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Judgment 16 1964

Appeal 9 OF 1964

No. 9 OF 1964

In The Privy Council

ON APPEAL

FROM THE COURT OF CRIMINAL APPEAL
NEW SOUTH WALES

BETWEEN

FRANK PARKER ---- ---- ---- ---- ---- ---- ---- ---- *Appellant*

AND

THE QUEEN ---- ---- ---- ---- ---- ---- ---- ---- *Respondent*

RECORD OF PROCEEDINGS

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No. 9 OF 1964

In The Privy Council

ON APPEAL from the Court of Criminal Appeal New South Wales

BETWEEN

FRANK PARKER ..... *Appellant*

AND

THE QUEEN ..... *Respondent*

RECORD OF PROCEEDINGS

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The Rt. Hon. Sir Douglas Ian Menzies	
The Rt. Hon. Sir Victor Windeyer	

NEW SOUTH WALES

In the Supreme Court of New South Wales. Criminal Jurisdiction.

R. v. Parker.

No. 1.

Indictment. 5th April, 1961.

WILLIAM JAMES KNIGHT, Esquire, Barrister-at-Law, being the Officer duly appointed to prosecute for Her Majesty in this behalf, by virtue of the Act in such case made being present in the Supreme Court at Narrandera on the fifth day of April, in the year one thousand nine hundred and sixty-one, charges that FRANK PARKER on the sixteenth day of October, in the year one thousand nine hundred and sixty, at near Jerilderie, in the State of New South Wales, did feloniously and maliciously murder Daniel Christopher Bingham, known as Daniel Kelly.

W. J. KNIGHT.

IN THE CRIMINAL COURT

Coram : Hardie, *J.*, and a Jury of twelve

NARRANDERA: Wednesday, 5th April, 1961

In the Supreme Court of New South Wales. Criminal Jurisdiction.

R. v. Parker.

No. 2.

Opening of Trial. 5th April, 1961.

REGINA v. FRANK PARKER

CHARGE: For that he on the 16th October, 1960, near Jerilderie, in the State of New South Wales, did feloniously and maliciously murder Daniel Christopher Bingham, known as Daniel Kelly.

PLEA: Not Guilty.

MR. KNIGHT, Q.C., appeared as Crown Prosecutor.

MR. COOK appeared for the Accused.

(At 11.24 a.m. the Crown Prosecutor opened to the Jury.)

(Short adjournment.)

Prosecution Evidence.

No. 3.

Dr. R. R. Pilkington.

5th April, 1961.

Examination.

Reginald Ralph Pilkington

SWORN, EXAMINED AS UNDER:

CROWN PROSECUTOR : Q. What is your full name? A. Reginald Ralph Pilkington.

Q. You are a legally qualified medical practitioner? A. Yes.

Q. Up until some time this year you were the Government Medical Officer for the district of Jerilderie? A. Yes, that is correct.

Q. And you were practising there? A. Yes.

Q. I think you are in Melbourne now? A. That is correct.

Q. On Sunday, 16th October, at about 4 o'clock in the afternoon, did Constable Cochrane, of the Jerilderie Police, tell you something and following on that did you drive out on the Goolgumbla Road? A. Yes, I was driven on that road by Mr. McKenzie.

Q. Did you come to a place where there was a body of a man lying on the roadway? A. Yes.

Q. You made an examination of the man then and pronounced life extinct? A. That is correct.

Q. Could you tell us what you saw out there as far as the man's body was concerned? A. Before reaching the scene I had met two of the Jerilderie Police. I saw Constable Cochrane and Sergeant Beauchamp and we proceeded along and the first thing we saw was a sedan off the road. A

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little further there was a bicycle and the body of a man who was lying on his right side. He was lying on the western side of the roadway across a table drain. The grass around his body had been flattened, there was a good deal of blood lying about and he had numerous wounds of the face, throat and chest. Both of his legs were broken below the knee and he was dressed in blue jeans and shirt. The wounds of the face and chest were on the exposed part of the body.

Q. He was only wearing a singlet at that time? A. Yes.

Q. At that time did you find he was then dead? A. Yes.

Q. Were you able to put it down to about how long before he had died? A. Well, the body was still warm and no rigor mortis had set in. The blood had not dried and I would think it would be from 30 minutes to an hour.

HIS HONOR: Did the doctor tell us what time it was when he arrived there?

WITNESS: It was 4.40, Your Honor.

CROWN PROSECUTOR: Q. You did see there a motor car and a bike and took note of their condition? A. Yes.

Q. You also saw some shoes there? A. Yes, a man's shoe and a woman's shoe.

Q. Did you also see a woman along the road there somewhere? A. I did not see her at the time.

Q. Later on? A. Yes, later Constable Cochrane came back and told me——(objected to).

Q. Did you go to where a woman was? A. Yes, I went to her.

Q. What was her condition at that time? A. She was shocked, she appeared to have an injury of her lower spine, the left arm and there was a bruise over her left eyebrow.

Q. You arranged for her to be taken into Jerilderie? A. I stayed with her and treated her and went into Jerilderie with her.

Q. You treated her in hospital later? A. Yes.

Q. Going back to the man; did you then make a detailed—were you present at a post mortem examination on the following day, 17th October? A. Yes.

Q. At that time you fully investigated the things he was suffering from? A. Yes.

Q. Can you tell us as far as the injuries on his face were concerned—would you describe those as you saw them, in detail, at the post mortem? A. There would be about—I do not know the exact number, but I would say there would be more than ten and less than 40 wounds on the face and throat and forehead, but there were only two of great significance, and they were on either side of the throat. The wound on the right side was an

incised wound, about half an inch long, but on investigating its extent at the post mortem it was found it had been made by a sharp instrument and had penetrated the voice box or larynx, and missed any large blood vessels.

Q. In order to get to the voice box are there a number of solid type tissues around there that have to be severed, or is it just more or less a soft type of tissue? A. No, the muscular tissue which covers the larynx and trachea would tend to slide out of the way, unless the knife were very sharp much vigour would be necessary to push it in.

Q. That one on the right side, while it went in deep, did not meet any large blood vessels or any other things that would cause death? A. That is correct.

Q. What about the wound on the other side? A. There was one on the left side which had penetrated in a different angle, and had severed the large vein in the neck, the vein called the internal jugular vein, and there was a lot of blood in and about. It had penetrated further into the muscles at the base of the tongue, right in deeply.

Q. From the point of view of the amount of force necessary to inflict that wound, what do you say as to that? A. Considerable vigour would need to be used. ~~I did see the knife with which it was done, and the blade was two or three inches long~~ . . . (Objected to—struck out.)

Q. You saw a knife? A. Yes.

Q. The knife you saw—is this the knife you were shown? (Shown to witness.) A. Yes.

Q. At the time when you saw it was it fairly sharp? A. No, different to that.

Q. The same as it is now? A. Yes.

(Knife m.f.i. "1".)

Q. Would that knife, to get into that depth—what do you say as to the amount of force that would be needed? A. Very considerable force.

Q. With that knife? A. Yes.

Q. Were there two other wounds under the chin area that gave the appearance of being caused with a knife or some instrument that made an incised wound? A. Around the chin area?

Q. Anywhere on the face? A. Yes, there were a number of wounds about the face, and after I had been shown the knife and considered the matter, they looked to me as if they could have been done by stabbing about the face.

Q. Were there any other facial injuries? A. Ones that appeared to be more like bruises than wounds. I could not really see how they had been made with the sharp end of the knife.

Q. Were you shown at the inquest a knuckle duster? A. Yes.

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Q. Is this the knuckle duster you were shown? (Shown to witness.) A. Yes.

(Knuckle duster m.f.i. "2".)

Q. Having seen that, does that convey to you any idea of the type of thing that would cause the injuries you saw on the face or chest? A. That could cause the wounds, yes.

Q. The wounds other than the incised type of wounds? A. Yes, there were wounds which had been made with a blunt instrument.

Q. Which would be caused by some such instrument as that? A. Yes.

Q. What about the injuries to the legs, what did they turn out to be when you examined them fully? A. Both the bones of both legs were broken below the knee. That is the tibia and the fibula of both the right and left legs.

Q. Whereabouts in relation to the knee and ankle? A. Both breaks—I did measure them—were about 12 to 14 inches above the level of the heel.

Q. Are you able to tell us in what direction the force was applied that caused the injury to both legs? A. The fracture of the right leg was of greater severity than that of the left, and it would appear that that had been struck first. ~~We know the man was on the bicycle, and he may have had his legs in any position~~ . . . (Objected to—struck out.)

HIS HONOR: Q. The right leg appeared to have been struck first? A. Yes.

CROWN PROSECUTOR: Q. Were you able to determine whether the injuries came from the side or which side, or the front, or the back, or how they came on to the legs? A. Not from the legs alone, but having seen the bike——

Q. Don't worry about that. From the injuries alone you could not say? A. No.

Q. Did you form an opinion as to the cause of the death of the man? A. Yes.

Q. What was that? A. There would be considerable shock, with the breaking of the legs, and some amount of haemorrhage with both legs broken, in the legs themselves. During the post-mortem the abdomen was opened and there was evidence of a small fracture of the pelvis. The main cause of the shock would have been the haemorrhage from the incised wounds on the left hand side.

Q. The left hand side of the neck? A. Yes.

Q. You did examine to find out whether there was any serious damage underneath the injuries to the face and chest, did you not? A. Yes.

Q. There was no fracture of the head or skull, was there? A. No. The brain was removed and carefully examined, and there was no skull fracture.

Q. Going back to Mrs. Parker, you treated her in hospital after she got there, did you not? A. Yes.

Q. What was she suffering from? A. She was treated in the first place for shock. The next day some X-rays were taken. I thought at first she could have had a fractured arm, but she had no fracture of the arm. I X-rayed the spine and it appeared to me that she did have a slight fracture of the spine.

Q. Whereabouts? A. The lower region.

Q. Where was that in relation to the place where the pelvis comes on to it? A. In the lumbar spine, a little above the pelvis.

Q. Did you discover any other injuries? A. No. There were various minor clinical things. Blood in the urine. I did a test. She had a bladder puncture. She was sick for a little while, but she did recover.

Q. What type of thing would cause the overall pattern of injury she had? A. It would appear that the spinal injury had been caused by something striking her lumbar spine from behind, and the injury to her left arm and head—when I saw her on the road she had sand in her hair that could have been caused by her falling.

Q. The man's legs were broken. At the time when the legs were broken would there be any question of him standing or being in an upright position from then on? A. No.

Q. On 17th October did you see the accused? A. Yes.

Q. Did you make an examination of him? A. Yes.

Q. What form did that examination take? A. I saw him at the Police Station with one of the detectives, Mr. Ellis I think it was, and I examined Mr. Parker and asked him some questions, whether he had been assaulted by Dan Kelly, and he said No; and whether he had any wounds or marks on his own body, and he had none.

Q. Do you remember having any other conversation with him at that time? Were you alone with him at this time? A. Yes.

Q. Did you have any conversation with him about the Police . . . (objected to as leading—allowed)? A. Parker told me that the Police had been good to him, inasmuch as he had not been ill-treated.

Q. Do you remember any other conversation there was with him at that time? A. Before the detective left me with him he warned him that anything —he said "This is Dr. Pilkington, he will examine you".

Q. And he gave him a warning? A. Yes.

Q. Do you remember anything he said about his wife? A. Yes, he was very concerned about his wife.

Q. What did he say about his wife? A. He asked me was she hurt very badly.

Q. What did you tell him about that? A. I reassured him I thought she would get well again.

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Q. After the man received his injuries, would you expect him to die straight away, after that wound to the neck? A. No.

Q. How long might he bleed after that? A. I should think it would take about five to ten minutes to die from a haemorrhage to that extent.

Q. In order to get the number of wounds that were on the face, forehead and chest, would there have to be a number of blows? A. Yes.

Q. Did you form any opinion as to how many there would have to be? A. I would assess it would—I have said there were more than ten and less than 30; that would mean there would be perhaps 20 blows.

Q. Were you able to form an opinion as to the position that the man was in, that is the deceased man, at the time he received the blows to the throat—the wounds to the throat? A. I think he would be probably lying on his back. Unless he was thrown to where he was—he was a strong and muscular man, and although he could not walk he may have pulled himself to where he was by his hands. When he was found he was lying on his right side.

Q. You think he was on his back when the wounds to the neck were caused? A. Yes, and I say that because of the almost parallel cuts in here and here (indicating).

HIS HONOR: Perhaps it should be noted that the witness pointed to either side of his neck when he said "in here and here".

Cross-examination.

CROSS-EXAMINATION

Mr. COOK: Q. You told us the deceased was a powerful muscular man? A. Yes.

Q. Would he be about 5 ft. 10 in. in height and 14-odd stone in weight? A. Not 5 ft. 10 in.; 5 ft. 9 in.

Q. And about 14-stone? A. Yes.

Q. Obviously a powerful man? A. Yes.

Q. In good physical condition? A. Yes.

Q. When you saw these injuries to his face and to his neck and you told us that they appeared to result from about 20 blows, did they appear to you from their position and the other matters connected with them, that they may have been struck by somebody in a frenzy? (Objected to; allowed).

HIS HONOR: Q. Can you answer the question? A. Yes, I would think so.

Mr. COOK: Q. May be they were an indiscriminate rain or hail of blows?

A. It would appear to me to be really a battering.

HIS HONOR: Q. Blows struck swiftly? A. Yes.

Mr. COOK: Q. With some degree of force? A. Yes.

Q. They were not concentrated on any particular portion of the face, they were all over the face? A. The lesser wounds were, yes.

Q. These wounds that were inflicted on the face with the knife, were they spread over the face or on any particular portion of the face? A. They were—the incised wounds appeared to be more on the forehead and over the bony part of the cheek and the deeper ones on the right and the left side of the neck.

Q. Had they penetrated right through the skin to the bone underneath —for instance the ones on the forehead? A. Yes, some of them did.

Q. And the injuries to the neck; you followed those injuries through and I suppose you could tell us approximately the line of entry of the knife into the throat? A. Yes.

Q. And from that, doctor, are you able to tell us whether—can you tell us how the blows were delivered with the knife to the throat. Can you give us any idea at all? A. It is hard to be positive but it is my idea that by this time Kelly was insensible, lying on his back, and that the wounds were inflicted on the throat with the knife as he lay insensible on his back.

Q. Would you agree with me that they appeared to be, and I demonstrate with my hand, in a clubbing type of motion? A. No, I would think the knife had been used like that (indicating) and poked in hard.

Q. In an underhand fashion? A. Yes.

Q. From the line of entry as the knife wound went into the throat did it go in an upwards direction, straight in, or was it pointing downwards with the body lying on his back? A. The wound on the right hand side entered in an horizontal plane to the body; if it were upright, this way. The wound on this side (indicating) came down.

Q. That is the left hand side? A. Yes.

Q. You indicate from an upright position? A. Yes.

Q. You indicate that the wound on the left came from the direction of your ear downwards? A. Yes.

Q. The wounds on the face with the knife; did you form an impression that they were delivered with an underhand motion or by vertical stabbing? A. By vertical stabbing or blows. The incised wounds by vertical stabbing.

Q. Do you know whether they were delivered with a knife held underhand or with a knife held in a clubbing fashion? A. I could not tell.

Q. You say the injuries to Mrs. Parker were consistent with her having been struck from the rear—the injury to the spine? A. Yes.

Q. You saw certain signs on the roadway and on the side of the roadway which would indicate where the point of impact took place between the car and Kelly? A. Yes.

Q. Did you form certain conclusions as to where the impact had taken place? A. Yes.

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Q. Did it appear from that that Kelly had been flung some distance to the side when hit by the car? A. Yes.

Q. Would you expect him to be flung a little way in the air immediately after the impact? A. A little way, yes.

Q. If Mrs. Parker had been standing beside and some little distance behind Kelly, two to three feet behind Kelly when he was struck and if she had turned to run, would it be consistent with her injuries that as she turned away from the roadway, facing in the opposite direction, she had been hit in the back by Kelly's shoulder as he was flung away from the road? A. It would be possible, yes.

Q. I think in relation to Mrs. Parker's injuries when she was actually conveyed to the hospital and when she was being taken out of the car she in fact fell from some height on to her back—as she was being taken out of the car? A. No, she did not hurt herself being taken from the car to the ward.

Q. She did fall on her back? A. She did not actually fall on to her back. She was in the back seat of a sedan car and it was difficult with the aid of the sister to get her out. She did not fall on the ground, no.

Q. She was in hospital for a period of about six weeks? A. Less than that.

Q. And when she was discharged from hospital she was perfectly fit? A. Yes.

Q. I think you told the Court here today that it was 4.40 when you arrived at the scene? A. Yes.

Q. Do you remember giving evidence at the inquest and saying, "It was about 5.20 when I was at the scene."? A. No I do not remember saying that.

Q. If you did say at the inquest, "It was about 5.20 when I was at the scene", would that have been correct? A. I was there from 4.40 until 7 o'clock at night because we brought Mrs. Parker to hospital and she was admitted at 8. I have the hospital papers of admittance here.

Q. Do you remember being asked about when you first saw the body and the body was identified to you and you were asked what time was it and you said you had a note of it and you said "It was 5.20 when I was at the scene."? (No answer.)

Q. Do you recall whether it was 4.40 or 5.20 when you got to the scene? A. I got to the scene at 4.40. It may be 20 to 5 and that is the mistake I made there.

Q. When you arrived there immediately you arrived did Constable Cochrane identify the body of Daniel Kelly to you? A. Yes.

Q. You were asked "What time was it?", and you said, "It was 5.20 when I was at the scene." But you say today it was 4.40? A. Yes.

Q. You were asked about the cause of death; would these injuries, the injuries to the legs and the other small fracture to the pelvis have been sufficient to cause death on their own? A. No.

Q. Did you notice the various tracks and marks on the roadway at the scene? A. Some of them, yes.

Q. Did you take any note of any track which appeared to be the tracks of the motor vehicle as they came up to the point of impact? A. Yes.

Q. Did those particular tracks show that at the last moment before the point of impact there had been a sudden swerve? A. Yes, towards the bicycle from the right to the left—behind the bicycle.

Q. There was a sudden swerve into the point of impact? A. Yes.

Q. When you arrived at the scene there were various items lying around there, were there not? A. Yes.

Q. And among them was a large knife? A. Yes, in a sheath.

Q. The deceased was wearing a sheath on his belt? A. Yes.

Q. And the sheath was empty at the time you saw him? A. I believe the knife was still in the sheath on the belt.

Q. On the deceased? A. Yes.

Q. That was a considerably larger knife than the knife you were shown here this morning? A. Yes.

HIS HONOR: Q. When you say you believe it was still in the sheath is it your recollection that you saw it in the sheath that morning? A. Yes.

Mr. COOK: You told us on the 17th you saw the accused at the Police Station and he showed great concern as to the condition of his wife? A. Yes.

Q. And he appeared to be very relieved when you told him his wife would be all right? A. Yes.

Q. Did he say anything about having caused any harm to her or anythink like that on that occasion? A. Not to me.

Q. When you examined him on the 17th did you see any injuries to his hands? A. Not exactly injuries; he had a few little scratches on his hands.

Q. A few scratches; do you recall having examined his hands at the time on the 17th—do you recall anything about the right hand at all? A. There was a small infected wound on it that I believe had some red stuff on it.

Q. That was a small infected wound such as a carbuncle on the right side of his wrist? A. That could be so.

HIS HONOR: Q. Do you say it was or it could be so? A. It was not a large carbuncle. It was a small infection on the side of the wrist.

Q. Would you describe it as a carbuncle? A. No.

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Cross-examination.

Mr. COOK: Q. It was a wound that had been there for some time? A. At least some days.

Q. And at the time you saw it, on the 17th October, the day after this incident, did you see whether it had received any treatment or was it bandaged or what? A. Except it appeared to have been painted with a chemical disinfectant—red mercurochrome.

Q. Do you remember at the Inquest whether it was painted on that occasion when you examined it? A. No, I do not recall that.

Q. You did examine his hand at the Inquest? A. Yes.

Q. It was at the Inquest, wasn't it, that the hand was painted? A. Yes.

Q. And not on the 17th? A. Quite correct.

Q. I think at the Inquest you examined all his knuckles and you found a number of wounds and injuries to his knuckles, didn't you? A. Yes, he did have a few injuries on the knuckles.

Q. And at that time they would—as far as you could see were these injuries recent or had they occurred since the time you saw him on the 17th October or do you recall whether they were present also on the 17th October? A. They were not there on the 17th October.

Q. It is possible for abrasions which are superficial abrasions to become infected? A. Yes.

Q. And if that is so, doctor, are you able to say whether the injuries you saw at the Inquest were consistent with an infective process having proceeded from the abrasions to the knuckles and to the hand? A. The Inquest was more than a fortnight later; it is possible, yes.

Q. It might well have been that he had suffered superficial abrasions and they became infected and more obvious? A. Yes.

Q. You had a look at this Dodge sedan which was then on the roadway, did you not? A. Yes.

Q. Did you notice something about the front nearside portion of the bumper bar—do you recall whether it was intact or damaged in any way? A. No, it appeared to have been bumped.

Q. From the height of that bumper bar off the ground and from the position or location of the wounds to the deceased was it consistent with him having been struck by the bumper bar that the wounds were caused and resulted to him? A. Yes, that is quite so.

HIS HONOR: Q. Do you base the last conclusion mainly on the height of the bumper bar from the ground? A. Yes.

Q. Do you base it solely on that matter or on other matters as well? A. I base it on the height from the ground of the bumper bar and also taking into consideration whether the man was at rest on the bicycle as he heard the car coming and what position his legs were in. He may have had one straight up and one around the other way.

Mr. COOK: Q. You say that Kelly was on the bicycle? A. On the bicycle. A moment ago you spoke about which side of the bumper bar; you said the nearside; did you mean the driver's side or the other side?

Q. I was using the nearside in the sense in which it is used—the side nearest the gutter on the correct side of the road. I think that is the common usage of the word? A. That is the passenger's side?

Q. Yes. A. I always call that the offside. (Discussion ensued.)

WITNESS: The passenger's side.

Mr. COOK: Q. On the passenger's side of the extreme end of the bumper bar? A. Yes.

Q. I think you advanced a moment ago the opinion in relation to the injuries that the deceased was riding a bicycle. (Objected to—allowed.) I think you volunteered he was on the bicycle at the time of the impact.

HIS HONOR: Q. What do you say about what Mr. Cook has just put to you? Have you drawn an inference or a conclusion as to whether he was on the bicycle or off it or standing beside it? A. I drew the inference he was on the bicycle when struck, because in addition to other things I have been asked about I saw the bike and the back wheel was squashed up to no larger than that (indicating).

Mr. COOK: Q. The injuries to the two legs were consistent with them having been made almost simultaneously, weren't they? A. Yes.

Q. You say he could have been sitting on the bike with his feet on the pedals and yet had both his legs struck almost simultaneously? A. Yes.

Q. Wouldn't one leg be ahead of the other? A. Yes. I have stated that the injury to the right leg was of greater severity than the left leg, and it was my opinion that the right leg was hit first with the passenger side of the bumper bar, and the violence continued and smashed the wheel in and hit his other leg.

Q. It is also consistent with his injuries to his legs, they were consistent with him standing on the ground alongside the bike, weren't they? A. No, I think not, because had the bicycle been hit without anybody on it it would have been flung a long way and would not have had the back wheel crumpled up.

Q. How far was it from the point of impact? A. The bike?

Q. Yes. A. About five or six feet.

Q. Five or six feet away from the point of impact? A. Yes.

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Prosecution Evidence.

No. 3.

Dr. R. R. Pilkington.

5th April, 1961.

Cross-examination.

Q. It would not be correct to say it was much further down the road than six feet? A. About six feet. The skid marks were there from the bike and the car wheels.

Q. If he had been sitting on the bike his legs would have been higher than the bumper bar, wouldn't they? If he had been using the pedals? A. Not a great deal higher. This would happen very quickly. I think he had this leg straight on the pedal (indicating).

HIS HONOR : Q. When you say "this leg", which leg do you mean? A. The right. And the left he may have taken from the pedal and had it hanging too, because right ahead of where this happened there was a culvert across the road.

Mr. COOK : Q. Even if he had the right leg on the pedal and the left leg hanging down, that would have elevated the bottom of his foot some eight or nine inches from the ground, wouldn't it? A. No, three. I ride a bike myself.

HIS HONOR : Q. You still do? A. Yes.

Q. In Melbourne? A. Yes, at times, to do the messages.

Mr. COOK : Q. How far would you say that Dodge bumper bar was off the ground? A. To the lower edge or the upper edge or the middle of the bumper bar?

Q. The middle of the bumper bar. It was a curved bumper bar, wasn't it? A. Yes. From the ground to the middle of the bumper bar I would think would be 14 inches.

Q. You told us that these injuries to the deceased's legs occurred some 12 to 14 inches up from the heel, up the leg? A. Yes.

Re-examination.

RE-EXAMINATION

CROWN PROSECUTOR : Q. Was there something else in connection with the injuries to Mrs. Parker that led your mind to the question as to whether they were still on the bike? A. Yes. You asked me before about the shoulder striking. Not you, Mr. Cook.

Q. About what? A. Whether Kelly's shoulder could have struck Mrs. Parker. On my examination of her spine the tender point was too localised for that to be so, and I formed the opinion on evidence and her injury that she was being carried at the time.

Q. And sitting on what? A. Sitting on the bar sideways and facing towards the left.

Q. The injury that you saw to her spine was lower down in the lumbar spine, and it would be approximately near the place where the saddle of the bike would hit her if it was jolted forward? A. Yes.

Q. That was another matter that led you to think they were on the bike? A. Yes.

FURTHER CROSS-EXAMINATION

Mr. COOK: Q. You did agree with me when you gave the matter consideration in cross-examination that the injuries to her back were consistent with her having been struck from the rear by the shoulder of Kelly, didn't you? A. No, I said it was possible.

HIS HONOR: Those were the doctor's words, and I think he chose them carefully.

Q. Are you still in practice? A. I will be shortly.

(Witness retired.)

NOEL CRAIG

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What are you by occupation? A. A labourer. Station hand.

Q. Living at Jerilderie? New Camp? A. Yes.

Q. Are you still at New Camp, are you? A. Yes.

Q. How long have you been living at New Camp? A. Five years eight months.

Q. During that time what part of the property have you lived on? A. On New Camp really. It is an out station.

Q. What does the out station consist of? A. It is a house.

Q. What is it made of? A. Tin.

Q. You have a family, have you? A. Yes.

Q. And you and your wife and family live there? A. Yes.

Q. In September and October of last year were there some other members of your family other than your immediate children living there too? A. Yes.

Q. Miss Samuels and Mr. Richard Connor were living there, were they? A. Yes.

Q. Did the accused and his wife and family come to stay with you? A. Yes.

Q. Can you tell us about when they came there? A. They arrived, I am not too sure of the date, and Frank Parker said he wished to look around for a job, and could he stay in the meantime.

Q. About how long before the 16th October would that be? A. Approximately six weeks.

Q. Some time in September? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 4.

N. Craig.

5th April, 1961.

Examination.

Q. During that time where were the accused and his wife living? Where were they sleeping? A. In the car.

Q. How many children did they have with them? A. Six.

Q. Were any of the children sleeping in the car, too? A. The little girl, the smallest.

Q. And the rest of the children, the other five, were sleeping in your premises? A. Yes.

Q. Do you remember an occasion when you met for the first time a man named Kelly? A man who introduced himself to you as Dan Kelly? A. Yes.

Q. Where was that? A. In the woolshed at New Camp.

Q. Were there other premises over there that people lived in? A. No, he was staying in the shearer's quarters on his own.

Q. About how long before the 16th October would that be? A. Say four months.

Q. You had met him about four months before? A. Yes.

Q. Do you remember during the time that the accused was up, going over to near the shearer's quarters or near the shearing shed, when the accused and his wife were with you? A. Yes.

Q. What did you go over there for? A. To get a sheep to kill.

Q. Did the accused and his wife and the children that were there meet Dan Kelly at that time? A. There was myself, Frank Parker, his wife, and a nephew of mine with me when we met Dan Kelly in the paddock.

Q. What happened after you met Dan Kelly in the paddock? A. He asked us would we like to go down and have a cup of tea.

Q. Did you? A. Yes, we went down.

Q. Did Mrs. Parker go into the premises, the shearers' quarters? A. Yes, into the kitchen. We had a cup of tea in there.

Q. Did you see Dan Kelly from time to time after that on New Camp? A. Yes. It was just after that he started coming over to my place.

Q. During the next few weeks was he over at your place quite a lot? A. This was just a week or so before the incident.

Q. It was about a week before the incident——? A. That we went over and had a cup of tea.

Q. Was that as far as you know the first time that the accused or his wife had been introduced to Kelly? A. Yes.

Q. During the following week how many times did you see Kelly over near your place? A. About five or six times.

Q. Can you tell us any of the things that happened during those days that led to him being over there? A. On Saturday afternoon he came across and we played cards, later in the evening, and he had tea with us. We played cards to early in the morning.

Q. Who played? A. Myself, Dan Kelly, Frank Parker and his wife. It was pretty late and I asked him would he like to sleep, and he slept for about an hour and got up.

Q. Where did he sleep? What part of the premises did he sleep in? A. We made a bed for him in the kitchen.

Q. And the accused and his wife, where did they sleep? A. They were in the car.

Q. Did he stay there any other time during that week? A. On about three or four occasions.

Q. What were the matters that led to him being over there on those occasions? A. He came across of his own accord at different times and stayed there. I never asked him to stay, but he stayed until such time as I asked him would he like to sleep. He did not look like going so I asked him would he like to lie down.

Q. Do you remember something about a pup? A. Yes. On the Sunday I asked Frank Parker about going into Jerilderie.

Q. What happened? A. Frank Parker said he was driving in, but after a few moments he came out and asked would I drive in as he did not feel like driving in, as he wanted to have a rest, so I drove in.

Q. When you came back did you come back to your premises? A. Yes.

Q. And Kelly was there at your premises again on the Sunday, was he? A. Yes.

Q. Was there something then on one day during that week about a driver's licence? A. I think it was the Tuesday that Frank Parker said he was going over to pick Dan up to take him in to get his driver's licence.

Q. Was there some question about jobs for men who could drive vehicles, around the district at that time? A. I do not remember why he was going to get his licence or anything, I was told Frank Parker was taking him in to get a licence.

Q. Did the accused leave the premises during that day? A. Yes, he went over to pick Dan Kelly up in the morning.

Q. Did either of them come back to your part of the premises that night? A. Yes, they both came back at approximately half past seven, but I was not there.

Q. Did they stay there until you did come? A. Yes.

Q. What happened that night? A. One of my boys, the baby, got sick, and I have not got a car so I went to ask a friend would he take me to town, and he was unable to, and Frank said, "I will take you back in", which he did.

Q. The following day? A. That was the Tuesday night.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 4.

N. Craig.

5th April, 1961.

Examination.

Q. Did Kelly go to town? A. No.

Q. Who did go into town? A. My wife, Richard Connor, Robert Connor, his brother, Frank Parker, my baby boy and myself.

Q. Can you remember anything happening on any of the other days at that week? A. On the Thursday Dan Kelly came over, Thursday afternoon, and he had tea, and he had a sheep pup he had left, and he came across to see how it was, and had tea with us, and we had three or four bottles of beer and we drank those, and I went to bed. Mr. and Mrs. Parker had a few words that night, the Thursday.

(Luncheon adjournment.)

On Resumption

Q. You are on your former oath. Do you understand that? A. Yes.

Q. You have told us about the earlier days of the week before the 16th October? A. Yes.

Q. 16th October itself was a Sunday, was it not? A. That is correct.

Q. Do you remember the Friday? A. Yes.

Q. Do you remember having a conversation with the accused on the Friday about Kelly? A. Yes, Dan Kelly came over to my place at approximately 3 o'clock, and I commented on him being early. Naturally he should have been at work. Frank Parker said to me that he was only coming over home to hang around Joan, and did I notice. I said I had not noticed, and that was all for then, and a few minutes later on he commented again and said, "He is only hanging around Joan", and I never commented then.

Q. Joan was in fact his wife? A. Yes.

Q. Was something again said by the accused on a later date, the Saturday or Sunday? Can you remember what happened on the Sunday morning, first of all? A. Yes, Frank Parker was to take me over to another friend of mine's place.

Q. You wanted to get something in connection with a gig or something on the farm, did you? A. Yes, actually a blow lamp and a bit and drill.

Q. You wanted to do some repairs? A. Yes.

Q. You set out fairly early in the morning, did you? A. About half-past 10. Dan Kelly was there. He had stayed the night.

Q. On the Saturday? A. Yes, the Saturday night. He said to me, "He is still hanging around Joan", his wife, Parker's wife. I never commented and he called his wife to the car as we were about to leave and told her to get inside and do some work, so he would not hang around her. Previous to that Dan Kelly got in the car and was about to come in with us. He had a bit of trouble to start the car and he got out and never got in again, and that is when Frank Parker told his wife to go inside and do some work so Kelly would not hang around.

Q. You and the accused were away from the place for the rest of the morning were you? A. Till about five past one.

Q. Tell us everything you can remember that happened from when you got back? A. We arrived back at my place. My wife and five children and Mrs. Parker and her children with Dan Kelly and my wife were going to a dam some three hundred yards away for a swim. Frank Parker whistled to his wife and then called out something in Maori and she turned round and stood, and with that he drove off over to where she was and had a conversation with her for perhaps a quarter of an hour. I was not there. I stayed at home. With that he came back and I carried on with what I was doing, and after about an hour I sang out to my wife to come home and get my meal, and Dan Kelly came down to where I was with an old 1936 Ford, taking the front wheel and axle off, and asking me what I was doing. I had a blow lamp going and I said I was heating a bolt——(objected to; rejected).

After a few minutes Dan Kelly left me at the Ford and went back to the house, and perhaps 15 minutes later I walked up and heard Frank Parker saying "Why can't you find a single girl? Have you no principles?" With that Dan Kelly replied "I lost my principles years ago". Frank Parker asked his wife would she go outside as he wanted to talk to her, which they did. I was inside for perhaps twenty minutes or half an hour or more, and went outside and continued doing what I was doing with the axle, and after a few minutes Frank Parker called me over to his car and told me Joan was leaving with Dan Kelly.

Q. Can you remember the exact words he used to you? A. He said "She is leaving with Dan, and if she does I will get him. There are a lot of dark nights, and one of these dark nights I will be waiting for him".

Q. Before we go any further can you remember any words that were said by the accused to you earlier on that day, after he had spoken to his wife when he was going on to the dam. She went to the dam with the rest of you, didn't she? A. Yes.

Q. And he came back to where you were? A. Yes.

Q. Can you remember him saying anything to you then? A. Then again he asked me—when they were coming back he asked me didn't I think there was something going on between Joan, his wife, and Dan Kelly.

Q. Can you remember what words he used? A. He said "I think there is something going on" or something to that effect. He said "Don't you think so?". I said "It appears so".

Q. You said "It appears so"? A. Yes.

Q. It was after that when they got back an hour later this other conversation took place in which he told you there would be some dark night? A. Yes.

Q. Did you go on with the work you were doing on the car? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 4.

N. Craig.

5th April, 1961.

Examination.

Q. What was the next thing that happened that you knew about? A. It was a few minutes later he again called me over to the car, and his wife and six children were there, and he said to his wife he had got a job at Albury he was to go to the following week, and he said to the children, "Wouldn't you like to go to Albury?" and they all answered "Yes". And his wife replied "It is no good, Frank", and walked away. I also walked away then.

Q. What did the accused do at that time? A. I do not really know. I walked away back to what I was doing.

Q. He stayed with the car? A. Yes, with the children.

Q. The children were there too? A. Yes.

Q. Shortly after that did he say something to you? A. The next incident I can recollect is when he tried to start his car.

Q. Before that did he ask you couldn't you put Kelly off the place? A. Yes. He asked me would I tell Dan Kelly to go, and I said I would, and I did.

Q. Did Kelly go? A. Yes, a little later on. Just before Dan Kelly went, he, Parker, got out of the car, and told Kelly to get going before something happened. Something like that.

Q. Do you remember the actual words he used? A. I think it was, "You had better get going before I do something".

Q. Was the word "lucky" used? A. "While you are lucky", yes, or "while your luck is in", maybe were the correct words.

Q. Do you remember anything else being said at that time? A. No. With that Dan Kelly got on the bike and rode off. That is correct, he told Dan Kelly that if his wife was going with him he had best go up to the gate and wait, and he would escort her up to him later on.

Q. After that did you notice what the accused did? A. No, I went back to what I was doing. The next incident, I was working with the axle off the Ford and Frank Parker walked past me down towards where the old Ford car was, and I noticed him pull a brake rod off the front portion of the Ford, and I saw him go back to car and get his tool box out, and a hacksaw, and commenced to cut a sharp edge on the brake rod.

Q. How big was this piece of broken rod that he pulled off the Ford? A. Approximately 3 feet, I suppose.

Q. What did it consist of? A. Just a straight piece of iron; I am not too sure—it may have had a nut on the end of it.

Q. Was it round? A. Yes, a round piece of iron.

Q. He took that up to his car and cut the end off it? A. Yes.

Q. What shape did it become? A. Spear shaped.

Q. Is this the piece of iron that you are referring to? A. Yes, that is it.

Q. Is that the end of it which you referred to? A. Yes.

(Piece of iron tendered and marked Exhibit A.)

Q. Did you say anything to the accused about that piece of iron? A. He was working on it for perhaps three minutes and I walked over and asked Frank what he was doing. He answered "Nothing". I waited another three to four minutes and as he commenced to file it, I said "Frank, you had better give me that", and with that I got hold of it and wrenched it out of his hand and told him to pull himself together that he had gone off the deep end and he had the children to think of. He said to me, "I won't be here to look after the kids—Joan will, and that other b——— won't be either".

Q. Did he use the word b——— or did he say it in full? A. In full.

Q. That was bastard, was it? A. Yes.

Q. Then what did he do? A. He seemed to quieten down a little so I went back to the axle I was working on and a few minutes later I saw Frank go down some 30 to 40 yards and I heard him crying and then—— (interrupted).

Q. That 30 or 40 yards he went, in what direction was that? A. Northerly.

Q. In what direction had Kelly gone? A. Kelly went south-easterly.

Q. It was approximately the opposite direction? A. Yes.

Q. How long was the accused down there—there are some trees there? A. Yes.

Q. How long was he down there near the trees? A. Perhaps five minutes.

Q. Then what happened? A. He came back for a jacket and walked down into the timber and trees and I never saw him again until about a quarter of an hour or 20 minutes perhaps when he came back. In the meantime Mrs. Parker had left just before he had started crying.

Q. Mrs. Parker left in the direction of the road? A. Yes, in the same direction Dan Kelly had taken.

Q. Who was she accompanied by? A. My niece, Janice Samuels and my nephew, Richard Conner.

Q. What were they doing? A. They were helping them to the road with the ports.

Q. Had she packed some ports? A. Yes.

Q. How many ports were there? A. Three—two large and a small one.

Q. Where had they come from? A. They brought them with them from Sydney. They were their own property.

Q. They were out of the car? A. Yes.

Q. The three of them went off in the same direction as Kelly? A. Yes.

Q. It was after that that the accused went down to the bushes in the opposite direction? A. Yes, quite correct, and cried.

Q. And he came back? A. Yes.

Q. And went back in the opposite direction again? A. He went in a westerly direction.

Q. It was not in the same direction? A. It was in the opposite direction.

Q. It was not in the direction of the road? A. No.

Q. He was away for about——? A. A quarter of an hour to 20 minutes.

Q. What happened then? A. He came back and tried to start the car and with that he asked me would I give him a push to see if it would start, which we did, and just before he drove off I noticed a piece of rag hanging out from under the front door on the driver's side, and my young daughter was there and I said "Pick that up and hand it to Frank", because it was a rag he used for wiping his hands. She handed it to him and he said to my daughter "Thanks, goodbye".

Q. Do you remember anything else he said before he left? A. No.

Q. At the time when you took the brake rod from him do you remember anything being said about size? A. Yes, he said, "It would be no good of me going fighting him"—or—"having a go at him", something in that respect. "He would beat me by hand, he is too big—he fights too well."

Q. Did he add anything to that? A. He said "I will still"—it is a word I am not too sure of, I am not too sure of the word he used—"get him" or "kill him", I cannot recall.

Q. It was something to that effect? A. Yes, something to that effect.

Q. We are now up to the stage when the accused went in a westerly direction for a quarter of an hour to 20 minutes, and came back; what happened then? A. He tried to start the car then and we gave him a push.

Q. Which direction did he go in then? A. He went in an easterly direction on to the Goolgumbla Road but out of a different gate, the bottom gate.

Q. There are two gates, one is a little closer to your place than the other one? A. Yes.

Q. And that is the one that Kelly and Mrs. ——? A. No, Dan Kelly took the road that leads in a south-easterly direction and Frank Parker went out the gate that leads from our place in an easterly direction—two gates.

Q. Could you see Kelly or Mrs. Parker or the two children that had gone with Mrs. Parker at the road or near the road? A. As they were getting near the road you could see them but at the road it was hard to see. It is approximately a mile from my home to the gate where they went.

Q. You don't know where they were at the time when the accused left in his car? A. No.

Q. The rod that has now been tendered in Court; you found that within the next day or two and gave it to the Police? A. Yes, that is correct.

Q. Had you even seen any piece of iron shaped like a knuckle duster? A. Yes.

Q. Where had you seen that? A. Some week or two weeks after Frank Parker came up to my place he got out of the car and said, "What do you think of this?" I said, "It is quite a dangerous weapon", or something to that effect. I said, "You had better put it away out of sight".

Q. What happened to it? A. He put it away.

Q. Away where? A. In the car.

Q. I show you now m.f.i. "2"; is that what you talk about now? A. Yes, that is it.

CROSS-EXAMINATION

Mr. COOK: Q. Mr. Craig, you told us of this conversation at the time and you said you don't quite remember the word said by Mr. Parker. May the word have been "stop"—"I will stop him"? A. Quite possibly could have been.

Q. There had been some talk previously that morning about fist fight, had there not—that you heard? A. I think it may have been around about the same time.

Q. When the accused was talking to Kelly and saying he had better go and leave, did he look as though he might strike him then and have a fight with him then and there? A. Yes, he looked as though he was getting that way emotionally.

Q. You thought he might strike him any moment? A. Yes.

CROWN PROSECUTOR: You mean the accused?

Mr. COOK: Yes, I do not suggest Kelly.

Q. Kelly was a very strong and powerful man, was he not? A. Yes, he was.

Q. Did you know anything of his prowess as a fighter? Did he ever say anything about his fighting or wrestling ability? (Objected to; disallowed.)

