and then later resiled from it. Mr. Cox put to you, well, that seems to be undoubtedly so, but did they make any mistake in the evidence of what they saw of the car and the people in it going towards the line, and the car coming back? Now, of course, this is very important evidence indeed. It is important because if the evidence of Louise White is correct that the driver going out was the boy she had seen in Strahan, although she didn't claim it was the accused here, and if Peter was in the car, who else could it have been — on the accused's statement, but this man? Now, that car had to get — if the bridge is on this road, we don't

know whether it was or not, but if the bridge was on this road, and that's where the accused had found the three other boys, if he woke up at the airport near Queenstown, who was driving back? Because Louise says it was the same boy. So this is all-important evidence to you. So I will read much of her evidence to you."

Thus in that passage the learned trial judge emphasized again the importance of Louise White's evidence, and did so by linking it with the unsworn statement and saying in effect (as I read the passage) that the unsworn statement tended to confirm Louise's evidence that the driver of the car on the outward journey was the appellant; and by saying further that if this was so, since the car had to be driven back by someone, and the unsworn statement said that the appellant had found himself in the car near the Queenstown airport, who would have been driving the car back but the appellant, as Louise said it was? Learned counsel for the appellant complained about this passage, and about further material in that part of the summing-up which went on to deal in detail with the evidence of the White girls, which tended according to his argument to build up and support Louise White's identification evidence in the eyes of the jury.

The further passages in this part of the summing-up of which counsel for the appellant complained were substantially the following:

1. "So, she says this was about a quarter past or twenty past seven. So, the question is, can she be mistaken about Peter Horsley? She had known him apparently a long time, although she had been working in Devonport. Well, if she was right in recognising Peter Horsley, go back to the unsworn statement. The only movement round Strahan is at about the eighth line, having got the coil 'When car fixed drove car up and down past garage a few times.' And he tells us of only one journey which might have taken him out of the town. 'Drive car up and down past garage a few times. Sometime late in afternoon, I don't know what time Peter say he want to see some boys with me. We drive off to see boys.' And then of course, he doesn't see Peter again. He doesn't know the streets — that's the inference, and probably doesn't, but if Peter was in the car, must this not have been the journey when he was with the accused — it is Peter and another. The accused doesn't tell us that Peter left him at some time, which would give time for Peter to go somewhere in another car, but that may have been so, but he hasn't told us. Then came the question 'Had you ever seen the driver before?' 'Only that afternoon, it was the same man that was standing near the car, the time would be quarter past or twenty past seven' — it was still very daylight, of course, 16th December, almost at the longest day, and we had daylight saving, you'd all know. The car continued beyond

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their house. She told you that the street continues on to a road known as the Zeehan Line, the old railway track, and she looked at the photograph and she saw that there was a swing to the right which goes into another street. So presumably she is saying that she didn't know whether the car went straight ahead on to the line, it could have turned the corner, she can't tell you. But if the accused was going somewhere with another man, could he have been going anywhere with any boy, other than the accused [sic]?"

2. "Well, between 7.30 and ten to eight, or I suppose five to eight, did something happen?"

"The car that had previously gone up the road returned down past our place, down Andrew Street. We were still there."

"Did you look at it as it went past?"

"Yes, there was only one person in the car and that was the driver."

"Was Peter Horsley in the car?"

"She said, 'No, he wasn't in it.'"

"Well, strictly of course, her answer should have been 'I couldn't see Peter in it'. He could have been crouched down out of view, of course, but she did not see him sitting up, anyway — he was not to be seen."

"Who was the driver?"

"This man I had previously seen round the street with the car earlier, and he had been driving the car past previously that night."

"She was not asked to identify the accused, so you are entitled to infer that she couldn't do it, but that is a matter for you. So her evidence is that she had seen a man in Strahan with Peter several times in the afternoon, at the car there — she says the car is the car she saw, from which you could at least understand that it seemed to be the same, colour, etc. She saw Peter Horsley in it, and she saw another man. She says it's the man she had seen in it in town earlier. Well, you've got the accused's statement — could it have been anyone else but the accused? At all events, she knows Peter Horsley."