Q. Was there any discussion when Parker was present when Kelly ever said anything about his ability to fight and box? A. Kelly once told me——

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 4.
N. Craig.
5th April, 1961.
Cross-examination.

Q. Was Mr. Parker present when any discussion took place about the deceased's ability to fight or box or wrestle? A. Not that I can recall.

Q. You have told us that on this particular morning you heard him sobbing when he went towards the trees? A. Yes.

Q. Was he sobbing at any time before that? A. No, not in my presence.

Q. You recall when he was in the car with his wife and child—was he sobbing then? A. He was not sobbing but I would say he was very close to tears.

Q. You do not recall him at any time in your presence, apart from this occasion when he went to the trees, sobbing and crying? A. I do not recall.

Q. But he may have been while you were away at the car? A. He could have been.

Q. There is no question of doubt that he was very emotionally disturbed at this news that his wife was going to go away? A. He was, indeed.

Q. You had him under observation for most of the time after he had been told of it; you saw him at different stages? A. Yes.

Q. Was he acting in a normal way or did he seem to be dazed? A. He seemed as though he just could not comprehend he was losing his wife. He just sort of would take no notice of anyone or anything and he was just walking around and he would go inside and outside, more or less following his wife around and at times begging with her.

Q. He was begging with her? A. Not, but that is my—he was following his wife around and I perhaps though he might have been doing that.

Q. Did you hear him saying anything; you were not close enough to hear what they were saying. When you say he was begging with her his general conduct was that at the time? A. Yes, his general manner. He was getting very emotionally upset and up until the time I took the rod off him his emotions seemed to give way a bit, when I did that. After he came back from the bush he was quiet—he was not himself. Frank was a man that will usually talk. Any time I was in his presence he would talk all the time. I thought it was a bit strange when he came back and got into the car and tried to start it and the only words he said were, "Give me a hand to help start it", and I said, "Yes", and he got in the car and tried to start it with the starter motor and it would not go and then we gave him a push.

Q. You do remember he was unusually quiet and very still in his manner? A. Yes, he was, yes.

Q. You told him at some stage "Not to go off the deep end"? A. Yes.

Q. You were quite convinced he was very, very upset at that stage? A. Yes.

Q. From what you have known of him—he had been married to your sister for ten years? A. Yes.

Q. They have six children? A. Yes.

Q. You have known them over the period of time and you know his relations with your sister? A. Up until the time he came up I had not seen him for seven years.

Q. For the six or eight weeks before the day when these things happened you had opportunities of seeing him with your sister and with his children? A. Yes.

Q. Did you form the opinion that he was deeply in love with his wife? A. Yes.

Q. As regards his children did he seem to have a deep affection for them? A. Yes.

Q. Did he seem to take a great pride in them? A. Yes.

Q. And did they return that affection, as far as you could see? A. Yes.

Q. Would you describe him as a good father and family man? A. Yes.

Q. From what you could see over this period? A. Yes.

Q. When you told us about this knuckle duster do you recall him ever telling you how it came into his possession? A. No, he never told me how it came into his possession.

Q. Do you remember him telling you that about 18 months before this date, the time of showing you the knuckle duster, he and some men had been working at a place at Narrabeen in Sydney and they had found it in a box in the house? A. I don't recall him saying that.

Q. Do you remember being asked at the Inquest "Did your friend Parker tell you it had been found about 18 months before when he and some other men had been working at Narrabeen?" and you answered, "I think there was some conversation about him having found it in a box". Then you were asked, "Did he mention Mr. Cedric Bond?", and you answered "Yes, many times". You were asked, "Did he tell you that he had been working with Mr. Bond at Narrabeen Nurseries, North Narrabeen, when they found the knuckle duster?", and you answered "Yes" and the next question was, "Did he tell you——" then several questions were asked about where it came from. Do you remember that now?

CROWN PROSECUTOR: The next question is the explanation.

Mr. COOK: "Did he tell you it belonged to a Hungarian woman who said she brought it from Hungary?" was the next question and you answered, "No, I don't remember anything about that part". You were asked, "Did he tell you Mr. Bond gave it to him as a souvenir?" and you answered, "No.". Do you recall him having said it was found at this place at Narrabeen? A. It was either a knuckle duster or a camera—I am not too sure. He told me he found it in a box and apparently it was the knuckle duster.

Q. You remember being asked that question before? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 4.

N. Craig.

5th April, 1961.

Cross-examination.

Q. And you answered it in the way I have read to you? A. Yes.

Q. Do you recall now that he did tell you that he had found it some 18 months before? A. Yes, I recall now the questions.

Q. You had never seen him carrying it on his person at any time? A. No.

Q. As far as you know for that period of time it never left the car? A. No.

Q. From what you could see in the previous week before this Sunday he and Kelly had been on good terms? A. Yes.

Q. In fact they had gone into Jerilderie together and had drinks together? A. They had.

Q. And as far as you could see right up to the Friday, at least, he still maintained a good friendly relationship with Kelly? A. Yes until Friday. That was the first I had heard Frank actually say anything in respect of his wife.

Q. He made this comment about them "hanging around"? A. Yes.

Q. From what he said to you at the time was he—did you understand from his words that it was Kelly who was doing the "hanging around"? A. Yes.

Q. Did he say anything or convey anything to you that he thought his wife was returning Kelly's attention? A. No.

Q. Did you see anything or did you hear anything from him in conversation or notice anything about his demeanour which would suggest that he was suspicious of his wife? A. Not that I remember at all.

Q. On this Sunday you told us about his not being able to comprehend what he was told about Kelly and his wife. Did it appear to come as a great shock to him that they were going to go away? A. Yes it did.

Q. You had seen Kelly and his relationship with Mrs. Parker—seen them together about the hut over the last week? A. Yes.

Q. Had you formed any opinion as to their relationship?

HIS HONOR: I will not allow that question, Mr. Cook.

Mr. COOK: Q. I think you did say in answer to my friend that when the accused said "Did you notice him hanging around, he seems to be hanging around Joan" you said "It appears so"? A. Yes.

Q. That was on the Sunday morning? A. Yes, Sunday morning or afternoon—it was after one really.

Q. Did anybody say Mrs. Parker or Kelly had any conversation—did they have any conversation with you in the previous week in relation to their attentions? A. Not that I remember at all.

Q. You don't recall anything? A. No.

Q. From what you told us they were only together in each other's presence about five or six times in the previous week? A. Yes.

Q. On the night you went into Jerilderie with Frank Parker and your wife and children what was Kelly and Mrs. Parker doing—were they left alone in the hut with the young children? A. That is correct.

Q. What time did you leave? A. Half past ten or eleven o'clock.

Q. At night? A. Yes, going to the doctor's.

Q. When did you return to the hut? A. It would be around one I suppose.

Q. Where were Mrs. Parker and Kelly when you returned? A. They were in the kitchen.

Q. Were the children asleep? A. Yes.

Q. You say that apart from that occasion the only occasions when they were with each other together was when you were there with your sister or when other persons of the family were present? A. They were always with company.

Q. I think one of the nights you were there you stayed up until four or five o'clock in the morning playing cards? A. That was the first Saturday afternoon Dan Kelly came across.

Q. On that night did you stay up the whole night? A. Just about, yes.

Q. Was that the night he only slept about an hour? A. Yes.

Q. And then left to go back to his quarters? A. On the Sunday night he went—he rode his bike back to his quarters. It was a Sunday.

Q. The previous occasion when he came he just stayed and obviously was going to stay the night? A. Yes.

Q. You in fact in the end asked him to stay? A. Yes.

Q. Did Frank Parker at all tell you when he was six years of age his mother had run off with another man? (Objected to; disallowed.)

Q. When Mrs. Parker was going were the children weeping and wailing? A. Yes.

Q. Quite loudly and noticeably? A. Yes.

Q. Was Parker crying also and sobbing at that time? A. No, it was just a little after that that he went down into the bush and cried.

Q. When you took this rod from him you just threw it into the grass did you? A. Yes.

Q. And that is where you found it a few days later, still lying there? A. Yes.

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 4.

N. Craig.

5th April, 1961.

Cross-examination.

Q. You have told us about the obvious love and affection that Parker had for his wife; when he said he would take his wife up to the gate how did he say that, do you recall his demeanour and tone of voice? (Objected to; disallowed.)

Q. Just before Kelly left did Parker do something with the window of his car? A. Yes.

HIS HONOR: Q. Did you see this or did somebody tell you about it? A. I saw it.

Mr. COOK: Q. What did he do? A. I think he started—he tried to start the car and it would not start so he got out and punched the window.

Q. Did he smash the window? A. I never saw the window—whether it was smashed or not. I noticed some blood on his hand and he apparently cut his hand.

Q. You saw him deliver the punch against the window? A. Yes.

Q. Did he deliver with some force? A. Yes, it looked to me as though it was.

Q. From what you could see did it appear to hurt him or have an effect on him? A. Yes, he seemed to close his fist tightly. He might have had pain there.

Q. When Parker had been staying with you he had been looking for a job had he not? A. Yes.

Q. And he had in fact obtained a job at Albury, did you know that? (Objected to; disallowed.)

Q. Before he came to stay with you do you know whether he had been employed on other station work? (Objected to; disallowed.)

Q. This knife which had been produced in Court, m.f.i. "1", do you recognise that knife? A. I do.

Q. Whose knife is it? A. Frank Parker's.

Q. Did you see him carrying that? A. Yes.

Q. How long before this Sunday did he have the knife? A. He had it practically all the time in a pouch on his belt. He carried it all the time.

Q. He wore it all the time? A. Yes.

Q. Did he ever say anything to you to indicate any reason for carrying a knife? A. His reason was in case of snake bites he would use it to cut himself.

Q. You told us he wore it all the time? A. Yes.

Q. You know Kelly of course and you had known him for some four months? A. Yes.

Q. Was he in the habit of wearing a knife? A. Yes, all the time.

Q. Do you recall on this Sunday whether he had a knife? A. Yes, he did.

Q. Was it a knife larger than Parker's knife? A. Much larger.

Q. Did he carry it in a sheath in his belt? A. No, usually he had it in a sheath strapped to his leg.

Q. Strapped to his leg? A. Yes.

RE-EXAMINATION

Re-examination.

CROWN PROSECUTOR: Q. Is that the knife you referred to that Kelly used to carry (Witness shown knife)? A. That is the knife.

(Knife identified by witness m.f.i. "3".)

FURTHER CROSS-EXAMINATION

Further cross-examination.

Mr. COOK: Q. (By leave): From your knowledge of the locality, Mr. Craig, if Kelly had left the gate was there more than one way he could have got back to his quarters at New Camp? A. Yes.

Q. Either by road or across the paddock? A. Yes, across the paddock or along the main road.

Q. He could have used his bicycle to cross the paddock? A. Yes.

(Witness retired.)

Joan Gwen Parker

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What is your full name? A. Joan Gwen Parker.

Q. You are the wife of the accused? A. I am, yes.

Q. You know that you are not bound to give evidence in these proceedings? A. I do know that and I do not wish to give evidence for or against.

(Witness retired.)

CROWN PROSECUTOR: Your Honor, I have informed my friend that I do not intend to call Miss Joan Parker, the daughter, unless Mr. Cook requires to cross-examine.

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 6.

J. M. D. Samuels.

5th April, 1961.

Examination.

Jeanette Mary Dolleen Samuels

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What is your full name? A. Jeanette Mary Dolleen Samuels.

Q. Do you go to work? A. No.

Q. Where do you live? A. New Camp, via Jerilderie.

Q. That is with your uncle and aunt, Mr. and Mrs. Craig? A. Yes.

Q. Were you living there in October of last year when the accused and his wife and family were living there too? A. Yes.

Q. Were you there at the time on the 16th October when the accused's wife left? A. Yes.

Q. Do you remember what happened on that day, the day that Mrs. Parker left? A. Yes.

Q. Can you tell us where the accused and Mr. Craig were during the morning? A. Well, Uncle Noel was down fixing—getting something off an old Ford car.

Q. At what time was this? A. Oh, about ten or something to eleven, I think.

Q. Mr. Craig is your uncle? A. Yes.

Q. Did they go anywhere after that? A. Yes.

Q. They were away in the accused's car, were they? A. Yes.

Q. Do you know what time it was when they came back? A. It was about something past two or something to three or something like that.

Q. Prior to that did you see Mr. Kelly around the place from time to time? A. Yes.

Q. Had he been there quite a lot during the week before that? A. Yes.

Q. Can you tell us where you were at the time when your Uncle Noel and the accused arrived back around about two o'clock or three o'clock or whatever time it was on the 16th October? A. I was just going over for a swim with Chris and Robert, that is Auntie Joan's nephew. We were just crossing—— (Interrupted.)

Q. With whom, Chris and Robert——

HIS HONOR: Q. What is Robert's other name? A. Connor.

CROWN PROSECUTOR: Q. Was Mrs. Parker there? A. They were ahead of us and they were going over for a swim too.

HIS HONOR: Q. Who were "they"? A. Auntie Joan, Kathleen, Richard, Annette, Neville, Barry——

CROWN PROSECUTOR: Q. Are they some children Parker and some children Craig? A. Yes.

Q. Do you know where Mr. Kelly was at that time? A. He was over at the dam waiting.

Q. What happened while you were walking over towards the dam? A. As we were going over Uncle Frank pulled up near the house and he called out to Auntie Joan but she could not have heard him so he asked Auntie Chris would she tell Auntie Joan that he wanted her and Auntie Chris got to her and told her and Auntie Joan said she wanted to go for a swim.

Q. What happened? A. She kept on walking and Uncle Frank drove and followed us in the car and pulled alongside of us and was talking to Auntie Joan.

Q. Did Mrs. Parker, Auntie Joan, go for a swim? A. Yes.

Q. What did the accused do? A. He went back home.

Q. How long were you all down at the dam? A. Oh, about an hour I think—about an hour.

Q. Were you dressed in swimming costumes? A. Yes.

Q. And Richard, was he in a costume too? A. Yes.

Q. Was everyone down there dressed in some form of swimming attire? A. Yes.

Q. After you finished swimming did you take off your costume? A. No.

Q. You had it on until after Mrs. Parker left, is that right? A. Yes.

Q. What about Richard? A. He had his on too.

Q. Can you tell us what happened when you came back from the swim—back to the house? A. Well, when we got back to the house Uncle Frank was waiting there and he said he wanted to talk to Auntie Joan out the back for a minute. They went out the back and when—

Q. You weren't there, were you; did you hear any of it? A. No.

Q. Was anyone else out the back at the time the accused and his wife were out the back? A. I don't know.

Q. Did you ever hear any conversation between Kelly, the accused and the accused's wife? A. No.

Q. After they had had a conversation at the back what happened? A. Well, they came back inside and Uncle Frank went out to the car and then Auntie Joan asked me to help her pack some things—no, Auntie Joan asked me—she got the case and asked Richard and I to help her carry them.

Q. Was she packing some things herself; did you see her pack some things? A. Yes.

Q. And she asked you and Richard Connor to help her carry them? A. Yes.

Q. Did she ask you to carry them? A. Yes.

Q. Did you help her to carry them? A. Yes.

Q. Where did you go to? A. We were going to the mail box but the cases got a bit heavy and Auntie Joan said to leave them near a big tree on the side of the road so we left them there.

CROWN PROSECUTOR: Q. Where did you go to? A. We went from there to the mail box.

Q. Who was at the mail box? A. Dan Kelly.

Q. What happened when you got to the mail box? A. When we got to the mail box Auntie Joan told Dan about the cases, and he asked Richard to go back on the bike and get them.

Q. Did Richard leave you? A. Yes.

Q. Did he come back after a while? A. Yes.

Q. When he came back what happened? I don't want any conversation, but what happened? Did he have the cases? A. No.

Q. What happened? A. Well, he told us that ——— (Objected to.)

HIS HONOR: Q. He told you something. What happened after that? (No answer.)

CROWN PROSECUTOR: Q. Did you all stay there near the mail box? A. No.

Q. What happened? A. Auntie Joan and Dan got on the bike and left.

Q. What did you do? A. Richard and I went back towards home.

Q. Were you still in swimming costume at that time? A. Yes.

HIS HONOR: Q. They did not take any cases with them? A. No.

CROWN PROSECUTOR: Q. You identified a bike in Court at the Coroner's Inquest as being the bike that they had gone off on, didn't you? Kelly's bike? A. Yes.

Q. And it was badly knocked about at that time? A. Yes.

Q. There was a bag tied on to the bike, a bag that had been tied on to the bike, wasn't there? A. Yes.

Q. Was it that bag with that name on it that used to be on the crosspiece of the bike? (Shown to witness.) A. I did not notice the name before.

Q. Was it a bag like that? A. Yes.

(Bag m.f.i. "4".)

Q. At the time when you were going back to the house, or before Mrs. Parker and Kelly left on the bike, did you see the accused's car? A. Yes.

Q. Where did you see it? A. Well, as we were going down the road it went past, and I do not know how far Auntie Joan and Dan were away.

Q. You were going back to the house and it passed you going in the direction of the road? A. Yes.

CROSS-EXAMINATION

Mr. COOK: Q. At that stage when you saw the car you could not see Auntie Joan and Kelly, could you? A. No.

Q. They had disappeared down the roadway? A. Yes.

Q. After you had come back from the dam and before Auntie Joan left, did you see Mr. Parker crying and sobbing? A. Yes.

Q. Was he doing that for some period of time? Was he crying for a long time? A. He was out in his car crying but I do not know how long he was crying for.

Q. When he was crying was his wife and children with him? A. His children were. I do not know if Auntie Joan was or not.

Q. Was there some time when Mrs. Parker was there with the children and her husband in the car? When they were there all together in the car? Do you remember that? A. Was Uncle Frank crying?

Q. No. At one stage Mrs. Parker was standing out near the car, wasn't she? A. Yes.

Q. Where Mr. Parker was? A. Yes.

Q. And the children were crying at that time? A. Yes.

Q. Were they asking their mother to stay? A. Yes.

Q. Did you hear her say anything when they were asking her to stay? A. I do not remember now.

Q. Was Mr. Parker sobbing then? A. Yes.

Q. When you were up at the mail box, at any time prior to Mrs. Parker and Kelly leaving on the bike, did you look back towards the hut? A. When Auntie Joan was going, do you mean?

Q. Yes, just before she left. Did you look back towards the hut? A. Yes.

Q. Did you see Robert Connor when he was coming back on the push bike? Could you see him coming back towards the gate when he was coming back? A. Yes.

Q. Could you see right down to the hut? A. You could not see it properly, you could just see it a bit.

Q. For some distance would the track to the hut be hidden by a rise in the ground? A. Yes.

Q. About how far would you be from the gate, from your experience, before you could see the gate, when walking up to it? About how far away coming up the track? Can you help us at all or do you find it difficult to judge the distance? A. Do you mean how far——

Q. When walking up the track from the gate would you have to be fairly close to the hut before you could see someone standing at the hut? A. No, when you walk from the house a bit you can see the gate from there.

Q. At any time when you looked back to the hut did you see Mr. Parker walking up towards the gate? A. No.

Q. Were you looking in that direction for some time? A. I would look now and again.

Q. Just to get this straight, I think there were some fourteen children and four adults living at the hut? A. Yes.

Q. The Parkers and their youngest child were staying in the car? A. Yes.

Q. This was a tin shed with two bedrooms and a kitchen? A. Yes.

Q. And when you had been at the hut the week before this Sunday you had seen Kelly there constantly, hadn't you? A. Yes.

Q. He stayed there, or he was over there every night of the week before the Sunday? A. Yes.

Q. And he stayed every night? A. No, not every night.

Q. In the week before how many times had he stayed at the hut? A. About three times.

Q. Were you there all the time he was there? A. Yes.

Q. With Mrs. Parker? A. Yes.

Q. You would be present, too? A. Yes.

RE-EXAMINATION

CROWN PROSECUTOR: Q. You were going back from the gate towards the house and the accused's car was going from the house towards the road. Were you on the same road? A. There is a fence along the lane, and we were going down the fence as the car came past.

Q. Were you in the same paddock as the car was? A. Yes, I was in the same lane.

Q. When you get to the end of that lane on to the street, is there a ramp the car goes over or is it a gate? A. A gate.

Q. So in order to get out you would have to stop the car and get out and open the gate and drive through? A. You mean on the main road? (Objected to; allowed; leave granted to Mr. Cook to cross-examine further if required.)

Q. Yes. A. It is just a culvert. Two culvert posts. Two white posts on each side. It is a sort of lane and the main road goes up the middle.

Q. Any gate there is near the house? A. There is the Needlewood paddock where Uncle Frank came out——

HIS HONOR: Q. You said you saw Kelly and Mrs. Parker go off on the push bike? A. Yes.

Q. How were they arranged on the bike? A. Auntie Joan was sitting on the bar, and Dan Kelly——

Q. Which bar do you mean? The handle bar? A. No.

Q. Which bar was she sitting on? First of all, who was pushing the pedals? A. Dan Kelly.

Q. Was Mrs. Parker in front of him or behind him? A. In front of him.

Q. Sitting on the bar immediately in front of him? A. Yes.

Q. That is behind the handle bars? A. Yes.

Q. Between Dan Kelly and the handle bars? A. Yes.

Q. On that bar? A. Yes.

FURTHER CROSS-EXAMINATION

Mr. COOK: Q. She was in fact sitting straight across the bar like that, wasn't she? (Demonstrating with fountain pen.) A. Yes.

Q. In a position right across the bar? A. Yes.

Q. She would be facing one side as they were riding along? A. Yes.

Q. Do you recall whether she had her left or right thigh near the saddle? Was she sitting facing the inside of the road, the fence, or the other side? A. She was facing the other side. The fence.

Q. Left or right? A. Left.

Q. Facing left? A. Yes.

Q. She was sitting right across the bar facing left? A. Yes.

HIS HONOR: Q. Have you ever ridden a horse? A. Yes.

Q. Do you know what an ordinary saddle is like on a horse, don't you? A. Yes.

Q. Do you know what a side saddle is on a horse, that a lady rides on, with both legs on one side of the horse? Have you heard of a side saddle? A. No.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.

Further Cross-examination.

Q. Are you clear about this, when Mrs. Parker was on this bike she was not straddling the bar you said she was on, she did not have one leg on each side of it? A. No.

(Witness retired.)

Prosecution Evidence.

No. 7.

R. J. Connor.

5th April, 1961.

Examination.

Richard John Connor

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. You live with your uncle and aunt, Mr. and Mrs. Noel Craig, at the property called New Camp? A. Yes.

Q. Were you at that place on the 16th October last year? A. Yes.

Q. The day that Mrs. Parker left? A. Yes.

Q. We have been told you carried bags up to the gate, is that right? A. Not right up to the gate.

Q. You carried the bags part of the way to the gate, then went up to the gate with your aunt, Mrs. Parker? A. Yes.

Q. We have been told Kelly and Mrs. Parker left on the bike, where you were at the gate, on the bike, and went towards Jerilderie? A. Yes.

Q. And you went back towards the house? A. Yes.

Q. Did you see the accused's car? A. Yes.

Q. Where was it? A. It was going along the Goolgumbla Road towards Jerilderie.

Q. How long after Mrs. Parker and Dan Kelly had left the gate? A. About five minutes.

Q. We have been told when you and Mrs. Parker and the last witness, Miss Samuels, first got up to the gate, you took the bike from Kelly and went back along the road to where the ports were? A. Yes.

Q. Did you see anything there? A. Yes, I saw Uncle Frank walking up the road towards us.

Q. That is the accused? A. Yes.

Q. He was walking then was he? A. Yes.

Q. How far up along the road was he? Was he halfway to where you were? A. Yes, about that.

Q. Which direction was he going in? A. Towards us.

Q. What did you do? A. I got back on the bike and rode back and told Dan and Auntie Joan.

Q. You did not collect the bags? A. No, I left them there.

CROSS-EXAMINATION

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 7.

R. J. Connor.

5th April, 1961.

Cross-examination.

Mr. COOK: Q. Did you see your Uncle Frank stop walking or turn around and go back? A. I saw him turn around.

Q. And go back towards the hut? A. Yes.

Q. You know that track very well, don't you? A. Yes.

Q. Where he was walking up towards the gate? A. Yes.

Q. From where he was would he have been able to see over the rise to the gate, or was he below the rise? A. I do not know.

Q. Is there a rise between the hut and the gate? Is there a rise—not a hill—a rise in the track a bit? A. I do not know. I am not too sure.

Q. Before Mrs. Parker went up the track with the ports did you see Frank Parker crying and sobbing? A. Yes.

Q. Was he sobbing for quite a long time before she left? A. I only saw him a bit. I did not see him doing it for long.

Q. Then you left. He was crying for a short while before you left? A. Yes.

Q. When you left he was still crying, was he? A. No, I do not think so.

Q. Where was he then? A. At the back of his car.

Q. You had seen Mr. Kelly come over a number of times during the week before this Sunday, had you? A. Yes.

Q. You had been there? A. Yes.

Q. Were you always there when he and Mrs. Parker were together? A. No, not all the time.

Q. When you saw your Uncle Frank, Mr. Parker, on this Sunday morning, just shortly before Mrs. Parker left, did he seem to be very upset and disturbed? A. Yes, I think so.

Q. Did Mrs. Parker and Kelly go towards Jerilderie or away from Jerilderie? A. Towards Jerilderie.

Q. Where were Kelly's quarters? Were they in the opposite direction to which they were going? You know where Kelly was staying, don't you? A. Yes.

Q. To get to his quarters would you go in the opposite direction? A. He was going the right way. He was going towards New Camp Lane to go up there.

Q. You could go up New Camp Lane or you could take a track across the paddocks? A. Yes, you could go both ways.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
No. 7.
R. J. Connor.
5th April, 1961.
Re-examination.

RE-EXAMINATION

CROWN PROSECUTOR: Q. My friend asked you whether you saw the accused crying that afternoon? A. Yes.

Q. You told him you had? A. Yes.

Q. My friend asked you the last time you saw him was he crying, and you said No, he was at the back of the car at that time? A. That was when we were leaving.

Q. To go with Mrs. Parker? A. Yes.

Q. What was he doing then? (Objected to; allowed; leave granted to Mr. Cook to cross-examine further if required.) A. He had a piece of iron in his hand, in the hole in the bumper bar at the back of the car.

Q. His own car? A. Yes.

Q. You say he was not crying at that time? A. No, I do not think so. He had his back to me.

Q. How long was it before you left with Mrs. Parker that you saw the accused crying? A. I do not know how long it was.

Q. Was it some time? A. Yes, it was a fair while.

(Witness retired.)

Prosecution Evidence.
No. 8.
I. Jukes.
5th April, 1961.
Examination.

Ian Jukes

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. Where do you reside? A. Dudley Park, Jerilderie, now.

Q. You were living in Victoria, weren't you? A. Yes I was in Victoria.

Q. You have a brother Ronald, have you not? A. Yes.

Q. And he lives somewhere in the vicinity of the place called New Camp? A. It is near New Camp.

Q. Do you remember on the 16th October, a Sunday, in the afternoon. being on the road, on the Goolgumbla Road? A. Yes.

Q. Which direction were you travelling? A. I was heading north.

Q. Towards or away from Jerilderie? A. Away from Jerilderie.

Q. About what time in the afternoon was it? A. About half past two or a quarter to three.

Q. Did you see a man and a woman on a bike? A. Yes, I did.

Q. Where were they in respect of the camp, the tin building that is on New Camp property? A. They were more to the south towards Jerilderie.

Q. Far? A. They would be about a mile and a half from the camp.

Q. Shortly after seeing them did you see anyone else? A. Yes, I saw two young people on the road.

Q. How were they dressed? A. They were in swimming togs.

Q. Shortly after seeing them did you see a vehicle? A. Yes, I saw a black sedan coming across the paddock.

Q. What paddock was that? A. Needlewood. We call it Needlewood.

Q. Part of New Camp? A. Yes.

Q. What did you notice about the car coming across the paddock? A. The only thing was that it seemed to be travelling a bit fast across that paddock.

Q. What happened as far as the car was concerned? A. I was going along and saw the car and it came to the gate, and he got out and opened the gate and just then I got past.

Q. When he opened the gate was he acting at ordinary speed? A. He seemed to be more in a hurry than usual. That was a very hot day.

CROSS-EXAMINATION

Mr. COOK: Q. You had come a mile and a half further along the road from seeing these persons on the bike to where you saw this person in the car? A. I beg your pardon?

Q. They were about a mile and a half down the road from where you saw him in the car? A. No, that would be from the camp. They were about a mile down the road.

Q. You had passed them and come on about a mile and then you saw him at the gate? A. Yes.

Q. And you were about at the gate when you saw him go through? A. Yes.

Q. Did you know the woman on the bicycle? A. I did not really know her. I saw her on the bike.

Q. Did you know the man on the bike? A. I did roughly. I did not really know him to speak to.

HIS HONOR: Q. You had seen him before, had you? A. No, I got mixed up—

Q. You had not seen them before? A. No, I had not seen them before. I had heard them talking about him.

Q. You had not seen the man and woman on the bicycle? A. No, they were the wrong people, I thought.

(Witness retired.)

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 9.

J. G. Cochrane.

5th April, 1961.

Examination.

Jack Gladstone Cochrane

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. You are a constable of police stationed at Liverpool? A. Yes.

Q. In October of last year were you then stationed at Jerilderie? A. Yes.

Q. On the 16th October, in the afternoon about 10 to 4, did you receive a telephone call at the Jerilderie Police Station? A. Yes.

Q. Tell us what happened as far as the phone call was concerned what was said on the phone? A. I answered the phone and a male voice said, "Hello, is this the police station?" I said, "Yes, Constable Cochrane speaking". He said, "I have just killed a boy, will you come out and bring a doctor, I do not want my wife to die, and she is hurt bad". I said, "Who is this ringing?" He said, "Parker". I said, "Where are you ringing from?" He said, "Little's place. There was no one home so I broke in". I said, "Where is your wife now?" He said, "Near New Camp. It is a part of Bundura". I said, "Which road is that on?" There was no answer and I listened for some minutes and then rang Dr. Pilkington of Jerilderie. I have spoken to a man, Frank Parker, on several occasions previously, and I would say the voice I heard on that phone was that of the same man and of the accused before the Court.

Q. Did you go out along the road? A. I went to a property known as Dunraven, which is situated approximately 25 miles due north of Jerilderie. I went to a residence occupied by John William Little.

Q. What did you notice about the property at that time? A. I entered the building on the western side and saw a door on the western side of the building that was open. I noticed the architrave had been prised off near where the lock catch is.

Q. Did you notice something about the telephone there? A. I entered a hall-way and on the left-hand side of the wall there was a telephone, and the receiver was off the hook and hanging suspended by a cord.

Q. Where did you go after that? A. I then left Dunraven and proceeded to the Goolgumbla Road. On arriving at the Goolgumbla Road I proceeded in a northerly direction from the unnamed lane and approximately a mile north of this unnamed lane I saw a black Dodge sedan No. ADH-898 on the western side of the roadway. The vehicle was facing in a westerly direction, and I noticed it was damaged to the nearside mudguard.

Q. Is that a photograph of the car showing the damage that was on it when you first saw it? (Shown.) A. Yes.

HIS HONOR: Q. Was that photograph taken at the spot where it was when you first saw it? A. Yes.

(Photograph tendered and marked Exhibit B.)

CROWN PROSECUTOR: Q. Did you see some distance away a woman you now know as Mrs. Parker? A. Yes.

Q. Where was she? A. Approximately half a mile north of the vehicle on the eastern side of the roadway and lying on an embankment.

Q. Was she conscious when you saw her? A. Yes, and she appeared to be injured.

Q. Was the doctor with you? A. The doctor came up later. The doctor was down with the deceased at the time.

Q. There was the body of a man there, was there? A. Yes.

Q. Where was he in relation to the motor car? A. Approximately 40 yards from the vehicle on the eastern side of the roadway on the eastern side of a table drain that runs along the eastern side of the roadway.

Q. There was the roadway, the table drain, and the man was over the other side of the roadway? A. Yes.

Q. He was then dead? A. Yes.

Q. The doctor examined him? A. Yes. There was no movement from the body.

Q. Can you describe the locality, starting with the motor vehicle? A. The motor vehicle was on the western side of the roadway at right angles to the road and facing in a westerly direction. This vehicle was damaged to the nearside mudguard and there was a woman's black cardigan hanging on the nearside headlight. There was a damaged push bike on the eastern side of the roadway and I noticed this bicycle was damaged to the rear wheel.

Q. Is that a photograph of the bike as it appeared at the time? (Shown.) It is being held up, is it not? A. Yes, I am holding it.

HIS HONOR: Q. Was this taken on the site? A. Yes.

(Photograph tendered and marked Exhibit "C".)

Q. Were those photographs taken that morning? A. The following morning. In the early hours of the morning.

CROWN PROSECUTOR: Q. I think you were going to tell us there were attachments from the bike scattered about? A. I then saw on the eastern side of the roadway a haversack, a bicycle headlight, a bicycle pump, a man's shoe, a woman's shoe, and motor vehicle number-plate ADH 898. I then saw tyre marks leading from the motor vehicle across the eastern side of the roadway and along the embankment on the eastern side. The articles I have just mentioned were scattered in the vicinity of these tyre marks, and north of a culvert which separated them from the car and the bicycle.

Q. Assuming the road is going straight out in front of you, and this is going towards Jerilderie, you are standing on the road looking towards Jerilderie—do you follow me? A. Yes.

Q. Your left-hand side would be the eastern side? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 9.

J. G. Cochrane.

5th April, 1961.

Examination.

Q. There is an embankment that slopes down to a watercourse, is there not? A. Yes, on both sides of the roadway.

Q. The roadway is built up at both sides to an embankment? A. Yes.

Q. The car is over on the western side some distance along the road? A. From where you are standing it would be on the right-hand side.

Q. A set of tyre marks led off on the eastern side and led down in a sweep, and cut back on to the roadway and across the roadway to where the car is? A. Straight across the roadway, directly from the rear of the vehicle, directly across the road along the eastern embankment, and then proceeded along in a northerly direction.

Q. If you are standing at the northern end where these marks go off the road, where was the body of the man in relation to that? A. On the eastern side of the table drain from the tyre marks.

Q. The tyre marks went along between the roadway and the table drain and the man's body was over the table drain? A. Yes.

Q. Was it over the table drain at a point where the tyre marks were off the road? A. Yes.

Q. Were you able to fix the point of impact? A. Yes, I was.

Q. Before you got to the point of impact were the tyre marks going in a straight line or did they vary? A. I followed them back to the formed portion of the roadway, and at this point there was a scrub mark about one foot in length at an angle of approximately 45 degrees, and there was a bicycle tyre mark leading from this scrub mark along the eastern side of the roadway in a northerly direction. There were also traces of dried mud and this mud was similar in form to that which adheres beneath mudguards of motor vehicles. The tyre mark then curved from the scrub mark across to the incorrect side of the roadway, that is the western side of the roadway, back to the eastern side of the roadway, and along in a northerly direction.

Q. That is on the eastern side and swinging round to where the car was? A. Yes. I examined the tyre pattern and this tyre pattern was identical with that of motor vehicle ADH 898.

Q. That is the tyre pattern further along the road? A. Yes, it was identical.

Q. You remained there until the Coroner came, did you? A. I did.

Q. You saw the area of flattened grass up near where the body was, did you? A. Yes, I made an examination of that.

Q. And you waited then until Detectives Sheather, Ellis and O'Sullivan arrived in the early hours of the following morning? A. Yes, approximately 2 a.m.

Q. Did you go on the night of the 19th October to the premises on New Camp where Mr. Craig lives? A. Yes.

Q. Did he hand you the iron brake rod? A. Yes.

Q. And you gave that to Detective Sheather? A. Yes, the following morning, on the 20th.

Q. What was the state of the roadway there, and the table drain, from the point of view of water, when you arrived out there? A. It was very dry. There had been no rain. The table drain was full of water, I would say approximately about a foot deep. It would be approximately 8 to 10 feet wide.

Q. Nothing was disturbed until Constable O'Sullivan took the photographs and took the measurements? A. No. I remained at the scene until the photographs were taken.

CROSS-EXAMINATION

Mr. COOK: Q. When you got there did you see anything to indicate the path of the motor vehicle to the point of impact? A. Yes.

Q. Did those marks show the vehicle had made a sudden swerve just prior to the point of impact? A. The marks of the vehicle showed that the vehicle was travelling in a southerly direction at approximately 50 yards from the point of impact it veered to the western side of the roadway and then in a curve back towards the eastern side of the roadway. The tyre pattern was continuous and I would say the brakes had not been applied on the vehicle.

Q. Just prior to the point of impact it did a figure "S"? A. Yes, approximately an "S".

Q. At the point of impact? A. Yes.

HIS HONOR: Q. A figure "S" or a figure "U"? A. Yes.

Mr. COOK: Q. From where you saw the point of impact, how far is it across to Little's place? A. By road or across country?

Q. Straight across country, for a start? A. It could be about a mile. Approximately a mile.

Q. Is it possible to gain access to Little's place through the lane or some other entrance near there? A. The only lane I know of is off the Goolgumbla Road, that is the unnamed lane that I came along in the Police vehicle.

Q. From Little's place? A. From Little's place.

Q. How far out from this particular spot does that lane come to the main road? How far away? A. Approximately a mile from where the vehicle and the scene were where I found the motor vehicle. Approximately a mile. The house is back from the unnamed lane approximately half a mile.

Q. If you went from the scene to Whittle's place you would go down about a mile and then in about a mile? A. It could be about a mile.

Q. And then into the house from the lane? A. Yes.

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 9.

J. G. Cochrane.

5th April, 1961.

Cross-examination.

Q. And to go across the paddock it would be about a mile? A. It could be less.

Mr. COOK: Q. When Mr. Parker was speaking to you on the telephone did you notice anything about his voice? A. He seemed very upset—very upset.

Q. You say you received that call about ten to four? A. Approximately ten to four, yes.

Q. You have told Mr. Knight that there was a drop off the road down to the table drain? A. Yes.

Q. Would it be about three feet? A. Yes, approximately three feet.

Q. I think just ahead of this particular point of impact in the direction in which the car was going there was a culvert? A. Yes.

Q. Is the table drain somewhat further below the road at that spot than at the point of impact? A. Yes, it is approximately 18 inches lower there.

Q. It would be 4 ft. 6 in. approximately below the road level? A. Yes.

Q. If you were driving along the road it would be obvious there was a drop on the left hand side? A. Yes.

Q. From what you have told us would it appear the car has gone off the road at a fairly sharp angle—45 degrees or sharper? A. Approximately at an angle of 45 degrees.

Q. And it careered along for a distance of approximately 40 yards? A. Yes.

Q. And it suddenly came up straight across the road. (Objected to.)

Q. From the marks you were able to see were you able to form a conclusion that the car had gone in a perfectly straight ahead fashion or had gone broadside or what? A. The car I would say had slewed, being on the embankment it had slewed and it had accelerated to get through the table drain and up over the embankment.

Q. From what you told us when I asked you about these marks were they continuous in a direct line or did the marks swerve as they went along? A. They were more or less in a straight line.

Q. You did notice what you thought was a mark showing the car had slewed? A. Yes, the car had slewed, yes.

Q. Did you move the car? A. No.

Q. Were you there when the car was moved? A. Yes.

Q. Was it driven away.? A. I was not there when the car was brought to the Police Station.

Q. You weren't there when the car was moved from the spot—you weren't there? A. No, I was not there when it was moved.

Q. Were you there when it arrived at the Police Station? A. I could not remember that.

Q. You told us that at Mr. Little's place you saw that the door or the architrave had been prised off near where the lock catches? A. Yes.

Q. Did you see anything near the door? A. No.

Q. When you were at the premises were the rest of the premises opened or locked or closed? A. I did not inspect any other door on the premises.

Q. There was nobody on the premises when you got there? A. No.

Q. You know this particular area fairly well? A. Yes.

Q. Do you know with regard to the telephone whether there is any telephone closer than Mr. Little's place? A. No, there would be no closer telephone, I should not think, from there.

Q. You did say you had spoken to Parker in Jerilderie prior to this date? A. On several occasions.

Q. You have not spoken to him in relation to any pending offences he committed? A. No, Mr. Parker had come from Sydney and we merely talked about Sydney.

Q. It was something——? A. Just friendly talks, that is all.

Q. Did you see him in town in that previous week at any time with the man now known to you as Kelly? A. Yes.

Q. Had you seen them together? A. Yes, approximately on the Thursday the accused and Mr. Kelly came to the Police Station and Mr. Kelly was after a driver's licence.

Q. Mr. Parker was there with him at that time? A. Yes, and Mrs. Parker and Jeanette Samuels.

Q. From what you could see of them together and their conversation together did they appear or be on quite friendly terms? A. Yes, they appeared to be on friendly terms.

HIS HONOR: Q. Are you able to say how far away the deceased's body was from the bicycle? A. It would be approximately 30 yards.

(Witness retired.)

Reginald Rex Beauchamp

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What is your full name? A. Reginald Rex Beauchamp. I am a Sergeant of Police stationed at Jerilderie.

Q. On the 16th October, 1960, we have been told by Constable Cochrane that following on a telephone conversation you and he went out first of all to a property known as "Dunraven" where Mr. John Little's home was? A. Yes.

Q. You went to the house and saw that the door was broken in? A. Yes.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 10.
R. R. Beauchamp.
5th April, 1961.
Examination.

Q. And that there was a telephone there hanging off the hook? A. Yes.

Q. But there was no one home and you did not see the accused at that time? A. No.

Q. Constable Cochrane has told us that you went down to the Goolgumbla Road and that you saw the body of a man there not very far away from the Dodge car? A. Yes.

Q. And a pushbike? A. Yes.

Q. And you saw various articles scattered along the eastern side of the road there? A. Yes.

Q. And following upon Const. Cochrane going further along the road he told you something and you went along and saw a woman along there? A. Yes.

Q. And you and he waited there until a doctor arrived? A. Yes.

Q. And you then instructed Const. Cochrane to stay there until the detectives and the scientific section arrived? A. Yes.

Q. And you in fact went back to the Police Station and you were back there at the time when the accused made a written statement? A. Yes.

Q. Sergeant, did you actually see the statement taken? A. No, not all the statement.

Q. What part of it were you present at? A. I was in and out of the office most of the time, answering the telephone.

Q. What was happening at the time when you saw the accused making the statement—what was he doing? A. He was seated and a typewritten statement was made by one of the detectives.

Q. He was saying what they were typing? A. Yes.

HIS HONOR: Q. Who was the detective? A. Det. Ellis.

CROWN PROSECUTOR: Q. You were in uniform at the time? A. Yes.

Q. The accused was charged before you as being the senior policeman present at the Police Station at that time? A. Yes.

Q. Did he make any complaint to you about any treatment that he had received? A. No.

Cross-examination.

CROSS-EXAMINATION

Mr. COOK: Q. This statement was made about 11.30 at night? A. Yes, about that.

Q. Do you know when Parker had come to the Police Station—did you know that Parker had come to the Police Station with another man? A. Yes. he did.

Q. Do you know what time that was? A. Somewhere about four o'clock or half-past four.

Q. Half-past four in the afternoon? A. Yes.

(Witness retired.)

Ronald Henry Jukes

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What is your full name? A. Ronald Henry Jukes.

Q. And your occupation? A. Farmer and grazier.

Q. Where do you live? A. West Park, Jerilderie.

Q. Mr. Jukes, whereabouts is West Park in relation to New Camp? A. New Camp would be slightly south-west—about eight miles.

Q. Is New Camp nearer to Jerilderie or further away? A. Roughly the same distance, only on two different roads. It branches a few miles away.

Q. Can you tell us on the 16th October last year where you were about half past four in the afternoon? A. Travelling up Johnny Little's New Camp lane, as we know it.

Q. What road does that run to? A. The Bundure Station.

Q. From what road? A. From Goolgumbla Road.

Q. Were you travelling towards Goolgumbla, Goolgumbla Road, or away from it? A. Away from it; I had turned off it and was travelling east.

Q. What happened? A. I seen a man I knew as Parker walking along and he hailed me.

Q. That is the accused, is it? A. Yes. He hailed me to pull up and I pulled up and he said not to leave him alone as he had run over a man and thought he had killed him and he had already been up to Johnny Little's and broke in and rung the police and was waiting for them then and I told him that I would get in and take him to meet them and he went . . he got in the car and said, "Take me back and see how the wife is"—he thought he had killed her too and run over her too and he got out when we went back and he and I got out—when we got to where it happened at the Goolgumbla Road and he got out and went up and down looking around for his wife and he could not find her and there was a car there in the side of the table drain facing into the west table drain. At the back of it was a busted-up pushbike and I could not find his wife about anywhere but I saw a bloke lying on the other side of the table drain.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 11.
R. H. Jukes.
5th April, 1961.
Examination.

Q. What about the man lying on the drain? A. I jumped over the drain and had a look at him and he had been bashed up rather bad and I thought he had been hit with a radiator and he was facing east and lying on his side. He was sort of breathing in jerky spasms. I thought he might have had a broken back so I didn't touch him. He was not bleeding anything fresh. I said we would go to meet the police and see about getting the doctor out. When we started off he went up and down the road calling out for his wife and he could not see her so we got into the car and headed for Jerilderie and we travelled a few miles on and he never said anything, he was just sort of crying to himself about it and he started telling me he had run over him.

Q. What did he say? A. He said he run over him on purpose and he thought he had killed him outright and he said he hit him when he seen him riding down the road he hit him with the car and he jumped out and could not find either of them and he heard a noise and seen his wife lying in the gutter so he pulled her out of the water and jumped over the other side of the table drain and attacked the bloke with a knife and ran up to Johnnie Little's and rang the police. I had met him walking back from there and he wanted to get the doctor out to his wife so I asked him if he had asked the police to get the doctor and he said he did not remember whether he did or not. He just sort of kept talking about how he did it on the way in. He reckoned he——. (Interrupted.)

Q. Did he make any reference when you say he kept talking about it, to whether the man was alive or breathing? A. No, he asked me at the time if he was still alive and I said he was just—he looked to be breathing and he said he ought to be dead—that he meant him to be.

Q. Any reference to what he had done to the man with the knife? Did he make any further comments to you about it? A. Well, he said he got out and bashed him up and then stabbed him and if he had thought of it he would have cut his head off, but he forgot. The main thing he seemed to be worried about was hitting his wife. He didn't seem to reckon she was on the bike at the time; he thought she was further away. He seemed to be worried about that and he kept referring back to it. He thought she was not even on the bike.

Q. Where did you go when you got into town? A. We went straight to the police station, but there was nobody there and we went to the doctor's and there was nobody there. Then we went back to the police station again and drove around the town to see if we could find them and we stayed there for a while when Detective Sheather came along.

Q. Were you present when Detective Sheather first spoke to the accused? A. Yes, for some of the time.

Q. What was said then? A. Detective Sheather asked what had happened and he told him he had run over a bloke with intentions of killing him and got out and attacked him and stabbed him and then he was worried about his wife again and he was talking about that for a while and a couple of blokes came outside in a truck and spoke to the detective and he came back and said his wife was all right and he said, "Thank God for that".

Q. While you were with the accused did you notice whether he was injured in any way? A. No, he didn't seem to be.

Q. Did you notice anything about his hands? A. No, except there was a bit of skin off a couple of his knuckles, that is all. I never seen any injury on him at all.

Q. When you were talking to the accused and when he was telling you in your car and you were going along and he was telling you what had happened, what was his emotional state—was he upset? A. Not when he was talking about the bloke, except when he went on to the wife part of—then he was upset. No time during when he was mentioning the bloke's name.

CROSS-EXAMINATION

Mr. COOK: Q. In fact it was quite remarkable, Mr. Jukes, when he was talking about his wife he broke down and sobbed and then mentioned Kelly and he would be quite icily calm or cold about Kelly? A. Well, I thought he was.

Q. It was quite remarkable, switching on and off? A. Yes, I could not understand it myself because I did not think it was possible.

Q. It is fair to say that every time he mentioned his wife or anything about his wife he sobbed quite uncontrollably? A. Yes, he did.

Q. And when he was talking about Kelly I think you said previously he seemed as if he was reading it off a paper? A. Yes, he just knew exactly what he was talking about. He knew when he mentioned him, but as soon as he came to where his wife happened to be in it he would break down again.

Q. He told you a lot about their previous relations and how this man had come around the hut? A. Well, he told me that the man had been there for a few days previous—I think about seven days I think he said—on the Sunday before and they had a bit of an argument then and the other bloke was too strong for him and he could not handle him.

Q. Did he tell you that that was on the Sunday previously or what? A. I just cannot remember what day he said that happened.

Q. Did he tell you that prior to this man Kelly going away with his wife that the man had said he could take Parker's wife with one hand and beat up Parker with the other? A. Yes, he did mentioned that somewhere along the ride. It must have been travelling into town, I just cannot remember.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 11.
R. H. Jukes.
5th April, 1961.
Cross-examination.

Q. He told you that? A. Yes.

Q. Did not he tell you that had taken place just before Kelly left on the afternoon he went from the hut and that he went after them? A. I just would not like to swear to that—that he did mention it happened that morning.

Q. But it had happened before this event? A. Yes. He did mention those words to that effect—that they had taken place at some time.

Q. Did he tell you that just before he hit this man on the side of the road everything went black? A. Yes, he said when he got up behind them his wife jumped off the bike and she went one way and he went the other and he said he aimed the car straight at him and his mind went blank and the next thing he knew he was over the other side of the table drain.

Q. He did not say anything to you about what was going on in his mind or what had passed through his mind while he was bashing and stabbing the man? A. No. The thing he said there was as soon as he bashed him and stabbed him he ran straight up to Johnny Little's to ring the police and the doctor. He wanted the doctor.

Q. Do you remember him telling you he set out from the hut after his wife and the other man because he was going to try and bring his wife back? A. Yes, he said he would try to bring his wife back.

(Witness retired.)

(Further hearing adjourned until 10 a.m. Thursday, 6th April, 1961.)

IN THE CRIMINAL COURT

Coram: Hardie, *J.*, and a Jury of Twelve

REGINA v. FRANK PARKER

NARRANDERA: SECOND DAY: THURSDAY, 6TH APRIL, 1961

CROWN PROSECUTOR: Your Honor, there is one matter I think I should clear up in the evidence of Dr. Pilkington.

Prosecution Evidence.
No. 12.
Dr. R. R. Pilkington.
6th April, 1961.
Recalled.

Reginald Ralph Pilkington

RECALLED, ON FORMER OATH

HIS HONOR: Doctor, you have already been sworn and you are on your former oath. You appreciate that?

WITNESS: Yes, Your Honor.

CROWN PROSECUTOR: Q. Yesterday, you were asked these questions: "Did you form an opinion as to the cause of the death of the man?" to which you answered "Yes". You were then asked, "What was that?" and your answer was, "There would be considerable shock, with the breaking of the legs, and some amount of haemorrhage with both legs broken, in the legs themselves. During the post mortem the abdomen was opened and there was evidence of a small fracture of the pelvis. The main cause of the shock would have been the haemorrhage from the incised wounds on the left-hand side." That is the way your answer was recorded and in that recording of it there is no direct statement of your opinion as to what the cause of death was. What was your opinion as to the cause of death? A. Shock from multiple injuries and haemorrhage from the wound in the left side of the neck.

Q. Just to clarify that, doctor, all things are possible, but would it be likely that a person would die from shock from having fractures of both legs in the way that this man had fractures of the legs, from being hit by a motor car either directly or the bike he was on being hit and thereby causing the fractures—would that be likely to cause death? A. Not alone, no.

Q. If there had not been the wound on the left-hand side of the neck, in your opinion would death be likely to have ensued? A. No. I honestly believe that the man did die of haemorrhage from that wound.

Mr. COOK: I have no questions, Your Honor.

(Witness retired and excused.)

Cedric Steadman Vear

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. You are a legally qualified medical practitioner, practising and residing at Finley? A. Yes.

Q. On 17th October did you go to the Jerilderie and District Hospital? A. Yes.

Q. Did you there see Dr. Pilkington? A. Yes.

Q. And the body of a man was identified to you at that stage by Det. O'Sullivan as being Daniel Kelly? A. Yes.

Q. And you and Dr. Pilkington carried out a post-mortem examination of the body? A. Yes.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution.
Evidence.
No. 13.
6th April, 1961.
Dr. C. S. Vear.
Examination.

Q. First of all, dealing with the exterior of the body, tell us what you noticed about it, and then go into the matters of the complete finding? A. (Referring to notes with His Honor's leave.) The body was that of a young man, well built, of approximately 30 to 35 years of age with dark hair. There were numerous external signs of violence on the body. Firstly the scalp and the forehead contained approximately 16 contusions and small lacerations. The face itself had a further eight or nine contusions and the neck contained two major wounds, one on either side, and two minor lacerations under the chin. Further down on the trunk there was a large bruised area over the right hip and buttock, and an extensive abrasion on the postero-medial aspect of the left lower leg. That is the rear inside portion of the leg. Both lower legs were in a peculiar attitude which indicated there had been a fracture of both bones of the lower leg in both legs. Those were the findings on the external examination.

Q. Go on to the more detailed examination, will you? A. I then proceeded with the autopsy and examined first of all the abdominal organs. There was no abnormality in the internal organs of the abdomen. However, on opening the abdomen the lower abdominal wall contained a large amount of blood, extravasated blood, that is blood in the tissues, not in the vessels, and the pelvis had been fractured. The thorax was then examined. The internal organs of the thorax contained no abnormalities.

Q. That is the heart, lungs——? A. Heart, pericardium, lungs and pleura were normal. I then continued to the examination of the cranial cavity. There were no fractures present in the skull. The brain tissue appeared to be normal except for one area of extravasated blood over the inferior surface of the right temporal lobe.

Q. Inside the scalp? A. Inside the cavity of the skull on the lower surface, on the lobe of brain known as the right temporal lobe.

Q. What would you expect to cause that bleeding? A. That would have been as a result of a concussive blow to the head.

Q. A jerk? A. I do not think so. I think a blow would be necessary to produce that type of injury. I refer back now to the injuries of the neck. The wound on the right side of the neck, which appeared to be a stab wound, that is it was a sharply incised type of wound, had penetrated through the posterior wall of the larynx. The internal jugular vein and the common carotid artery were intact.

Q. This is on the right side? A. Yes, on the right side of the neck. No major nerves had been severed.

Q. The wound on the right side of the neck, although it was quite deep, did not touch anything that would be vital to life? A. Not as an immediate event, no.

Q. And the left side? A. The wound on the left side of the neck, which was also apparently a stab wound, had torn the internal jugular vein, but had not severed the common carotid artery. No other vital structures had been damaged on the left side.

Q. The tearing of the internal jugular vein, is that a serious matter? A. Yes, that is an injury of major importance.

HIS HONOR: Q. Because of loss of blood? A. Yes, because of bleeding which takes place from it. It is a massive vessel, probably as thick as my thumb, and if injured the rate of blood loss from it could be extremely rapid.

CROWN PROSECUTOR: Q. How soon in the ordinary way would you have to start remedial action to stop loss of blood in order to save life? A. With an injury of the order such as was present in this particular instance some type of pressure control of haemorrhage would be required within a very few minutes. Perhaps two minutes. Otherwise the amount of blood loss from a wound of that nature could lead perhaps to some pints within as I say perhaps two or three minutes.

Q. That would mean that was something that would be likely to cause death very quickly? A. Yes, it was the type of injury from which death could result in say five minutes.

Q. Did you form an opinion as to what was the actual cause of death? A. Yes.

Q. What was that opinion? A. In my opinion death was due to a combination of factors; firstly shock from the multiple injuries received, that is the head injuries and the multiple fractures of the lower legs, pelvis, and secondly hastened by blood loss from the wounds in the neck.

Q. Does the wound that causes extensive bleeding itself lead to shock? A. Blood loss if untreated has associated with it shock. Shock is a slower cause of death than blood loss.

Q. In this case—I am not meaning is it possible, because medically there is very little that is not possible—would it be likely in the ordinary way that without that injury to the vein of the neck that death would have taken place? A. I think that death could well have taken place from the injuries received, apart from blood loss. The injuries received in the way of fractures and head injuries could easily have provoked sufficient shock to have caused death.

Q. How long would you expect death to have taken on those injuries alone? A. Some hours.

Q. From the point of view of the violence necessary there would have to be a considerable amount of violence to cause the fractures of all four bones in the lower legs—that would have to be something coming from some very hard object being driven against them with fairly considerable force, is that right? A. Yes, that would be a fairly accurate statement.

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 13.

6th April, 1961.

Dr. C. S. Vear.

Examination.

Q. From the point of view of the facial and forehead injuries what did you think of those? A. They could only have been inflicted or received would be perhaps better—they could only have been received by the multiple application of some force by a hard object.

Q. Would there be any question of the skin being broken in the way that it was by merely blows with fists? A. I do not think it would be possible for the skin to be broken in so many places and with the type of wound present by a purely flesh to flesh contact.

Q. The injuries you described on the neck you described in the nature of stab wounds—it would require a sharp instrument to inflict those? A. Yes, it would be impossible to inflict them without a sharp instrument.

Q. With a sharp instrument what degree of force would be needed to go through the tissue in those areas of the neck? A. A considerable force—a comparable force to that required, for argument's sake, to cut the throat of a sheep. A force of that order to drive an object through the tissues would be required.

Q. It probably goes without saying, that if the injury to the legs were received first would there be any question of the man being able to be otherwise than lying down—after receiving the injuries to the legs? A. It would be most unusual for him to attempt to stand. It would have been impossible for him to have stood. Therefore the inference is that he would probably be lying following that injury.

Cross-examination.

CROSS-EXAMINATION

Mr. COOK: Q. Doctor, you told us this morning that you thought the death would follow from these injuries in about five minutes? A. I said that death could have followed within five minutes.

Q. Could have followed? A. Yes.

Q. It is quite possible that the deceased could have lived for half an hour or three-quarters of an hour? A. It is possible that he could have lived that long, yes. The factor controlling that would be the rate of loss of blood from the wounds in the neck.

Q. You said the loss in the first couple of minutes of blood was some pints, I believe, and you would expect if that was the rate of loss of blood you would expect death within five minutes; is that right? A. It is impossible to say because even the bodily attitude of the victim may control the rate of blood loss. If he was aware that he was losing blood and perhaps then bent his head to the side it may have controlled his rate of blood loss.

Q. He may have been bleeding at a far less rate than some pints in the first few minutes? A. Yes.

Q. Do you know that in this particular case the Police were informed about ten to four of the facts in relation to the killing of this man and that he was seen at the site of this incident by a man at half past four, still breathing? A. Yes.

Q. That would indicate, taking into consideration that some time must have elapsed before ten to four—some delay occurred before ten to four? A. Yes.

Q. It would appear that the deceased lived for at least three-quarters of an hour? A. Yes, I would say that is so.

Q. I think you told us that with this type of injury he would have to have help in the first two minutes to save his life? A. Perhaps I have been a little ambiguous. I did not say he would have to have help. I said blood loss would have to be controlled.

Q. That's what I mean, doctor. There would have to be some action? A. Yes.

Q. In that time, in the half to three-quarters of an hour lapse from the injuries and the time of his death, would it have been possible to save his life? A. I think so, yes.

Q. And it was possible too, was it not, doctor, that this man did in fact drag himself along the ground for some distance after receiving these injuries? A. I have no knowledge of that.

Q. You did not go to the scene? A. No.

Q. You do not know anything in relation to that? A. That is so.

Q. He was obviously a very powerful man? A. He was well built and a very muscular man.

Q. You saw the line of entry of the knife wounds to the neck? A. Yes.

Q. You told us of something of the force that would be required to deliver such a blow? A. That is right.

Q. Are you able, from that, to form any conclusion—from the force and the line of entry and position you have assumed, of the man on the ground—whether the knife blow was delivered in a clubbing fashion or a poking fashion? A. I feel that the wounds were inflicted by a clubbing type of action, but it is not impossible for them to have been received by a trusting action.

Q. You have told us—I think the wound on the left came down from the direction of the ear to the shoulder? A. Yes.

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 13.

Dr. C. S. Vear.

6th April, 1961.

Cross-examination.

Q. For that to have been inflicted in that line with a poking action the person delivering the blow would have to have stood at the head of the deceased? A. Yes, that would be fairly accurate; it depends entirely on the attitude in which the victim was disposed at the time the blows were delivered.

Q. The injuries to the face, the contused blows, would you describe those fairly from their position and the force which has been used to deliver them, that he had received a battering? Would that be a fair description? A. Yes.

Q. The blows appeared to have been delivered with considerable force and rapidity all over the face? A. Yes.

Q. From what you saw of the blows would it appear that it would be a hail of blows or a rain of blows? A. Yes.

Q. You did not see the motor vehicle? You did not see a black Dodge sedan at any time? A. No.

Q. The height of the fractures to the legs was 12 to 14 inches off the ground? A. Yes, perhaps—about 14 inches from ground level I should say. It is a type of injury which one commonly sees associated with motor vehicle accidents.

Q. People standing on the ground and being hit by a motor car? A. Yes.

Q. I want you to take it that the height of the bumper bar off the ground is 14 inches; does that further reinforce your opinion that he was standing on the ground when he was struck by the bumper bar? A. No, not at all. It is compatible with it, but I do not think the inference could be made from it.

Q. You did tell us that that type of injury was consistent and was frequently seen in persons walking on roads when struck by motor vehicles? A. Yes.

CROWN PROSECUTOR: The doctor said standing, not walking.

Mr. COOK: Q. You did not see any of the injuries to Mrs. Parker? A. No.

Q. You did not treat her? A. No.

Q. You do not know anything about her at all? A. No.

Q. Did you see any injuries to the chest, doctor? A. There was nothing of any significance—medical significance. There was a small skin laceration on the right shoulder, I think—yes, the right shoulder. It was not of any medical significance.

Q. Certainly no contusions or lacerations or incised wounds similar to those on the face or neck? A. No.

Q. When you qualified to practise as a doctor were you required to study a course of psychiatry in your medical course? A. A very elementary course of psychiatry, yes.

Q. I suppose psychiatry is a recognised branch of medicine? A. I would think so, yes.

Q. And I suppose what you learnt to qualify you as a doctor would be some general and elementary principles of psychiatry? A. Yes.

Q. Can you tell us, doctor, in general principles, from what you know, is it possible for a person to suffer some experience as a child and some very important experience and for that experience to remain in their subconscious mind all their life? A. I am not an expert psychiatrist, but I would think that would be possible.

Q. I suppose you get the situation, do you not, of a child or person frightened by a dog or falling into the water at a very early age—would you consider from your knowledge and experience that that sort of experience may last for the whole of their life in their subconscious mind? A. It could do.

Q. I take it from what you have told us that you would not—you would not venture any psychiatric opinion in relation this particular case? A. No, I would not.

CROWN PROSECUTOR: I have no re-examination.

(Witness retired and excused.)

John William Liddle,

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. Your full name, please? A. John William Liddle.

Q. What occupation do you follow? A. Grazier.

Q. Where is your property? A. At Jerilderie.

Q. Actually, is it 25 miles north of Jerilderie? A. Yes.

Q. Is it near Goolgumbla Road, although I do not think it adjoins it? A. Some part of it does, yes.

Q. Did you know the accused prior to the 16th October last, the man in the dock? A. I had met him.

Q. Had he on occasions telephoned from your property? A. Yes.

Q. You were away from your home on Sunday, 16th October? A. Yes.

Q. When did you get back, on that same night? A. Yes.

Q. When you did get back had you spoken to Constable Cochrane? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 14.

J. W. Liddle.

6th April, 1961.

Examination.

Q. What was the state of the door leading into your house? A. It had been forced open.

Q. And the telephone? A. It was off the hook.

Q. Did you notice something on the premises—on the verandah of the premises? A. Yes.

Q. What was that? A. A knife.

Q. Was there also with it a sheath? A. Yes.

Q. And some other article, wasn't there? A. Yes, and a belt.

Q. Was it the knife which is marked for identification "1" and the belt and sheath that you are now shown? A. Yes.

Q. They are the articles? A. Yes.

(Belt and sheath become part of m.f.i. "1".)

Q. What did you do with those articles? A. Detective Sheather took them.

Cross-examination.

CROSS-EXAMINATION

Mr. COOK: Q. You had gone away for the week-end? A. Yes.

Q. You locked up the house? A. Yes.

Q. There was nobody on the property at all, as far as you knew? A. No.

Q. You had yourself locked up the doors before you left? A. Yes.

Q. Did you see near where this damage was done to the doors any axe or something like that—a tool? A. Yes, there was an axe near the kitchen door.

Q. Did it appear from the marks in the woodwork that they were consistent with an axe having been used to open the door? A. Yes.

Q. It appeared from the marks in the woodwork that they were consistent with an axe having been used to open the door? A. Yes.

Q. Did it appear to you that the axe had been used with some force to prise open the door? A. Yes.

Q. Where this knife was lying on the verandah it was in quite an obvious position on the verandah? A. Yes.

Q. Anybody who had come on to the verandah would have immediately seen it? A. Yes.

Q. From your place, from the house across the paddocks— (Withdrawn.)

Q. You know the spot where this man Kelly met his death? A. Yes.

Q. You know where that is? A. Yes.

Q. From your place to that spot across the paddocks how far would that be, approximately? A. Two miles.

Q. Was that country at that time covered with long grass, fallen timber, bushes and scrub and that sort of thing? A. A fair amount of grass and not very much timber.

Q. There was a quantity of fallen timber and long grass? A. Yes, odd logs.

Q. There as a lane that runs from your place down to Goolgumbla Road? A. It runs onto the Goolgumbla Road, yes.

Q. That goes on to the Goolgumbla Road some distance from the spot where Kelly met his death? A. Yes.

Q. How long do you think from your knowledge—would it take you two to three minutes to drive by car to go from your place to the spot where Kelly was slain? A. Yes.

CROWN PROSECUTOR: Q. No re-examination, Your Honor.

(Witness retired.)

Arthur Andrew O'Sullivan

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. What is your full name? A. Arthur Andrew O'Sullivan. I am a Detective Constable of Police attached to the Scientific Investigation Bureau at Wagga Wagga.

Q. On the night of the 16th October, after having a conversation with Det. Sheather and Det. Ellis at the Jerilderie Police Station, did you go out along the Goolgumbla Road to a point where there was a culvert and a number of articles on the road? A. Yes.

Q. Could you describe for us the nature of the roadway at that point? Was it a flat road, or were there hills or bends, or what? A. The roadway at that point was completely flat and extended in a north and south direction, and was straight for approximately one mile either side of this particular area. The road was raised up about three feet higher than the surrounding ground and was 16 ft. in width. The road surface comprised very hard ground. On either side there was a sloping grassed embankment and on the eastern side this embankment was 19 ft. 6 inches in width. A table drain which contained about 9 inches of water adjoined the bottom end of this embankment on the eastern side, and was 5 ft. 9 in. in width. The ground to the east of this was quite flat and contained a considerable amount of long grass.

Q. What was the state of the weather prior to your getting out there? A. On that particular night it was overcast and very windy.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 15.
A. A. O'Sullivan.
6th April, 1961.
Examination.

Q. Did it in fact rain during the night? A. It did.

Q. Certain things were told to you about the surface of the roadway itself from a point away from Jerilderie from where this was? A. Yes.

Q. By the time you looked at it you were not able to see marks on the roadway itself? A. Not on the main part of the road, but on the eastern edge of the road.

Q. There were no marks on the carriageway itself, the first mark you could see was on the eastern edge of the road, very close to the edge, where there were marks off the road? A. Yes, the main part of the road was windswept and no marks were visible on that roadway.

Q. You were told certain things about them but did not see them yourself? A. That is right.

Q. Describe what you saw on the side of the roadway that indicated the point of impact? A. Commencing north of the culvert which extended under the roadway and at a point 131 feet north of this culvert, I saw a tyre track on the extreme eastern edge of the roadway which extended towards the eastern grass embankment. Near the end of this mark I saw a bicycle tyre track which extended for a distance of five feet in a southerly direction. At the southern end of this bicycle track there was a scrub mark on the surface of the roadway which commenced one foot from the eastern embankment and extended towards the embankment at an angle of about 45 degrees and was nine inches in length.

There was a second car track which commenced 17 feet 7 inches south of the commencement of the first mark, and another track very close to this which extended parallel to it, and curved off the roadway onto the grassed embankment. Both these marks and the first mentioned one formed the tracks of a motor vehicle. They continued down over the grass embankment and at a point 36 feet from the northern end of the easternmost mark the tracks divided and the eastern one extended into the western edge of the table drain on the eastern side of the roadway. The marks passed the end of the culvert and through the water in a drain which passed under the culvert, then onto the embankment on the southern side of the culvert where the marks then came closely together again, and at a point 73 feet 6 inches south of the culvert they crossed onto the roadway again, and directly across the roadway, in a curve to the rear wheels of a 1938 model Dodge sedan car. This vehicle was standing on the western grass embankment facing in a westerly direction, with the rear of the car 1 foot 6 inches on the roadway.

Q. The tyre marks started going onto the embankment on one side of the culvert, they swung round and went in through the watercourse, and came up onto the road on the other side of the culvert? A. Yes.

Q. At the place where the culvert was the water was closer to the road than it was along the ordinary table drain? A. Yes.

Q. You could still see the place where the mud had been thrown up where the wheels had gone through, even where the water was fairly deep in the table drain? A. Yes.

Q. Along the line from the point where you have described as being the scuff mark and the point of impact you fixed, and the car, did you see a number of objects? A. Yes.

Q. First of all, over on the extreme point where the scuff mark was, did you see a man's body? A. Yes.

Q. Could you describe whereabouts that was? A. Commencing 46 feet south of the northern end of the easternmost tyre mark I saw a trampled area of grass on the western side of the channel that is on the eastern side of the roadway. At an angle across the channel I saw similar trampled ground and the grass coming out of the water and in this area was leaning and pointing in a more or less easterly direction, which indicated that some body or object had been either dragged or dragged itself out of the water to the long grass on the eastern side of the channel. I then noticed an area of the long grass which was 11 ft. in width and 26 ft. long, where the grass had been trampled down, and was considerably bloodstained for the whole of the area. I saw the body of a man lying near the northern end of this area. The head of the body was facing towards the roadway and table drain and was lying on the right side. The right leg was extended almost straight out. The left leg was bent backwards at the knee. The right arm was extended straight in front of the body and the left arm was bent over his arm, and the hand was in front of the face.

Q. Did you see a number of other articles between the scuff mark and the car? A. Yes.

Q. What were they? A. 17 ft. south of the northern end again of the eastern tyre mark I saw a gent.'s left black shoe lying in the grass and 3 ft. from the edge of the roadway. 14 ft. 7 inches south of this and 1 ft. 3 inches from the edge of the roadway I saw the right shoe similar to the other one, and near this was a damaged cigarette lighter. A further 19 ft. 4 inches south of this and 10 ft. 7 inches from the edge of the roadway I saw a car number plate ADH-898, a bicycle headlight and a bicycle pump. They were all lying close together. Just south of this and on the edge of the roadway I saw a large knife. A further 20 ft. 6 inches south of these articles and 8 ft. from the edge of the roadway I saw a haversack with the name "D. Kelly" printed thereon. A damaged pushbike was on the eastern side of the roadway south of the culvert, and 32 ft. 6 inches from the rear of the Dodge sedan car.

Q. Did you draw a plan of this roadway to scale? A. Yes.

Q. Did you mark on the plan the marks that you have described as being tyre marks, exactly to scale on the plan as they were on the roadway? A. Yes.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 15.
A. A. O'Sullivan.
6th April, 1961.
Examination.

Q. Did you also include on the plan all those articles that you have mentioned? A. Yes.

Q. Did you take photographs showing the area, one from each end, and then various photographs in between, and mark on the plan from (1) to (8) the places where you took the photographs, and mark on the photographs the corresponding number to the (1) to (8) that you put on the plan? A. Yes.

Q. In this the plan that you drew? (Shown.) A. That is correct.

Q. Are these the photographs numbered (1) to (8) that show those things that are on the plan? A. Yes.

Q. Did you see a piece of iron shaped in the form of a knuckleduster? A. Yes, that was on the trampled area which was bloodstained, and on the western side of the channel, just south-east, on the opposite side to where the body was. That is on the western side of the table drain.

Q. Between the table drain and the road? A. Yes, it was embedded in the road on the edge of the channel.

HIS HONOR: The witness said something about it being "bloodstained", and the way in which he used the word it was ambiguous. He could have been referring to the ground or the article being bloodstained.

WITNESS: The ground was bloodstained.

CROWN PROSECUTOR: Q. Is this the article you are referring to? (Knuckleduster shown to witness.) A. Yes.

(Knuckleduster, previously m.f.i. "2" tendered and marked Exhibit "D".)

Q. Look at this photograph, No. 1. Do you see the end of the red lines that are on that? A. Yes.

Q. It is not quite clear whether two of them point to the same track? A. There are three red lines on the photograph.

Q. One of them points to something you have described as being a number of feet further north than the other? A. Yes, the two top ones are together, and the bottom one points to where it goes off to the grass embankment there. (Indicating on photograph.)

Q. The two that go off near the same point, do they point to the same tyre mark? A. No, there is a red line to each of these tyre marks.

Q. They are separate tyre marks? A. Yes, very close to one another.

Q. They both go off the road at that point? A. A little bit further, here. (Indicating on photograph.)

Q. Both those tyre marks go off at approximately the same point? A. Yes.

Q. But they are not the same tyre mark? A. No, two different tyre marks.

Q. Any other tyre marks on the roadway are not relevant? A. No, they are from other vehicles.

(Plan tendered and marked Exhibit "E-1".)

(Eight photographs tendered and marked "E-2" to "E-9".)

(Exhibit "E" shown to jury.)

Q. You have described a large type of knife that was there near the roadway? A. Yes.

Q. Is that the knife? (m.f.i. 3 shown to witness.) A. Yes, that is the knife.

(Knife, previously m.f.i. 3, tendered and marked Exhibit "F".)

Q. Is that the haversack with the name on it you have described? (Shown.) A. Yes.

(Haversack, previously m.f.i. "4", tendered and marked Exhibit "G".)

Q. You took a number of photographs of the body of this man, both in the place where it was at this site and also at the Morgue? A. The following day.

CROWN PROSECUTOR: Those photographs are in Court, and if my friend wishes me to tender any of them, I will. If he does not wish me to I won't tender any of them.

Q. On the 17th October did you go to the property of Mr. Liddle? A. Yes.

Q. Detectives Sheather and Ellis were there also? A. Yes.

Q. On the verandah you saw the small knife in a leather pouch in a belt, did you not? A. Yes.

Q. Those articles? (Shown.) A. Yes.

Q. They were taken possession of at that time? A. Yes.

(Belt &c., previously m.f.i. 1, tendered and marked Exhibit "H".)

Q. You saw the marks on the doorway to the premises, and you are able to describe what was obviously a way of breaking into the house? A. Yes.

Q. You were present on the same morning and you had a conversation with Dr. Pilkington at the hospital, and you identified the body of the man to him as being commonly known as Daniel Kelly? A. Yes.

Q. You were present when the doctor was introduced to the accused and asked to make an examination of him, were you not? A. Yes.

Q. You had a conversation and told the accused, warned him, he did not have to make any statement or submit to any examination if he did not want to? A. Yes.

In the Supreme Court of New South Wales.
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A. A. O'Sullivan.
6th April, 1961.
Examination.

Q. After the warning was given what was said? The rest of what was said?——

HIS HONOR: What date was this?

WITNESS: 11 a.m. on the 17th October. The accused said to the doctor, "I have not any injuries, doctor, the Police have been very good to me. They have not touched me at all. In fact I have been treated very well by them. I cannot complain in any way".

CROWN PROSECUTOR: Q. The doctor was making his examination. Was there anything further? A. Yes, the doctor said to the accused while he was making the examination, "Did the man Kelly assault you in any way?" and the accused replied "No, doctor, I have not been injured by anyone".

Q. After warning him Det. Sheather showed the accused the knife and articles you had found on the back verandah of Liddle's place? A. Yes.

Q. I do not think we need go into the detail of it, but did the accused say anything about the knife particularly? A. Yes, the accused said when Det. Sheather showed it to him, "Yes, that is my knife and belt. That is the knife. It is mine". Det. Sheather said "Is that the knife you used to stab Daniel Kelly with yesterday afternoon?" The accused replied, "Yes, that is the knife I stabbed Danny Kelly with".

HIS HONOR: Is it clear which knife the witness is speaking about?

CROWN PROSECUTOR: Q. Is that the last exhibit (Exhibit H shown)? A. That is the knife.

Q. You were out at the scene of the happening about 1.30 that same day when Detectives Sheather and Ellis came out with the accused, and you were making measurements for your plan, and the accused was pointing out places to them then? A. Yes.

Q. You were present during the post-mortem examination, were you? A. Yes.

Q. Did you on the 18th October go to the shearers' camps at the New Camp property? A. Yes.

Q. Did you see books in the name of Daniel Christopher Bingham? A. I did.

Q. And a photograph in a book indicated it was the deceased's book? A. Yes.

CROWN PROSECUTOR: They are in Court. I do not propose to tender them. My friend can see them if he wishes to.

CROSS-EXAMINATION

Mr. COOK: Q. The Naval pay books were in his belongings? A. Yes.

Q. You would agree with me, wouldn't you, it does not appear in this Naval pay book that he was discharged from the Navy? A. That is right.

Q. As far as you are aware did he have leave from the Navy or was he a deserter? A. I understand he was a Naval deserter.

Q. Have you made inquiries yourself as to whether or not he was married or had any family? A. I understand so. Other Police have made inquiries.

Q. You understand he was married and had two children at the time? A. That is correct.

Q. You told us you were not able to see any tracks apart from the ones you marked on the plan leading up to the point of impact? A. That is right.

Q. You do not know the path of the vehicle immediately up to the point of impact, do you? A. No, I did not see any other marks other than those on the plan.

Q. From what inquiries you have made and what you have been able to establish, do you agree that the time Kelly met with his injuries was about 3.30 in the afternoon? A. Roughly, yes.

Q. I think when you went to Liddle's place you went there looking for a knife. You had been told of a knife on the verandah? A. Yes.

Q. Parker told you that? A. Not me. Some other Police officers.

Q. You went there to find the knife and examine the premises? A. Yes, the house.

Q. Did it appear that doors had been prised open with some instrument? A. Yes, three of them had been damaged. I saw an axe standing near one of the doorways.

Q. Were the marks consistent with an axe having been used? A. Yes.

Q. Did it appear considerable force had been used to prise open the doors? A. Yes.

Q. There is no doubt when the knife was lying on the verandah it was perfectly obvious to anybody coming on to the verandah? A. Yes.

(Witness retired.)

John Justin Gorman

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. Are you a sharefarmer by occupation? A. Yes.

Q. Where do you farm at? A. Around Jerilderie.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 16.

J. J. Gorman.

6th April, 1961.

Examination.

Q. Did you go to the morgue at the Jerilderie Hospital on the 18th October? A. Yes.

Q. Did you see the body of a man you knew there? A. Yes.

Q. In what circumstances had you known him? A. I met him accidentally in the street at Jerilderie and he appeared to be destitute and had no money and no food.

Q. Did he work for you? A. Yes.

Q. What year did he work for you? A. About 15th June, I think it was, of last year.

Q. How long had he worked for you? A. About six weeks from memory.

Q. What name did he give ordinarily? A. Dan Kelly.

Q. Did he speak to you about what his correct name was? A. Yes.

Q. What did he tell you his correct name was? A. Bingham.

Q. Was there some documents you saw while he was working for you that had the name Bingham on them? A. Yes, he gave me a machete with "Bingham" inscribed on the handle, and he showed me his various marine papers from the Merchant Navy and also the Royal Navy.

Q. Did he tell you how he came to this country? A. He told me he was discharged in Sydney. His time had run out with the Royal Navy, but it appeared afterwards he had deserted.

Q. That was in Melbourne? A. In Sydney. He told me his time ran out in Sydney, but appears he deserted in Melbourne.

Mr. COOK: No questions.

(Witness retired.)

Prosecution Evidence.

No. 17.

N. A. Sheather.

6th April, 1961.

Examination.

Norman Arthur Sheather

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. You are a Detective Senior Constable of Police stationed at Wagga Wagga? A. Yes.

Q. Were you in Jerilderie on the 16th October? A. I was.

Q. At about a quarter to six in the afternoon did you see Mr. Ronald Jukes? A. I did.

Q. And ten minutes or so later did you see the accused? A. Yes.

Q. At that time was there anyone at the police station? A. No.

Q. Did you force a way into the police station? A. Yes.

Q. And then did you have a conversation with the accused? A. I did.

Q. At that time when you were having the conversation were you doing anything? A. Yes. I made notes of the conversation I had with the accused.

Q. In the early part of the conversation was there anyone present? A. No one was present until 9.45 p.m.

Q. Did Mr. Jukes go away immediately? A. He was there for a short period of time, then he left. He would only be there for possibly five minutes.

Q. And other police did not come till about 9 o'clock or so? A. Other police returned to the station about 8 p.m., but I had no conversation with the accused between 8 p.m. and 9.45 p.m.

Q. Can you tell us when you first saw the accused what was said at that stage? A. When I first saw the accused I said, "My name is Detective Sheather. What is your name?" He said, "My name is Frank Parker". I said, "I understand you have had an accident with your motor car. What happened?" He said, "I ran over a bloke and I attacked him and I stabbed him with my knife". I said, "At the time you hit the man with your car and then attacked him did you intend to kill him?" He said, "Yes, I intended to kill him, but I did not mean to hurt my wife. I did not mean to kill my wife but when I hit him——".

HIS HONOR: The witness can refresh his recollection if he would like to by reference to his notes.

CROWN PROSECUTOR: Q. Have you your handwritten notes there? A. Yes, they are in Court. (Produced to witness.)

HIS HONOR: The purpose of referring back to that is not to read from it but to refresh your recollection, and having refreshed your recollection, to give your evidence. Is that clear?

WITNESS: Yes.

(Mr. Cook referred to the fact that it appears at this stage no warning was given.)

CROWN PROSECUTOR: Q. Can you remember what was said at that particular time, now having refreshed your memory? A. Yes. He then said, "When I hit him" or "hit her, she was lying in the water, and when she moaned I attacked Kelly as if I was attacking a sheep. I had the killer instinct". I said, "What happened to your wife?" He said, "She was on the push bicycle with him and when I hit him I hit her. She is hurt badly. She was laying in the water and I went and pulled her out of the water in the table drain, and I attacked Kelly again with my knife. I told my wife to stay there and I would go and get help. I then ran across to Liddle's place and rang the police and told them about it, and then when I returned with Mr. Jukes I could not find her. I called out to her and I could not find her. She is hurt badly".

In the Supreme Court of New South Wales. Criminal Jurisdiction.

Prosecution Evidence.

No. 17.

N. A. Sheather.

6th April, 1961.

Examination.

I then left the police office and spoke to a man outside and then returned, I said to the accused, "I have been informed that your wife is all right and I will arrange for someone to attend to her". He said, "Thank God for that". I said, "I am going to ask you further questions in relation to what you have told me about trying to kill a man. I want you to understand you need not say anything in answer to those questions unless you wish, as anything you do say may be used in evidence. Do you understand that?" He said, "Yes, I understand that. I set out to kill him. I will tell you what you want to know. I know I have done the wrong thing. I will tell you the truth". I said "Did you know the man that you tried to kill?" He said, "Yes, he was Danny Kelly. Daniel Kelly." I said, "What was your reason for wanting to kill him?" He said, "He was running away with my wife and I decided earlier today to kill him. I knew that if I had a fight with him he would beat me, so I decided to kill him." I said, "When was it you decided to kill Kelly?" He said, "I think it was last Friday. Kelly came over to our place and was hanging around my wife. I spoke to my brother-in-law, Noel, and my wife, about it, and when I spoke to my wife about it she got niggly. He was hanging around today and when I came back from Bisher's place today with Noel I decided I could not beat him fighting and I would kill him."

I said, "How long was it prior to when you hit Kelly with your car and attacked him that you decided you were going to kill him?" He said, "I do not know exactly. It was before lunch or just after. It was before he went away with my wife. I wanted to get rid of him out of the road. I think it would have been a few hours before, I think." I said, "Did Kelly at any time provoke you to a fight?" He said "No". I said, "Whereabouts did it happen?" He said, "Not far from New Camp, on the road from New Camp to Jerilderie. My car is still there." I said, "What direction were you travelling?" He said "I was travelling towards Jerilderie". I said, "You have told me your wife and Kelly were on a push bicycle. What direction were they travelling?" He said, "They were travelling the same way, the same direction". I said, "When you hit Kelly and your wife with your car were they on the push bicycle on the side of the road?" He said, "My wife was standing a bit further away, I think she would be on the grass. I aimed my car at him and I thought I would miss my wife. I did not mean to hit her".