3. "It was put to her (Louise White) that she could not see the car coming back the second time, until after it passed the window. She said, 'Not until it's at the window itself'. This of course, is relevant to what view she would have seen of people in the car, whether she could have formed an opinion that it was the same boy she had seen, and as to whether Peter was not in the car. She just turned her head, she didn't get up. 'How long would you have had the car in your vision?' 'On its way back towards Strahan. Only a few seconds. You can only see it just as it goes past the window'. Then it was put to her that she was mistaken when she said that she picked her sisters up from the wharf on this day."

[His Honour went on to set out passages of cross-examination in which doubt had been admitted by the witness as to whether she had gone to the wharf to pick her sisters up, as she had said in evidence earlier, and the like. He continued:]

"It was put to you that you shouldn't accept with certainty her claims of what she saw going past the window. She said 'I picked them up at the top of the hill. I know that now, and we did go back down the street, but I had forgotten that previously. But I definitely did pick them up because we went right round to Regatta Point and back.' Well, I can suggest to you that a mistake of this kind is more understandable, because it was her practice to go down to the wharf and pick up her sisters, and apparently rare for them to have left the wharf, and therefore her memory played a trick this day. And the sort of thing that she is asked to remember about the cars, of course, and seeing Peter Horsley in the car, is of course, not something she would do every day, or see every day. She's been away in Devonport anyway."

[And then followed further passages of cross-examination suggesting faulty memory on the part of this witness.]

"Well, these are the sorts of tricks of memory that can happen to any of us. But of course it goes to the credibility or otherwise of what she claims to have seen through the window. Well, it's put to you for the defence that all that evidence you could not accept — that she saw the car go past, that it was the car, she says, but at least I say it is a similar car to the one she had seen in the street — that she'd seen Peter in it, and that she'd seen also driving, the boy she had seen with Peter previously in the street."

Similar criticisms were made of the manner in which the summing-up dealt with the evidence of Carol White, but her evidence was less important than Louise's, and I do not find it necessary to examine that criticism in detail here.

The other part of the summing-up to which I refer is that concerning the ballistics evidence, which provided one of the chief links in the Crown case. At the trial it was subject to attack by defence counsel on the basis that the police expert, who gave evidence that two empty cartridge cases found a short distance away from the body of the deceased were fired from the gun which had been in the possession of the appellant at about 8.15 p.m. on the evening of 16th December at Queenstown, did not produce micro-photographs or charts to illustrate or support his evidence, and did not even produce the two empty cartridge cases. Counsel argued that the expert had merely given his own opinion without producing any tangible evidence to support it when he could and should have done so. His Honour in summing-up referred to this criticism in the following terms:

"... criticism was made of Mr. Hislop's (the expert's evidence which is of such importance. It is put to you that you should not be satisfied with his evidence, upon which he gives the opinion that the cartridges found on the road which are shown in the photographs were discharged by this particular gun. This, of course, is very important evidence. Well if it wasn't this gun, it means, of course, that there was another gun somewhere there and one which was used." [And then his Honour deals with the evidence in detail.] "... now what is put to you, that you've been given no opportunity of testing the validity of his identification. You've just got his say so and consider what he said when he was asked about those various points of identification, which you've not been able to test for yourselves. And I asked some questions. He told us He said 'the irregularities of them', but he doesn't tell you what he saw by way of irregularities and this is the submission made to you by Mr. Elliott, that you have not been given the facts, the real facts, which enable you to test as well as you can, the accuracy of his conclusion . . . we still don't know what these irregularities were. What did he see? Well, you didn't have that (i.e., photographs and the like) so you will bear that in mind when you are considering the matter. This evidence, of course, is very important, but of course if you accept Louise White's evidence, knowing that — if you are satisfied that was the accused's car in the sense that that was the one he had brought from Hobart and if you are satisfied that he had a gun with him, and the deceased died as a result of gunshot wounds up this road, although we don't know which day the deceased actually died from any expert evidence, you may say: 'Well in that case, even if we don't accept the opinion of Mr. Hislop (the ballistic expert) because we couldn't check it', you may still come to the conclusion that it was the accused's gun. You will take all the evidence into account. All these matters are for you."

To say that to the jury was in substance I think to put to them that even if they were not satisfied about the identity of the killing weapon with that which the appellant had in his possession shortly after the deceased was last seen alive, if they accepted Louise White's evidence of identification they might still be satisfied that the accused had shot the deceased. I say that because there can scarcely be any logical connection between the identification evidence and the evidence concerning the identity of the killing weapon. This matter has point in relation to the criticism that no warning was given the jury about approaching the girls' identification evidence with caution.