Q. You do not remember the next part? A. I do not remember the next question.

Q. Can you refer to your note and tell us what it was? A. Yes. (Witness refers to notes.) I said, "When you drove your car at Kelly did you mean to kill him?" He said, "Yes, I left home with the intention of killing him. When I first saw them they were both on the push bicycle. Then they got off. They must have seen me coming. I aimed my car straight at him and ran over him, because I wanted to kill him". He said further there too. (Witness refers to notes.)

He then said, "I then stopped my car and got out and I attacked him with a knuckle duster and I stabbed him with my knife". I said, "Where is the knife now that you stabbed Kelly with?" He said, "After I stabbed Kelly I put my knife back in the pouch of my belt and I went across to Liddle's place and there was no one there so I broke in as I wanted to ring up and I rang the Police and then I went to the back verandah and I lay down for a while and then I left. I left my knife and belt on the verandah." I said, " You have told me that you also attacked Kelly with a knuckle duster. Where is that?" He said, "That is out there where he is; I don't know exactly where it is but it is somewhere between where he was lying and where my wife was lying." I said, " You have told me that you went with Mr. Jukes and Mr. Jukes has also told me that you returned to where Kelly was. When you returned was he still alive?" He said, "Yes, he had moved from where I first attacked him across to the other side of the table drain." I said, "When you attacked Kelly was he conscious". He said, "No, he was unconscious".

I then had a conversation on the telephone and I later said to the accused, "I have been informed——". No, I am sorry. I then said, " I want to ask you further questions in relation to what you have told me about you trying to kill a man. I want you to understand that you need not say anything as anything you do say may be used in evidence. I have now been informed that Kelly is dead and you will be charged with the murder of him."

Q. At this point of time did you put a piece of paper in the typewriter? A. Yes, I did.

Q. And type down questions that you asked him and the answers that he gave? A. Yes, I did.

Q. This was after you had learned that the man was dead? A. Yes.

(Short adjournment.)

UPON RESUMPTION:

CROWN PROSECUTOR: Q. At 7.15 after you learned that Kelly was dead, you told us that you then went back and had a further conversation with the accused? A. Yes, I did.

Q. At that time you were typing questions and answers? A. Yes.

Q. What did you say to him and what did he say to you? A. After I cautioned him I said, "Did you understand?" He said, "Yes". He then said, "I understand—I meant to kill him. I will tell you the truth." I said, "How long have you known the man Kelly?" He said, "A week or a bit more". I said, " What made you want to kill Kelly?" He said, "Well, I will put it to you this way, when I was a young child the same sort of thing happened to me". I said, "What do you mean by the same sort of thing?" He said, "My mother ran away with another man in New Zealand when I was only six, and Kelly was running away with my wife today". I said, "How did you know that Kelly was running away with your wife?" He said, "My wife told me and he told me and we had an argument about it".

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 17.

N. A. Sheather.

6th April, 1961.

Examination.

Q. Is this the paper I now show you the actual piece of paper you were typing on at the time? A. Yes.

Q. Will you refresh your memory from that as to what was the next thing you asked after he said, "We had an argument about it."? A. I said, "Now tell me exactly how you tried to kill Kelly." He said, "Well I more or less tried to kill Kelly with my car and after I hit him with my car I stopped my car and got out and walked back to where Kelly was lying and I saw my wife in the table drain and I thought I had killed her too. I did not mean to hit her at all. I love my wife and I done my temper well and truly by this and I was going to kill Kelly.

I put my knuckle duster on and punched Kelly about the head and face. I was going to kill him then I heard my wife groan and I went back and dragged her out of the table drain. I had my knife in my pocket, in my belt and I pulled it out and stabbed Kelly with it". I said, "How many times did you hit Kelly with the knuckleduster?" He said, "I don't remember". I said, "Where did you get the knuckleduster from?" He said, "In Sydney. I used to carry it in the glovebox of my car. It was a Hungarian knuckleduster". I said, "Where did you stab Kelly with the knife?" He said, "In the throat". I said, "How many times did you stab him with the knife?" He said, "I don't remember". I said, "Why did you want to kill him?" He said, "Well, if it had not been for him my wife would have still been with me and the kiddies". I said, "What speed were you travelling at when you hit Kelly with your car?" He said, "25 or 30—say 30 miles an hour". I said, "When you saw Kelly and your wife standing on the side of the road did you steer your car so that it would hit Kelly?" He said, "Yes, I aimed it straight at him. I swung it to the left so that I would hit him and then I ran off the road down the table drain and I accelerated——". I am sorry. "——I ran down the table drain and up on the wrong side of the road after I hit them. I put my foot on the accelerator so I would not turn over."

Q. That was the end of the conversation was it? A. Yes.

Q. Other Police came to the Police Station? A. Yes.

Q. And later did you see the accused with Det. Ellis at Deniliquin? A. Yes.

Q. At what time? A. 9.45 p.m.

Q. I do not wish to go right through it again but did the accused repeat the same things in front of Det. Ellis as he had said previously to you? A. Yes, he did.

Q. There was a statement taken in front of Det. Ellis? A. Yes.

Q. What was said? A. After the conversation, Det. Ellis and myself had I said to the accused, "Are you now prepared to make a written statement regarding what you have told us in regard to the death of Daniel Kelly? I want you to understand that you need not make that statement unless you wish as anything you do say may be taken down in writing and

may be used in evidence. Do you understand that?" He said, "Yes, I understand, I will make a statement. I will make a statement to the best of my ability. I will tell you right from the start so you will know what happened".

Det. Ellis then said, "Can you write?" He said, "No, not very good". Det. Ellis said, "Do you want us to type it for you?" He said, "Yes, that would be better". Det. Ellis then said, "Can you read?" He said "Yes". The defendant then dictated a statement which was typed for him. On completion he was handed the statement and he read it over aloud. He then made corrections to the statement and signed it. I then typed four questions on the back of the last page of the statement and the accused read those questions and wrote in the answers. He again signed the statement. I then said to him, "What you have told us in that statement—is that true?" He said, "Yes, to the best of my knowledge it is".

Q. Is this the document to which you refer? A. Yes.

(Statement tendered and marked EXHIBIT J; statement read to Court by Crown Prosecutor.)

CROSS-EXAMINATION

MR. COOK: Q. Det. Sheather, you told us on the second occasion when you saw Ellis before he made the statement he gave the same evidence to you and Ellis as you had given before? A. Yes.

Q. Actually did it happen you put a summarized version of what he told you to him and asked him if that was all right? A. Yes.

Q. You did not go into any real detail at this stage before the statement? A. Not full detail, no.

Q. I think you told us also that when you were first speaking to him he said that they had got off the bike—"they must have seen me coming. As I got near them I aimed my car at him and hit him with the car". You said this morning "—as I wanted to kill him"? A. Yes.

Q. Do you remember giving evidence at the Coroner's Court at Jerilderie? A. Yes.

Q. Do you remember saying this "Then they got off—they must have seen me coming. As I got near them I aimed my car at him and hit him with my car. Then I stopped my car, got out and attacked him with a knuckleduster and hit him with my knife". Do you remember saying that? A. I cannot recall it but if it is in the depositions that is what I must have said.

Q. You have told us the history of the conversation; did it appear to you—(Withdrawn).

Q. Did he in fact tell you repeatedly in the interviews that you had with him that he meant to kill Kelly? A. Yes, he did.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 17.

N. A. Sheather.

6th April, 1961.

Cross-examination.

Q. Did he seem to be unusually insistent in his manner—unusually for him? (Objected to; withdrawn.)

Q. You told us that he spoke to you repeatedly about the fact that he meant to kill him? A. Yes.

Q. Was there anything in relation to the way he was telling you of that or when he spoke to you of that in his manner; did it seem to be unusual or different? (Objected to.)

CROWN PROSECUTOR: Unusual to whom?

MR. COOK: Q. Unusual to you, Detective?

CROWN PROSECUTOR: I still object, Your Honor.

MR. COOK: Q. From the number of occasions he told you and spoke to you about this that he meant to kill him did he always tell you that in answer to a question you put to him or did he sometimes volunteer that not in answer to any question? A. He sometimes volunteered it not in answer to questions put to him.

Q. From that fact did it appear to you that he was unusually insistent? (Objected to; allowed.) A. I do not know how to answer it correctly, Your Honor. He did mention it on a number of occasions and he was insistent on a number of occasions that he meant to kill him and he had set out to kill him.

Q. What I am asking you is about the number of times he said it to you and the number of occasions he said it to you not in answer to any questions? A. I cannot say.

Q. Did he appear to be insistent on wanting to tell you of that fact? A. Yes, he did.

Q. Did you notice anything about his behaviour during the time you were interviewing him when he was talking about his wife and when he was talking about Kelly? A. Yes, when he was talking about his wife he cried on some occasions but when he was talking about Kelly he was calm and on occasions he grimaced his face when he spoke about Kelly.

Q. Was there a noticeable change in his demeanour when he spoke about his wife? A. Yes, when he spoke about his wife he was very upset and when he spoke about Kelly he was calm.

Q. Do you say calm or cold?——

HIS HONOR: He said, calm.

Mr. COOK: Q. When you say calm was he particularly quiet when he spoke? A. What I mean is he was not upset—he spoke naturally.

Q. Did it seem to you that he was speaking about Kelly—when he was speaking about Kelly his manner of speaking it was as if he was reading it out or reading it off—was there something of that nature about it? A. No, I would not say that.

Q. He told you he had this experience in his early life when his mother had run away with another man? A. Yes.

Q. Did he tell you any more about that? A. No—on two occasions he mentioned it.

Q. Did he ever tell you he had been present when they had run away together? A. No, he never told me.

Q. You say he never told you that? A. He never told me.

Q. It is clear, was it not, from what he told you, that he had mentioned on a number of occasions about Kelly taking his wife away from the children? A. I just could not get that, would you repeat it please?

Q. He told you about Kelly taking his wife, Mrs. Parker, away from the children? A. Yes.

Q. He told you that on a number of occasions? A. On two or three occasions I think he mentioned it.

Q. You also told us that in this interview that you had with him that was taken down on the typewriter, that he more or less aimed the car at him? A. Yes.

Q. But he told you that he had not seen them until he got up the road and then gone down the road some? A. No, he said when he first saw them they were on the bike.

Q. Down the road? A. Yes, he told me they were on the bike when he first saw them, down the road, and they got off as they must have seen him coming. He did say that.

Q. In relation to this matter of his mother having run away when he was at the age of six, have you made any enquiries in New Zealand in relation to that matter. (Objected to—disallowed.)

Q. In relation to this knuckle duster did he tell you he found it when he was working in Narrabeen in Sydney? A. No; he told me he found it in Sydney and the woman in whose place he found it said it was an Hungarian knuckle duster. He did not mention Narrabeen to me.

Q. From your knowledge do you know if he was in the habit of carrying that knuckle duster on his person? A. I do not know from my own knowledge but from the enquiries I did make I was told that he was not in the habit of carrying it.

HIS HONOR: Q. That he was or was not? A. That he was not.

Mr. COOK: Q. Did he tell you that after this attack on Kelly he ran straight across to Liddle's place to ring up? A. Yes, he did.

Q. Were you present when the motor vehicle was moved—the Dodge sedan? A. Yes.

Q. Was it driven away under its own power? A. No.

In the Supreme Court of New South Wales.
Criminal Jurisdiction.
Prosecution Evidence.
No. 17.
N. A. Sheather.
6th April, 1961.
Cross-examination.

Q. Was it towed away? A. Yes, I towed it.

HIS HONOR: Q. You say you towed it? A. Yes, Your Honor.

Mr. COOK: Q. You have told us of his speaking of his wife and Kelly and his manner; did you notice anything in his demeanour when talking about Kelly to suggest that he was in triumph or had any feelings about the matter or anything at all? A. No, the only thing he showed was that he appeared to speak naturally and was very calm.

Q. From this spot where Kelly was lying across to where Mr. Liddle's house is, would it be fairly rough going for anybody on foot at that time of the year? A. Yes, it would have been.

Q. From enquiries you made are you able to ascertain that Kelly and Parker were on friendly terms? A. Yes, they were.

Q. Did you see them in town together at any stage? A. No, I did not.

HIS HONOR: Q. Were you stationed at Jerilderie at that time? A. No.

Q. You were stationed at Wagga, were you? A. Yes.

(Witness retired.)

No. 18.
J. K. Ellis.
6th April, 1961.
Examination.

John Kenneth Ellis

SWORN, EXAMINED AS UNDER

CROWN PROSECUTOR: Q. You are a Detective Constable of Police stationed at Deniliquin? A. Yes.

Q. On the 16th October at about 8.30 in the evening did you go over to the Jerilderie Police Station? A. Yes.

Q. Did you see Det. Sheather and Mr. Jukes, and did you take a statement from Mr. Jukes? A. That is correct.

Q. Some time after that you were present with Const. Sheather and had a conversation with the accused? A. Yes, that is correct.

Q. Can you tell us about the time and what was said? A. Yes, it was about 9.45 p.m. and Det. Sheather said to the accused, "I want you to understand that anything that is said to you or any questions that are asked of you you need not say anything in reply, as anything you do say may be given in evidence. Do you understand that?" The accused said "Yes". Det. Sheather said, "This is Det. Ellis". The accused said, "Yes, how are you?" Det. Sheather said, "This is Frank Parker. He is telling me that this afternoon a man named Daniel Kelly was at his place and that Mrs. Parker left home and went away with the man Kelly on a push bicycle. Both Kelly and Mrs. Parker rode the bicycle from New Camp Station towards Jerilderie. A short time after Kelly and Mrs. Parker left home, Parker tells me he got in his car and drove along the same road in the same direction, and when he saw Kelly and Mrs. Parker he drove his vehicle straight at Kelly, hitting both Kelly and Mrs. Parker. He then got out of the car and he attacked the man Kelly with a knuckle duster about the face and the head, and he then

heard his wife groaning and he went and pulled her out of the water which was in the table drain, and he then further attacked the man Kelly with a knife. He tells me he stabbed him in the throat. Kelly is now dead. He has also told me that he drove his vehicle straight at the man Kelly as he intended to kill him, and that he made up his mind before Mrs. Parker and Kelly left home that he would kill Kelly."

I said to the accused, "You have heard what Det. Sheather has said, is that right?" He said, "Yes, that is right. I meant to kill him, but I did not want to hurt my wife. Thank God she is all right. The bastard was trying to break up our marriage and I meant to kill him. I am not sorry that I did it. He was trying to take my wife away from me and the kiddies." I said "How do you feel now?" He said, "I feel all right now that I know the wife will be all right". I said to the accused "I understand that you have told Det. Sheather that you made up your mind to kill Kelly some hours before you drove your car out on to the Goolgumbla Road and ran over him, and attacked him and stabbed him with a knife". He said, "Yes, I meant to kill him all right. What I have told Det. Sheather is the truth. You can take it from me that I meant to kill him". I said to the accused, "I have been informed that Kelly's body is now lying at the side of the Goolgumbla Road about 25 miles north of here. Is that where you killed Kelly"? The accused said, "Yes, that would be right. It is about four miles this side of where I am living with my brother-in-law, Noel Craig, at New Camp".

I said, "What time did it happen"? The accused said "I do not know what time it was, but it was just before I rang the Police because after I stabbed him I ran straight across the paddock to Liddle's place and broke in and rang up". I said, "How long have you known the man Kelly". The accused said, "I met him just over a week ago when we went across to New Camp with my brother-in-law, Noel, to get a killer. My wife was there too". I then said to the accused, "What indications did you have that Kelly and your wife had become attracted to each other"? The accused said, "He started off by saying he was lonely and that he would have to get a girl, and he was talking about sponsoring a girl to come out here. And then today my wife told me she was in love with him and that she was going to go away with him".

I said to the accused, "Have you ever suffered from any mental illness of any kind or have you ever been treated for anything like that"? The accused said, "No, nothing like that. I knew what I was doing as well as I know what I am doing now. I set out to kill him and I meant to kill him and I am not sorry at all that I did it".

Q. Then there was some conversation leading up to him making a written statement? A. Yes.

Q. You did go out along the road with the other Police, is that right? A. That is correct.

In the Supreme Court of New South Wales.
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No. 18.
J. K. Ellis.
6th April, 1961.
Examination.

Q. And the accused went with you? A. With Det. Sheather and me, yes.

Q. I do not think we need worry about anything that took place out there. You did later on show him a knife, did you not? A. Yes.

Q. After warning him? A. Yes.

Q. The following day? A. That is correct.

Q. Then there was conversation about the nature of the car and the condition it was in, out there at the car? A. Yes.

Q. We need not go into that. He did indicate positions to you out there as to where the man was when he saw him didn't he? A. Yes.

Q. And where the impact had taken place? A. Yes.

Q. Then you did take possession of a number of articles, did you not? There was a knuckle duster and things that were along the road, including the lamp of a bike? A. Yes. Det. O'Sullivan collected all these articles.

Q. They are all here in Court. The front bumper bar of the car or portion of it what was broken? A. Yes.

Q. That is in here and the number plates and the rest of it? A. Yes.

CROWN PROSECUTOR: If my friend wishes any of them to be tendered I can tender them, but I do not propose to tender any of them.

Q. Amongst those articles that were along the road was a large knife? A. That is correct, that was lying near the number plate.

Q. Did you have a conversation with the accused at the Deniliquin lock-up about that? A. Yes.

Q. In the course of the conversation about other things? A. Yes.

Q. All those things along the road? A. Yes.

Q. Can you tell us anything he said about the knife? The large knife? A. Yes, that was on the 3rd November, 1960, with Const. Sheather I again saw the accused at the Deniliquin lockup, and Det. Sheather said to him, "I am going to ask you some questions in relation to these articles, but I want you to understand that you need not say anything unless you wish, as anything you do say may be given in evidence". At the same time Det. Sheather had in his hand a knife, a knuckle duster, and a piece of steel with a sharpened point. He showed the accused the knife and he said to him, "Have you ever seen this knife before"? The accused said "Yes". Det. Sheather said, "Whose knife is that"? The accused said, "Danny Kelly's, I think it is his". Det. Sheather then showed the accused a piece of steel with a sharp point.

Mr. COOK: At this stage I object to any conversation that follows after this. (Not pressed by Crown Prosecutor.)

CROSS-EXAMINATION

Cross-examination.

Mr. COOK: Q. When Parker was telling what had happened at Jerilderie police station did you notice anything about his demeanour, his behaviour? A. Yes.

Q. Did he at times become quite emotional and other times be quite calm? A. Yes, he did.

Q. Was that sort of switching on and off all the time? Is that the way to describe it? A. To a degree, yes.

Q. When talking about his wife there was a marked change in his demeanour, and he was quite upset, as compared with when he was talking about Kelly? A. Yes.

Q. Did you see the tracks at the scene just prior to the point of impact, from the vehicle, to the point of impact? A. Yes, just prior to the point of impact.

Q. Do they indicate a sudden swerve to the left? A. Yes, in my opinion they did indicate a sudden swerve to the left.

RE-EXAMINATION

Re-examination.

CROWN PROSECUTOR: Q. There is one matter I should have asked in chief in respect of the knife, the big knife. (Leave granted.) You were telling me in respect of the knife at the Deniliquin lock-up, do you remember that? A. Yes.

Q. There was a conversation about the knife? A. Yes.

Q. Then you went on to a conversation about the piece of iron? A. Yes.

Q. Eliminate any questions about the piece of iron. Did Det. Sheather ask the accused anything about whether Kelly at any time had threatened him with the knife? A. Yes.

Q. Can you remember what answer he gave to that, or can you remember what the question and answer were? A. Yes, Det. Sheather said to the accused, "Has Daniel Kelly at any time ever threatened you with this knife, or given you any indication that he would attack you with a knife"? The accused said, "No, he has never threatened me at any time. He used to use it on the property. I do not know what for".

FURTHER CROSS-EXAMINATION

Further Cross-examination.

Mr COOK: Q. I think you also said the knuckle duster was shown to him and he was asked certain questions in relation to the knuckle duster at that time? A. Yes.

In the Supreme Court of New South Wales.

Criminal Jurisdiction.

Prosecution Evidence.

No. 18.

J. K. Ellis.

6th April, 1961.

Further Cross-examination.

Q. Did he tell you on that occasion he used to carry that knuckle duster in the glove box of the car and sometimes on the ledge near the rear window of the car? A. Yes.

Q. As far as you are aware yourself from enquiries you have made, did he ever carry it on his person at any time? A. Not to my knowledge, no.

(Witness retired.)

(Case for the Crown closed.)

(Luncheon adjournment.)

At 2 p.m.

CASE FOR THE ACCUSED

Accused's Evidence.

No. 19.

Statement from the Dock.

6th April 1961.

STATEMENT FROM THE DOCK

ACCUSED: Your Honor, gentlemen of the jury: You have heard the detectives say I was not sorry for the crime I have committed. I am sorry I am definitely sorry for what I have done, and the injustice I have done that man's wife and children. I myself really do not know what to say in my own defence and ways, and it is very difficult for me in the position I am in.

But myself, I will say in my early days back home in New Zealand things and ways were very unsettled and things that happened in my earlier days and life, I would say stayed in my mind. When I was the age of six, back home, there was one thing that has always been reminded to me and stayed in my mind, and that was the loss of my own mother. It might be very hard for you to really understand things like that, but to me the loss of my own mother, and seeing her go away like she did that day, was something that always stayed with me, and has stayed with me till the present time.

I can still picture my mother the day she left and went away with a chap by the name of Jack Ray (?). I went with my mother, who was going into town, and I walked with her towards the tram stop. The chap she went away with was standing there, Jack Ray, and my mother asked me "Is there anything you want me to bring back from town for you?" I said "Yes, bring me back a little sand spade and bucket". She said "All right, I will". That, gentlemen, of the jury, was the last day I saw my mother for quite a considerable time.

After that I saw my mother again when I was in hospital. For a little while after I got out of hospital I lived with my mother and the chap she was living with. I got to hate that chap. I hated him and just could not help it. I hated him all the time. After that I left my mother and went back with my father to live. From then on right up till the time I left school

I lived with my father in various certain places throughout my home town, Wanganui. We lived wherever we could get a place to live with my sisters. My brother was at the time out working. From there I went out to work at the age of 14. Schooling, myself I have not had schooling. I could not settle down to it and had no interest in it. I had unrest and wanted to get away, I wanted to get out to work. It was just something in me. I could not settle down. I wanted to get away and my father could not really give me the life that I suppose he wanted to give me. He had no money, he was only living on the old age pension. Therefore, when I went to work I went out on a dairy farm where we were milking 100 cows night and morning. I was getting £1 a week.

From there I got various jobs in New Zealand, till the time I left New Zealand and came to Australia. The first job was at Stan Hindmarsh's outside Bowral. From there I went to Sydney and worked in Sydney on different jobs. I could not settle down to city life. I went out to work on a poultry farm just outside Sydney, at a place called Castle Hill, and it was whilst I was working up there I met my wife. It was Saturday, I remember the day well. A friend of mine by the name of Bill (?) and myself were going round town that morning and we used to go to different restaurants to have our meals. This particular day my mate wanted to go in and have a heavy meal for his dinner. We went into the restaurant and my wife served us. My wife and myself got talking—I mean to say the wife to be at that time. I said "What are you doing tonight?" She said "Nothing". I said "Would you like to come out with me, I have no one to go with. I am on my own." She said "Yes, I will". After a while she said "Yes, all right I will." I took the wife to be out that night and we went to the pictures and I took her home.

Two or three days went by and I came to town again, and one night went round to the same restaurant and met the wife to be again there, again asked her would she come out with me and she said Yes. From that night onwards we started to go out more regularly and I used to go into town more regularly to take her out. It reached the stage I was definitely attracted to her. I am still deeply attracted to the wife now, but anyway I asked the wife would she marry me and she said Yes.

We were married, I am not quite sure whether it was a week or thereabouts afterwards. We were living at 98 Regent Street, Redfern, at the time and things between the wife and myself were everything you would expect from a newly married couple. We had a better life for a while even though we were living under extremely hard conditions and—conditions. We had quite a good life. At the time the wife was pregnant with our eldest daughter Joanie. She gave birth to the child and things were then extremely happy. Shortly after that the wife met a boy in Lithgow, I do not remember his name. I could not tell you his name whatsoever, but she did start to show a bit of affection towards him. That went on for quite a while till one day

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I could not stand it any longer. I approached him at the time about it and it was a Saturday morning I approached, and he said he wanted to take the wife back up to Lithgow with him. I could not take it any more. I gave him a hiding in a fist fight and put him on the train and sent him back up to Lithgow. From then on we lived a happy eleven years of married life. The most happy moments of our married life was the three times when the wife was pregnant and when she bore me the son which she herself so dearly wanted to bear to me—that was one time I will never forget. I worked—we lived in Sydney at one stage and went from Sydney to Griffith to the property by the name of Bontock (?). I am not quite sure of the man's name there but we were to do station work and it was whilst I was there the wife, she wanted her mother to come up and live with us. I said "no". The wife got dissettled up there and didn't want to stop there. From there she left and came back to Sydney. When she left the place I automatically lost my job myself. From there I came back to Sydney, picked the wife up again and we kept on living there—wherever we could go to live for a considerable time. Then we went up to North Narrabeen and we were living in the North Narrabeen camping area there and then we got two or three houses which the rents were extremely high and things like that. I left there to come down here to Jerilderie to get station work and to try to get a decent house for the wife and my children. It was whilst I was down here that these unfortunate incidents did happen.

Before it happened I had no indication of that—of that ever happening from my wife or anything like that. I had no indication of it ever happening right up to the actual day it happened. The day it happened was a day and ways I will never forget. May I speak to Mr. Cook, please.

(Accused confers with Mr. Cook.)

On that day the incident happened as I was driving up the road I could see my wife and the deceased standing on the side of the road. Well I don't know—it seemed just to remind me of ways of my own mother and Jack Ray standing there exactly the same way—the last picture I can remember of my mother leaving me the day I seen her go away. I do not know really how to try to explain it, I don't think I could ever explain it—the feeling or the emotional disturbance I felt. It is something I would never be able to explain, really, just what happened or the way I felt when I seen them—the wife and Kelly—standing there. It is a thing that I myself have never forgotten and myself, I don't think I would ever be able to forget. Your Honor may I speak with Mr. Cook please?

(Accused confers with Mr. Cook.)

MR. COOK: Your Honor, the accused has told me he desires to give evidence on oath.

(Accused leaves dock and enters witness box.)

Accused

SWORN, EXAMINED AS UNDER

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MR. COOK: Q. What is your full name? A. Frank Parker.

Q. Mr. Parker, you made a statement from the dock—you say that everything you said in the dock is true and correct? A. It is.

Q. I think you told us in your statement from the dock of coming to Jerilderie and not having any suspicions in regard to your wife? A. I had no suspicions towards my wife or regards my wife whatever.

Q. During the week prior to this Sunday had you done things with Kelly and spoken to Kelly in that week? A. In which way do you mean?

Q. You had been into town with him? A. Yes, I had been into town with him, yes.

Q. Were you on friendly relations with him? A. I was on friendly relations with him.

Q. Mr. Craig has told us that on Friday you made some statement to him about Kelly hanging around? A. That is correct.

Q. At that time did you see anything to indicate that your wife was returning any affection? A. No.

Q. I want you to come to the Sunday morning at New Camp. Bring your mind to the time when you had gone away with Mr. Craig and come back to the camp. Do you recall that? A. Yes.

Q. When you returned Kelly and your wife and children were going across to have a swim in the dam? A. Actually Kelly was already over at the dam. My wife and my children and some of Mr. Craig's children were going over. Mr. Craig's wife and the rest of the children were behind my wife going over towards the dam as well.

Q. Did you then have a certain conversation with your wife? A. Yes.

Q. Did you come back to where your brother-in-law was and did she go on to the dam? A. That is correct.

Q. I think you spoke to your brother-in-law Mr. Craig, again and I think he has told us about seeing Kelly hanging around? A. That is correct.

Q. At this stage did you then see anything which would indicate to you there was any return of affection by your wife towards Kelly? A. No, there was no indication of it whatsoever.

Q. I think when your wife returned after having a swim you had some conversation with her, did you not? A. That is correct.

Q. I think you have given a statement in this particular matter—you gave it at the Jerilderie Police Station on the 16th October? A. Yes.

Q. In relation to what is set out in the statement and in relation to the conversation you had with your wife, is that to the best of your recollection true and correct? A. It is.

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Q. I think Kelly came in in the midst of the argument or discussion with your wife? A. That is correct.

Q. Can you tell us, Mr. Parker, anything that Kelly said to you or you said to Kelly in that conversation? A. When I was talking to the wife I was saying to the wife "Why didn't you tell me sooner"? She said, "Ask Kelly". All she kept on saying was "Ask Kelly". While she was saying that Kelly walked in and I approached him straight away about it. He said "I am in love with your wife; what are you going to do about it?" or words to that effect. He said, "Anyway, are you in love with your wife?" I said, "Yes, she has borne me six children."

Q. Did you say anything about having any principles or do you recall some conversation such as that? A. Yes, I do recall a conversation like that.

Q. Is most of that conversation set out in the statement? A. Yes, most of it is set out in the statement.

Q. When you were talking to Kelly and your wife, was anything said about a fist fight? A. He did say something about taking the wife in one hand and taking me in his other. He said he could take my wife in one hand and beat me with the other, or something to that effect. I am not quite sure of the exact words.

Q. Do you recall at this conversation whether anything was said by Kelly about your wife being a Maori? A. I did say my wife was a quarter-caste Maori—that her grandmother came from—he said to me that he had never had a quarter-caste Maori girl before; that they ought to be pretty good.

Q. What happened then? A. I am not quite sure whether it was then I said something about principles or whether it was after that or whether I went outside just after that. I am not quite sure. Part of it is hazy at times.

Q. Did you go out to your car and were you speaking to your wife at the car and were the children there? A. Yes.

Q. Do you remember at the time what your emotional state was? A. I was terribly shocked. I did not expect anything like it to ever happen. The wife had always assured me she would never leave the children or anything like that. She always said she loved the children and to have that happen like it was, well, I was really and truly—I could not believe it. I was more or less in a trance and I did not know what to do, think or anything. It was just as though it was not real.

Q. Do you remember saying anything to your wife about going to Albury and that you had a house and a job there for the children and her? A. Yes, I do remember that. On the Saturday before I had received a letter —I do not know the gentleman's name—about the job at Albury where I was to do the milking, the killing and gardening and the wife was to do housework. There was a house, electricity and meat on the property for us to go to. I said to the wife, "What about the job; we have come down here to get a job

—we have the job to go to. What about we go to it for the children's sake and stop altogether and go down there?" She sat for a while thinking and she turned around and said "No". I said, "Are you going to throw me and the children away like a dirty rag?" To that the wife answered, "But you have always treated me like a dirty rag yourself". She sat quiet for a while, and she thought, and she said, "It is no use Frank, I could not stop with a man I don't love. I am in love with Kelly. Three days ago we made the arrangements to run away together. We didn't tell you because we did not want to hurt you". By that I gather now that was on the Thursday morning prior to the happening that they made the arrangements to go away together.

Q. During the course of while that was going on were the children there around about your wife—what did you notice about the children? A. The children were in the car and they were crying and begging their mother to stop. They did not want their mother to go away or anything like that. It was just after the wife said she would not stop with me or the children she went inside. I turned around and said to the children then, "Who do you want to stop with; do you want to stop with your mother and Kelly or stop with me?" They said, "No, we want to stop with you and we want Mummy to stop with us too". Then Gloria wanted to go inside. She got out of the car and Gail and Sharon, the two younger daughters started fighting with her to pull her back into the car. I was going to take the children away—drive them away from the place so they would not be able to see their mother going. The only thing is I could not start the car up and we just stopped there.

Q. Was Kelly nearby while that was going on? A. He was sitting at the doorway going into Noel Craig's quarters.

Q. While this was going on? A. Yes.

Q. Could you see what he was doing or could you see him? A. He was squatting down or sitting down at the doorway with a grin all over his face, looking at me and at the kiddies and grinning all the time.

Q. Kelly left the place a while after that did he? A. I am not quite sure how long it was after that that he left the place.

Q. Do you recall before he left did you speak to him or say anything to him before he left? A. Yes, I do remember speaking to him. I told him he had better shoot through.

Q. Did you say anything about your wife and children to him? Your wife, I should say? A. I have a recollection of saying, "Don't hang around here while you are lucky. You had better shoot through while you are lucky, and if the wife wants to go with you I will get Noel or myself"—I am not sure of that—"to escort her to the gate for you, and you can rest assured I will never harm her or hurt her".

Q. When you said that did you want your wife to go away? A. No.

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Q. Did something happen just before this about the window of the car? A. I am not quite sure, but I have heard it said in evidence, and I do remember when I got up to Goulburn Gaol that my knuckles here, and especially this finger here (indicating) was all skinned and got infected. So it was stated, that I had bashed the wind deflector on the car.

Q. Do you remember that? A. I do not, but apparently did do it.

Q. From the time your wife told you she was going to go away with Kelly, have you a clear recollection of what happened or can you describe your recollection of what went on at the camp that morning? You have said something about a trance. Tell us again what the state of your mind was? A. Parts of it, yes I can remember fairly well. Parts are very hazy. The children, I remember this well, as I stand here, crying, begging the wife to stay, and I remember her saying No, she would not stop with a man she did not love and she would go with Kelly.

Q. Do you remember walking down the bush and back again, or up the track? Do you remember any of that? A. No, I do not.

Q. You did leave the camp in your motor car. Do you recall leaving in the motor car? A. I do recall leaving.

Q. Why did you leave the camp in the motor car? A. I wanted to bring the wife back to the children.

Q. Did you know where your wife had gone at that time? A. All I knew was they were going over to New Camp to get Kelly's gear.

Q. They said that, did they? Had that been said in conversation? A. No, it had not been said in conversation, I just more or less took it for granted. He had no clothing or anything like that with him. All his clothes were at New Camp, so I assumed he would be going over there to get his clothing and things like that.

Q. You said you went in the car to get your wife to come back to the children. Do you recall when you left the camp what was your state of mind towards Kelly? A. I was not thinking of Kelly, all I was thinking about was getting the wife back and taking her back to the children. As regards Kelly I cannot explain anything, I cannot explain my feelings towards him. I had one set purpose in my mind when I left, the children, and that was to bring their mother back to them and stop her running away.

Q. Did you have any intention to hurt Kelly or do anything to Kelly that you can remember? A. Definitely not. Definitely I might have had intentions of having a fist fight with him or trying to have a fist fight with him, or maybe to hurt him some way, but definitely no other intentions whatsoever.

Q. When you got in the car do you remember anything about the knuckle duster you kept in the car? A. No, I do not remember at all. I could have picked it up when I got in the car. On that I am not really quite sure. All I do know is when I got out of the car apparently I had it with me.

Q. You say "apparently". Can you tell us when you came up, as you have told us in the dock you came up, to the spot where Kelly and your wife were standing on the side of the road—do you recall that? A. Yes.

Q. Do you remember how and where they were standing on the roadway and what they were doing? A. I cannot recall that quite well. I was driving up the left hand side of the road. The wife was standing on the grass, what I took to be the grass at the side of that roadway, and Kelly would be standing on the gravel. Say for argument sake I am facing you now and you are coming towards me, she would be on his right hand side.

Q. How was he standing? Was he side-on to the road, or how was he? Do you remember the details of the position in which he was standing? A. As I was coming up to them he was standing more or less as I am now, and I came up more or less from behind.

Q. You came up more or less behind him? A. Yes.

Q. Do you recall whether they had their heads turned towards you or were looking at you or anything like that, or can't you recall? A. Yes, vaguely I can.

Q. As you came up to them did something happen to you as you came up close to them? A. Yes, when I was driving up towards them myself, closer and closer, they were just standing there and I was driving up closer and closer all the time, and everything seemed to just go black.

Q. What happened after that? What do you remember after that? A. I lost control of the car just then and thinking back deeply, more still now while standing here, I have a vague recollection of a voice saying to me "Frank, what is the matter with you"? The next thing I know I am over the other side of the road and the car is stopped.

Q. Do you recall what happened then, or is there anything about it at all that you can tell us about your recollection of what took place then? A. I got out of the car. I expected to see the wife standing there. I do not know, just I thought she would be standing there. I went to run over to her and she was not there, and I hesitated. I ran over and the further I got to the crown of the road I saw the wife laying face down on the table drain facing towards me. Kelly was lying up on the bank a bit further away from her. I do not know then, I just seemed to lose more or less control of myself, and I raced over and I started hitting him and bashing him with the knuckle duster. I can remember part of that pretty well. All

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of a sudden there was a moan and groan behind me. Something stopped, I stood up straight and looked around and here was the wife trying to push herself up out of the water. I went straight to her and pulled her from the water to the bank her head at my feet, and she collapsed.

From then on I do not know what really happened. The next thing I do really remember was the wife again trying to sit up, I went back to her and pulled her up further away from the water and told her to lay still and I would go and get help. It was while I was going over to get help that things started to really penetrate and come back to me. Things that seemed unreal. I started thinking.

Q. What do you mean by that? A. It started to come back really that I seemed to visualise I had stabbed a chap and it started to come back and I remember as though I had stabbed him. Yet again it was not me that stabbed him. It was just as if I had been standing back and was looking on at myself stabbing him. That went on passing through my mind.

I could not really work it out or understand it. All I could see was a picture of myself stabbing the chap. I got over to Liddle's place and forced my way in and rung up, and went back outside, and it was then I went out on the verandah and looked at my right hand and noticed blood all over it, and I started to wonder and worry just really what I had done. I could not realise it or believe it. I could not understand it. Then I started to tell myself, "I have done it". I had killed a chap. Yet it still seemed so unreal. That is when I was laying on the back verandah.

Then I thought—I do not know—I undid my belt and just left it laying there. I think I stopped there for two or three seconds. I am not sure. Then I think I went over and washed my hands, washed the blood off them. I think I stopped there for a while. I could not say quite correctly.

Then I started to go back down the road and it was still passing through my mind "What have I done? I have killed a chap. I have killed a chap." It kept on repeating and repeating "I have killed a chap". Then I started to think I must have meant to. "Did I mean to? What did I do?" Then I started to tell myself if I killed him I must have meant to kill him. I do not know what it was, whether I killed him or I did not. That kept on repeating itself through my mind all the time, right till I met Mr. Jukes.

I met Mr. Jukes, and I was frightened. I did not want to be left alone. I wanted to have someone with me, somebody I could talk to. Mr. Jukes said, "Get in the car". I told him I wanted to see how my wife was, so we went back. I could not find my wife anywhere, yet Kelly he was there. He was lying on the opposite side from where I had left him. I could not think of anything else. I wanted to find my wife. I wanted to find her. Mr. Jukes said, "We had better go into town to the police". He

said "Apparently your wife is all right". So I got into Mr. Jukes' car and we drove into the police station. There was nobody there when we got to the police station. We just drove around. He was looking for the police.

Q. I think later you saw Det. Sheather and you spoke to him for some time, from after five o'clock till about eight o'clock, and I think you saw Dets. Sheather and Ellis somewhere about ten o'clock through to about half past eleven? A. I do not remember what times they were. I do remember seeing the detectives, yes.

Q. What do you recall of your emotional state and state of mind that particular night? A. I only could think of one thing. Even after I was told my wife would be all right I could never get the thought of my wife out of my mind, and how badly hurt she was.

Q. Before you spoke to the detectives had you tried to think and work out how this had happened? A. I tried to and I just could not get an answer. I tried to realize what I had done. Yet I just could not get an answer at all. I just kept on telling myself all the time, "He is dead. He is dead. I have killed him. I must have intended to kill him or otherwise he would not be dead." It just kept on repeating itself.

Q. You told us in your statement from the dock the effect this experience you had when you were six years of age had on you. Do you remember anything more about that? (Objected to—rejected.)

CROSS-EXAMINATION

Cross-examination

CROWN PROSECUTOR: Q. Would you say this was a correct description of what you did: "I aimed the front left-hand mudguard at him and the bike." Would you say that was a correct description of what you did? A. I am not quite sure.

Q. Come on. Would you say that was a correct description or not? A. No, I would not say.

Q. "After I hit him I swerved and put my foot down on the accelerator." Would you say that was a correct description of something that had happened? A. It could have been a reaction.

Q. Did you or didn't you? A. Parts there I am quite unsure of and I have been unsure of for quite a considerable time in my mind as to what happened.

Q. Tell me whether this is a correct description of what you did, what you are sure of. "After I hit him I swerved and put my foot down on the accelerator, as I was going off the road." A. If I said it——

Q. Is it correct? A. It would be correct.

Q. "I went through a greasy boggy patch." Is that correct? A. I did go through a wet greasy patch, yes.

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Q. "And then swerved over the wrong side of the road with the nose of my car facing towards the table drain." Is that a correct statement? A. That is correct.

Q. "I got out of the car." Is that correct? A. Yes.

Q. "I looked for the wife." A. That is correct.

Q. "and at first I could not see her." A. That is correct.

Q. "And when I first seen her she was laying in the table drain." A. That is correct.

Q. "face down"? A. That is correct.

Q. "and I thought I had killed her." A. That is correct.

Q. You did dictate all that to the Police when they were typing the statement at your dictation, didn't you? A. I did to the best of my ability.

Q. And then you went on, "I done my block". A. I did.

Q. "Lost my temper and walked over to where Kelly was, and started hitting him"? A. That is correct.

Q. "Then I heard the wife moan and struggling in the water"? A. That is correct.

Q. "I left Kelly and pulled the wife out of the table drain. She was in agony then"? A. She was in agony.

Q. That is all correct, and that is what you dictated to the police? A. That is correct.

Q. "It flashed through my mind if it had not been for Kelly I would not have injured the wife." Is that correct? A. I would say that was not correct.

Q. You say you did not dictate that to the police? A. I did dictate that to the police, yes.

Q. "I pulled out my knife that I had in my belt and went back and stabbed him in the throat." Did you dictate that to the police? A. I did dictate that to the police.

Q. And you say now it is incorrect, is that right? A. In my statement——

Q. Do you say now it is incorrect? A. In some ways, yes.

Q. When you were giving evidence to my friend you never once mentioned a knife did you? A. I mentioned the knife, yes.

Q. You did not mention you stabbed this man with a knife, did you? When my friend was leading you in evidence? You skipped over that, didn't you? A. I think I did say I stabbed him when I took the knife off.

Q. You said that later on when you were lying down on the verandah you could see yourself stabbing him, but you did not say during your evidence that you stabbed this man, did you? A. No.

Q. In fact, you said that after you hit the man you picked up your wife, and you do not remember anything more until you were pulling your wife up the bank. You deliberately left it out, that you stabbed him? A. I did not deliberately leave that out now.

Q. Do you say now you remember taking your knife out of your belt and stabbing the man? A. I remember taking my knife out of the belt.