The substance of the grounds of appeal was as follows:

(1) It was unfair and unjustified comment on the part of the learned trial judge to link certain passages in the appellant's unsworn statement with the identification evidence given by the

witness Louise White, and thereby to tend to confirm the latter evidence in the eyes of the jury.

(2) The learned trial judge erred in that he failed to warn or adequately warn the jury in relation to the exercise of caution in accepting the evidence of identification of the witnesses Louise and Carol White.

(3) The learned trial judge erred in failing to direct the jury that it was their duty to acquit the appellant if there was any reasonable hypothesis open to the jury which was consistent with his innocence.

Ground 1 is subsidiary to and closely linked with ground 2, but I think there is some substance in it standing alone. I do not think it was unfair to suggest to the jury, as his Honour did, that the one journey out of Strahan with the deceased in the car which was referred to in the unsworn statement was probably the same outward journey past the house in Andrew Street spoken of by Louise White. The unsworn statement was evidence in the case as any other unsworn evidence (such as that of a child) would be: *Masneq v. The Queen* [1962] Tas. S.R. 254, at p. 258, and I see no reason why assertions contained in it might not be treated by the jury as admissions of fact when linked with other evidence in the case. However, I do not think it was justifiable to treat anything in the unsworn statement, or any inferences which might be drawn from it, as tending to confirm the identification by Louise White of the driver of the car on the return journey as the same person seen by her earlier. In the first place, I doubt whether anything in the statement, or any inference from it, was logically probative of the identification of the driver on the return journey. But more importantly, the identification of the driver on the return journey was the vital evidence of identification given by Louise White. It was vital because the identification on the outward journey was consistent with the version of the facts given in the unsworn statement, and was consistent with innocence on the part of the appellant, if the appellant's version in the unsworn statement were to be considered in respect of whether it was a reasonably possible explanation of events consistent with innocence. The identification of the driver on the return journey, however, was inconsistent with the account given in the unsworn statement, and if it were to be accepted was scarcely reconcilable with innocence. Therefore, if any warning should have been given to the jury about this witness's evidence of identification, it was in respect of this part of her evidence that the warning was most necessary.

Much attention has been given recently in England to the importance of warning a jury to consider identification evidence with caution — see *Reg. v. Turnbull* [1977] Q.B. 224; 63 Cr. App. R. 132; *Reg. v. Keane* (1977) 65 Cr. App. R. 247; and *R. v. Oakwell* [1978] 1 W.L.R. 32; [1978] 1 All E.R. 1223. (And also *Arch. Crim. Pl.*, 39th edn, par. 1350, Suppt. No. 7, where reference is made to

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the report of Lord Devlin's committee on evidence of identification, and a statement made by the Attorney-General in a written answer in the House of Commons in May, 1976). The specific guidelines laid down in *Reg. v. Turnbull* (*supra*) and amplified in the other two cases, do not of course have a literal application in Australia, but nevertheless the warnings are helpful and useful. However, the best guidance for present purposes in the English authorities is contained in *Arthurs v. Attorney-General for Northern Ireland* (1970) 55 Cr. App. R. 161. It was there said by Lord Morris of Borth-y-Gest, with whom the other members of the House agreed, that a "general warning" to the jury of the dangers of evidence of visual identification, given in any kind of stereotype pattern, is not necessary to be given as a rule of law. But his Lordship said (at pp. 168, 169):

"Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ."

His Lordship dealt with various sorts of cases in which identification evidence might be thought to be reliable, and then said:

"There will, however, be some cases where the situation is very different. I refer to cases where a witness has seen someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility. I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases." (The guidance was in fact given in the subsequent cases above-mentioned.) "A summing up that fails to give adequate instruction to the jury or which in the circumstances and in relation to the facts of a particular case fails carefully to alert them to the risks of convicting an innocent person might in any event be held to be defective and to warrant the use by the Court of Criminal Appeal (of its powers)". (*Ibid.*)

In Australia the question of juries being warned about the dangers inherent in identification evidence has been dealt with in a number of cases, which up to 1970 have been usefully reviewed by the Supreme Court of South Australia *in banco* in *Reg. v. Goode* [1970] S.A.S.R. 69. That case was mainly concerned with the question whether a warning should be given where in addition to the identification evidence there is other evidence tending to implicate the accused. The court pointed out that in a

number of Australian cases where there was evidence other than identification evidence tending to support the guilt of the accused, convictions have been quashed where no adequate warning was given by the trial judge as to the dangers of identification evidence. Examples are *Reg. v. Gaunt* [1964] N.S.W.R. 864 and *Reg. v. Gaffney* [1968] V.R. 417.