Q. And going over to him? A. I do not remember actually going to him. I do not remember getting to him.

Q. Do you remember his being on the ground, do you remember that? A. I do not remember him being on the ground, yes.

Q. Do you remember him being unconscious? A. No.

Q. He was unconscious, wasn't he? A. I do not know.

Q. Do you say you did not tell the police he was unconscious at that time? A. He could have been. He couldn't have been. I do not know. Things are very hazy.

Q. You knew you had deliberately run into him with a motor car, didn't you? A. I am not sure all what I done.

Q. Mr. Jukes was the first man you talked to, wasn't he? A. Mr. Jukes was, yes.

Q. And you have heard him give evidence now twice. At the inquest and again yesterday? A. That is correct.

Q. Did he give truthful evidence? (Objected to: rejected.)

Q. Is there anything in his evidence that you quarrel with? A. I am not in a position to say Yes or No to that because as I stated I cannot remember parts. Parts I can remember quite clearly.

Q. Did you say this to Mr. Jukes? He said that you said you ran over him on purpose. Did you say that to Mr. Jukes? A. I do not remember saying it to him.

Q. Was it correct? A. I beg your pardon?

Q. Was it correct you ran over him on purpose? A. I could not say Yes or No to be quite truthful.

Q. "And he thought he had killed him outright". Did you say that to Mr. Jukes? A. I may have. I may not have. I could not say.

Q. Did you say this to Mr. Jukes: "If I thought of it I would have cut his head off, but I forgot." Did you say that to Mr. Jukes? A. I have no recollection of that whatsoever.

Q. That was what your thought was, wasn't it? A. No, it was not.

Q. That you wanted to cut the man's head off? A. No, it was not.

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Q. You told us that when you went out to your car and got in your car to drive away from the camp, the New Camp property, that you had no idea of doing anything to Kelly? A. I may have had intention to have a fight with him and do injury to him some way, but not to kill him.

Q. You told the Police you knew you were no match for him with your fists, didn't you? A. I have had fights with bigger men.

Q. Did you tell the Police you knew you were no match for him with your fists? A. I do not remember.

Q. Did you sharpen up that three feet bit of steel to a point on that day? A. As I stated to the Police earlier I have no recollection of that part. I stated that to the Police at Deniliquin. When I was confronted with that I stated I had no recollection of it.

Q. Do you remember being asked by Det. Sheather, "What was your reason for wanting to kill Kelly?" Do you remember being asked that? A. At what time.

Q. At the police station? A. If Det. Sheather said I said it I suppose I must have said it.

Q. You answered, "He was running away with my wife. I knew I could not beat him fighting and I decided earlier today that I would kill him." Is that correct? A. That is definitely not correct.

Q. The Constable did ask you when you made up your mind to kill him, did he not? A. He asked me that a number of times.

Q. And you told him it was about lunchtime, about a little before or maybe a little after, didn't you? A. It would not have been at lunchtime, because we would not have been home at lunchtime.

Q. Did you tell him that? A. It is quite possible I did.

Q. You told us when you stopped the car you looked around expecting to see your wife standing there. You said that here in evidence a few minutes ago? A. That is correct.

Q. You never expected to see Kelly standing there, did you? A. That is the part I cannot work out.

Q. You knew you had knocked him over with the front of your car, didn't you? A. There are parts there I wish I was more settled on and had a better idea of what really happened, in my mind. If I had better thoughts I would be more settled and feel more settled in my mind.

Q. You did drive over on to the right-hand side of the road, your incorrect side of the road when you were approaching where your wife and Kelly were, didn't you? A. To the best of my ability, no. Under normal circumstances, or any time, I do not think I would have done that.

Q. You would not drive to the incorrect side of the roadway? A. Not coming to that stretch there.

Q. With a stretch a mile straight, and you could see every blade? A. We used to have our set tracks. One side of the road has big potholes, and the other side is a bit smoother than the other. Things like that. We used to drive on different sides of the road.

Q. You swerved over from your incorrect side of the road and drove straight at Kelly and made a quick turn to do it, didn't you? A. Definitely not.

Q. What speed do you say you were going at when you hit Kelly? A. To the best of my ability, and the car's ability, I would say about 25 to 30 miles per hour, because the car was not capable of doing any faster.

Q. You had it flat out at the time you deliberately drove it straight at Kelly? (Objected to—rejected.)

Q. Do you deny you drove straight at Kelly? A. I will not deny it.

Q. Will you deny you drove at top speed when you drove at Kelly? A. I will deny I drove at top speed, because the top speed of that car under normal conditions would be about 70 to 80 miles per hour.

Q. I am talking of the conditions at that time. You told me the maximum it would go at was 30? A. Yes, that would be correct.

Q. This happened, you say, before four o'clock in the afternoon, do you? A. Going by the evidence I have heard, yes. I am not quite sure of the time myself.

Q. What time do you say yourself? Your own recollection? What time do you say was the latest it could have been? A. I have no idea whatsoever.

Q. It was before tea, wasn't it? Before dinnertime that night? A. It was before teatime that night.

Q. What time was it when you saw Const. Ellis? A. I have no idea.

Q. Was it at least ten o'clock? A. I have no recollection of the times whatsoever.

Q. What were you doing between eight o'clock and a quarter to ten that night? A. I think I went to sleep. I am not quite sure.

Q. Then Const. Ellis came along with Const. Sheather after you had had a sleep, is that right? A. It could have been.

Q. You were quite composed by this time, weren't you? A. No, I was not.

Q. After Const. Sheather had outlined the thing to you, what the allegation was and what you had told him, did Const. Ellis then ask you "Is that right?" The allegation that Det. Sheather was making? A. I accepted it as it must have been the only thing that could have happened.

Q. Did Const. Ellis ask you was this allegation that Const. Sheather was making correct? A. I understand what you mean.

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Q. Is that right? A. At that time it was. It was the only thing I could think of—it was not exactly correct.

Q. Did you say this in answer to Const. Ellis "I made up my mind to kill him"? Is that right? A. I will not deny saying it.

Q. "But I did not want to hurt my wife"? A. I will not deny saying that either because I had no intentions and I never will have any intentions of hurting my wife or harming her.

Q. And that "The bastard was trying to break up my marriage and I meant to kill him and I am not sorry that I did," did you say that to Const. Ellis that night? A. If Const. Ellis said I said it, I must have said it.

Q. Do you still feel that you are not sorry you did? A. I am definitely sorry.

Q. Did Const. Ellis ask you "I understand you told Det. Sheather that you made up your mind to kill Kelly some hours before you drove out in your car on to the Goolgumbla Road and ran over him and attacked him and stabbed him," did he ask you that? A. I have no recollection of him saying it but it would be incorrect because I had no intention of killing him or wanting to kill him.

Q. Do you say the Constable did not ask you that question? A. I do not remember it being asked.

Q. Did you say "Yes, I meant to kill him all right"? A. Definitely not.

Q. Do you deny that at any time you told the police officer that you meant to kill this man? A. I am not quite sure whether I meant it—— (Interrupted.)

Q. You did not tell it to Mr. Jukes at all, that you meant to kill this man?

Mr. COOK: He said he was not sure.

CROWN PROSECUTOR: Q. Do you deny that you told Mr. Jukes you intended to kill this man? A. I won't deny it.

Q. Although you said it you say you did not mean it? A. I definitely didn't mean it.

Re-examination.

RE-EXAMINATION

Mr. COOK: Q. You told us about if you said it you did not mean it. After this happened told us you thought about it and worked it out how it happened or why it happened? A. I have been trying to do that ever since it happened.

Q. On that day, on the 16th October, when you were speaking to Mr. Jukes and then you were speaking to the Police you told us before that you thought if you had done it you must have meant to have done it. (Objected to—allowed.)

Q. I was asking you—do you remember the question? A. No, I am afraid I do not.

(Previous question read to Court by Court Reporter.)

WITNESS: That could be correct. I suppose it would be correct, definitely.

Mr. COOK: Q. You were also asked and you would not deny that you drove the car at Kelly? A. I would not deny it.

Q. Did you realize at some time you had hit Kelly—when did you realize you had hit Kelly with the motor car? A. There again is another thing. When things went black I just—I don't know really when I really realized that I hit him.

(Accused returned to dock.)

Mr. COOK: There is no further evidence for the accused, Your Honour.

(Case for the accused closed.)

HIS HONOUR: It might be advisable if counsel were to debate with me for ten or fifteen minutes on what issues are arising. I do think if the jury were to retire for a short time the air might be cleared by a short discussion on some legal points.

Have you any objection, Mr. Crown?

CROWN PROSECUTOR: No, Your Honor.

HIS HONOR: Have you any objection, Mr. Cook?

Mr. COOK: No, Your Honor.

(At 3.13 p.m. jury retire; discussion ensued in the absence of the jury; at 3.35 p.m. jury returned to Court.)

(Counsel addressed.)

(Further hearing adjourned to Friday, 7th April, 1961.)

IN THE CRIMINAL COURT

Coram: Hardie, *J.*, and a jury of twelve

REGINA v. FRANK PARKER

NARRANDERA: THIRD DAY—FRIDAY, 7TH APRIL, 1961

HIS HONOR: Mr. Cook and Mr. Knight, before the jury are brought in I would indicate that I have thought further over the legal matters debated yesterday afternoon and I will not be leaving to the jury an issue of provocation.

I thought that ought to be told to counsel and if Mr. Cook desires to add anything to what he said yesterday he can. Also it may assist you, Mr. Crown, in your approach to the subject.

Mr. COOK: I can only refer Your Honor on the question of provocation to Holmes's case.

HIS HONOR: Yes, I have read Holmes's case very closely and I have in mind what you have put to me; I realize it is not an easy point and I thought it would be better that you be told that so you may, if you wish, make an application to supplement what you put yesterday.

Mr. COOK: If I may at the proper time ask Your Honor for certain directions.

HIS HONOR: Yes, you may, but from the point of view of your address to the jury is there anything you desire to add?

Mr. COOK: Not in the circumstances, Your Honor.

(At 9.44 a.m. jury brought into Court.)

(Crown Prosecutor addressed.)

(For summing-up see separate transcript.)

IN THE CRIMINAL COURT

Coram: Hardie, *J.*, and a jury of twelve

NARRANDERA, FRIDAY, 7TH APRIL, 1961

In the Supreme Court of New South Wales Criminal Jurisdiction.

R. v. Parker.

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Summing Up and Charge to the Jury.

7th April, 1961.

REGINA v. FRANK PARKER

SUMMING-UP

HIS HONOR: Gentlemen of the jury, in this case the accused Frank Parker is charged with murder. The charge as read to him in your presence at the beginning of the case, was in these terms—

> "For that he on the sixteenth October, 1960, near Jerilderie, in the State of New South Wales, did feloniously and maliciously murder Daniel Christopher Bingham known as Daniel Kelly."

Before I tell you what is involved in the crime of murder I want to make a few observations to you as to the onus of proof. The Crown must satisfy you beyond reasonable doubt that the accused is guilty. It is not for the accused to establish his innocence—the Crown must establish his guilt. The Crown will establish his guilt if upon the whole of the evidence you are left with the firm conviction that he is guilty of the crime with which he is charged. If you have a doubt about the matter and it is a reasonable doubt,

the accused is entitled to the benefit of that doubt. When I say that the accused is entitled to the benefit of a reasonable doubt I mean that that doubt must be founded in reason; that it must arise out of the evidence and not be a mere flimsy or fanciful doubt.

You need not, in order to convict, accept every word of the evidence for the prosecution. You look up the whole of the evidence and if you are then satisfied beyond reasonable doubt that the accused is guilty you will convict. If on the other hand you are not so satisfied or you think there is a reasonable doubt as to his guilt, he is entitled to the benefit of that doubt and you will acquit him. The duty of the Crown to satisfy you in the way I have stated extends throughout the trial from beginning to the end. You must be so satisfied as to each one of the elements upon which the Crown case rests. If in the course of my summing-up I refer to the Crown being required to prove any particular matter, you will take it that such matter must be proved beyond reasonable doubt in the sense in which I have just indicated.

The facts in the case are for you to determine. It is my province to instruct you on the law and the legal principles involved. It is not my province to give you any directions or instructions as to how to find on the facts. It is important that you should bear that firmly in mind so that if, during the course of my summing-up, I express any view on the facts or appear to hold or to incline to any view on the facts, you are not on that account to accept that view. You would only accept it if, after your own independent consideration of the evidence, you came to that conclusion yourself.

Murder is defined, gentlemen, by the Crimes Act of this State, in this way: it is said to have been committed where the act of the accused causing the death charged was done with reckless indifference to human life or with intent to kill or inflict grievous bodily harm. You will thus see from that definition that the prosecution must in a case such as the present one, satisfy you in the way I have indicated—that firstly an act or a series of acts of the accused caused the death of the person referred to in the indictment and referred to in the evidence in this case as Daniel Kelly; secondly, that the accused did that act or series of acts with the intention stated in the section I have just quoted—to kill the deceased or to inflict grievous bodily harm upon him—or acted with reckless indifference to human life. That reckless indifference to human life means that it was done with the knowledge that what the accused was doing could result in the death of the deceased and not caring whether or not it did.

As to the first matter I have adverted to, whether you have been satisfied that an act or series of acts of the accused caused the death of Daniel Kelly, there is a substantially unchallenged, and you may well think unchallengeable, body of evidence. I refer particularly to the evidence of the two doctors called in the Crown case—that the deceased died during the

afternoon of the 16th October following upon and as a result of extensive injuries which were described by them, and in particular a stab wound in the neck which the doctors said severed the internal jugular vein. In addition the uncontradicted evidence points strongly, and you may well think irresistibly, to the conclusion that the injuries were inflicted upon the deceased by the accused. Gentlemen, you will have understood from what I have already said, that before the Crown has established a case of murder it must satisfy you beyond reasonable doubt that the accused at the time of inflicting the injuries intended to kill the deceased or to cause him grievous bodily harm or that he acted with reckless indifference to human life.

The Crown in this case invites you to find that the intent to kill has been established beyond any possible doubt. It relies upon what the accused did and said before leaving the camp in his car on the afternoon of the Sunday in question. You heard the Crown Prosecutor stress the evidence of Mr. Craig, the brother-in-law of the accused, as to the accused, shortly before, cutting and sharpening a long piece of metal rod that he obtained from an old motor vehicle nearby; the Crown also refers to the evidence of the same witness, Mr. Craig, as to the conversation he had with the accused shortly before he left. You will recall that Mr. Craig's evidence, and it is a matter for you whether or not you accept him as a witness of truth and of accurate recollection, but his evidence was that the accused told him that if his wife left with the deceased he would "get" or "kill" the deceased and you will recall Mr. Craig also said that there was a reference to the fact that there are many dark nights and that he would "get him on some dark night".

Moving from the events that happened just before the accused left the camp to the actual events on the roadway, the Crown invites you to take the view that the intent to kill has been proved in this case beyond any shadow of doubt by the very nature of the attacks made by the accused upon the deceased—the motor car driven at a speed conceded by the accused in his evidence to be at a speed of between 25 to 30 miles an hour at the deceased; the attack by the accused upon the deceased, when the deceased was prostrate on the ground with two broken legs, firstly with the instrument which is in evidence and which has been referred to as a knuckle-duster, and then the stabbing with the knife both on the face and in the vital region of the neck. The Crown claims that the brutal and savage nature of the attacks establishes beyond any question that the accused must have intended to kill, or alternatively to inflict serious bodily harm.

In addition, when addressing your minds to this branch of the case you will bear in mind the other matter or series of matters relied upon by the Crown, and they are the various conversations which the accused had with Mr. Jukes on that afternoon, and the various conversations which the accused had with the police officers later that afternoon and that night. You will recall that those witnesses, Mr. Jukes and the police officers, gave evidence of conversations with the accused which are relied upon as indicating

an admission by the accused of an intention to kill. Gentlemen, you saw those witnesses give their evidence; Mr. Jukes, who picked up the accused from the roadway after the accused had phoned the police, and the police officers I referred to, and it is a matter for you to say whether you are satisfied that they are truthful witnesses and that their recollection should be be relied upon. You will recall that the accused gave evidence in the witness box but did not challenge or dispute their evidence as to what he said to them. That is the case which the Crown has made against the accused. I should also, before leaving the Crown case, refer to the statement in writing—a typed statement running into some six pages—made by the accused Parker on the night of Sunday, 16th October last. That statement is among the exhibits in the case and there is no suggestion made by the accused or on his behalf that it was obtained under any circumstances that would render it suspect or unreliable. You will recall that the accused in his evidence in the witness box did not assent then, in the box, to every matter set forth in that statement. You saw the police officers who were in the witness box—the officers who took the statement—and you will give that statement in writing and containing the signature of the accused, full consideration in the light of all the other evidence in the case, including that given in the Crown's case and in the case for the accused.

Gentlemen, you heard counsel for the accused address you yesterday afternoon and you will pay full attention to and give careful consideration to the various matters advanced before you as to why you should not convict his client of murder. Mr. Cook invited you to accept the sworn evidence of his client that when he set out in his car on that Sunday afternoon his only intention was to bring back his wife to their children, and that he had no intention of killing the deceased. Further, counsel for the accused seeks to explain the attacks made by his client upon the deceased, first with the car and then with a knuckleduster and finally and fatally with a knife, as unpremeditated and instantaneous reactions on the part of the accused to an emotional crisis of overpowering intensity; an emotional crisis claimed to have been brought about not only by the acute problems on that afternoon besetting the accused but also to a large measure by a somewhat similar experience in his early impressionable childhood days in New Zealand. Counsel for the accused thus claims that you will take the view that the accused did not have any intention to kill or to inflict grievous bodily harm, or alternatively, that you will not be satisfied beyond reasonable doubt that the accused had any such intention, and on that approach to the matter he invites you to acquit his client of murder and to bring in a verdict for the lesser crime of manslaughter. Gentlemen, in considering this aspect of the case it is necessary for you to keep in mind some important principles or aspects of Criminal Law with which I will now deal. One is that our law does not recognise or allow either as a complete or partial defence to a charge of murder, the fact that the accused committed the act or acts resulting in the death in question, by reason of some overpowering

or even irresistible impulse, or whilst subject to some severe emotional stress or strain. As you will probably appreciate, in many cases of murder the accused has been subject to great emotional stress and strain and if that were recognised by the law as a defence, convictions would be difficult, if not almost impossible, to obtain in the case of crimes of passion.

Another important principle is that in the case of an attack, whether premeditated or not, on another person with a weapon or other instrument likely to cause death or serious bodily injury, the law normally—that is to say, assuming the person in question is of the age of reason and is in law responsible and accountable for his actions—treats the person who has made the attack as having intended the natural and probable consequence of the use by him, under all the circumstances present, of the weapon or instrument. The third principle or point I wish to mention at this stage is that an unprovoked and instantaneous attack upon a person with an instrument and in circumstances likely to result in the death or serious bodily injury of the person attacked, even though not done with the intent specified in the definition of murder, that is to say to kill or inflict serious bodily harm, may well be and often is accompanied by a reckless indifference on the part of the wrongdoer to human life, which as you will have already understood from what I have said, is sufficient to constitute the necessary mental component or ingredient of the crime of murder.

I have mentioned to you certain important principles of Criminal Law for you to bear in mind when considering the submissions that have been put before you by counsel for the accused. As I said before, the determination of the facts in this case is a matter for you, you are the persons upon whom the law imposes the heavy responsibility of making the decision in a case like this. The law is that you must be satisfied beyond reasonable doubt on the matter I have already mentioned. Your duty is to examine all the evidence in the case and ask yourselves whether you are satisfied beyond reasonable doubt of the matters I have mentioned and particularly the matter of intent or mental state on which counsel for the accused bases his defence. If you are satisfied, gentlemen, in the way I have indicated, that the accused is guilty of murder then it is your duty and responsibility to be fearless and return that verdict. It is of no concern of yours to seek to apportion blame as between the accused, his wife and the deceased for the creation of the acute family and emotional problems that provide the background or the setting in which the accused made his attack upon the deceased—that is no part of your function. Nor is it any part of your function to dwell upon the consequences or likely effect upon the accused or his wife or his children of a conviction; the law takes care of that matter.

There is one other point that I think I should deal with briefly, and that is the matter you have heard mentioned from the bar table from time to time throughout this case—namely the question of provocation. Provocation in

certain cases can be relied upon by an accused to reduce what would otherwise be murder, to manslaughter. I have ruled that this is not one of those cases, gentlemen; I have ruled that as a matter of law, with the result that you are not in this case concerned with any question of provocation. That is an important matter for you to bear in mind and I emphasize what I said before, that you are not in any way concerned with the apportionment of responsibility or blame for the creation of the situation which gave rise to this very tragic event.

Gentlemen, you have listened carefully to the evidence given in this case and it is not necessary for me to take you through it—you will probably recall it, it would be difficult to forget. You will in addition have with you in the jury room the various exhibits including the plan of the area and the photographs. There is a shorthand note, from which a transcript has been typed, of all the oral evidence given throughout the trial, and if you wish to refer to any portion of that evidence you can make a request to me and you will be brought back into Court and it will be read to you.

A further matter I should mention is if, on consideration of all the evidence in this case, you come to the conclusion that you should accept the submission made to you on behalf of the accused that the Crown has not established beyond reasonable doubt the necessary mental element or ingredient in the offence, then in that event you would acquit the accused of murder and find him guilty of manslaughter. That is because, on any view of the facts in this case, the death of the deceased was brought about by acts of the accused which were wrongful and which were dangerous.

Gentlemen, the fact that I make that comment at the end of my summing-up is not to be taken as an indication from me that I am inviting you to take that view on the facts of this case. You have heard the evidence and you will consider it carefully, weigh up what has been put to you on behalf of the accused and on behalf of the Crown and decide whether murder has been established in the way I have indicated. If it has, your duty is clear.

Mr. Cook, you wanted to put some submissions of law, did you?

Mr. COOK: I would like Your Honor to outline the defence in this case.

HIS HONOUR: I thought I had summarised your main point. Is there any particular portion you would like me to put? Firstly I think the jury should retire and you might formulate precisely what you want me to put.

Is there any particular portion of the evidence you would like me to refer to, Mr. Crown?

CROWN PROSECUTOR: I think the accused raised character in this case, Your Honor. It was raised indirectly and I think Your Honor should give a direction on it. There is another matter; Your Honor said just towards the close of Your Honor's summing-up that it was no concern of the jury's to seek to apportion blame to the accused, his wife, or the deceased for the

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events that took place. Your Honor was at that time dealing with the question of the guilt or innocence of the accused, but the jury might interpret that to mean that Your Honor was directing them that their traditional right to make a recommendation for leniency in any case was not open to them in this case.

HIS HONOR: I did not think there could be any ambiguity about what I put on that point. I think I would prefer that debated when Mr. Cook raises his other points. I will add something on the question of character at this stage.

Mr. COOK: I thought Your Honor was going to send the jury out.

HIS HONOR: I would like you to formulate your submissions a little more precisely Mr. Cook, but this question of character is a matter I would have referred to in any case. The jury can go out and your submissions can be made, but I propose to add something as to character and then I will ask the jury to retire and I will hear your further submissions.

Mr. COOK: I ask that they defer deliberations until I make my submissions to Your Honor.

HIS HONOR: Very well. Gentlemen of the jury, I was reminded by the Crown Prosecutor that the accused had raised the question of his previous good character and not having had an earlier collision with the law. It is provided by our Crimes Act that evidence as to the character of the accused shall in all cases be received and dealt with as evidence on the question of his guilt. This does not mean that if the accused had a bad record you are at liberty to assume that he is therefore likely to be guilty; it means that if he is proved to have a good character either generally or in some particular respect, you should consider whether that makes it unlikely that he committed the offence, having regard to the other circumstances of the case. However, gentlemen, on this and other matters in the case you use your commonsense, and you consider the nature of the offence charged—the sort of good character which the evidence shows the accused possessed, and you consider whether the facts as to his character make it unlikely that he committed the offence, having regard to all the matters that have been proved in evidence.

Gentlemen, there are certain submissions on some other points I would like to hear counsel on before I finally ask you to retire and consider your verdict. Would you retire for a short recess whilst these submissions are being made?

(Jury retired at 10.44 a.m.)

HIS HONOR: Mr. Cook, would you amplify your submission that you say I should put to the jury the case that has been made on behalf of the accused.

Mr. COOK: I start first of all with a matter of some importance in this case—the observation by the Crown Prosecutor that the only reason the accused gave a statement from the dock was to get in irrelevant evidence. With great respect that is a most damaging statement to make, as I am sure Your Honor would be aware of the authorities that in making a statement from the dock the accused is entitled to make such statement to bring such facts before the Court——

HIS HONOR: What is the section?

Mr. COOK: S. 405 of the Act. It is a matter of some considerable importance and I have the Practice here and in part s. 405 says: "In practice very great latitude is allowed to prisoners in making statements, and this seems the better course to adopt. In *R. v. McMahon,* 17 V.L.R. 335, it was held that a prisoner in making his statement is not limited by the ordinary rules of evidence as to the facts he states . . .".

Your Honor, that is a short note of this case but here we have a statement by the Crown Prosecutor that this man deliberately made a statement from the dock to get in irrelevant evidence which Your Honor later said was inadmissible. With respect that is entirely incorrect and an improper submission to be put forward by the Crown Prosecutor.

HIS HONOR: Do you say the Crimes Act forbids any such comment?

Mr. COOK: I do indeed say that. The rules as to what is allowed to be made in comment on statements from the dock and the fact that a statement has been made from the dock are very strict indeed.

This accused made a statement from the dock and then decided he wanted to give sworn evidence on oath. Having made his statement from the dock he entered the witness box and he was liable to be cross-examined on everything he said in the dock. He placed himself under that complete risk. Every single thing he said he was entitled to be cross-examined on.

Here we have a statement by the Crown Prosecutor, improperly I say—very strongly indeed—to completely shut out from the jury's mind any possible consideration of this previous experience that this man suffered and which he sought to tell the jury about, and which Your Honor ruled that he could not expand upon when giving evidence from the witness box. Your Honor has made that ruling and I bow to Your Honor's ruling on that particular matter—it is a matter for Your Honor to decide. For the Crown Prosecutor to say that having been the case, that Your Honor later ruled that that evidence was inadmissible because it was from the witness box on oath, therefore it would completely nullify anything that was said in the statement from the dock, and Your Honor left with the jury the impression that Your Honor ruled that the evidence was inadmissible and could not be considered by the jury.

HIS HONOR: On that point, Mr. Cook, what do you submit I should do?

Mr. COOK: I respectfully submit that Your Honor should direct the jury that the accused was entitled to make a statement from the dock; that that was his right and he was entitled to make it; that what he says in the dock are matters which they are entitled to take into account. The fact that he then submitted himself to cross-examination, and he submitted himself to complete cross-examination on what he said in the dock, that no cross-examination in any way at all was directed towards his previous experience or whether it had had any effect on him at all.

If Your Honor will direct that when the question was put by me at the conclusion of his evidence in re-examination in relation to that matter, Your Honor then ruled that it was inadmissible. Your Honor was only ruling, as Your Honor saw fit to rule, that that evidence was not admissible because of the circumstances of the accused being then in the witness box. Your Honor's observations as to certain rules of evidence then applied but in no way do they detract from the fact that the jury are entitled to take the matter into consideration.

HIS HONOR: What you want me to do is to add to my summing-up a statement to the jury that your client was within his rights in making a statement from the dock, and that the jury should take the matters brought out in that statement into consideration, together with all the other evidence in the case. Is that right?

Mr. COOK: That does not go far enough, Your Honor.

HIS HONOR: You want at least that, Mr. Cook?

Mr. COOK: I want at least that, Your Honor, yes indeed. I want on top of that that Your Honor stress to the jury that what the Crown Prosecutor said in this case was that this statement from the dock was the only way in which he could bring in all sorts of inadmissible irrelevancies—I took the words down—"The only purpose was to bring something into the case which he could not have brought in otherwise".

HIS HONOR: I do not think that is a verbatim transcript of what the Crown Prosecutor said. I think it must be a little coloured by counsel.

Mr. COOK: Is Your Honor saying that I am not saying what I took down during that address? I copied down what was said in Court and I stand by that, Your Honor.

HIS HONOR: It does not agree with my recollection of the way the Crown Prosecutor put it.

Mr. COOK: Maybe Mr. Knight would be prepared—

HIS HONOR: Don't let us get matters completely out of order. You go on and tell me what additional directions you want me to give.

Mr. COOK: With respect, Your Honor, it was said by Mr. Knight and if Your Honor—whatever Your Honor thinks of whether this was in fact said, it is my submission it was spoken by the Crown Prosecutor—that this was evidence which "he could not have brought into the case otherwise".

Your Honor will recall that the evidence given by Detective Sheather was of this previous experience and there was evidence in this case which was brought in by the Crown which was admitted as part of the record of events and we are entitled, in those circumstances, to expand on what was meant by that—how that came into the picture at all. He was asked about this and he said, "I will explain to you; something happened to me—" and he went on to say it in discussion with Detective Sheather and he referred to it on two or three occasions. In those circumstances it was introduced by the Crown and we are entitled to tell the jury what we meant by that and how that quite possibly came into the picture or what possible effect it could have.

Here the man made a statement and told the jury of his previous experience and how it worried him and how he developed this hatred of this man and how it affected his life. He then goes into the witness box and Your Honor says I cannot expound on anything that was said and I cannot argue with Your Honor's ruling, although I pressed the matter.

I do say in these circumstances that for the Crown Prosecutor to make the most damaging statement that this was to simply bring in inadmissible irrelevancies—that it was the only way he could bring into the case things which otherwise might not be brought in, is entirely wrong and it goes totally beyond the point of all fair comment which is entitled to be made by the Crown Prosecutor on such matters.

HIS HONOR: That does not help me when I am trying to find out the additional directions you require; would not it be easier for you to tell me what the additional directions are? I might then say that I will hear Mr. Knight on those matters.

MR. COOK: My submission is that Your Honor will direct the jury that the observation of the Crown Prosecutor in this particular case as to the accused making a statement from the dock and the effect of his then giving evidence in the witness box, is something which Your Honor has to tell them is the right of the accused to do—the fact that he is entitled to give his statement, and he is given great latitude in giving his statement, and Your Honor should tell the jury that the Crown has raised this matter in the Crown case. Detective Sheather said it was what the accused said to him and the accused was entitled to tell the jury what he meant by that when it was said at the very first conversation with the Police. Also, that having gone into the witness box the accused placed himself open to cross-examination, completely, and that no cross-examination by the Crown was directed in any way at all to this statement by the accused as to the effect of this previous experience in his life.

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HIS HONOR: Am I right in understanding this to be one of your complaints Mr. Cook: I should not only tell the jury your client is entitled to make a statement, that I should tell them they take it into consideration with the evidence, and also that I should direct their attention to that particular part of the statement in relation to the New Zealand experience.

MR. COOK: Yes; I say Your Honor should direct them that way, and I would submit here that Your Honor should go very far indeed to correct the impression which has been left improperly with the jury in relation to these matters. The final thing I say is Your Honor ruled as to the inadmissibility of the evidence, and I ask Your Honor to say that because Your Honor ruled that way that the circumstances in which Your Honor made the ruling in no way prevents them from having the matter clearly under their consideration.

HIS HONOR: I think I referred rather prominently to this alleged New Zealand experience in his early childhood in my summing-up. I think I brought it into my summing-up when I was attempting to summarise what I thought was the crux of your address yesterday afternoon to the jury. Did I not mention the New Zealand matter, Mr. Crown?

CROWN PROSECUTOR: Yes, Your Honor did mention it. Your Honor said, "The acts were brought on by an emotional crisis and this in turn was brought on by reason of events of the past in New Zealand".

Mr. COOK: Your Honor said "emotional crisis was claimed to be brought about by acute problems on that afternoon, together with the effect of a similar experience in his early days".

HIS HONOR: I think I said "early childhood in New Zealand". Does not that, in effect, bring the jury's minds back to the point that that matter is before them in Court. It is a matter for them to consider in their deliberations.

Mr. COOK: It was my submission that that was so, but Your Honor did not say that; it was left on the basis of what I said——

HIS HONOR: I then told them to consider carefully everything that had been put by you on behalf of the accused and by Mr. Knight on behalf of the Crown.

Mr. COOK: With great respect the bare fact that I had made a statement to them is entirely void when I have already been charged with having spoken a lot of "voodoo" to them, and they have had that impression on their minds with the attack by the Crown on the defence submissions. They are left with the impression that "this is another thing which is a lot of 'voodoo' " and I ask Your Honor——

HIS HONOR: I cannot completely restore the balance, or the lack of balance, you might claim due to the fact that the Crown had the last address.

Mr. COOK: It is not a question of last address; the Crown Prosecutor knows what he can and what he cannot say. If something was said which should not have been said then it is Your Honor's duty——

HIS HONOR: I am not expressing any view that anything was said that should not have been said.

Mr. COOK: These are not Your Honour's observations, they are mine. I do not want to force upon Your Honor any point of view—it is my point of view. All I can say is that I impress upon Your Honor most earnestly to give further directions and to repair what I claim is a great damage which has been done to the accused in this case in the way the Crown Prosecutor put it to them and in the way it was left with them—that that was a point put by counsel of the effect of a previous experience; and to the defence being a lot of "mumbo jumbo"; and, to the damaging statement that he had only done this to use his privilege in a statement from the dock to get in something which he would not have been entitled to get in, and that, in accordance with the authorities, is completely incorrect.

HIS HONOR: At what page does it appear in Hamilton and Addison?

Mr. COOK: It appears on p. 379, and it says, "In the King against McMahon it was held that a prisoner in making his statement is not limited by the ordinary rules of evidence as to the facts he states." He is entitled to make that statement and to try and impeach his right, and to say he only did it for a certain reason is wrong.

The next matter of substance and importance which I wish to put before Your Honor is I ask Your Honor to withdraw that part of your summing-up which refers to the matter of the man intended the natural and probable consequences of his acts.

HIS HONOR: I did not quite put it the way in which the House of Lords put it in Smith's case, but I put it in a way that might be said to resemble what the House of Lords said in Smith's case—to represent the same sort of approach to this presumption or principle.

Mr. COOK: Might I refer Your Honor to the reference of this presumption of natural intention which was put with great stress by the Crown. We heard examples of writing cheques and smoking cigarettes and the probable consequences of things like that. Your Honor no doubt is aware of the case of *Smyth* v. *The Queen,* reported in 98 C.L.R. 163 where the High Court said that this was a case in which, without going into the facts—I will read the Court's judgment:

> "Having considered the evidence in this case we think that a jury properly directed and understanding the question could not reasonably fail to draw the inference that when the appellant struck the deceased several times with the wrench he intended to cause him what would amount to grievous bodily harm.

For that reason we think that we ought not to grant special leave to appeal notwithstanding that we think that the direction complained of is not in accordance with law and ought not to have been given. In this Court disapproval has been expressed on more than one occasion of the use, where a specific intent must be found, of the supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable, consequences of his acts: see *Stapleton* v. *The Queen; Baily* v. *Baily; Deery* v. *Deery; Gow* v. *White,* per O'Connor, *J.* The ruling of Lord Goddard, *C.J.* in *Reg.* v. *Ward,* is difficult to reconcile with His Lordship's statement in *R.* v. *Steane,* which we think is to be preferred and is certainly sound. The fact is that, as Cussen, *J.* remarked in *Cox* v. *Small,* the statement is that a person must be held to intend the natural consequences of this act merely conceals the true position."

If I may take Your Honor directly to The Queen against Steane, which was approved of by the Court of Criminal Appeal in the case of *R.* v. *Smith* reported in 60 2 All E.R., p. 450——

HIS HONOR: That decision of the Court of Appeal in Smith's case was upset by the House of Lords. Have you read the House of Lords judgment in the *Director of Public Prosecutions* v. *Smith,* 60 3 W.L.R., 546?

Mr. COOK: No, I have not read that report, Your Honor.

HIS HONOR: It is probably in the All England Reports too, Mr. Cook. In that judgment of the House of Lords I have just referred to the decision of the Court of Appeal you are now going to give me was reversed. It was said to be wrong.

Mr. COOK: That may be, Your Honour, but I would say it would have no effect on this submission to Your Honor because the High Court said they followed *The King* v. *Steane* and now the House of Lords has said The King against Steane is wrong. I am of course unaware of it and I do not know the text of the judgment. I have only found in my research the case I have mentioned and there the Court expressly agreed with what was said in *The King* v. *Steane.*

HIS HONOR: Unfortunately, from the point of view of your argument, the judgment delivered by the Lord Chancellor in the House of Lords said that the Court of Criminal Appeal went wrong in their decision in *R.* v. *Smith.*

Mr. COOK: Wrong in following *R.* v. *Steane*?

HIS HONOR: I think that is the one; I will look and see if they refer to *R.* v. *Steane.*

CROWN PROSECUTOR: I do not think Steane was referred to in that matter, Your Honor. Ward was referred to.

Mr. COOK: Your Honor finds himself in the position of following what the High Court said or what the House of Lords said. In this case we have a matter which includes both specific intent and not a specific intent. Reckless indifference to human life is not a specific intent—there has to be knowledge, Your Honor, an intent to do an act and you are acting recklessly—they are both bound together. In *Smyth* v. *The Queen* they did follow what was said in *R.* v. *Steane* but I am not in a position to be fully able to discuss what was said in the House of Lords and I accept, naturally enough, what was said about it by Your Honor. If there has to be a reconciliation between Smyth and The Queen and the latest House of Lords case, then I would submit Your Honor would be bound to follow the High Court.

HIS HONOR: I gather your submission is that I should withdraw that portion of my summing-up in which I made reference to the persons intending the natural and probable consequences of their act?

Mr. COOK: And point out to the jury that the Crown Prosecutor spent some time in impressing on them this matter. The Crown Prosecutor expressed that "a man should be taken to intend not only these things he knew but also the necessary and natural consequences of what he does."

CROWN PROSECUTOR: I did not put that because it is wrong and it is bad law.

Mr. COOK: He said this and I have a note of this and——

HIS HONOR: I do not think it will help much because I told the jury they take the law from me and I have dealt with this point in my summing-up. Should I now withdrawn what I have put to the jury, or qualify it, or add to it?

Mr. COOK: I ask Your Honor to put it to the jury that the direction or the statement of what was said in The King against Steane, as follows at p. 816—47 All E.R. 813—"Where the instances of——".

That is a bald statement and whether the judgment takes it any further I do not know. They said, "It is proved that he did severely wound——".

It is clear in my submission that the Court was putting it that this intent can be treated subjectively. From what Mr. Knight has said and from what Your Honor has said about the case in the House of Lords that is completely overruled, but the High Court still say in Smyth and The Queen that this direction should not be left to the jury in the sense of a natural presumption—an intention to be gained from a natural presumption, and it is a misleading direction to even suggest it and the natural consequences of the act. The jury must look at the whole of the evidence and decide if there is more than one view available that could have been or was in his mind. That is quite apart from the face of it, as to what would appear to be the natural consequences of his act.

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Might I now go to what Your Honor said about that matter—I have a note of it?

HIS HONOR: I think it would be better to have the Court Reporter read the relevant portion.

(The following extract from His Honor's summing-up appearing at p. 7 of this transcript was read to the Court by the Court Reporter:

"Another important principle is that in the case of an attack, whether premeditated or not, on another person with a weapon or other instrument likely to cause death or serious bodily injury, the law normally—that is to say assuming the person in question is of the age of reason and is in law responsible and accountable for his actions—treats the person who has made the attack as having intended the natural and probable consequences of the use by him, under all the circumstances present, of the weapon or instrument.")

HIS HONOR: I was correct, Mr. Cook, as to what I had said; you will notice I put it as an attack on a person with an instrument likely to cause death or serious bodily injury, and I said the law normally treats him as having intended the natural consequences of the use by him of that weapon or instrument in all the circumstances present. I did not put it quite as broadly as it was put in the House of Lords in Smith's case, but I put my proposition in a very specific form and I put it in very guarded language, bearing in mind that this branch of the law is by no means static and that there was probably room for quite a lot of debate on it in the Higher Courts in this country.

MR. COOK: I withdraw my submission to Your Honor to withdraw that portion of Your Honor's summing-up.

The law does not recognise a complete or partial defence by reason of overpowering or irresistible impulse or emotional strain for committing such an offence. Your Honor says the law does not recognise complete or partial defence but I ask Your Honor to direct the jury in this case the defence was that at the time the alleged incident took place the accused did not have the intent—could not form the intent. The fact that he was acting under a strain—it was the reason why he did not have the intent, not his whole reason why he did it as his defence was to the effect that there was an overpowering impulse, which would deprive him of the intent. It was an overpowering impulsive emotion—in other words he had an overpowering impulse and it was an overpowering impulse which caused this.

HIS HONOR: You are not setting up temporary insanity are you, Mr. Cook?

MR. COOK: I do not think that has been raised, Your Honor; it was not sought to be raised.

HIS HONOR: You say it has not been raised and you are not raising it now?

MR. COOK: Your Honor said something about uncontrollable impulse was not a defence. Here it was submitted to the jury that there was evidence of overpowering or overwhelming strain at that particular moment and that caused there to be no intent.

HIS HONOR: I did not tell the jury that that principle was completely destructive of your submission or was destructive of it at all. I told the jury that there was such a principle of law and they should keep it in mind in examining and considering your submission.

MR. COOK: I appreciate Your Honor is following Brown's case in the Privy Council where it was held that there was no evidence of insanity because of the overwhelming impulse. Leaving aside that I would ask Your Honor to put it to the jury that they can consider the fact that the man had an overwhelming impulse or an overpowering emotion or some reactivation of his subconscious mind, to consider whether he had at the time an intent, because it may be said a man can have an overwhelming impulse and still have intent. If the man had an overwhelming impulse and the jury were satisfied that he had any intent or was capable of forming any intent at the moment of impulse or blackout or lack of conscious appreciation, that is a matter for them to take into account.

HIS HONOR: You ask me to direct the jury that they can, in a case such as this, treat an overwhelming impulse or whatever you call it, as negativing intent?

MR. COOK: No, I ask you to put it to the jury that Your Honor's direction as to overwhelming impulse not being a defence in law does not prevent them from considering whether or not the overwhelming impulse was such as to deprive him of conscious intent, and if they do consider overwhelming impulse as Your Honor has expressed it, to deprive him of conscious intent, then they can acquit him of murder.

HIS HONOR: What about the other point I dealt with—the question of reckless indifference to human life. Do you say that an overwhelming impulse might negative such recklessness?

Mr. COOK: I put it to the jury yesterday that when they were considering the question of intent and conscious intent, with what was a quite obvious dangerous instrument, they have to consider whether at the time to the accused it was obvious—whether he could form an appreciation at the time that he was acting with reckless indifference to human life.