The court in *Reg. v. Goode* (*supra*), having reviewed the authorities, came to this conclusion (at p. 77):

“ . . . where a vital part of the case for the prosecution depends on the identification of an accused person who displays on sight no extraordinary and peculiar characteristics by witnesses who have never seen him before, the circumstances of the case may make it necessary that an appropriate warning be given about the dangers of such evidence, and that the mere fact that there is incriminating evidence additional to that of the identifying witness or witnesses does not necessarily dispense with the need for such a warning.”

There are a number of cases in the High Court of Australia concerned with this question. *Craig v. The King* (1933) 49 C.L.R. 429 was a case of a conviction for murder in which the principal evidence against the accused was evidence identifying him as the driver of a car on a particular journey, the only other evidence in substance being a statement attributed by one of the witnesses to that driver. Apparently it was only upon appeal to the High Court that the sufficiency of the identification evidence to warrant conviction was questioned, and it does not appear from the report, at p. 450, whether a warning as to the danger of identification evidence was given by the trial judge. Rich and Dixon JJ., considered that a proper direction to the jury had been given and that the evidence as a whole was sufficient to warrant conviction. Evatt and McTiernan JJ., however, in a dissenting judgment, indicated they were in favour of granting special leave to appeal on the ground relating to identification evidence and on another ground. In relation to identification evidence, their Honours, in the course of a long passage which has often been cited subsequently, said this (at pp. 445, 446):

“In criminal cases, where the only real issue is the identity of the accused with the person who was performing some apparently innocent act at a time long before the trial, all the surrounding circumstances have to be carefully considered, for we at once enter what has been described as that branch of proof ‘so notoriously delicate as proof of identity’.”

Their Honours then went on to consider the various considerations involved in the giving of evidence of identification, such as opportunities for observation, whether the observer was a stranger to the person observed, whether the person observed had any special peculiarities, the length of time involved between the observation and the identification, and the like.

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Davies and Cody v. The King (1937) 57 C.L.R. 170 was a case in which the High Court was concerned particularly with consideration of proper methods of identification of persons in police custody — whether it is proper to show the accused alone to a person with no previous knowledge of him other than the observation in question, for the purpose of identification, and the like. The authority is not particularly apt for the purposes of the present case.

Raspor v. The Queen (1958) 99 C.L.R. 346 again is a case relating particularly to its own facts. The court was much concerned with the nature of its own function in granting special leave to appeal. The evidence against the accused depended virtually wholly upon identification, and at one stage the chairman of general sessions conducting the trial had advised the jury to stop the case and acquit the prisoner, but the jury did not accept his advice, and the trial proceeded and the accused was convicted. The identification evidence was unsatisfactory, but the trial judge had given an appropriate caution to the jury concerning the dangers of it. In all the circumstances, the High Court refused leave to appeal.

Reg. v. Donnini [1973] V.R. 67 is a recent Victorian case in which the question of identification evidence is the main subject of consideration. The applicant had been convicted of robbery under arms, relating to a bank robbery carried out by two hooded men. The principal evidence against them was identification evidence, but there was some other evidence implicating them, mainly by way of admission. The identification evidence was on its face of a nature to be approached with caution, but the trial judge gave an appropriate warning as to its danger. The main question on appeal was whether he should have gone further and should have instructed the jury that the identification evidence on its face was insufficient for conviction. By a majority, the Court of Criminal Appeal held that the trial judge was not in error in failing to give such a direction. On appeal to the High Court (*Donnini v. The Queen* (1972) 128 C.L.R. 114) understandably the court did not find it necessary to discuss to any extent the question of a warning as to identification evidence, but Barwick C.J. indicated that he agreed that the identification evidence if accepted by the jury was sufficient to convict the applicant, and that the warning given by the trial judge had been adequate. Walsh J., who dissented on other grounds, said however that in his opinion the identification evidence alone was insufficient to establish the guilt of the applicant.