We get down to the very vital point of the subjective or objective test which is a matter of importance. I put it that it is a subjective test for the jury to consider as to whether or not it was obvious to the accused that he was capable at the time these things were being carried out of appreciating his acts as being indifferent—having some appreciation of acting in a way he could appreciate as reckless or indifferent, and not caring.

HIS HONOR: Are there any further matters you wish to put?

Mr. COOK: Just this: Your Honor in recounting the Crown evidence and the conversation with Mr. Craig, said that the accused told Mr. Craig in a conversation that he would "get him" or "kill him" and you also brought in "getting him on a dark night". Your Honor will recall that evidence in cross-examination by Mr. Craig was that the word could have been "stop him". I ask Your Honor to point out to the jury that Mr. Craig said it could have been "stop him". I ask Your Honor to put specific matters of fact before the jury at this stage. Your Honor said that they had seen the Police witnesses in the box talking about conversations and the statement. The accused gave evidence and he did not challenge or dispute their evidence on those conversations, Your Honor said. I ask Your Honor to put it that it was said by the accused that he could not remember certain matters about those conversations. To leave it to the jury that the accused did not challenge or dispute their evidence would leave the jury the impression that they must accept that entirely. I know Your Honor said that it is a matter for them to accept or reject what they liked, but I do ask Your Honor to say he did say that he did not remember particular parts of the conversations. That is an important part of my submission.

HIS HONOR: That is in relation to the conversation to which the police officers deposed to.

Mr. COOK: That is so, Your Honor, and Mr. Jukes too. I think he said he could not remember some of the conversation and some of the things said. I think the accused said he would not deny having said some of them and some, I think he said, he could not remember. I think he said he was "hazy", at some stage.

There was one final thing; Your Honor said, "On any view of the facts in this case you can acquit of murder but you convict of manslaughter". Your Honor went on: "It is for you to decide and you must not accept my views" and I think you said "On any facts they could not acquit". I think that is how Your Honor put it.

HIS HONOR: I did not think you put that in your address, Mr. Cook.

Mr. COOK: I implied to Your Honor yesterday afternoon—first of all Your Honor asked could I press for an acquittal and Your Honor said you did not think I could. Your Honor will of course realise the implication if I, in a case of this nature, sought to press the jury in circumstances such as these,

for an acquittal—such a matter might be prejudicial. At the same time I submit it is Your Honor's duty to point out to the jury that in any trial for murder they can either acquit, bring in a finding of not guilty, or come back with a finding of not guilty of murder but guilty of manslaughter.

HIS HONOR: You did not want to weaken all the main points in your address by putting this argument, but you contend I should put it to the jury—I should say that it is open to them.

Mr. COOK: While Your Honor is considering that Your Honor is fully aware of the decision on provocation where it is said that even though the accused's defence and counsel does not put to the jury any matter of provocation then, in Mancini's case, as it is held, it is the duty of the Judge if there is evidence of provocation to put it before the jury. It may be prejudicial for the defence to put a matter of provocation, and yet still try to seek that there was no intent.

HIS HONOR: You do not challenge this proposition, do you, that the causing of a person's death whilst doing a wrongful act that is dangerous, is always manslaughter, regardless of intent or state of mind?

Mr. COOK: I would still think the jury would be entitled to completely reject the Police evidence. Your Honor said on any view of the facts in this case——

HIS HONOR: They would have to completely reject your client's evidence too.

Mr. COOK: That is a matter for them. It is a matter for counsel if he decides to leave out some matter he could deal with.

HIS HONOR: I do not dispute that proposition of yours but I am at a loss to see what is really to be gained by going back over that, because it seems to me your client has admitted it was his car and it was his knuckle-duster and it was his knife and that he was driving the car and that he was wielding the knuckleduster and the knife; I cannot see that there is any reality about this present matter you are speaking of.

Mr. COOK: I appreciate the weighty force of Your Honor's submission but I ask Your Honor to direct them in that way.

HIS HONOR: To say "Guilty of murder", or Guilty of manslaughter", or "Not guilty"?

Mr. COOK: Yes, and I think I am entitled to say in view of the provocation case it should not be something put as a mention by counsel as being put before the Court, as it could be prejudicial. I hope Your Honour understands what I mean by that.

HIS HONOR: Yes, I follow you.

Mr. COOK: There is another matter: it is a matter entirely for Your Honor as to what matters should be put before the jury in the summing-up. The jury have heard the evidence for the last couple of days but I would like to make this comment, that Your Honor did to some extent outline the Crown case and my submission is that Your Honor made more stress and set out the Crown case to the jury more than the defence. I appreciate Your Honor did outline the emotional crisis and previous experience and the fact that he said he did not have any intention to kill.

Those are the only matters Your Honor brought to the jury.

HIS HONOR: What other matters were there that I could bring to the notice of the jury?

Mr. COOK: With respect, the consistency of the evidence and his acts that such an impulse—his acts with such an overwhelming impulse. I have taken some considerable time in putting these submissions but I formally request Your Honor to do that. I do not think there are any other matters I can direct Your Honor's attention to.

HIS HONOR: Mr. Crown, I do not wish to hear you on a number of matters Mr. Cook has raised, but going back in the reverse order to that in which he raised them; the final point when I said to the jury that on any view of the facts they should find manslaughter if they didn't find murder—what do you say?

CROWN PROSECUTOR: I know of no version of the facts that has been put in this case on which Your Honor could say to the jury, "If you find this you would be entitled to your view that that is reasonably possible", or "if you find that the Crown have not proved anything to the contrary—" there is no such version before the Court that Your Honor could say would entitle them to acquit entirely.

HIS HONOR: You oppose the re-opening of that matter?

CROWN PROSECUTOR: Yes, Your Honor.

HIS HONOR: The next thing I want to raise is this: I am minded, subject to anything you may put, to draw the attention of the jury to the fact that the accused, although he did not challenge or dispute any of the evidence of Mr. Jukes or the police officers, he did not recall various parts of the conversations.

CROWN PROSECUTOR: This would be the first time in which "I don't remember" was going to be used with such strength that it was suggested that Your Honor should call the jury back after the conclusion of the summing-up to say that the accused said. "I don't remember" in respect of some matters which in fact he does not challenge or dispute, and the only matter that Your Honor has said in respect of it is that he does not challenge or dispute them.

HIS HONOR: This addition that Mr. Cook wants me to add: I refer to the evidence of Mr. Craig—"Get him" or "kill him" or "stop him". That was probably a matter that might be mentioned, as long as these things do not get out of proportion at this stage.

CROWN PROSECUTOR: My friend read that particular passage to the jury in his address in respect of the evidence in Court.

HIS HONOR: But that was yesterday afternoon.

CROWN PROSECUTOR: And he read the first sentence in cross-examination in relation to it. This morning I referred to it and I used the three versions—"get", "stop" or "kill" and Your Honor briefly referred to it and said "kill" or "get". I suggest that there is not such a difference between "stop" and "get" that Your Honor would think it was necessary to highlight that at the end of the summing-up.

HIS HONOR: The main point Mr. Cook dealt with was the question of the objective and subjective tests and *R.* v. *Steane* and *R.* v. *Smyth*. I do not propose to re-open that matter or the other matter on irresistible impulse.

CROWN PROSECUTOR: That is completely covered by the House of Lords matter.

HIS HONOR: The remaining matter is this application that Mr. Cook made earlier in his submissions that I should give some direction as to the right of the accused to make a statement from the dock. I did not give any indication that I had any view on this matter of what was said by counsel during the course of their address. My recollection of what you said was not precisely the same as Mr. Cook's recollection, but I do not propose to open that up. I am disposed, subject to anything you may wish to put to me to the contrary, to indicate to the jury that the accused had the right to make a statement from the dock and that the law gives him that right either alternatively to or in addition to giving evidence from the witness box, and that the statement made by him from the dock should be taken into consideration together with all the sworn evidence in the case.

That is a direction that normally I would have given if there had been a statement from the dock that really got anywhere, but it seemed to me to be so early in point of time and so remote in relation to the crime charged in this case that I did not say anything about it purposely.

CROWN PROSECUTOR: I would have thought that the fact that the accused person made a statement and the weight that should be given to it—that if an accused person makes a statement in any Court it is of importance to tell them what weight they should give to the statement. Defence counsel, as a rule, desire a Judge to leave that out on the basis that it is a weakening of the defence.

HIS HONOR: Defence counsel in this case has been provoked by something you said, or something he thought you said.

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CROWN PROSECUTOR: I do not think that is so. I think my friend might have a complaint and that is that Your Honor did not substantially tell the jury that the accused need not have gone into the witness box and given evidence and have been subjected to cross-examination on it, and he did in this case do that. That direction is quite frequently given when an accused person goes into the witness box. It is quite clear from what he does that he has that right.

If Your Honor said that Your Honor might think he would have to say he does not remember—although he remembered on every other occasion—he does not remember the using of the knife, in the witness box, so if Your Honor was going to mention that it might highlight the matter out of proportion.

HIS HONOR: That is a problem. Mr. Cook wants me to go into more detail as to what his case is. Once I start opening that up I do immediately get into that contentious area you have just mentioned.

Apart from answering the points Mr. Cook raised, do you want to raise a point yourself?

CROWN PROSECUTOR: Yes, Your Honor; I got the impression that Your Honor said it was no concern of the jury to seek to apportion blame between the accused, his wife, and the deceased. I got the impression that Your Honor was dealing with the question of guilt or innocence, but that Your Honor might have implied to the jury that they would not have the right to give any recommendation of mercy that they might feel was attributable to any question of the apportionment of blame.

HIS HONOR: I was not thinking in terms of any recommendation at all, Mr. Crown. If I remember correctly I linked this up with my intimation to the jury that provocation was not available as a limited defence in this case. In other words my intention was—whether I conveyed it clearly is another matter—but my intention was to convey to them that they had to look at the facts of this case and particularly what the accused had done and whether he had done it with reckless indifference or with the required intent, and could not treat as exoneration or excuse what had happened earlier that day, could not regard any conduct of his wife or of the deceased as in any way justifying it.

CROWN PROSECUTOR: Whether Your Honor thinks he should in the circumstances of this case and in the light of the fact that there might be some question of the jury thinking you may have ruled that there was no question of their making a recommendation, that Your Honor should inform them that they have the power of recommendation.

HIS HONOR: I am not so sure of that. In the case of a crime for which the law fixes—you would refer to a recommendation that then might operate on the proper authorities in relation to the power of shortening sentences, and things like that, would you?

CROWN PROSECUTOR: Yes.

HIS HONOR: I do not think they are likely to draw the impression I was referring to that matter. I prefer to leave that matter out. I think that will cause more confusion. I will make my supplementary observations to the jury as short as possible.

Mr. COOK: Would Your Honor formally direct the jury there is some evidence of provocation?

HIS HONOR: No. However, it will be noted that Mr. Cook makes that submission. I have already indicated that in the present case I am satisfied that the defence or partial defence or limited defence of provocation is not available to the accused in the circumstances of this case.

(Jury brought back to Court at 11.50 a.m.)

HIS HONOR: Gentlemen of the jury, as you will recall I have already explained to you what are the ingredients or elements in the crime of murder, and I explained to you that the onus was on the Crown to established its case beyond reasonable doubt, and I dealt with the facts of this case. Now I propose to add a few additional matters to what I said before, but I do not want you to think that because I am adding them now some half hour or thirty-five or forty minutes after my main summing-up, you are to forget what I told you this morning. My summing-up as given stands, except as it may be qualified by a few matters I am adding at the request of counsel.

You will recall that the accused in this case made a statement from the dock and then went into the witness box and gave evidence in the witness box. You will take into consideration in your deliberations of this case all the evidence given by the various witnesses, including the documents tendered, and the other articles tendered, and you will take into consideration the evidence given by the accused in the witness box and his statement from the dock. He has a right to make a statement from the dock, and need not go into the witness box, in which event he would not be liable to cross-examination at all. In this case he did both, he exercised his right to make a statement from the dock, and then went into the witness box and became liable to cross-examination and was cross-examined. That is a matter I mention to you at the request of counsel for the accused.

In the course of my summing-up I did make reference to the fact that the Crown place reliance upon what the accused did at the camp on the Sunday morning before he left in his car, and not only what he did but what he said to his brother-in-law, and I mentioned to you that the brother-in-law gave evidence to the effect that during that period of time before the accused set off in the car, the accused had said that if his wife went off with Kelly he would kill him or get him, and made some reference to getting him some dark night. I have been asked to remind you of a matter which you probably remember because counsel for the accused stressed it in his address

yesterday afternoon, that Mr. Craig, having given evidence to the Crown Prosecutor that the accused had said to him something to the effect that he would get him or kill him, meaning Kelly, in cross-examination Mr. Craig told counsel for the accused that he did not quite remember the words used by the accused, and he was asked this: "May the word have been 'stop'? I will stop him." And he said, "It could have been." That is a matter counsel for the accused asked me to draw to your notice, and I have done so.

You will remember that I referred to the fact that the Crown place reliance upon the conversations which Mr. Jukes and the Police officers gave evidence of, which they said they had had with the accused on that afternoon. Mr. Jukes' conversation was the first one during the afternoon, and the Police officers were later, either that afternoon or that night. When dealing with those conversations that were dealt with in the evidence of those witnesses I did say that the accused did not challenge or dispute that evidence. That is correct, but I have been asked by counsel for the accused to bring to your notice the fact that the accused in the witness box said in relation to some parts of those conversations—and some very material parts of those conversations—that he did not remember them taking place; in other words, he did not challenge or dispute them, but did not necessarily admit them because he said he did not remember them. Counsel for the accused has asked me, as he is entitled to, to bring that matter to your notice and I do it.

There is one further matter that I deal with very briefly, and it is this: You will recall I said something along these lines, that if you came to the conclusion that the accused did not intend to kill or did not intend to inflict serious bodily harm, and did not act with reckless indifference to human life, or if you were not satisfied beyond reasonable doubt that one or other of those mental states existed at the relevant time, then you would acquit the accused of murder. I then went on to say something about manslaughter, and said that manslaughter takes place when there has been in fact a killing in the course of doing a wrongful act that is dangerous. I think I said to you that on any view of the facts that was the position here. I would like to add to what I said then, this, that the facts in the case are for you and you alone, as I said earlier; and on that matter also you would have to be satisfied; if you acquitted the accused of murder you would have to be satisfied in the manner I have already indicated, that is to say, beyond reasonable doubt, that the accused caused the death of the deceased and caused it whilst doing a wrongful act or a series of acts that were wrongful and that were dangerous. I have not heard anything put to you by or on behalf of the accused that gives any indication of any explanation of the events of this tragic day other than at least a wrongful and dangerous act or series of acts on the part of the accused. But, as I say, the facts in the case are for you, and that being so you are the persons to make the decision.

Are you satisfied beyond reasonable doubt that the Crown has made out on the evidence in this case the charge against the accused that he committed murder on this day? If not, are you satisfied, again beyond reasonable doubt, that the accused on this day committed manslaughter?

In the Supreme Court of New South Wales. Criminal Jurisdiction. — R. v. Parker. — No. 21. — Summing Up and Charge to the Jury. — 7th April, 1961.

I think that covers the additional matters I wanted to bring to your notice. But, as I say, do not overlook the fact that I have dealt with the principles and the various matters involved in this trial already, and do not give undue importance to what I have said now because it comes later than what I said earlier.

The exhibits, as I said before, will be with you in the jury room during your deliberations, and as I indicated earlier there is a typed transcript of the oral evidence, and any portion of that can be read to you if you feel you need it, or if you feel it will assist you in arriving at a correct decision in this matter. You may now retire and consider your verdict.

(Jury retired at 12.01 p.m. and returned at 2.17 p.m. with a verdict of guilty, with a strong recommendation for mercy.)

(Jury discharged.)

In the Supreme Court of New South Wales. — R. v. Parker. — No. 22. — Verdict. — 7th April, 1961.

HIS HONOR: Does any question arise as to antecedents in view of that finding, Mr. Crown?

CROWN PROSECUTOR: No, Your Honor.

SENTENCE

In the Supreme Court of New South Wales. — R. v. Parker. — No. 23. — Sentence. — 7th April, 1961.

HIS HONOR: Frank Parker, the jury has found you guilty of the charge of murder. You have had a very full and a very fair trial. Your counsel has said everything that could have been said on your behalf. It was apparent, however, that the jury's verdict was inevitable.

The law prescribes for a crime such as yours, penal servitude for life, and that is the sentence I impose.

In the Court of Criminal Appeal, New South Wales.

R. v. Parker.

No. 24.

Notice of Appeal and Grounds of Appeal.

10th April, 1961.

IV

CRIMINAL APPEAL ACT, 1912

R. v. FRANK PARKER

Notice of Appeal or Application for Leave to Appeal

The [1] tenth day of April, 1961.

TO THE REGISTRAR.

(Form No. V.)

I, Frank Parker, having been convicted at [2] Supreme Court holden at Narrandera, of [3] Murder on the seventh day of April, 1961, and having been sentenced to penal servitude for life on the seventh day of April, 1961, and being now a prisoner in H.M. Gaol at [4] Goulburn, hereby give notice that I desire to appeal to the Court of Criminal Appeal against my conviction [5] and against my sentence on the grounds set forth on page 2 hereof.

(*Signed*) [6]
(Sgd.) F. PARKER, Appellant.

The appellant must answer the following questions: —

1. Have you been granted a certificate that your case is a fit one for appeal? If so, you must forward it with this notice. No.
2. Do you desire legal aid to be assigned to you? If so—
   (*a*) What was your occupation, and what wages, salary, or income were you receiving before your conviction? Labourer, £20 0s. 0d. per week.

[1] If this notice is signed more than ten days after conviction or sentence, appellant must also forward notice of application for extension of time.

[2] Here state Court.

[3] State offence shortly, *e.g.*, larceny, murder, etc.

[4] If not in custody instead of "being now a prisoner, etc., etc.," put "and now living at " giving address in full.

[5] Alter this to meet circumstances, *e.g.*, if appeal is against sentence only, strike out "against my conviction and".

[6] This notice must be signed by appellant, and if he cannot write, his mark must be attested by a witness, whose name and address must be given.

(*b*) Have you any means or property? and if so, what? Nil.

(*c*) Was any solicitor acting for you on your trial? If so give his name. Legal Aid supplied.

3. Do you desire to be present when the Court considers your case? If so, state the grounds on which you think you should be present. Yes. In my own interest.

4. Do you desire to call any witness on your appeal? If so, you must forward with this notice Form No. XV. Leave to Counsel.

Page 2 of Notice

Grounds for Appeal or Application

[*These must be filled in before the notice is sent to the Registrar. Set out here the grounds or reasons why your conviction should be quashed or your sentence reduced. You can also, in addition to giving the grounds of your appeal, etc., set out in writing your case and argument in support of it. This will then be considered by the Court without any person appearing on your behalf.*]

1. The Judge should have directed the jury on my statement from the dock. I should have a new trial because evidence regarding previous experience in New Zealand should have been admitted by the Judge.

2. The Judge was wrong in law in saying that I was presumed to know the consequence of doing the I did. He should have told the jury that they could consider my state of mind.

3. An irresistible impulse was not my defence. My defence was that overwhelming compulsion robbed me of the ability to form intent.

4. The Judge summed up against me.

5. The jury should have been told they could acquit me.

In the Court of Criminal Appeal, New South Wales.

R. v. Parker.

No. 25.

Additional Grounds of Appeal (undated).

Exhibit "E"

IN THE COURT OF CRIMINAL APPEAL No. of 1961

REGINA v. FRANK PARKER

Grounds of Appeal

1. His Honour misdirected the jury as to the evidence to establish the intention required under section 18 of the Crimes Act.

2. His Honour's direction to the jury, namely "another important principle is that in the case of an attack whether premeditated or not on another person with a weapon or other instrument likely to cause death or serious bodily injury the law, normally, that is to say, assuming the person in question is of the age of reason and is in law accountable and responsible for his action, treats the person who has made the attack as having intended the natural and probable consequences of the use by him, under all the circumstances at present, of the weapon or instrument" was wrong in law and the said direction was likely to confuse or mislead the jury as to the law.

3. His Honour in stating to the jury "the third principle or point I wish to mention at this stage is that an unpremeditated and instantaneous attack upon a person with an instrument and in circumstances likely to result in the death or serious bodily injury of the person attacked even though not done with the intention specified in the definition of murder, that is to say, to kill or inflict serious bodily harm, may well be and often is accompanied by a reckless indifference on the part of the wrongdoer to human life which as you have already understood from what I have said, is sufficient to constitute the necessary mental component of the crime of murder" erred in law and His Honour's statement was likely to confuse and mislead the jury.

4. His Honour should have directed the jury that it was entitled to consider the totality of the evidence in order to decide whether the necessary intention required by section 18 of the Crimes Act had been established against the accused and that any inferences to be drawn by it from the circumstances of the killing were to be considered in the light of the whole of the evidence.

5. His Honour erred in law in holding that there was no evidence which could be left to the jury of provocation under section 23 of the Crimes Act.

6. His Honour erred in law in refusing to admit evidence from the accused in examination in chief in relation to a previous experience of his childhood in New Zealand and the effects that the said experience had had upon the mind of the accused in subsequent years and at the relevant time.

7. His Honour erred in law in directing the jury that "our law does not recognize or allow either as a complete or partial defence to a charge of murder the fact that the accused committed the act or acts resulting in the death in question by reason of some overpowering or even irresistible impulse or while subject to some severe emotional stress or strain" for the reasons that the mental state of the accused prior to and at the time of the committing of the act or acts was relevant to establish the intention required by section 18 of the Crimes Act.

8. His Honour should have directed the jury that it could consider that if the accused was overwhelmed or overpowered by an impulse or was subjected to severe emotional strain, the accused may not have had or been able to form the conscious intention required under section 18 of the Crimes Act.

9. His Honour should have directed the jury that if the accused was acting under some overwhelming or irresistible impulse or was subjected to some severe emotional strain he may not have been acting with "reckless indifference to human life" or been doing some act "obviously dangerous" to human life.

10. His Honour erred in law in failing to clearly sum up to the jury on the effect and rights of the accused making a statement from the dock and then giving evidence on oath immediately thereafter. His Honour should have directed the jury to disregard the observations of the Crown Prosecutor in relation to this matter in so far as it was alleged that the only purpose of the accused making a statement from the dock and then giving evidence in chief was to get into evidence a whole mass of inadmissible and irrelevant evidence.

11. His Honour should have directed the jury that it could have acquitted the accused both of murder and of manslaughter.

12. His Honour in making the comment "on any view of the facts in this case, the death of the deceased was brought about by acts of the accused which were wrongful and which were dangerous" prejudiced the fair trial of the accused.

13. His Honour in summing up the trial placed undue and unfair emphasis upon the case for the Crown and failed to adequately and fairly put the case for the defence before the jury.

In the Court of Criminal Appeal, New South Wales.

R. v. Parker.

No. 26.

Judge's Report.

25th July, 1961.

The Registrar,
Court of Criminal Appeal,
Supreme Court, SYDNEY.

Dear Sir,

REGINA v. FRANK PARKER

As requested, I furnish my report on this case.

The facts, briefly, are as follows: Parker was unemployed, and went with his wife and children to stay with his brother-in-law, Craig, on a property near Jerilderie while looking for work. Dan Kelly was employed on the property and became friendly with the Parkers. Eventually, Mrs. Parker told her husband that she was running away with Kelly.

The evidence indicated that Parker was greatly upset and pleaded with her not to go. Later in the day Mrs. Parker left with Kelly on his bicycle. Parker followed in his car and drove it at high speed at Kelly where he stood with his bicycle at the edge of the road. The impact broke both Kelly's legs and may have rendered him unconscious. Parker then attacked him, where he lay, with a knuckle duster which he kept in the car, and finally stabbed him repeatedly with a knife which he always wore. The circumstances of the killing were not in dispute.

The evidence was that he then broke into a nearby house and telephoned the police. He was given a lift by Mr. Jukes who drove him to the police station. Mr. Jukes and the police officers gave evidence that Parker told them that he had intended to kill Kelly.

In the witness box, Parker stated that he had not intended to kill Kelly, but only to bring his wife back to their children. It was argued on his behalf that the attacks were unpremeditated and instantaneous reactions on his part to an emotional crisis of overwhelming intensity.

The jury were directed that, in the circumstances of this case, provocation was not available as a defence; that irresistible impulse is not available as a defence; and that a person who attacks another with a weapon likely to cause death or serious bodily injury will normally be taken to have intended the natural and probable consequences of his attack or, at least, will be regarded as having acted with reckless indifference to human life. They were also told that if they did not find the necessary mental ingredient established beyond reasonable doubt, then they should acquit the accused of murder and find him guilty of manslaughter because, on any view of the facts, Kelly's death was brought about by acts of Parker which were wrongful and dangerous—though it was for them to decide whether they were satisfied that the accused did, in fact, cause Kelly's death and caused it while doing a wrongful and dangerous act.

The jury returned a verdict of guilty of murder, adding a strong recommendation for mercy. A verdict of manslaughter or not guilty would have been explainable only on the basis of sympathy for a man of apparently good character involved in a very tragic family situation.

M. F. HARDIE. 25th July, 1961.

IN THE COURT OF CRIMINAL APPEAL No. 50 of 1961

In the Court of Criminal Appeal, New South Wales.

Coram: EVATT, *C.J.*, SUGERMAN, *J.*, MANNING, *J.*

Friday, 24th November, 1961

R. v. Parker.

No. 27.

REGINA v. PARKER, FRANK

Judgments of the Court of Criminal Appeal.

JUDGMENT

24th November, 1961.

EVATT, *C.J.*: In this matter I am of opinion that the appeal fails and should be dismissed. I publish my reasons.

Evatt, *C.J.*

I am authorised by Mr. Justice Manning to state that he also is of opinion that the appeal should be dismissed. I publish his reasons.

SUGERMAN, *J.*: I agree that the appeal should be dismissed. I publish my reasons.

EVATT, *C.J.*: The order of the Court is that the appeal is dismissed.

EVATT, *C.J.*: The appellant stood his trial at the Supreme Court in Narrandera, before Hardie *J.* and a jury of twelve, on a charge that on 16th October, 1960, near Jerilderie, in the State of New South Wales, he did feloniously and maliciously murder Daniel Christopher Bingham known as Daniel Kelly. The trial was held on 5th, 6th and 7th April of this year. The appellant pleaded not guilty to the charge, but the jury returned a verdict of "Guilty with a strong recommendation for mercy". The sentence imposed by the learned presiding Judge was one of penal servitude for life.

The facts of the case, briefly, are as follows. The appellant Parker was unemployed and went with his wife and children to stay with his brother-in-law, Craig, on a property near Jerilderie while looking for work. The deceased, Daniel Kelly, was employed on the property and became friendly with the Parkers. Eventually, Mrs. Parker told her husband that she was running away with Kelly. The evidence indicated that Parker was greatly upset and pleaded with his wife not to go. Later in the day Mrs. Parker left with Kelly on his bicycle. Parker followed in his car and drove it at high speed at Kelly where he stood with his bicycle at the edge of the road. The impact broke both Kelly's legs and may have rendered him unconscious. Parker then attacked him, where he lay, with a knuckleduster, which he kept in the car, and finally stabbed him repeatedly with a knife which he always wore.

I think it is important in this case to refer to the medical evidence in some detail. Dr. Pilkington, who was the Government Medical Officer for the district of Jerilderie, stated that in company with two police officers he proceeded to the scene of the killing. He there saw the body of a man lying on the roadway; he made an examination of the man and pronounced life extinct. There was a good deal of blood lying about and the deceased had numerous wounds of the face, throat and chest. He was wearing a singlet and the wounds were on the exposed part of the body. The doctor expressed the opinion that death had occurred from half an hour to one hour prior to his examination.

Dr. Pilkington stated further that he was present at a post-mortem examination on the following day, and in answer to the Crown Prosecutor he gave the following evidence:

Q. Can you tell us as far as the injuries on his face were concerned—would you describe those as you saw them, in detail, at the post-mortem? A. There would be about—I do not know the exact number, but I would say there would be more than ten and less than 40 wounds on the face and throat and forehead, but there were only two of great significance, and they were on either side of the throat. The wound on the right side was an incised wound, about half an inch long, but on investigating its extent at the post-mortem it was found it had been made by a sharp instrument and had penetrated the voice box or larynx, and missed any large blood vessel.

Q. In order to get to the voice box are there a number of solid type tissues around there that have to be severed, or is it just more or less a soft type of tissue? A. No, the muscular tissue which covers the larynx and trachea would tend to slide out of the way, unless the knife were very sharp much vigour would be necessary to push it in.

Q. That one on the right side, while it went in deep, did not meet any large blood vessel or any other things that would cause death? A. That is correct.

Q. What about the wound on the other side? A. There was one on the left side which had penetrated in a different angle, and had severed the large vein in the neck, the vein called the internal jugular vein, and there was a lot of blood in and about. It had penetrated further into the muscles at the base of the tongue, right in deeply.

Q. From the point of view of the amount of force necessary to inflict that wound, what do you say as to that? A. Considerable vigour would need to be used. ~~I did see the knife with which it was done, and the blade was two or three inches.~~ . . . (Objected to; struck out.)

Q. You saw a knife? A. Yes.

Q. The knife when you saw it was it fairly sharp? A. No different to that.

Q. The same as it is now? A. Yes.

(Knife m.f.i. "1".)

Q. Would that knife, to get into that depth—what do you say as to the amount of force that would be needed? A. Very considerable force.

Q. With that knife? A. Yes.

Q. Were there two other wounds under the chin area that gave the appearance of being caused with a knife or some instrument that made an incised wound? A. Around the chin area?

Q. Anywhere on the face? A. Yes, there were a number of wounds about the face, and after I had been shown the knife and considered the matter, they looked to me as if they could have been done by stabbing about the face.

Q. Were there any other facial injuries? A. Ones that appeared to be more like bruises than wounds. I could not really see how they had been made with the sharp end of the knife.

Q. Were you shown at the Inquest a knuckleduster? A. Yes.

Q. Is this the knuckleduster you were shown? (Shown to witness.) A. Yes.

(Knuckleduster m.f.i. "2".)

Q. Having seen that, does that convey to you any idea of the type of thing that would cause the injuries you saw on the face or chest? A. That could cause the wounds, yes.

Q. The wounds other than the incised type of wounds? A. Yes, there were wounds which had been made with a blunt instrument.

Q. Which would be caused by some such instrument as that? A. Yes.

Q. What about the injuries to the legs, what did they turn out to be when you examined them fully? A. Both the bones of both legs were broken below the knee. That is the tibia and the fibula of both the right and left legs.

Q. Whereabouts in relation to the knee and ankle? A. Both breaks—I did measure them—were about 12 to 14 inches above the level of the heel.

Q. Are you able to tell us in what direction the force was applied that caused the injury to both legs? A. The fracture of that right leg was of greater severity than that of the left, and it would appear that that had been struck first. ~~We know the man was on the bicycle, and he may have had his legs in any position.~~ . . . (Objected to; struck out.)

HIS HONOUR: Q. The right leg appeared to have been struck first? A. Yes.

CROWN PROSECUTOR: Q. Were you able to determine whether the injuries came from the side, or which side, or the front, or the back, or how they came on to the legs? A. Not from the legs alone, but having seen the bike——

Q. Don't worry about that. From the injuries alone you could not say? A. No.

Q. Did you form an opinion as to the cause of the death of the man? A. Yes.

Q. What was that? A. There would be considerable shock, with the breaking of the legs, and some amount of haemorrhage with both legs broken, in the legs themselves. During the post-mortem the abdomen was opened and there was evidence of a small fracture of the pelvis. The main cause of the shock would have been the haemorrhage from the incised wounds on the left hand side.

Q. The left hand side of the neck? A. Yes.

Q. You did examine to find out whether there was any serious damage underneath the injuries to the face and chest, did you not? A. Yes.

Q. There was no fracture of the head or skull, was there? A. No. The brain was removed and carefully examined and there was no skull fracture."

"Q. After the man received his injuries, would you expect him to die straight away, after that wound to the neck? A. No.

Q. How long might he bleed after that? A. I should think it would take about five to ten minutes to die from a haemorrhage to that extent.

Q. In order to get the number of wounds that were on the face, forehead and chest, would there have to be a number of blows? A. Yes.

Q. Did you form any opinion as to how many there would have to be? A. I would assess it would—I have said there were more than ten and less than thirty; that would mean there would be perhaps twenty blows.

Q. Were you able to form an opinion as to the position that the man was in, that is the deceased man, at the time he received the blows to the throat—the wounds to the throat? A. I think he would be probably lying on his back. Unless he was thrown to where he was—he was a strong and muscular man, and although he could not walk he may have pulled himself to where he was by his hands. When he was found he was lying on his right side.

Q. You think he was on his back when the wounds to the neck were caused? A. Yes, and I say that because of the almost parallel cuts in here and here (indicating).

HIS HONOR: Perhaps it should be noted that the witness pointed to either side of his neck when he said 'in here and here'."

In cross-examination Dr. Pilkington gave the following evidence: —

"Mr. COOK: Q. You told us the deceased was a powerful muscular man? A. Yes.

Q. Would he be about 5 feet 10 inches in height and 14-odd stone in weight? A. Not 5 feet 10 inches; 5 feet 9 inches.

Q. And about 14 stone? A. Yes.

Q. Obviously a powerful man? A. Yes.

Q. In good physical condition? A. Yes.

Q. When you saw these injuries to his face and to his neck and you told us that they appeared to result from about 20 blows, did they appear to you from their position and the other matters connected with them, that they may have been struck by somebody in a frenzy? (Objected to; allowed.)

HIS HONOR: Q. Can you answer the question? A. Yes, I would think so.

Mr. COOK: Q. Maybe they were an indiscriminate rain or hail of blows? A. It would appear to me to be really a battering.

HIS HONOR: Q. Blows struck swiftly? A. Yes.

Mr. COOK: Q. With some degree of force? A. Yes.

Q. They were not concentrated on any particular portion of the face, they were all over the face? A. The lesser wounds were, yes.

Q. These wounds that were inflicted on the face with the knife, were they spread over the face or on any particular portion of the face? A. They were—the incised wounds appeard to be more on the forehead and over the bony part of the cheek and the deeper ones on the right and the left side of the neck.

Q. Had they penetrated right through the skin to the bone underneath for instance the ones on the forehead? A. Yes, some of them did.

Q. And the injuries to the neck; you followed those injuries through and I suppose you could tell us approximately the line of entry of the knife into the throat? A. Yes.

Q. And from that, doctor, are you able to tell us whether—can you tell us how the blows were delivered with the knife to the throat. Can you give us any idea at all? A. It is hard to be positive but it is my idea that by this time Kelly was insensible, lying on his back, and that the wounds were inflicted on the throat with the knife as he lay insensible on his back.

Q. Would you agree with me that they appeared to be, and I demonstrate with my hand, in a clubbing type of motion? A. No, I would think the knife had been used like that (indicating) and poked in hard.

Q. In an underhand fashion? A. Yes.

Q. From the line of entry as the knife wound went into the throat did it go in an upwards direction, straight in, or was it pointing down-wards with the body lying on his back? A. The wound on the right hand side entered in an horizontal plane to the body; if it were upright, this way. The wound on this side (indicating) came down.

Q. That is the left hand side? A. Yes.

Q. You indicate from an upright position? A. Yes.

Q. You indicate that the wound on the left came from the direction of your ear downwards? A. Yes.

Q. The wounds on the face with the knife; did you form an impression that they were delivered with an underhand motion or by vertical stabbing? A. By vertical stabbing or blows. The incised wounds by vertical stabbing.

Q. Do you know whether they were delivered with a knife held underhand or with a knife held in a clubbing fashion? A. I could not tell.

Following the occurrence, the appellant made and signed a statement to the police in the following terms:

> Just over a week ago I was with my brother-in-law and my wife and we went over to New Camp to get a killer for house meat. As we were going around the paddock looking for the sheep we met Dan Kelly. We were talking to him and while we were talking to him, Noel, the brother-in-law got the killer and put it in the back of the gig. Dan Kelly asked us would we go up his place and Noel said, we will go up for a while and we can have a look at the shearing shed at the same time. We went up to Kelly's place, that is my wife, Noel and myself. While we were there he asked us if we would have a cup of tea and we said, yes. While he was making a cup of tea my wife and myself went over and had a look at the shearing shed with Noel. We went back from the shed to Kelly's

place and we sat down and had a cup of tea and a general conversation, and in the conversation he was saying how lonely it was over there by himself and that he would have to get a girl-friend or somebody to do his cooking for him and he also stated that he had been up to Sydney to see some people up there regards sponsoring to bring a girl out here. He didn't say where from, he was from Ireland himself. Then he said if he had known where Noel was living before he would have been over. He said something about, I might be over later on and Noel said he could come over when he liked. The next time I seen him he came over in the evening and we played euchre and poker together. I think he stopped the night there and went back next morning. I am not quite sure of that. I think it might have been a day went by and he came over again I think it was in the early hours of the afternoon and we were talking about work and things like that. I had just been on the Social Service and we were talking about my licence and getting a "C" class licence and I said that I never had the money to get it. He offered me two pounds for the use of getting my licence. On the next day, Tuesday, we went over to "New Camp", the wife and myself and a young girl named Janette to pick Kelly up to bring him into Town so he could see about his own licence himself. After being up here to the Police Station to see about our licence we went down to the Hotel where he knew a chap in the Hotel who had a truck and he asked the chap could I have the use of the truck to get my licence. The chap never lent me the truck because the brakes weren't too good. We had one drink then, the chap we were speaking to, I do not know his name at all said that a Mr. Sweeney was looking for a chap to drive one of his tractors. We left him then in the Bar and went into the lounge where the wife was sitting. We had two or three drinks there, then we went down to Collins shop and put the orders in for the groceries, that is the wife and myself. Kelly went in the shop alongside the Hotel to do his shopping. From there we picked up the groceries and then we went to see if Mr. Sweeney was home. From there we came back into Town again and we pulled up outside the Hotel. I went looking for work and then I went back to my car and the wife, Janet and Kelly was sitting in the car, we then went down to Tongala in my car, I was going there looking for a job, there was nobody there. We came back to Jerilderie and later went home. During the day I noticed that Kelly was making eyes at my wife and he kept saying to my wife "Aren't you talking to me yet". She didn't say anything to him only smiled. I don't remember if Kelly stopped at our place or not that night. Yes, I remember now I drove him home next morning. The next time I saw Kelly was last Thursday night I went over to Newcamp and picked him up in my car and I drove him over to the place where I was staying, we had tea. After tea we talked for a while while

the wife was fixing the children up and putting them to bed. After the wife put the kiddies to bed I went to bed myself and then Noel walked out and asked me if I wanted a drink I said no, Noel, his wife, my wife and Kelly stopped inside drinking. Around about eleven o'clock that night our young baby Vicky started coughing and crying in the car and I yelled out for the wife and she didn't come out and she and Kelly started singing songs, they finished singing and one of my daughters told her that I wanted her, she come out to the car and asked me what I wanted and I told her to get in and fix the baby up and wasn't it about time that she got to bed and stopped drinking and we had a bit of an argument about it. She fixed the baby up and went inside and made a cup of tea. I went inside and was talking to my brother-in-law and Kelly was just sitting there not saying anything. The next morning I woke up it must have been about half past six and the wife was inside talking to Kelly. He went from there to work and he came over early last Friday afternoon and we didn't have much to say to one and other he was following my wife around, that went on all the time till he went back home. On the Saturday afternoon he come over again and he kept hanging around my wife all the time. On the Friday when Kelly came over and was hanging around my wife I spoke to my brother-in-law Noel about Kelly hanging around my wife and I called my wife over to the back of my car and spoke to her about it and she just turned around and not niggily about it and went back inside. To-day, this morning we got up early to go to one of the outer Stations to get some parts to fix up Noel's gig when we asked Kelly if he was coming over with us he said no and the wife was sitting down on the bed opposite him I called her over to the car and I told her to keep away from him as the only reason he wasn't going with us was that he wanted to hang around with her and she went inside and we drove over to Mr. Bish's place. Kelly wouldn't come with us. We were over there for about two hours and when we came back he was over at the dam swimming and the wife and the children and the brother-in-law's wife and children were all going over to the dam I called out to my wife that I wanted her and not to go over and she didn't come to me and I drove over in the car to her and asked her couldn't she wait for a person to come back before she went over to the dam swimming and she said how the hell would I know how long you would be and I said well you knew I would be as quick as I could get away from the place and she said aren't you coming over now and I told her no, I said "we have got work to do". I turned around and drove back to where the brother-in-law was working there. We spoke about the way Kelly was hanging around my wife, when she came back from the dam after swimming I again approached her about the way Kelly was hanging around her and couldn't she notice it her-

self she answered me "Yes". I said "Why didn't you tell me earlier instead of arguing with me about it". I said "What do you think about it", she said "Well ask him" and walked inside. I followed her inside and asked her what she meant and she wouldn't tell me all she said was "You see him" and then Kelly walked inside to the bedroom and I approached him about the way he had been hanging around the wife and asked him if he considered it was the right thing to do and he said "I don't know about that, do you love her". I said "Yes, of course I do she borne me six children". I said "Anyway do you think it is the right thing for a joker to walk into a house and turn around and do a thing like that, even if the woman turned around and showed him a bit of affection if he was any decent sort of a chap he wouldn't take any notice of it". And I said "If it had been your wife and it was in your place I know what I would have done, because a chap that does things like that has got no principle at all" He turned around and said "I lost my principles a long time ago". I said "Yes, that is the type of bloody joker you are no bloody principle at all" I then walked over to my car and called out to Joan that is my wife to come over as I wanted to speak to her on her own and she came over to me and told me that she was in love with him. I turned around and said "Not love infatuated with him". Then she said "Three days ago we made the arrangements to run away together" but they didn't want to tell me as they didn't want to hurt me. I tried to make her see reason and stop together for the kiddies sake and she said "No". She then left me and went inside I got my children and explained to them what was happening and asked them which one they wanted to stop with and they said they wanted to stop with me and not the mother and him. The children asked the wife to stop and she wouldn't stop and Kelly was sitting outside grinning his head off and I turned around and started to get wild and I said to the Brother-in-law it is time that Kelly got off the property and I said to Noel that if it had been my place from the word go I would have stopped Kelly from coming there as I knew what type of bloke he was, then Noel told Kelly to go and Kelly stopped around for a while and while he stopped there I put my fist through wind deflector on my car I was getting that wild and I told him myself that he had better shoot through and he went up to the roadway and waited for the wife at the roadway and after he went away the wife I don't know whether she would be right up to the roadway or not I started the car up and drove up the road getting up the road I seen Kelly doubling my wife on his push bike and as I got up closer to them they both got off the bike then stood alongside the road, he was standing on the gravel and the wife was standing on the grass. I aimed the front left hand mudguard at him and the bike after I hit him I swerved and put my foot down onto

the accelerator as I was going off the road and I went through a greasy boggy patch and then swerved up over the wrong side of the road with the nose of my car facing towards the table drain. I got out of the car and I looked for the wife and at first I couldn't see her and when I first seen her she was laying in the table drain face down and I thought that I had killed her. I done my block, lost my temper and walked to where Kelly was and started hitting him, then I heard the wife moan and struggling in the water. I left Kelly and pulled the wife out of the table drain and she was in agony then. It flashed through my mind that if it had not been for Kelly I wouldn't have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat. After I done that the wife struggled and tried to sit herself up on the bank. I pulled her up further and told her to lay still and from there I went over to Johnny Littles through the paddock and when I got to Johnny Littles he was not there. I forced my way in to use the telephone to ring the Police. After I rang up I layed down on the back verandah for a while and took my belt and knife off and left it laying on the verandah and after that I walked down the lane and met Mr. Jukes. Mr. Jukes drove me back there and the wife was not to be seen and Kelly was on the opposite side of the bank from where I left him and from there Mr. Jukes drove me into Jerilderie.