In my opinion, the rule of practice to be applied in relation to warning a jury about such evidence, for the purposes of the present case, is well expressed in a passage from *Reg. v. Gaffney* (*supra*, at p. 420) cited in *Reg. v. Goode* (*supra*, at p. 76):

“Where identification is a vital issue it depends upon the circumstances of the case whether a jury should be warned about the dangers inherent in acting upon such evidence of

identification. There is no rule of law that such a direction must be given in every case, but the law is plain enough that, if the circumstances of the case call for it, a direction should be given, and if it is not given a court of appeal will set aside a verdict because of the danger in allowing such a verdict to stand."

In this case the identification evidence of Louise White can be described as vital, both in its own right and by virtue of its place in the evidence as a whole. In my opinion, with respect, a warning should have been given to the jury about the dangers inherent in accepting the evidence of this witness, for two reasons particularly. The first is that on the basis of the unsworn statement it was easy for the jury, especially with his Honour's encouragement, to accept the view that this witness was correct in identifying the driver on the outward journey. But it was also easy for Louise White to have assumed, on the basis of the brief glimpse she had of the driver on the return journey, that he was the same person she had seen driving in the opposite direction half-an-hour or so before. The second reason is that if the defence hypothesis (that other persons met the appellant and the deceased out of Strahan, and that one or more of them other than the appellant must have shot the deceased, and one had driven the car back into Strahan and towards Queenstown with the appellant lying down in the car where he could not be seen, in a drugged state or asleep) was to be considered seriously by the jury in respect of whether it was a possible explanation consistent with innocence, then the issue whether the driver of the car on the return journey was in fact the appellant was vital not only from the point of view of identification but also in relation to the question of proof by circumstantial evidence. That is to say, one vital link in a chain of circumstances relied on to establish guilt was to be proved by a kind of evidence inherently dangerous in itself.

In my opinion the absence of a warning concerning the identification evidence was sufficient in itself to cause this court to regard the verdict as unsatisfactory. The learned trial judge, as I think counsel for the appellant correctly argued, gave no warning to the jury to approach that evidence with caution, but on the contrary made comments which sought to strengthen it in the eyes of the jury — by linking it with such parts of the unsworn statement as might arguably be used to support it; by indicating views of his own which tended to negate weaknesses of recollection indicated by those witnesses; and by suggesting that even if the jury did not accept the evidence concerning the identity of the gun, the identification evidence might be enough in the circumstances to prove guilt.

With great respect, I think also that the summing-up did not adequately assist the jury to appreciate that the prosecution case was one of circumstantial evidence, and that it was necessary for them, in order properly to consider whether guilt had been

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established beyond reasonable doubt, to consider whether there was any reasonably possible explanation consistent with innocence which the circumstances might bear; and in particular, to consider in the light of that question the hypothesis advanced by the applicant. The case for the Crown was one of circumstantial evidence alone. There was no direct evidence that the appellant was present when the deceased was shot. On the evidence it should be assumed that the jury was satisfied that the place where he was shot was at or very near to where his body was found. The nearest the evidence came was to put the appellant three to four kilometres away from that place, but driving in company with the deceased in the direction of the vehicle route which would take him there. That evidence (of Louise White, and by way of tending to confirm it, that of her sister Carol), if accepted, had the appellant returning from the direction of that place some half an hour later without the deceased. Hence the importance of Louise White's evidence, upon which the learned trial judge placed such emphasis in his summing-up. Then some half an hour or so later still, the appellant parted with possession of a gun which the evidence suggested strongly was the killing weapon.

Since it was a case solely of circumstantial evidence, conviction of the appellant depended upon the jury being satisfied that the circumstances were capable of bearing no reasonable explanation other than his guilt of the offence. As Sir Owen Dixon said in *Martin v. Osborne* (1936) 55 C.L.R. 367, at p. 375, and repeated in *Plomp v. The Queen* (1963) 110 C.L.R. 234, at p. 243:

"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued. The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant, is rigidly excluded. But the class of acts and occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the

probability or increased probability, judged rationally upon common experience, that they would not be found unless the fact to be proved also existed."

Ground 3 is in substance a complaint that the trial judge failed to give a direction in accordance with what has been referred to as the rule in *Reg. v. Hodge* (1838) 2 Lew. C.C. 227, at p. 228: viz. that the jury should be told that if there is any reasonable hypothesis consistent with the innocence of the prisoner, it is their duty to acquit. Griffith C.J. said in *Peacock v. The King* (1911) 13 C.L.R. 619, at p. 630, that it is the practice of judges in circumstantial evidence cases to give such a direction whether they are bound to do so or not. (And see *Barca v. The Queen* (1975) 133 C.L.R. 82.) But it has been held both in England and Australia by courts of highest authority that there is no rule that this direction must be given in every such case. It was so held by the House of Lords in *McGreevy v. D.P.P.* [1973] 1 W.L.R. 276, and by the High Court of Australia in *Grant v. The Queen* (1975) 11 A.L.R. 503, confirming the decision of a Court of Criminal Appeal of the Supreme Court of Victoria (*Reg. v. Grant* [1975] V.R. 809). In *Grant v. The Queen* Barwick C.J., with whose judgment the other members of the Court (McTiernan, Mason, Jacobs and Murphy JJ.) agreed, said (at p. 504):

"In my opinion, there is no rule of law that a direction such as is suggested in this case must be given in every case in which the prosecution relies upon circumstantial evidence. Further, in my opinion, there is no invariable rule of practice that such a direction should be given.

"It must be remembered that the direction suggested by Baron Alderson in *R. v. Hodge* (*supra*) is an amplification of the direction that the Crown must prove its case beyond all reasonable doubt. Unquestionably, there are cases which depend upon circumstantial evidence in which it would be proper and, indeed, there are cases in which it is necessary, for the trial judge to assist the jury by way of some such direction as is now being sought. Whether or not it is either proper or necessary is a matter which, in the first place, the trial judge must resolve for himself. I use the word 'proper' because I can well understand that in some cases the direction might confuse more than assist the jury, depending on the nature of the case and of the evidence given in support of it.

"Where the circumstances of the case seem to require that some such direction be given, the summing up regarded as a whole may prove to be, and generally may be likely to be, inadequate. On the other hand, having regard to the circumstances of the case and the nature of the summing up, the failure to give the special direction may not in a particular case result in an inadequacy of the summing up as a whole. It may none the less be concluded from the terms of the summing up that the jury were fully instructed.

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"The trial judge, therefore, in the case where circumstantial evidence is relied upon by the prosecution, must consider whether or not the case calls for the assistance of the jury by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence.

"A Court of Criminal Appeal when the adequacy of a summing up is challenged, for want of a special direction, will itself consider whether the case is one in which it was necessary to give a further direction. If it concludes that the circumstances of the case call for the assistance of the jury by the giving of the special direction, the court will then consider whether the summing up as a whole was inadequate in its instruction of the jury. But it will be the inadequacy of the summing up as a whole to instruct the jury as to their task which warrants the Court of Criminal Appeal in setting aside the conviction and ordering a new trial.

"In the present case, the direction was not sought by counsel at the trial, nor was it thought necessary by the judge: that is to say, those who were in the atmosphere of the trial did not regard the circumstances as requiring the giving of the special direction."

It is proper to say that in the present case counsel for the appellant did not ask the learned trial judge to give such a direction.

That there should be no invariable practice to give such a direction in this type of case undoubtedly flows from the enormous variation from one case to another in the nature and cogency of the circumstantial evidence; and particularly in how far removed it may be from direct proof of the fact to be proved, and to the extent to which, if at all, the circumstantial evidence is supported by other evidence. For example, in *Peacock v. The Queen* (*supra*), the body of the deceased had never been found, and there was thus no direct proof of the fact of death. In *Plomp v. The Queen* (*supra*) the general circumstances of the death were consistent with accident, and there was no direct proof that the death was other than accidental. By contrast, in the present case both those facts were plainly proved, and the appellant was the last person seen in the company of the deceased, albeit 14 days before the body was found. The general nature of the circumstantial evidence in this case was much more like the sort of evidence led in *McGreevy v. D.P.P.* (*supra*), and in *Barca v. The Queen* (*supra*).