At the trial the appellant made the following statement from the dock:

"Your Honor, gentlemen of the jury: You have heard the detectives say I was not sorry for the crime I have committed. I am sorry, I am definitely sorry for what I have done, and the injustice I have done that man's wife and children. I myself really do not know what to say in my own defence and ways, and it is very difficult for me in the position I am in.

But myself, I will say in my early days back home in New Zealand things and ways were very unsettled and things that happened in my earlier days and life, I would say stayed in my mind. When I was the age of six, back home, there was one thing that has always been reminded to me and stayed in my mind, and that was the loss of my own mother. It might be very hard for you to really understand things like that, but to me the loss of my own mother. and seeing her go away like she did that day, was something that always stayed with me, and has stayed with me till the present time.

I can still picture my mother the day she left and went away with a chap by the name of Jack Ray (?). I went with my mother, who was going into town, and I walked with her towards the tram stop. The chap she went away with was standing there, Jack Ray,

and my mother asked me 'Is there anything you want me to bring back from town for you'? I said 'Yes, bring me back a little sand spade and bucket'. She said 'All right, I will'. That, gentlemen of the jury, was the last day I saw my mother for quite a considerable time.

After that I saw my mother again when I was in hospital. For a little while after I got out of hospital I lived with my mother and the chap she was living with. I got to hate that chap. I hated him and just could not help it. I hated him all the time. After that I left my mother and went back with my father to live. From then on right up till the time I left school I lived with my father in various certain places throughout my home town, Wanganui. We lived wherever we could get a place to live with my sisters. My brother was at the time out working. From there I went out to work at the age of 14. Schooling, myself I have not had schooling. I could not settle down to it and had no interest in it. I had unrest and wanted to get away, I wanted to get out to work. It was just something in me. I could not settle down. I wanted to get away and my father could not really give me the life that I suppose he wanted to give me. He had no money he was only living on the old age pension. Therefore, when I went to work I went out on a dairy farm where we were milking 100 cows night and morning. I was getting £1 a week.

From there I got various jobs in New Zealand, till the time I left New Zealand and came to Australia. The first job was at Stan Hindmarsh's outside Bowral. From there I went to Sydney and worked in Sydney on different jobs. I could not settle down to city life. I went out to work on a poultry farm just outside Sydney, at a place called Castle Hill, and it was whilst I was working up there I met my wife. It was Saturday, I remember the day well. A friend of mine by the name of Bill (?) and myself were going round town that morning and we used to go to different restaurants to have our meals. This particular day my mate wanted to go in and have a heavy meal for his dinner. We went into the restaurant and my wife served us. My wife and myself got talking—I mean to the wife-to-be at that time. I said "What are you doing tonight"? She said "Nothing". I said "Would you like to come out with me, I have no one to go with. I am on my own". She said "Yes, I will". After a while she said "Yes, all right I will". I took the wife-to-be out that night and we went to the pictures and I took her home.

Two or three days went by and I came to town again, and one night went round to the same restaurant and met the wife-to-be again there. I again asked her would she come out with me and she said yes. From that night onwards we started to go out more regularly and I used to go into town more regularly to take her out. It reached

the stage I was definitely attracted to her. I am still deeply attracted to the wife now, but anyway I asked the wife would she marry me and she said yes.

We were married, I am not quite sure whether it was a week or thereabouts afterwards. We were living at 98 Regent St., Redfern, at the time and things between the wife and myself were everything you would expect from a newly-married couple. We had a better life for a while even though we were living under extremely hard conditions and—conditions. We had quite a good life. At the time the wife was pregnant with our eldest daughter Joanie. She gave birth to the child and things then were extremely happy. Shortly after that the wife met a boy in Lithgow. I do not remember his name. I could not tell you his name whatsoever, but she did start to show a bit of affection towards him. That went on for quite a while till one day I could not stand it any longer. I approached him at the time about it and it was a Saturday morning I approached, and he said he wanted to take the wife back up to Lithgow with him. I could not take it any more. I gave him a hiding in a fist fight and put him on the train and sent him back up to Lithgow. From then we lived a happy eleven years of married life. The most happy moments of our married life was the times when the wife was pregnant and when she bore me the son which she herself so dearly wanted to bear to me—that was one time I will never forget. I worked—we lived in Sydney at one stage and went from Sydney to Griffith to the property by the name of Bontock (?). I am not quite sure of the man's name there but we were to do station work and it was whilst I was there the wife, she wanted her mother to come up and live with us. I said "No". The wife got dissettled up there and didn't want to stop there. From there she left and came back to Sydney. When she left the place I automatically lost my job myself. From there I came back to Sydney, picked the wife up again and we kept on living there—wherever we could go to live for a considerable time. Then we went up to North Narrabeen and we were living in the North Narrabeen camping area there and then we got two or three houses which the rents were extremely high and things like that. I left there to come down here to Jerilderie to get station work and to try to get a decent house for the wife and my children. It was whilst I was down here that these unfortunate incidents did happen.

Before it happened I had no indication of that—of that ever happening from my wife or anything like that. I had no indication of it ever happening right up to the actual day it happened. The day it happened was a day and ways I will never forget. May I speak to Mr. Cook please.

(Accused confers with Mr. Cook.)

On that day the incident happened as I was driving up the road I could see my life and the deceased standing on the side of the road. Well I don't know—it seemed just to remind me of ways of my own mother and Jack Ray just standing there exactly the same way—the last picture I can remember of my mother leaving me the day I seen her go away. I do not know really how to try to explain it, I don't think I could ever explain it—the feeling or the emotional disturbance I felt. It is something I would never be able to explain really, just what happened or the way I felt when I seen them—the wife and Kelly—standing there. It is a thing that I myself have never forgotten and myself, I don't think I would ever be able to forget. Your Honor may I speak to Mr. Cook please?

(Accused confers with Mr. Cook.)

MR. COOK: Your Honor, the accused has told me he desires to give evidence on oath.

(Accused leaves dock and enters witness box.)."

He then entered the witness-box and on oath affirmed the truth and correctness of his statement from the dock.

No further evidence on behalf of the appellant was tendered at the trial.

From the circumstances of the killing, which are not in dispute, it is clear that the attack made by Parker upon Kelly was of a particularly ferocious and cruel nature. It consisted of what may be described as a series of onslaughts—I refer to the running down of Kelly by Parker in his motor car, the use of the knuckleduster, and the stabbings with the knife. The statement by Parker to the police contains a chronological and detailed account of events prior to and leading up to the crime, and in all respects bears the mark of rationality.

In my opinion the Jury were entitled, on the evidence, to come to the conclusion that the acts of Parker which resulted in the death of Kelly were committed with reckless indifference to human life or with intent to kill or inflict grievous bodily harm, and, in the absence of evidence to suggest a state of mind which would render Parker not responsible for those acts, the jury's verdict of guilty of murder was fully justified.

The crucial provisions of the Crimes Act dealing with homicide is contained in s. 18 (1) (a) which reads as follows:

> "Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to

human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life, or of a crime punishable by death or penal servitude for life."

S. 18 (1) (b) provides that "Every other punishable homicide shall be taken to be manslaughter".

Looking at these provisions as a whole, the Legislature has provided the Court with specific power to deal with the punishment of homicide, and the definitions employed by the Legislature are crystal clear. The outstanding provision in s. 18 is the first paragraph, (1) (a). The section proceeds to make its own provisions all-embracing because of the provision in sub-s. (1) (b) that "Every other punishable homicide shall be taken to be manslaughter".

S. 18 (1) (a) contains a statutory provision or declaration that in certain circumstances the act of the accused amounts to murder. The very description in the transcript by the relevant witnesses, especially the medical witness, Dr. Pilkington, gives a precise, definite and unambiguous account of the acts of the accused which must in their aggregate amount to the crime of murder or alternatively to the crime of manslaughter. There are no two ways about this description of the acts admitted to have been perpetrated by the appellant Parker himself. The details contained in Parker's evidence show that the precise conditions of s. 18 (1) (a) were fulfilled by Parker's admitted conduct.

For these reasons, I am of opinion that the appeal fails and should be dismissed.

I certify that this and the 15 preceding pages are a true copy of the reasons for judgment herein of His Honour The Chief Justice of New South Wales.

HELEN KIRBY, Associate.

Dated 7th March, 1962.

Coram: EVATT, *C.J.*, SUGERMAN, *J.*, MANNING, *J.*

24th November, 1961

REGINA v. PARKER

JUDGMENT

SUGERMAN, *J.*: This is an appeal by Frank Parker against his conviction of the murder of one Daniel Kelly near Jerilderie on 16th October, 1960.

The appellant and his wife became acquainted with Kelly while they, together with their six children, were staying with the wife's brother, Noel Craig, who was a labourer working and living on a station property near Jerilderie. Kelly forthwith began to pay marked attentions to the appellant's wife, which were noted and resented by the appellant who several times reproached his wife for tolerating Kelly's advances. Within a few days of their first acquaintance, Kelly and the wife agreed that she should leave the appellant and the children and that they should go away together on the following Sunday.

The appellant became aware of this plan early in the afternoon of the Sunday. He remonstrated with Kelly and entreated his wife to remain, but these efforts did not avail him. They left on Kelly's bicycle at about 3.30 p.m. Shortly afterwards the appellant set off after them in his motor car.

When the appellant caught up with his wife and Kelly standing by the roadside he aimed and drove his car at high speed at Kelly, both of whose legs were broken by the impact. The wife was also struck and injured. Next the appellant attacked Kelly with a knuckleduster which he had in his car, striking him many—perhaps about 20—blows and inflicting numerous wounds on his face, throat and forehead. Finally the appellant stabbed Kelly with his knife, with which he inflicted, with considerable violence, two deep wounds in the throat. One of these severed the internal jugular vein.

In the opinion of one of the doctors who was called, haemorrhage from this last-mentioned wound was the cause of death, which was unlikely to have been caused by shock from the fractures of both legs alone. In the opinion of the other doctor called, the cause of death was, firstly, shock from the multiple injuries received (the head injuries and the multiple fractures of the lower legs) and, secondly, hastened by blood loss from the wounds in the neck. But in his opinion the injuries received in the way of fractures and head injuries could easily have produced sufficient shock to have caused death apart from the blood loss, although death from those injuries alone would have been delayed for some hours.

After these attacks on Kelly, the appellant drove to a nearby house, forced an entry, telephoned the police station at Jerilderie, said that he had just killed a man, and asked that a doctor be sent to his wife. He then stopped a passing motorist named Jukes, who drove him at his request to

where Kelly and his wife were lying by the roadside. Kelly was still alive, but died shortly afterwards. Jukes drove the appellant from the scene to the police station at Jerilderie.

These facts, constituting the substance of the Crown case, the appellant did not deny at the trial, going no further in his evidence than to say, as to some matters, that his recollection of the whole affair was defective and that he did not remember. He said, however, at his trial that he had set out with no intention of killing or harming Kelly but with the sole purpose of bringing his wife back to the children.

This is inconsistent with many statements which the appellant made to Jukes on the way to the police station and to the police after his arrival there. In these, the appellant said that he had intended to kill Kelly, that he had set out with that purpose, that he had deliberately run him down, and that he had thought he had killed him outright by this means. When he found that he had injured his wife he had gone across to Kelly, beaten him with the knuckleduster, and stabbed him. In the making of these statements, the appellant had remained calm while speaking of Kelly but had become emotionally disturbed when referring to his wife.

To Jukes the appellant said that he had run over Kelly on purpose and thought he had killed him outright; that after seeing his wife lying injured in the table drain he had pulled her out and then "bashed" and stabbed Kelly; "if he had thought of it he would have cut his head off, but he forgot". To police officers the appellant said: "I meant to kill him but I did not want to hurt my wife. Thank God she is all right. The bastard was trying to break up our marriage and I meant to kill him. I am not sorry that I did it. He was trying to take my wife away from me and the kiddies". And later, after returning a negative answer to question whether he had ever suffered from or been treated for any mental illness: —"I knew what I was doing as well as I know what I am doing now. I set out to kill him and I meant to kill him and I am not sorry at all that I did it."

The substance of what the appellant had thus said was repeated as part of a lengthy and circumstantial statement which the appellant made to the police the same evening and which was taken down and signed: —

> "The children asked the wife to stop and she wouldn't stop and Kelly was sitting outside grinning his head off and I turned around and started to get wild and I said to the Brother-in-law it is time that Kelly got off the property and I said to Noel that if it had have been my place from the word go I would have stopped Kelly from coming there as I knew what type of bloke he was, then Noel told Kelly to go and Kelly stopped around for a while and while he stopped there I put my fist through wind deflector on my car I was getting that wild and I told him myself that he had better shoot through and he went up the roadway and waited for the wife at the roadway and

after he went away the wife I don't know whether she would be right up to the roadway or not I started the car up and drove up the road getting up the road I seen Kelly doubling my wife on his push bike and as I got closer to them they both got off the bike and stood alongside the road, he was standing on the gravel and the wife was standing on the grass. I aimed the front left hand mudguard at him and the bike after I hit him I swerved and put my foot down onto the accelerator as I was going off the road and I went through a greasy boggy patch and then swerved up over the wrong side of the road with the nose of my car facing towards the table drain. I got out of the car and I looked for the wife and at first I couldn't see her and when I first seen her she was laying in the table drain face down and I thought that I had killed her. I done my block, lost my temper and walked to where Kelly was and started hitting him, then I heard the wife moan and struggling in the water. I left Kelly and pulled the wife out of the table drain and she was in agony then. It flashed through my mind that if it had not been for Kelly I wouldn't have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat."

The appellant did not challenge at the trial the evidence of his having made these various statements or to their free and voluntary character; again he advanced a defective recollection of the event and a failure to remember. He did say, however, that it was not true that he had acted with the intention of killing Kelly. Any statement which he had made to this effect he attributed to his own confused state of mind at the time, which had led him to conclude, after realising what he had done and turning it over in his mind, that since he had in fact killed Kelly he must have intended to do so.

The appellant's account of the matter is that when his wife told him that she was leaving he suffered a profound emotional disturbance. From then on he was more or less in a trance. Parts of what happened later he remembered fairly well, but parts were very hazy. In fact the statement earlier referred to gives a fairly circumstantial account of the events of this period, with which the appellant's account in evidence at the trial was in substantial agreement.

It may be interpolated here that there was also evidence in the Crown case of the appellant's brother-in-law Craig, from which it appeared that between his learning of his wife's intended departure with Kelly and his setting off in pursuit in his car the appellant was in an emotionally disturbed state. He uttered threats in the presence of Craig, some open and some veiled, that he would kill Kelly. He told Kelly to leave while he was lucky. He set about fashioning a lethal weapon by sharpening the end of an iron rod to a spear-point; Craig took this from him. He punched the window of his car with considerable force, and at one stage burst into a fit of crying.

In his examination-in-chief the appellant said that as he was driving closer and closer to Kelly and his wife "everything just seemed to go black". "I lost control of the car just then and thinking back deeply more still now while standing here, I have a vague recollection of a voice saying to me 'Frank what is the matter with you?' The next thing I know I am over the other side of the road and the car is stopped". When he found that he had injured his wife he just seemed "to lose more or less control" of himself and "raced over and started hitting and bashing him" that is, Kelly, who was lying with both legs broken, "with the knuckleduster". He could "remember part of that pretty well". He heard his wife moan and went and pulled her out of the water:—"From then on I do not know really what happened. . . . It was while I was going over to get help that things started to really penetrate and came back to me. Things that seemed confused. I started thinking. Q. What do you mean by that? A. It started to come back really that I seemed to visualise I had stabbed a chap and it started to come back and I remember as though I had stabbed him. Yet again it was not me that stabbed him. It was just as if I had been standing back and was looking on at myself stabbing him. That went on passing through my mind.

"I could not really work it out or understand it. All I could see was the picture of myself stabbing the chap. I got over to Liddle's place and forced my way in and rang up and went back outside, and it was then I went out on the verandah and looked at my right hand and noticed blood all over it, and I started to wonder and worry just really what I had done. I could not realise it or believe it. I could not understand it. Then I started to tell myself I have done it. I had killed a chap. Yet it still seemed so unreal. That is when I was laying on the back verendah.

"Then I thought—I do not know—I undid my belt and just left it laying there. I think I stopped there for two or three seconds, I am not sure. Then I think I went over and washed my hands, washed the blood off them. I think I stopped there for a while. I could not say quite correctly.

"Then I started to go back down the road and it was still passing through my mind 'What have I done? I have killed a chap. I have killed a chap'. It kept on repeating and repeating 'I have killed a chap'. Then I started to think I must have meant to 'Did I mean to? What did I do?' Then I started to tell myself if I killed him I must have meant to kill him. I do not know what it was, whether I killed him or I did not. That kept on repeating itself through my mind all the time, right till I met Mr. Jukes."

The appellant seems, in his statement from the dock, to seek to explain the emotional disturbance and loss of control from which he says he suffered by reference to the similarity of the events to an incident of his early childhood. His mother, he said, had deserted his father for another man, and as a small boy he had witnessed her going off with the other man. This, he said, had produced in him a profound emotional disturbance, and he had

not forgotten it and probably never would. Seeing his wife and Kelly standing by the roadside seemed to remind him of his mother and the other man standing there in exactly the same way.

Portions of the cross-examination of the appellant, whose effect I have earlier stated shortly may here be quoted: —

Q. "I pulled out my knife that I had in my belt and went back and stabbed him in the throat." Did you dictate that to the police? A. I did dictate that to the police.

Q. And you say now it is incorrect? A. In some ways, yes.

Q. When you were giving evidence to my friend you never once mentioned a knife, did you? A. I mentioned the knife, yes.

Q. You did not mention you stabbed this man with knife, did you? When my friend was leading you in evidence? You skipped over that, didn't you? A. I think I did say I stabbed him when I took the knife off.

Q. You said that later on when you were lying down on the verandah you could see yourself stabbing him, but you did not say during your evidence that you stabbed this man, did you? A. No.

Q. In fact, you said that after you hit the man you picked up your wife, and you do not remember anything more until you were pulling your wife up the bank. You deliberately left it out, that you stabbed him? A. I did not deliberately leave that out now.

Q. Do you say now you remember taking your knife out of your belt and stabbing the man? A. I remember taking my knife out of the belt.

Q. And going over to him? A. I do not remember actually going to him. I do not remember getting to him.

Q. Do you remember him being on the ground, do you remember that? A. I do remember him being on the ground, yes.

Q. Do you remember him being unconscious? A. No.

Q. He was unconscious, wasn't he? A. I don't know.

Q. Do you say you did not tell the police he was unconscious at that time? A. He could have been. He couldn't have been. I do not know. Things are very hazy.

Q. Do you remember being asked by Det. Sheather, "What was your reason for wanting to kill Kelly?" Do you remember being asked that? A. At what time?

Q. At the Police Station? A. If Det. Sheather said I said it I suppose I must have said it.

Q. You answered "He was running away with my wife. I knew I could not beat him fighting and I decided earlier to-day that I would kill him". Is that correct? A. That is definitely not correct.

Q. The Constable did ask you when you made up your mind to kill him, did he not? A. He asked me that a number of times.

Q. And you told him it was about lunch-time, about a little before or maybe a little after, didn't you? A. It would not have been at lunch-time, because we would not have been home at lunch-time.

Q. Did you tell him that? A. It is quite possible I did.

Q. You swerved over from your incorrect side of the road and drove straight at Kelly and made a quick turn to do it, didn't you? A. Definitely not.

Q. What speed do you say you were going at when you hit Kelly? A. To the best of my ability, and the car's ability, I would say about 25 to 30 miles per hour, because the car was not capable of doing any faster.

Q. You had it flat out at the time you deliberately drove it straight at Kelly. (Objected to: rejected.)

Q. Do you deny you drove straight at Kelly? A. I will not deny it.

Q. Will you deny you drove at top speed when you drove at Kelly? A. I will deny I drove at top speed, because the top speed of that car under normal conditions would be about 70 to 80 miles per hour.

Q. I am talking of the conditions at that time. You told me the maximum it would go at was 30? A. Yes, that would be correct.

Q. Did you say this in answer to Const. Ellis "I made up my mind to kill him"? Is that right? A. I will not deny saying it.

Q. "But I did not want to hurt my wife"? A. I will not deny saying that either because I had no intentions and I never will have any intention of hurting my wife or harming her.

Q. And that "The bastard was trying to break up my marriage and I meant to kill him and I am not sorry that I did". Did you say that to Constable Ellis that night? A. If Constable Ellis said I said it, I must have said it.

Q. Do you still feel that you are not sorry you did? A. I am definitely sorry.

Q. Did Const. Ellis ask you "I understand you told Detective Sheather that you made up your mind to kill Kelly some hours before you drove out in your car onto the Goolgumbla Road and

ran over him and attacked him and stabbed him," did he ask you that? A. I have no recollection of him saying it but it would be incorrect because I had no intention of killing him or wanting to kill him.

Q. Do you say the Constable did not ask you that question? A. I do not remember it being asked.

Q. Did you say "Yes, I meant to kill him all right"? A. Definitely not.

Q. Do you deny that at any time you told the police officer that you meant to kill this man? A. I am not quite sure whether I meant it . . . (interrupted).

Q. You did not tell it to Mr. Jukes at all, that you mean to kill this man?

Mr. COOK: He said he was not sure.

CROWN PROSECUTOR: Q. Do you deny that you told Mr. Jukes you intended to kill this man? A. I won't deny it.

Q. Although you said it you say you did not mean it? A. I definitely didn't mean it.

And from the appellant's re-examination:

Mr. COOK: Q. You were also asked and you would not deny that you drove the car at Kelly? A. I would not deny it.

Q. Did you realise at some time you had hit Kelly—when did you realise you had hit Kelly with the motor-car? A. There again is another thing. When things went black I just—I don't know really when I really realised that I hit him.

At the conclusion of his evidence-in-chief, which followed his statement from the dock, the appellant was asked the following question: "You told us in your statement from the dock the effect this experience again had when you were six years of age had on you. Do you remember anything more about that?" This question was objected and rejected. We have been told that what was sought to be proved was that when, over the years, the appellant had from time to time been reminded of the childhood incident of his mother's departure he had had fits of uninhibited sobbing and been depressed.

The grounds of appeal are, thirteen in all, in the form into which they were ultimately reduced by counsel for the appellant. Of these, eight are related in one way or another to the question of the intent requisite in murder. These complain of misdirection and nondirection in various respects on this subject. In one ground there is a complaint of wrongful rejection of evidence, that is, of the question which I have just quoted. It will be convenient to consider these, the main grounds of appeal, first, leaving the remaining five grounds for later mention. Before doing so, I should indicate the contents of His Honour's summing up as a whole.

His Honour commenced his summing up by a general direction, which is not complained of, as to the nature of the burden of proof which lay upon the Crown, telling the jury that this burden extended to each one of the elements on which the Crown case rested. He then proceeded to instruct the jury in the ingredients of the crime of murder, with specific reference to such forms of the mental element as defined in section 18 of the Crimes Act, 1900, as were relevant—namely, reckless indifference to human life and intent to kill or inflict grievous bodily harm. At the same time he informed them that the presence of the necessary element must be established by the prosecution to their satisfaction in the way which he had indicated—that is, beyond reasonable doubt.

After suggesting that the body of evidence that the act of the accused caused the death of the deceased might well be thought to be unchallengable as well as unchallenged, His Honour proceeded once more to tell the jury very explicitly that before the Crown had established a case of murder it must satisfy them beyond reasonable doubt that the accused at the time of inflicting the injuries intended to kill the deceased or to cause him grievous bodily harm or acted with reckless indifference to human life. He then drew the jury's attention to the facts from which the Crown invited the jury to find that the requisite intent had been established beyond reasonable doubt, mentioning the acts and declarations of the appellant before and after the killing and also stating that the Crown claimed that intention to kill or inflict grievous bodily harm was established beyond question by the brutal and severe nature of the appellant's attacks upon the deceased.

His Honour next told the jury that they must give consideration to the various matters advanced before them by counsel for the appellant as to why they could not convict his client of murder. The matters relied upon, His Honour explained, were a setting out in his car with no intention of killing but with the intention only of bringing his wife back, and "unpremeditated and instantaneous reaction on the part of the accused to an emotional crisis of overpowering intensity; an emotional crisis claimed to have been brought about not only by the acute problems on that afternoon besetting the accused but also to a large measure by somewhat similar experience in his early impressionable childhood in New Zealand". I do not understand Mr. Cook to have disclaimed this as a fair summary of what had been sought to be laid before the jury on behalf of the accused by evidence whose nature I earlier elaborated. Indeed his own description before us of the nature of the appellant's case on the question of intent was in substantially similar terms.

The passage which follows in His Honour's summing up contains the directions which are the principal subject of challenge in this case. The passage should therefore be quoted in full:

> "Gentlemen, in considering this aspect of the case it is necessary for you to keep in mind some important principles or aspects of

Criminal Law with which I will now deal. One is that our law does not recognise or allow either as a complete or partial defence to a charge of murder, the fact that the accused committed the act or acts resulting in the death in question, by reason of some overpowering or even irresistible impulse, or whilst subject to some severe emotional stress or strain. As you will probably appreciate, in many cases of murder the accused has been subject to great emotional stress and strain and if that were recognised by the law as a defence, convictions would be difficult, if not almost impossible, to obtain in the case of crimes of passion.

Another important principle is that in the case of an attack, whether premeditated or not on another person with a weapon or other instrument likely to cause death or serious bodily injury, the law normally—that is to say, assuming the person in question is of the age of reason and is in law responsible and accountable for his actions—treats the person who has made the attack as having intended the natural and probably consequences of the use by him, under all the circumstances present, of the weapon or instrument. The third principle or point I wish to mention at this stage is that an unprovoked and instantaneous attack upon a person with an instrument and in circumstances likely to result in the death or serious bodily injury of the person attacked, even though not done with the intent specified in the definition of murder, that is to say to kill or inflict serious bodily harm, may well be and often is accompanied by a reckless indifference on the part of the wrongdoer to human life, which as you will have already understood from what I have said, is sufficient to constitute the necessary mental component or ingredient of the crime of murder."

Each of the three matters here stated by His Honour to the jury is complained of as a misdirection.

His Honour went on to repeat once more that the jury must be satisfied beyond reasonable doubt of the matters he had mentioned "and particularly the matter of intent or mental state on which counsel for the accused bases his defence". Finally he gave this direction:

> "A further matter I should mention is if, on consideration of all the evidence in this case, you come to the conclusion that you should accept the submission made to you on behalf of the accused that the Crown has not established beyond reasonable doubt the necessary mental element or ingredient in the offence, then in that event you would acquit the accused of murder and find him guilty of manslaughter. That is because, on any view of the facts in this case, the death of the deceased was brought about by acts of the accused which were wrongful and which were dangerous".

This last direction is also the subject of complaint in two grounds of appeal (11 and 12) which are not within the eight earlier mentioned.

It should be added that, after some discussion between the learned trial judge and counsel after the jury had retired, the jury were recalled by His Honour and told that the facts were for them and that it was a matter for them whether they were satisfied beyond reasonable doubt that the appellant caused the death of the deceased when doing a wrongful act or a series of acts that were wrongful or dangerous and, if they acquitted of murder, whether the appellant committed manslaughter.

The eight grounds of appeal earlier referred to may be stated or summarised as follows: —

(1) That His Honour "misdirected the jury as to the evidence to establish the intention required under section 18 of the Crimes Act".

(2) and (3) That the second and third principles stated by His Honour in the passage from his summing up earlier quoted were wrong in law and "likely to confuse or mislead the jury".

(4) His Honour should have directed the jury that it was entitled to consider the totality of the evidence in order to decide whether the necessary intention required by section 18 of the Crimes Act had been established against the accused and that any inferences to be drawn by it from the circumstances of the killing were to be considered in the light of the whole of the evidence.

(6) His Honour erred in law in refusing to admit evidence from the accused in examination-in-chief in relation to a previous experience of his childhood in New Zealand and the effects that the said experience had had upon the mind of the accused in subsequent years and at the relevant time.

(7) That His Honour erred in law in the statement of the first of the beforementioned principles "for the reasons that the mental state of the accused prior to and at the time of committing the act or acts was relevant to establish the intention required by section 18 of the Crimes Act".

(8) His Honour should have directed the jury that it could consider that if the accused was overwhelmed or overpowered by an impulse or was subjected to severe emotional strain, the accused may not have had or been able to form the conscious intention required under section 18 of the Crimes Act.

(9) His Honour should have directed the jury that if the accused was acting under some overwhelming or irresistible impulse or was subjected to some severe emotional strain he may not have been acting with "reckless indifference to human life" or "been doing some act obviously dangerous" to human life.

I have quoted from the evidence at some length because it is difficult to state in summary terms the character of the issue which it was sought on behalf of the appellant to have submitted to the jury. Putting the best construction which can be put in favour of the appellant on the evidence in his and the Crown's case, the matter seems to come to this: —That what he did was done under the stress of emotion and the impulse of anger or fury. The anger was a mounting one, culminating when he discovered that he had injured his wife. The general emotional background was one of distress and despondency at the desertion of himself and his children by a wife for whom he still entertained a strong affection, stirred up the more in his case because of his recollection of a similar happening in his early childhood.

In the discussion which ensued after His Honour had completed his summing-up, Mr. Cooke put the case of the appellant thus:

> "Your Honor says the law does not recognise complete or partial defence but I ask Your Honour to direct the jury in this case the defence was at the time the alleged incident took place the accused did not have the intent—could not form the intent. The fact that he was acting under a strain—it was the reason why he did not have the intent, not his whole reason why he did it as his defence was to the effect that there was an overpowering impulse, which would deprive him of the intent. It was an overpowering impulsive emotion—in other words he had an overpowering impulse and it was an overpowering impulse which caused this."

And again it was put: —

> "HIS HONOR: You ask me to direct the jury that they can, in a case such as this, treat an overwhelming impulse or whatever you call it, as negativing intent?
>
> MR. COOK: No, I ask you to put it to the jury that Your Honor's direction as to overwhelming impulse not being a defence in law does not prevent them from considering whether or not the overwhelming impulse was such as to deprive him of conscious intent, and if they do consider overwhelming impulse as Your Honour has expressed it, to deprive him of conscious intent, then they can acquit him of murder."

In the case in which irresistible or uncontrollable impulse has been held not to support a defence of insanity I have found no suggestion that the evidence that the accused was impelled by such an impulse might of itself avail to ground a conclusion by the jury that the intent necessary for murder was lacking so as to lead to an acquittal of murder and a conviction for manslaughter only. There seems to be no need in the present case to engage in such a general inquiry as whether an uncontrollable impulse resulting from disease of the mind may be accompanied by an incapacity to form the specific intent which is required for murder. Such a combination

might be thought to verge upon the automatatism which was the subject of consideration in *The Queen* v. *Cottle* ([1958] N.Z.L.R. 999) and in *Reg.* v. *Charlson* ([1955] 1 All E.R. 859) but is not set up here. Nor does it seem necessary to enter upon such even wider questions as Mr. Cooke suggested to be relevant in this appeal—whether the inquiry into intent should be of a "subjective" or "objective" character; or suggested opposition between the views expressed by the High Court of Australia in *Smyth* v. *The Queen* (98 C.L.R. 163) and those expressed in the speech of Viscount Kilmuir, L.C., in the House of Lords in *Director of Public Prosecutions* v. *Smith* ([1961] A.C. 290); or whether, as was suggested, the lastmentioned views were wrong, in so far as they require the existence of intent to be determined by reference to an "objective" standard. It is sufficient to confine attention to the facts of the present case and to the particular questions to which they give rise.

In *Smyth* v. *The Queen* (supra) the Court, after expressing its conclusion that special leave to appeal should be refused because a jury properly directed and understanding the evidence could not fail to draw the inference that when the appellant struck the deceased several times with the weapon he intended to cause him what would amount to grievous bodily harm, proceeded, at p. 155:—"In this Court disapproval has been expressed on more than one occasion of the use, where a specific intent must be found, of the supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable, consequences of his acts." Several decisions of the Court are then referred to, of which the first is *Stapleton* v. *The Queen* (86 C.L.R. 358 at p. 365).

In *Stapleton* v. *The Queen* the Court had said, on the page referred to:—"The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self-evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation." In the present case the worst that might be said of such a reference to natural and probable consequences as was made by the learned trial Judge is that it was not helpful. For in the present case there was no real issue of intent.

The act of running into a man with a motor-car may be consistent with other hypotheses than an acting with intent to kill or to do grievous bodily harm or with reckness indifference to life, such as mere carelessness or accident. No such hypothesis as I have mentioned was proffered here for consideration by the jury. It might be considered, however, that it was open to the jury to give some effect to the appellant's evidence that, as he described it, everything seemed to go black. Conceivably, for example, the jury might have been left in doubt whether the appellant might not have suffered some momentary lapse of consciousness depriving him temporarily of control of his vehicle and leading to its colliding with Kelly.

But even if that were granted as a possibility which is conceivable, the matter is otherwise with the twenty or thereabouts blows with a knuckle-duster and the deep stab wounds in the throat. Acts of this character require no reference to an "objective" standard in order that they should be described as inconsistent with any other hypothesis than that of an intent to kill or cause grievous bodily harm, or at least an acting with reckless indifference to human life, in the case of an actor who does not lack capacity to form an intent. I have earlier quoted the evidence given by the appellant as to these matters. At most it amounts to no more, in effect, than that what the appellant did was done under the compulsion of blind rage and that at his trial he had no clear recollection of all the details, though he recollected them clearly enough immediately after the event. At the trial he remembered the episode with the knuckleduster, he remembered taking his knife out of his belt, he remembered Kelly being on the ground, but he did not remember the actual stabbing. Indeed, in reality, the appellant's explanation of the whole episode at the trial amounted in its effect to no more than that, namely that he acted at the time in a fury of rage and that his present recollection of the details of his acts was in some respects defective.

I should propose in this connection to make some references to the judgment of the Court of Criminal Appeal in *Director of Public Prosecutions* v. *Smith* (supra), which is reported along with that of the House of Lords in (1961) A.C. I do so on the assumption, whose correctness I find it unnecessary for the purposes of this case to decide, that, as submitted by Mr. Cooke, the decision of the House of Lords is in conflict with the expressed views of the High Court of Australia and should not be followed in the Courts of this country.

It would not be without relevance to refer to the whole of what was said on pp. 300-301 of the report. I confine myself, however, to the citation of two short passages, one from pp. 201-202 and the other from p. 302. In the former, Byrne, *J.*, delivering the judgment of the Court said: —

> "As regards the various other authorities cited by Mr. Clarke on this point, care must, of course, be taken to consider the phrases therein used in relation to the particular facts. The strength of any presumption obviously varies according to particular facts, and this may entail considerable adjustments in the practical terms of the charge to the jury. Thus, there is a class of cases where the act of the accused must obviously cause grievous bodily harm, as where a blow with a sharp and heavy hatchet is deliberately aimed at and strikes the victim. In another class are cases where a reasonable man would realise that his act might cause grievous bodily harm but the degree of the probability or possibility of that type of harm resulting varies according to the facts of the case.

In the first class of case where the harm must obviously result from the act and there is no evidence which could be regarded as rebutting the presumption, a direction to the jury that 'a man must be presumed to intend the natural consequences of his act' could be apposite, in the other cases it would not.

In the other cases the charge of the jury will, of course, vary according to the facts (including the degree of likelihood of grievous bodily harm being caused) but the essence of the matter remains that whilst the accused may be presumed to have intended the natural consequences of his act, the question is: 'Did he actually intend them'?"

The second quotation is as follows: —

"The final question for the jury must always be whether on the facts as a whole an actual intent to do grievous bodily harm was established, remembering, of course, that intent and desire are different things and that once it is proved that an accused man knows, that a result is certain the fact that he does not desire that result is irrelevant."

I believe that this case does not provide an occasion for the resolution of the difficult questions of general principle to which Mr. Cooke has made reference in his argument, urging upon us that we should consider what has been written by a number of learned academic writers and what was said at the recent convention of the Law Council of Australia by way of criticism of the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* (supra). Even if it were found that the learned trial judge had erred to some extent in the direction which he gave to the jury on the question of intent, I should be of opinion, having made a careful consideration of the whole of the evidence, that the case is within the proviso to section 6 (1) of the Criminal Appeals Act, 1916. The test to be applied has been established by *R.* v. *Haddy* ([1944] K.B. 422) and *Stirland* v. *Director of Public Prosecutions* ([1944] A.C. 315). And the same test is to be found in *Laurenson* v. *The King* ([1933] A.C. 699) at pp. 707-708 the effect of the phrase "must have returned the same verdict" on p. 707 being qualified by the concluding sentence of the same paragraph terminating on p. 708.

Taking, on the question of general principle, the view most favourable to the appellant, and accepting for this purpose, as Mr. Cooke has urged upon us, that in view of pronouncements of the High Court of Australia we should govern ourselves by the decision of the Court of Criminal Appeal in *Smith* v. *Director of Public Prosecutions* (supra), rather than by that of the High Court of Australia, I should nevertheless conclude that the learned trial judge did not err in any of the respects alleged in grounds (1)-(3), (4) and (7)-(9) of the amplification of the notice of appeal and, more particularly, that the directions which he gave were appropriate to the particular circumstances of the trial before him.

I am of opinion that the following words of the Full Court of the Victorian Supreme Court in *R.* v. *Jakac* ([1961] V.L.R. 367 at p. 371) are appropriate here: —

> "Whatever may be said of the objective test or of the principle applied in Smith's Case in the House of Lords, that in the case of a person who is in law responsible and accountable for his action, i.e. capable of forming an intent, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result, there is a great difference between saying, on the one hand, that a man is to be presumed to intend the natural or probable consequences of his act or is presumed to intend that to happen which is intrinsically likely to happen, and saying, on the other hand, that when a man deliberately or intentionally does an act which he knows will probably or more than likely cause death or grievous bodily harm he must be taken to intend that consequence. The latter is a subjective test not an objective test. It is his actual knowledge of the likely consequence of his intentional act which leads to the inescapable conclusion if the likely result does ensue that he intended it to happen. In such a case his indifference to the consequences or even his desire that they may not follow, does not affect his intention. He knew what the consequences were likely to be, and with that knowledge he deliberately did the act and if the consequences in fact did follow, he must be taken to intend them."

In the present case when all the evidence is considered there can be no real question but that the appellant's acts were deliberate and that nothing appears to suggest that he was without knowledge of their probable, and indeed in some measure inescapable, consequences.

It follows also from what has been said that ground (6), relating to the rejection of evidence, should not be upheld. The evidence sought to be led could have no bearing on the question of the appellant's intent at the time of the acts which caused Kelly's death.

The remaining grounds of appeal as ultimately stated are five in number, namely: —

> "5. His Honour erred in law in holding that there was no evidence which could be left to the jury of provocation under section 23 of the Crimes Act.
>
> 10. His Honour erred in law in failing to clearly sum up to the jury on the effect and rights of the accused making a statement from the dock and then giving evidence on oath immediately thereafter. His Honour should have directed the jury to disregard the observations of the Crown Prosecutor in relation to this matter in so far as it was alleged that the only purpose of the accused making a statement from the dock and then giving evidence-in-chief was to get into evidence a whole mass of inadmissible and irrelevant evidence.

In the Court of Criminal Appeal, New South Wales.

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No. 27.

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24th November, 1961.

Sugerman, J.

11. His Honour should have directed the jury that it could have acquitted the accused both of murder and of manslaughter.

12. His Honour in making the comment 'on any view of the facts in this case, the death of the deceased was brought about by acts of the accused which were wrongful and which were dangerous' prejudiced the fair trial of the accused.

13. His Honour in summing up the trial placed undue and unfair emphasis upon the case for the Crown and failed to adequately and fairly put the case for the defence before the jury."

As to these, very little remains to be said. Although there was evidence of some extremely offensive remarks addressed by Kelly to the appellant perhaps an hour or thereabouts before the appellant set off after Kelly in his motor car, it is clear that in all the circumstances of the case His Honour correctly concluded that there was insufficient to require that an issue of provocation be put to the jury—Crimes Act, 1900, section 23 (2); *Mancini* v. *Director of Public Prosecutions* ([1942] A.C.1). The comment referred to in ground 12 was one which was completely warranted by the undisputed facts of the case. It follows, since the only question raised was one of the presence of the intent necessary for a conviction of murder, that no ground existed for giving the direction referred to in ground 11, although in the result, and by way of supplementing his summing up, His Honour in fact left it to the jury to say whether they were satisfied beyond reasonable doubt, that the accused committed manslaughter. Since in practice a certain liberality is commonly extended to accused persons with respect to the range of matters referred to in a statement from the dock, there may be cases in which it is better to refrain from such comment as is referred to in ground 10, just as there may be cases in which such a comment is proper. I cannot hold in the present case that there was any miscarriage of justice on this account. And in fact, after the jury was recalled His Honour directed them to take into consideration what the accused said in his statement from the dock, pointing out that he had a right to make a statement from the dock and also that he went into the witness box and thereby exposed himself to cross-examination. I find no ground whatever for the suggestion (ground 13) that His Honour placed undue and unfair emphasis upon the case for the Crown and failed to adequately and fairly put the case for the defence before the jury.

In my opinion, all the grounds of appeal fail and this application should consequently be dismissed.

I certify that this and the 17 preceding pages are a true copy of the reasons for judgment herein of His Honour Mr. Justice Sugerman.

K. M. TREVELYAN, Associate.

Dated 7th March, 1962.