It is necessary, as Barwick C.J. said in *Grant v. The Queen*, (*supra*, at p. 504) for this court to make a judgment as to whether the jury should have been assisted by being given "some such direction" as this special direction in a case depending upon circumstantial evidence, in amplification of the general direction as to the onus of proof, which here was satisfactorily given. It is to be noted that the appellant's defence went well beyond a mere assertion of innocence, which his Honour told the jury was the

defence. In fact the appellant placed before the jury in the unsworn statement an explanation of the circumstances proved by the prosecution which if accepted, or thought to be reasonably possible, was consistent with his innocence. However unlikely the trial judge may have thought that explanation, it was a requirement of the summing-up, in my view, that in some reasonably appropriate way it should have been brought home to the jury that this was the nature of the defence; and that it was necessary for them to give serious consideration to the defence explanation, and to be able to eliminate it, and any other reasonable explanation consistent with innocence which the proved circumstances might bear, before convicting the appellant. But in fact there was no overall appraisal or assessment of the evidence in any such light by the trial judge, and I think, with respect, that on this ground also the verdict should be quashed and a new trial ordered. These are not matters, in my opinion, in respect of which the proviso in the *Criminal Code*, s. 402(2), could properly be applied.

EVERETT J.: The Chief Justice and Neasey J. have afforded me the opportunity of reading their reasons for judgment in draft form.

I find it unnecessary to make any separate review of the essential facts and am content to adopt the summary of those facts as set out in the reasons for judgment of Neasey J. I also adopt his Honour's exposition of the substance of the grounds of appeal as they were finally argued, as set out on pp. 159, 160, *supra*.

I agree that the appeal should be allowed, the conviction quashed and that there should be an order for a new trial.

However, I do not find it necessary to consider the first two of the three substantial grounds of appeal to which I have referred, but prefer to rest my own decision on the third ground only—that is, that the circumstances of the case were such that a fair trial necessitated a direction to the jury that they were bound to acquit the accused if, on a consideration of the totality of the evidence, they were of the opinion that it revealed a reasonable hypothesis inconsistent with the guilt of the accused (see *Reg. v. Hodge* (1838) 2 Lew. C.C. 227, at p.228; *Peacock v. The King* (1911) 13 C.L.R. 619 and subsequent cases to which Neasey J. has referred). Such direction was not given, and in my respectful view the omission to do so caused a miscarriage of justice because, however strong the case presented against the accused might be thought to have been, nevertheless he was entitled to have the rule in *Reg. v. Hodge* (*supra*) explained with care to the jury.

The words of Alderson B. in *Reg v. Hodge* (*supra*) have long stood the test of time and it is convenient to quote them verbatim as they appear in the official report:

"Alderson, B., told the jury, that the case was made up of circumstances entirely; and that, before they could find the prisoner guilty, they must be satisfied, 'not only that those

circumstances were consistent with *his* having committed the act, but they must also be satisfied *that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*

"He then pointed out to them the proneness of the human mind to look for — and often slightly to distort the facts in order to establish such a proposition — forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt."

In my opinion there is no advantage in discussing this clear statement of the law in the context of phrases such as "the practice of judges" or the existence or otherwise of any "rule of law". The words used by Alderson B. are starkly simple and clear.

The essential question initially is one of law — that is, was *the case of murder against the accused* "made up of circumstances entirely"? The answer is, in my opinion, clearly, "yes". It should be appreciated that a large part of the evidence presented by the prosecution related to matters which occurred before the time at which the jury was entitled to find, with the assistance of the accused's unsworn written statement, that the accused and the deceased boy left together the garage at Strahan at which they had been seen in company for a considerable part of the afternoon of the 16th December, 1978, and also to the events which occurred when, as a matter of common ground, the accused obtained petrol from a garage at Queenstown about 8.15 p.m. on the same day.

Trite though it may be, there is a valuable discussion of the essential characteristics of circumstantial evidence in *Wills on Circumstantial Evidence*, 5th edn. (1902), at pp. 19 *et seq.*

A succinct statement of the *rationale* of the rule in *Reg. v. Hodge* (*supra*) is expressed by the author of that edition at p. 42 as follows:

"Where the evidence is direct, and the testimony credible, belief is the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, — frequently of a delicate and perplexing character, — liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, which has been profoundly compared to the distorting power of an uneven mirror, imparting its own nature upon the true nature of things."

Even on the basis of the acceptance of the evidence of the Misses White, the indictment against the accused by which he was charged with culpable homicide amounting to murder, could only on the evidence adduced by the Crown and a legally proper consideration of the unsworn statement of the accused, be said to

rest on circumstantial evidence. It involved the following elements at least:

- (a) The commission by the *accused* of an act amounting to culpable homicide within the meaning of the *Criminal Code*, s. 156;
- (b) The existence of the specific intent under the *Criminal Code*, s. 157, whereby culpable homicide is the crime of murder.

Because of the absence of any evidence in any way relating to provocation, self-defence or accident I have omitted any reference to these provisions in the *Criminal Code* in setting out the essential elements which the jury had to be satisfied beyond reasonable doubt had been established against the accused.

Neasey J. has quoted extensively from the judgment of the Chief Justice of the High Court of Australia in *Grant v. The Queen* (1975) 11 A.L.R. 503, and I need not repeat the quotation. But it is important to note that although the Chief Justice, with whom all of the four other judges who constituted the Court agreed, emphasised that there is "no rule of law" and "no invariable rule of practice" that a direction in the terms of *Reg. v. Hodge* (*supra*) must be given in every case in which the prosecution relies on circumstantial evidence, nevertheless the judgment can only be understood, in my opinion, as indicating that the question of whether or not the direction should be given is one to which the trial judge should direct his mind. Indeed this is made plain by the observation of Barwick C.J., at p. 504, that "whether or not it" (i.e. the giving of the special direction) "is either proper or necessary is a matter which, in the first place, the trial judge must resolve for himself."

It appears from the appeal books that *Grant v. The Queen* (*supra*) was not cited to the trial judge either before his summing up by way of submission or subsequently in response to his direct invitation.

Although the High Court in *Grant v. The Queen* (*supra*) took the view that, despite the fact that in that case no special direction was given as to the nature of the evidence, nevertheless the summing up was adequate, the facts obviously were very different from those in the case before us. As Barwick C.J. said (at p. 505):

"The case was, in my opinion, one in which it was not necessary to give a special direction. The case was in truth a very simple one. The jury were presented by the accused with an issue which turned entirely upon his own credit. He gave evidence, and quite evidently from the verdict they returned the jury did not believe him."

In the case under appeal virtually the whole substance of the evidentiary burden which the Crown sought to discharge was circumstantial in character and in my view required that a special direction be given. I consider that two special reasons made such a requirement particularly essential. First, the accused had admitted stealing the vehicle which was involved in his

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movements on the day on which the jury was entitled to conclude the deceased boy was killed; secondly, counsel for the accused at the trial conceded that the accused had on a number of occasions told lies to the police. Each of these facts may have had a prejudicial effect on some members of the jury in their general judgment of the appellant and have tended to obscure the true nature of the burden of proof which rested on the prosecution. The clarification of the character of that burden by the giving of the special direction therefore assumed real significance.

From the time when Alderson B. propounded the rule in *Reg. v. Hodge (supra)* in language which it has generally been considered stated the common law with what has been termed "more complete exactness" than some of the forms of expression of the principle which preceded it, there has never been any suggestion that there is any burden on the accused to point to a hypothesis which is reasonable and is inconsistent with his guilt. The accused may, of course, as a positive part of his defence, advance an argument that the evidentiary circumstances bear a reasonable explanation not consistent with his inculpation, to adapt the words of Dixon C.J. in *Plomp v. The Queen* (1963) 110 C.L.R. 234, at p. 243, as the applicant did in this case in the form of an unsworn written statement; or counsel for the accused may, in his final address to the jury, point to and rely upon one or more allegedly reasonable explanations inconsistent with the guilt of the accused. Indeed, in argument before us counsel for the appellant advanced what I understood to be at least one such explanation which had not been previously suggested. Since there is to be a new trial I do not canvass that explanation.

But the essence of the common law rule is that, as a complementary aspect of the general burden of proof which rests on the prosecution, it is for the jury itself, whether or not any specific explanation is advanced by the defence as worthy of consideration as a reasonable explanation inconsistent with the guilt of the accused, to examine the totality of the evidence from this viewpoint and only to express itself as satisfied beyond reasonable doubt as to the guilt of the accused if it cannot perceive such an explanation.

There will often be cases in which it would not be safe for the trial judge to omit to assist the jury in such a task "by the giving of a direction specifically directed to the application of the onus of proof to circumstantial evidence" (per Barwick C.J. in *Grant v. The Queen (supra)*, at p. 504).

In my opinion, this was such a case and the omission of the specific direction amounted to a miscarriage of justice, not capable of being rectified by the application of the *Criminal Code*, s. 402(2).

*Appeal allowed. Conviction quashed.
New trial.*

Attorneys for the appellant: *Jennings, Elliott & Stanwix.*

F.D.C.S.