Coram: EVATT *C.J.*, SUGERMAN *J.*, MANNING *J.*

24th November, 1961

REGINA v. PARKER

JUDGMENT

MANNING, *J.*: I have had the advantage of reading the reasons for judgment prepared by Sugerman *J.* and I agree with his conclusions.

I do not desire to add anything in relation to any of the grounds of appeal which were argued before us except those relating to the question of intent. I am in complete agreement with the views of Sugerman *J.* and his reasons on all other matters.

I only wish to add a short statement of my views in regard to the objections taken to the learned Trial Judge's summing-up on the matter above-mentioned.

The debate before us centred around the meaning of the word "intent", where used in s. 18 of the Crimes Act.

Since the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* (1961 A.C. 290), a controversy has raged as to whether the intent of an accused is to be determined objectively or subjectively.

In my opinion much of the discussion has resulted from a misunderstanding of what was said in the reasons of the Lord Chancellor. It does not appear to have been sufficiently appreciated that where reference is made to the complaint that the learned Trial Judge in Smith's case directed the jury that if in doing what he did, the accused must, as a reasonable man, have contemplated that serious harm was likely to occur, then he was guilty of murder, the learned Law Lords treated the reference to a "reasonable man" as referring to an "ordinary man capable of reasoning who is responsible and accountable for his actions" in contradistinction to "the man on the Clapham omnibus" (1961 A.C. at 331).

It is pointed out by Salmon *J.* in an illuminating address to the Bentham Club (1961 Current Legal Problems I) that many important and far-reaching questions have been raised by the reasons of Their Lordships in Smith's case, but it is far from clear as to what answers must be given to them.

I would only add that I have some doubt (and I say this with all deference) as to the accuracy of what was said by Lord Denning in his address "Responsibility before the Law", made on the occasion of his visit

to the Hebrew University of Jerusalem in January 1961. His Lordship there said: "The Lord Chancellor summarised the direction in this way, 'If in doing what he did, *he must* as a reasonable man have contemplated that serious harm was likely to occur, then he was guilty of murder'. Note the words *'he must'*—that is—*this particular man* must have contemplated. Thus it must be brought home to *him* subjectively".

From my reading of the decision in Smith's case I would have thought it clear that an objective test was held to be the proper one to apply although, as mentioned above, the ascertainment of the standard seems to me to be a matter upon which there has been misunderstanding. I can find nothing in the decision in Smith's case which suggests that the intention of the accused must have been established subjectively as distinct from objectively.

However this may be, I am of opinion that this Court is bound to follow the decisions of the High Court in *Stapleton* v. *The Queen* (86 C.L.R. 358) and *Smyth* v. *The Queen* (98 C.L.R. 163).

I take it to be clear that where it must be established that an accused person did an act with a particular intent, the jury must be satisfied that the accused did in fact form that intent.

The real difficulty which has arisen in considering the matter is founded upon the not infrequent references to a so-called "presumption". In Smyth's case the High Court said at p. 166: "In this Court disapproval has been expressed on more than one occasion of the use, where a specific intent must be found, of the supposed presumption, conclusive or otherwise, that a man intends the natural, or natural and probable, consequences of his acts . . . The fact is that, as Cussen *J.* remarked in *Cox* v. *Smail* (1912 V.L.R. 274 at 279), the statement that a person must be held to intend the natural consequences of his act merely conceals the true position.

In Stapleton's case the Court said: "The introduction of the maxim or statement that a man is presumed to intend the reasonable consequence of his act is seldom helpful and always dangerous".

As has been said and repeated many times, the use of expressions such as those referreed to in the judgments cited tends to confuse the proposition to be proved with the evidence which has been adduced in support of the proposition.

The fact that a man not subject to any disability of mind would normally be regarded as having formed the necessary intent is a factor, and it may be a cogent factor, for consideration by the jury in determining whether the accused did have the intent charged, but there is never any "presumption" in the strict sense that the accused did or did not have an intent solely because the ordinary reasonable man, or the ordinary responsible man, would normally be regarded as having such an intention.

In this case it is true that His Honour the Trial Judge in summing up to the jury as to the intent to kill which had been charged against the accused said, "Another important principle is that in the case of an attack, whether premeditated or not, on another person with a weapon or other instrument likely to cause death or serious bodily injury, the law normally—that is to say, assuming the person in question is of the age of reason and is in law responsible and accountable for his actions—treats the person who has made the attack as having intended the natural and probable consequences of the use by him, under all the circumstances present, of the weapon or instrument."

The facts in this particular case have been set out in the judgment of Sugerman *J.* and need not be repeated. The summing-up of the learned Trial Judge did in fact summarise the arguments of counsel for the accused and is in terms which, in my view, would not permit the jury to conclude that there was any presumption of intent against the accused.

At the worst it might be said that the passage cited was unhappily worded, but reading the summing-up as a whole I think it must have been clear to the jury that if they found that the accused did not have any intention to kill or to inflict grievous bodily harm, or alternatively, that the jury were not satisfied beyond reasonable doubt that the accused had such an intention, then their duty was to bring in a verdict of manslaughter.

In any event, having considered the evidence in the case, I have formed the view that the jury, properly directed and understanding the question, could not reasonably fail to draw the inference that the appellant, having deliberately run down the deceased with his car, having then struck him many times with the "knuckle duster" and then having cut his throat, intended to cause him what would amount to grievous bodily harm.

In my opinion the appeal should be dismissed.

I certify that this and the four preceding pages are a true copy of the reasons for judgment herein of His Honour, Mr. Justice Manning.

R. ROYLE, Associate.

Dated 9th March, 1962.

G 43929—11

(L.S.)

No. 28

ORDER GRANTING SPECIAL LEAVE TO APPEAL

At the Court at Buckingham Palace

The 23rd day of October, 1963

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	MR. CARR
MR. BOYD-CARPENTER	MR. BARBER
SIR JOHN CLAYDEN	

In the Privy Council.

R. v. Parker.

No. 28.

Order Granting Special Leave to Appeal.

21st October, 1961.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 21st day of October 1963 in the words following viz.: —

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Frank Parker in the matter of an Appeal from the Supreme Court of New South Wales between the Petitioner and Your Majesty (Respondent) setting forth that the Petitioner desires to obtain special leave to appeal to Your Majesty in Council against his conviction for murder in the Criminal Court of the Supreme Court of New South Wales on the 5th day of April 1961 and against the decision given on the 24th day of November 1961 by the Full Court of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal for the said State whereby the said Court refused the Petitioner's appeal against the said conviction and against the decision of a majority of the High Court of Australia refusing an application for special leave to appeal from the said Full Court to the said High Court given on the 24th day of May 1963: And humbly praying Your Majesty in Council to grant him special leave to appeal to Your Majesty in Council against the decision of the Full Court of the Supreme Court of New South Wales dated the 24th day of November 1961 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the decision of the Full Court of the Supreme Court of New South Wales dated the 24th day of November 1961:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of New South Wales and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW

IN THE COURT OF CRIMINAL APPEAL No. 50 of 1961

Between FRANK PARKER, Appellant

and

THE QUEEN, Respondent

CERTIFICATE VERIFYING TRANSCRIPT RECORD

I RONALD EARLE WALKER of Sydney in the State of New South Wales Registrar of the Court of Criminal Appeal of the said State DO HEREBY CERTIFY that the sheets hereunto annexed and contained in pages No. 1-170 inclusive contain a true copy of all the documents relevant to the appeal by the Appellant FRANK PARKER, to Her Majesty in Council from the judgment of the Court of Criminal Appeal for the State of New South Wales, given and made herein on the Twenty-fourth day of November, one thousand, nine hundred and sixty-one, so far as the same have relation to the matters of the said appeal together with the reasons for the said judgment given by the said Court and an index of all papers, documents, and exhibits in the said Suit included in the annexed transcript record of which true copy is remitted to the Privy Council pursuant to the Order of His Majesty in Council of the Second day of May in the year of our Lord one thousand nine hundred and twenty-five.

(L.S.) IN FAITH & TESTIMONY whereof I have hereunto set my hand and caused the seal of the said Court to be affixed this 15th day of January in the year of our Lord one thousand nine hundred and sixty-four.

(L.S.)

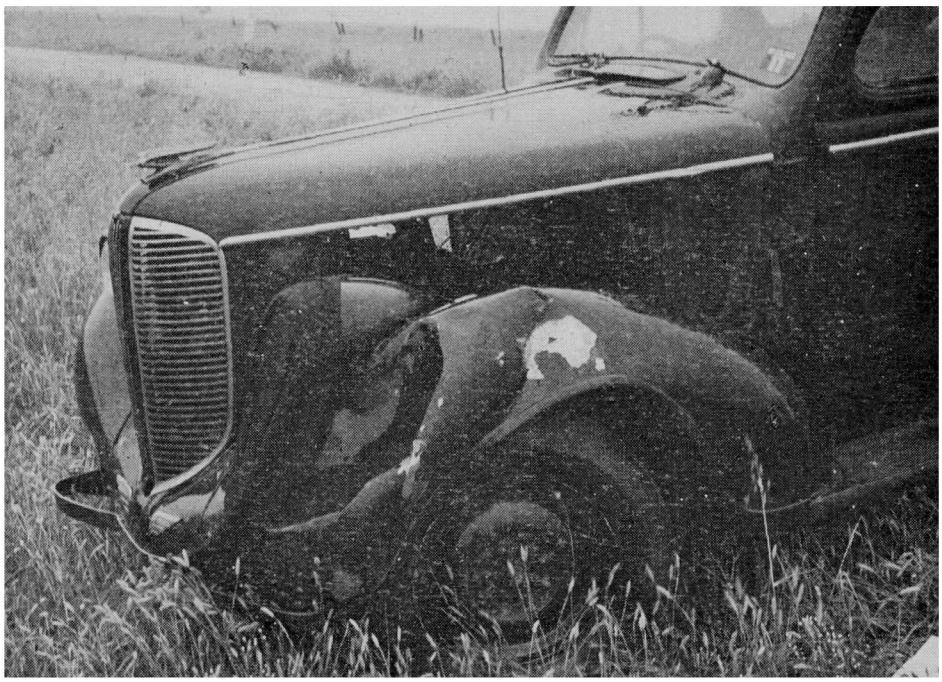
R. E. WALKER,
Registrar of the Court of Criminal Appeal.

EXHIBITS

PART II

EXHIBIT B

5th April, 1961



Photograph of the front nearside of Dodge sedan car, No. ADH 898, showing the extent of damage to it and the location of a dark cardigan.

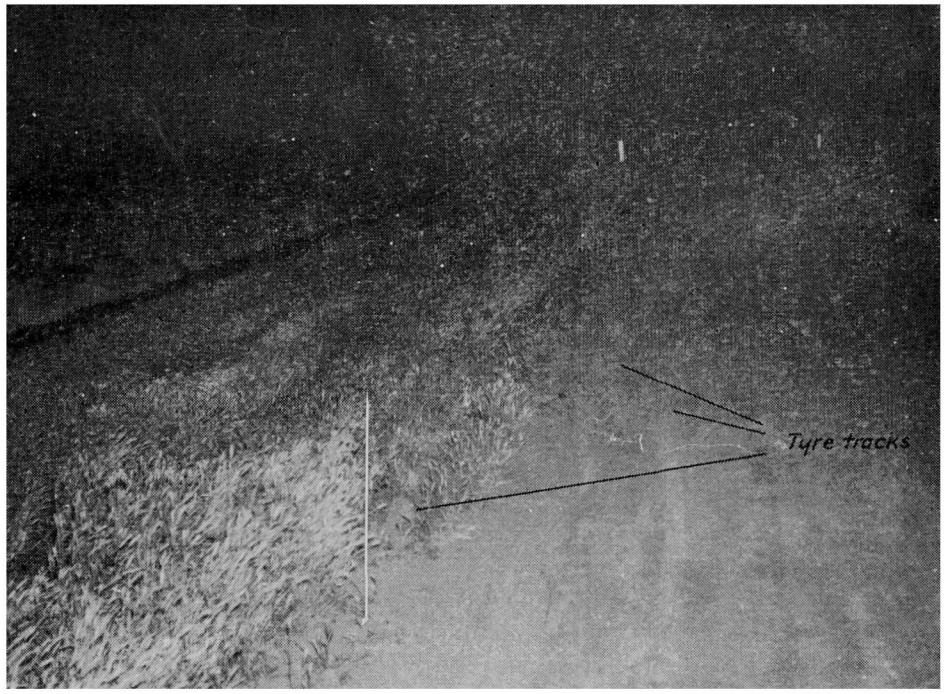
EXHIBIT C

5th April, 1961

Photograph of a Master Sports bicycle found on the eastern side of a section of the Goolgumbla Road about 25 miles north of Jerilderie showing the extent of damage to it.

EXHIBIT E2

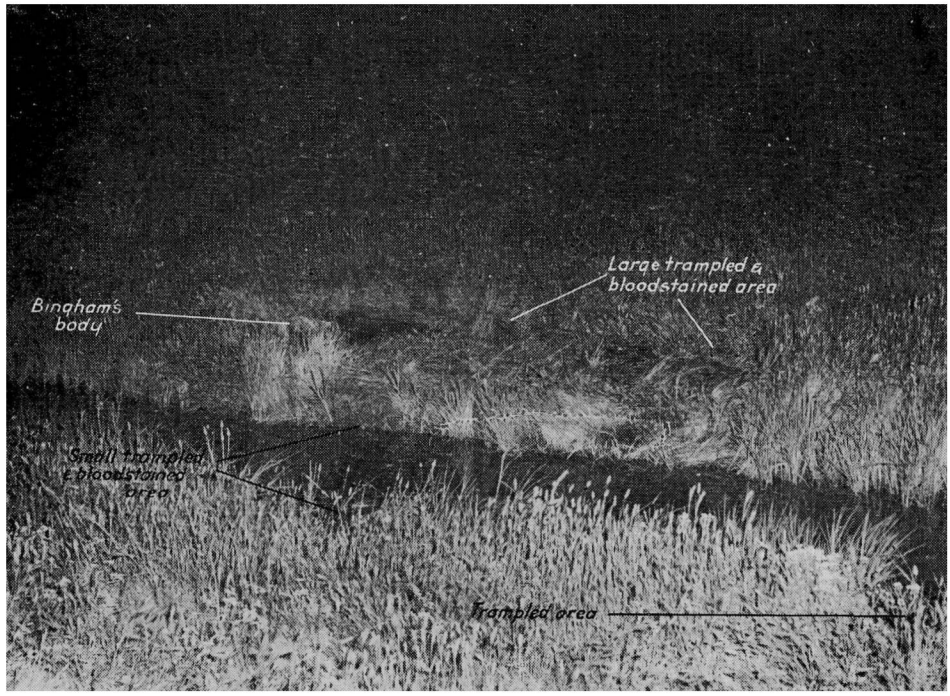
6th April, 1961



Photograph showing two sets of tyre marks moving off the hard earth surface of a section of the Goolgumbla Road about 25 miles north of Jerilderie on to and along the long grassed and sloping embankment on the eastern side. Photograph taken looking in a southerly direction on the 17th October, 1960.

EXHIBIT E3

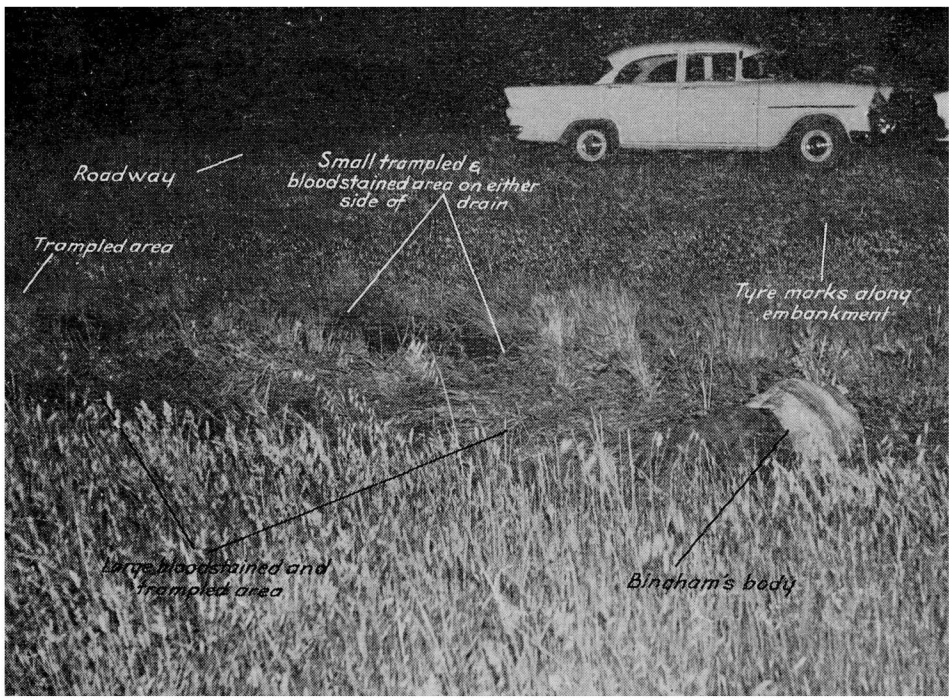
6th April, 1961



Photograph of a section of the eastern embankment, drain and open ground on the eastern side of a section of the Goolgumbla Road about 25 miles north of Jerilderie showing the location of a trampled area on the western edge of the drain on the right foreground of the photograph, a trampled and bloodstained area on either edge of the drain in the left centre of the photograph, a larger trampled and bloodstained area east of the drain and the position of the body of Daniel Christopher Bingham known as Daniel Kelly. Photograph taken looking in an easterly direction.

EXHIBIT E4

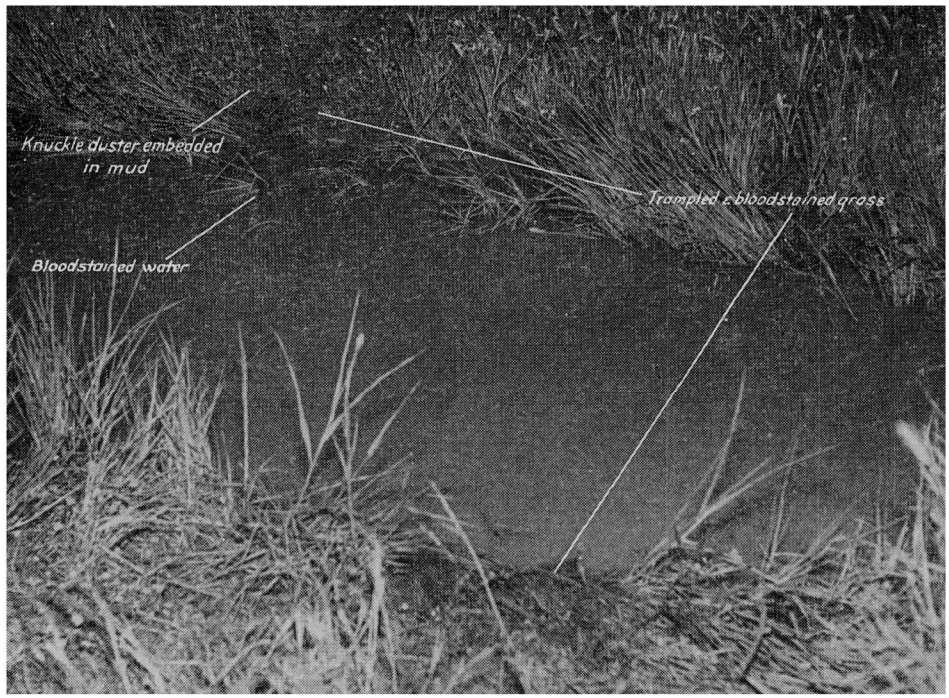
6th April, 1961



Photograph of a section of the open ground, drain and embankment on the eastern side of a section of the Goolgumbla Road about 25 miles north of Jerilderie showing an area of trampled and bloodstained grass and the position of the body of the deceased Daniel Christopher Bingham known as Daniel Kelly on the open ground, the trampled and bloodstained area on either side of the drain, the location of tyre marks along the embankment and the location of the roadway. Photograph taken looking in a westerly direction.

EXHIBIT E5

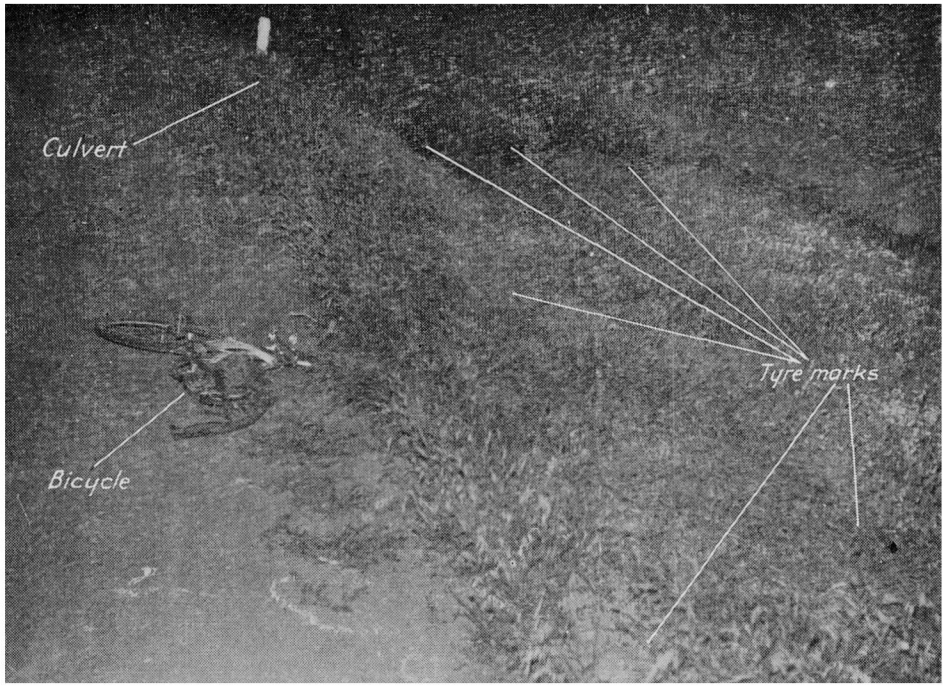
6th April, 1961



Photograph of a section of the drain running along the eastern side of a section of the Goolgumbla Road about 25 miles north of Jerilderie showing trampled and bloodstained grass on either edge of the drain, bloodstained water on the western side and the position of a knuckle duster embedded in the mud on the trampled and bloodstained area also on the western side of the drain. Photograph taken looking in an approximate westerly direction.

EXHIBIT E6

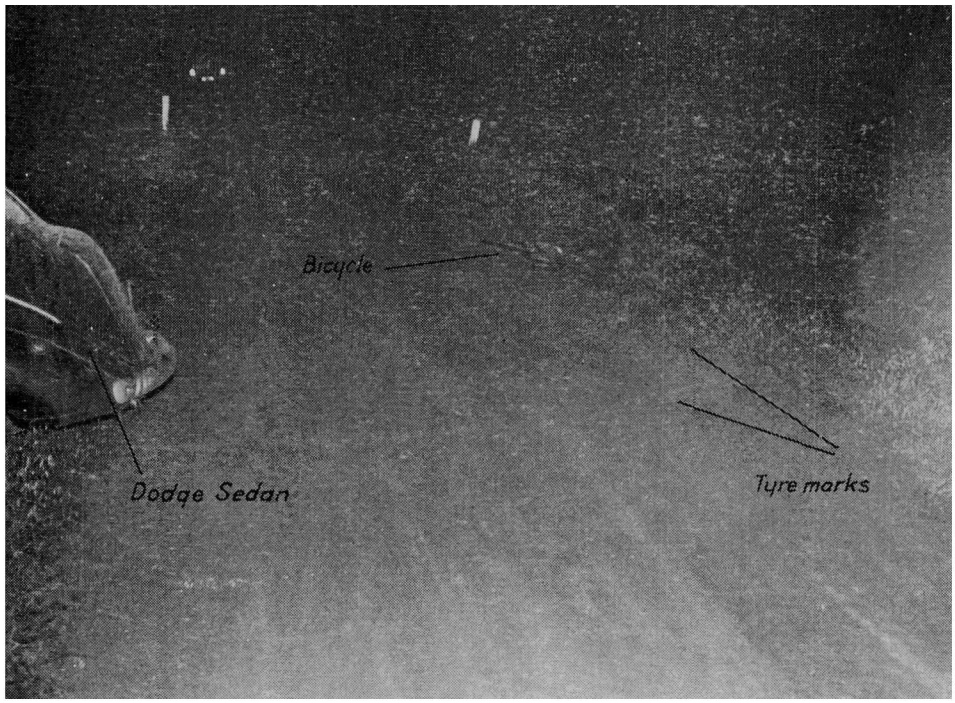
6th April, 1961



Photograph of a section of the eastern edge of a section of the Goolgumbla Road about 25 miles north of Jerilderie and part of the eastern embankment adjoining the roadway showing the location of a damaged bicycle on the roadway, the eastern end of a culvert and the continuation of tyre marks along the embankment in a northerly direction then through part of the water filled drain.

EXHIBIT E7

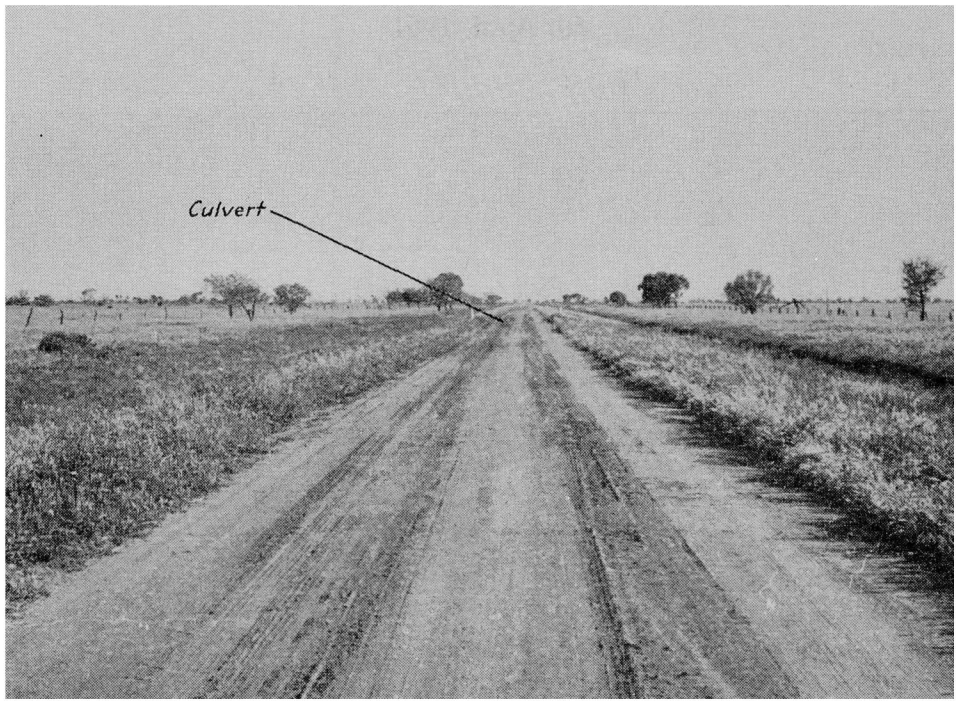
6th April, 1961



Photograph of a section of the Goolgumbla Road about 25 miles north of Jerilderie looking in a northerly direction and showing the location of a 1938 model Dodge sedan, No. ADH 898, on the western embankment, tyre marks from the rear of that vehicle across the roadway on to and along the eastern embankment in a northerly direction and the location of a damaged bicycle on the eastern edge of the roadway.

EXHIBIT E8

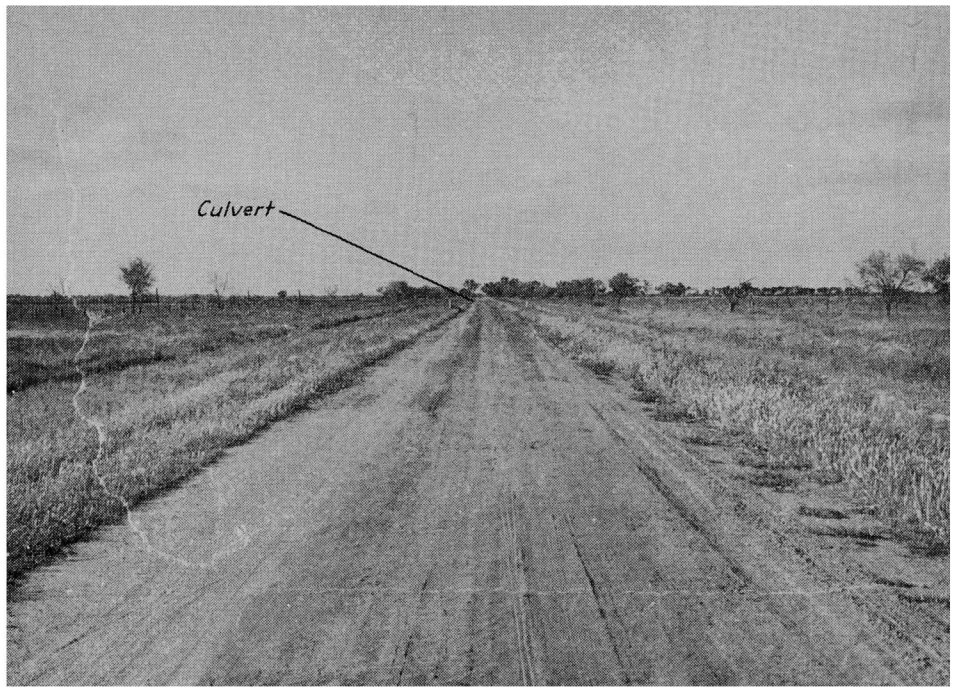
6th April, 1961



Photograph of a section of the Goolgumbla Road north of Jerilderie showing a general view of it and the location of a culvert under the roadway. Photograph taken looking in a southerly direction.

EXHIBIT E9

6th April, 1961



Photograph of a section of the Goolgumbla Road north of Jerilderie showing a general view of it looking in a northerly direction and the location of a culvert under the roadway.

Exhibit J.

Accused's Statement to Police.

6th April, 1961.

P. 190

NEW SOUTH WALES POLICE

STATEMENT

PLACE: Police Station, Jerilderie.

DATE: 16th October, 1960

NAME: PARKER, Frank.

ADDRESS: C.o. N. Craig, "New Camp", Jerilderie.

OCCUPATION: Labourer.

STATES—

Just over a week ago I was with my brother-in-law and my wife and we went over to New Camp to get a killer for house meat. As we were going around the paddock looking for the sheep we met Dan Kelly. We were talking to him and while we were talking to him, Noel, the brother-in-law, got the killer and put it in the back of the gig. Dan Kelly asked us would we go up to his place and Noel said, we will go up for a while and we can have a look at the shearing shed at the same time. We went up to Kelly's place, that is my wife, Noel and myself. While we were there he asked us if we would have a cup of tea and we said, yes. While he was making a cup of tea my wife and myself went over and had a look at the shearing shed with Noel. We went back from the shed to Kelly's place and we sat down and had a cup of tea and a general conversation, and in the conversation he was saying how lonely it was over there by himself and that he would have to get a girl friend or somebody to do his cooking for him and he also stated that he had been up to Sydney to see some people up there regards sponsoring to bring a girl out here. He didn't say where from, he was from Ireland himself. Then he said if he had known where Noel was living before he would have been over. He said something about, I might be over later on and Noel said he could come over when he liked. The next time I seen him he came over in the evening and we played euchre and poker together. I think he stopped the night there and went back next morning. I am not quite sure of that. I think it might have been a day went by and he came over again. I think it was in the early hours of the afternoon and we were talking about work and things like that. I had just been on the Social Service and we were talking about my licence and getting a "C" class licence and I said that I never had the money to get it. He offered me two pounds for the use of getting my licence. On the next day, Tuesday, we went over to "New Camp", the wife and myself and a young girl named Janette to pick Kelly up to bring him into town so he could see about his own licence himself. After being up here to the Police Station to see about our licence we went down to the Hotel where he knew a chap in the Hotel who had a truck and he asked the chap could I have the use of the truck to get my licence. The chap never lent me the truck because the brakes weren't too good. We had one drink then, the chap we were speaking to, I do not know his name at all said that a Mr. Sweeney was looking for a chap to drive one of his tractors. We left him then in

the Bar and went into the lounge where the wife was sitting. We had two or three drinks there, then we went down to Collins shop and put the orders in for the groceries, that is the wife and myself. Kelly went in the shop alongside the Hotel to do his shopping. From there we picked up the groceries and then we went to see if Mr. Sweeney was home. From there we came back into town again and we pulled up outside the Hotel. I went looking for work and then I went back to my car and the wife, Janet and Kelly was sitting in the car, we then went down to Tongala in my car, I was going there looking for a job, there was nobody there. We came back to Jerilderie and later went home. During the day I noticed that Kelly was making eyes at my wife and he kept saying to my wife "Aren't you talking to me yet". She didn't say anything to him only smiled. I don't remember if Kelly stopped at our place or not that night. Yes I remember now I drove him home next morning. The next time I saw Kelly was last Thursday night I went over to New Camp and picked him up in my car and I drove him over to the place where I was staying, we had tea. After tea we talked for a while while the wife was fixing the children up and putting them to bed. After the wife put the kiddies to bed I went to bed myself and then Noel walked out and asked me if I wanted a drink I said No, Noel his wife, my wife and Kelly stopped inside drinking. Around about eleven o'clock that night our young baby Vicky started coughing and crying in the car and I yelled out for the wife and she didn't come out and she and Kelly started singing songs, they finished singing and one of my daughters told her that I wanted her, she come out to the car and asked me what I wanted and I told her to get in and fix the baby up and wasn't it about time that she got to bed and stopped drinking and we had a bit of an argument about it. She fixed the baby up and went inside and made a cup of tea. I went inside and was talking to my brother-in-law and Kelly was just sitting there not saying anything. The next morning I woke up it must have been about half past six and the wife was inside talking to Kelly. He went from there to work and he came over early last Friday afternoon and we didn't have much to say to one and other he was following my wife around, that went on all the time till he went back home. On the Saturday afternoon he come over again and he kept hanging around my wife all the time. On the Friday when Kelly came over and was hanging around my wife I spoke to my brother-in-law Noel about Kelly hanging around my wife and I called my wife over to the back of my car and spoke to her about it and she just turned around and got niggily about it and went back inside. Today, this morning we got up early to go to one of the outer Stations to get some parts to fix up Noel's gig when we asked Kelly if he was coming over with us he said no and the wife was sitting down on the bed opposite him I called her over to the car and I told her to keep away from him as the only reason he wasn't going with us was that he wanted to hang around with her and she went inside and we drove over to Mr. Bish's place. Kelly wouldn't come with us. We were over there for about two hours and when we came back he was over at the dam swimming and the wife and the

children and the brother-in-law's wife and children were all going over to the dam. I called out to my wife that I wanted her and not to go over and she didn't come to me and I drove over in the car to her and asked her couldn't she wait for a person to come back before she went over to the dam swimming and she said how the hell would I know how long you would be and I said well you knew I would be as quick as I could get away from the place and she said aren't you coming over now and I told her no, I said "we have got work to do". I turned around and drove back to where the brother-in-law was working there. We spoke about the way Kelly was hanging around my wife, when she came back from the dam after swimming I again approached her about the way Kelly was hanging around her and that couldn't she notice it herself she answered me "Yes". I said "Why didn't you tell me earlier instead of arguing with me about it". I said "What do you think about it?" She said "Well ask him", and walked inside. I followed her inside and asked her what she meant and she wouldn't tell me all she said was "You see him". And then Kelly walked inside to the bedroom and I approached him about the way he had been hanging around the wife and asked him if he considered it was the right thing to do and he said "I don't know about that, do you love her". I said "Yes of course I do she borne me six children". I said "Anyway do you think it is the right thing for a joker to walk into a house and turn around and do a thing like that, even if the woman turned around and showed him a bit of affection if he was any decent sort of a chap he wouldn't take any notice of it". And I said "If it had have been your wife and it was in your place I know what I would have done, because a chap that does things like that has not no principle at all". He turned around and said "I lost my principle a long time ago". I said "Yes that is the type of bloody joker you are no bloody principle at all". I then walked over to my car and called out to Joan, that is my wife, to come over as I wanted to speak to her on her own and she came over to me and told me that she was in love with him. I turned around said "Not love infatuated with him". Then she said "Three days ago we made the arrangements to run away together" but they didn't want to tell me as they didn't want to hurt me. I tried to make her see reason and stop together for the kiddies sake and she said "No". She then left me and went inside. I got my children and explained to them what was happening and asked them which one they wanted to stop with and they said they wanted to stop with me and not the mother and him. The children asked the wife to stop and she wouldn't stop and Kelly was sitting outside grinning his head off and I turned around and started to get wild and I said to the brother-in-law it is time that Kelly got off the property and I said to Noel that if it had have been my place from the word go I would have stopped Kelly from coming there as I knew what type of bloke he was, then Noel told Kelly to go and Kelly stopped around for a while and while he stopped there I put my fist through wind deflector on my car. I was getting that wild and I told him myself that he had better shoot through and he went up to the roadway and waited for the wife at the roadway and after

he went away the wife I don't know whether she would be right up to the roadway or not I started the car up and drove up the road getting up the road I seen Kelly doubling my wife on his pushbike and as I got up closer to them they both got off the bike then stood alongside the road, he was standing on the gravel and the wife was standing on the grass. I aimed the front left hand mudguard at him and the bike after I hit him I swerved and put my foot down on to the accelerator as I was going off the road and I went through a greasy boggy patch and then swerved up over the wrong side of the road with the nose of my car facing towards the table drain. I got out of the car and I looked for the wife and at first I couldn't see her and when I first seen her she was laying in the table drain face down and I thought that I had killed her. I done my block, lost my temper, and walked to where Kelly was and started hitting him, then I heard the wife moan and struggling in the water. I left Kelly and pulled the wife out of the table drain and she was in agony then. It flashed through my mind that if it had not been for Kelly I wouldn't have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat. After I done that the wife struggled and tried to sit herself up on the bank. I pulled her up further and told her to lay still and from there I went over to Johnny Littles through the paddock and when I got to Johnny Littles he was not there. I forced my way in to use the telephone to ring the Police. After I rang up I layed down on the back verandah for a while and took my belt and knife off and left it laying on the verandah and after that I walked down the lane and met Mr. Jukes. Mr. Jukes drove me back there and the wife was not to be seen and Kelly was on the opposite side of the bank from where I left him and from there Mr. Jukes drove me into Jerilderie.

F. PARKER.

Witness: N. A. SHEATHER,
Detective Senior Constable No. 6006,
Police Station, Jerilderie.
16th October, 1960. 11.30 p.m.

Q. Have you read this statement? A. Yes.

Q. Did you make this statement at your own free will? A. Yes.

Q. Was any threat, promise, or inducement held out to you to make this statement? A. No.

Q. Were you cautioned before you made this statement, that you were not obliged to do so, unless you so desired, as whatever you did say would be taken down in writing and may be used in evidence? A. Yes.

F. PARKER.

Witness: N. A. SHEATHER,
Detective Senior Constable No. 6006,
Police Station Jerilderie.
16th October, 1961.
Detective Constable 1st Class J. K. Ellis present during the taking of this statement.

DOCUMENTS NOT INCLUDED IN THE RECORD

Order of the High Court of Australia and Reasons for Judgment.

Dixon, *C.J.*

PARKER v. THE QUEEN

SYDNEY, August 24, 27, 1962; MELBOURNE, May 24, 1963

Before DIXON, *C.J.*, TAYLOR, MENZIES, WINDEYER and OWEN, *JJ.*

DIXON, *C.J.* This is an application for special leave to appeal from an order made on 24th November, 1961, by the Full Court of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal, whereby an appeal by the applicant from a conviction of murder was dismissed. The application for special leave to appeal was of course made long out of time, but the Solicitor-General who, as it seemed, was fully apprised of the circumstances, made no objection to the enlarging of the time and it was extended accordingly. The appellant no doubt has been serving his sentence in the meantime but inasmuch as the most serious question arising upon the application is whether the jury should have been directed that they might, if they thought fit, find that the prisoner acted upon provocation reducing the homicide to manslaughter, his imprisonment under sentence may not be as important as might otherwise appear. The sentence for murder, however, is penal servitude for life (Crimes Act, 1900-1962 (N.S.W.), s. 18 and s. 453).

The case is a curious one and at the trial, although on the proofs no doubt could exist that the appellant, by the injuries which he inflicted upon the deceased, had killed him, yet there was never any admission on his behalf that it was out of the question for the jury to find a simple verdict of not guilty and thereby acquit him completely. Part of the complaint of the applicant against his conviction is that a question of provocation was not submitted to the jury and therefore was not considered by the tribunal of fact.

It goes without saying that a distinction must be maintained between the manner in which the court examines the evidence for the purpose of ascertaining whether a question of provocation should have been submitted to the jury and the manner in which the court examines the evidence in considering whether there is material sufficient to support the jury's conclusion that the applicant was guilty of homicide amounting, if considered independently of any possible extenuation such as provocation, to murder. Cf. the statement of Lord Devlin for the Privy Council in *Lee Chun-Chuen* v. *The Queen*, (1962) 3 W.L.R. 1461, at pp. 1466, 1467. It was for the jury to decide what weight they would give to the evidence before them as it affected this primary question and since they have decided it against the applicant it is enough to sustain their conclusion so considered if contained in the evidence there is enough reasonably to lead to that conclusion, even if another view might be formed of this or that part of the evidentiary material. But on the question of provocation there has been no decision of

Order of the High Court of Australia and Reasons for Judgment.

Dixon, C.J.

the jury and the question is whether they ought to have been allowed to decide it. Perhaps it may be said that the question is to be considered just as if the jury had decided it in favour of the prisoner and, by some freak of procedure, the question arose whether that decision could be sustained. The point is that the issue before the Court of Criminal Appeal was whether by any possibility the jury might not unreasonably discover in the material before them enough to enable them to find a case of provocation. The selection and evaluation of the facts and factors upon which that conclusion would be based would be for the jury and it would not matter what qualifying or opposing considerations the court might see: they would not matter because the question was, ex hypothesi, one for the jury and not for the court.

The facts material to the homicide may be stated very shortly. The indictment alleged the murder of one Daniel Christopher Bingham, known as Daniel Kelly, at Jerilderie on 16th October, 1960. Jerilderie is in the plain country in the Southern Riverina about forty miles north of the Victorian border. There was an out station in the district called New Camp, consisting of a two-roomed dwelling probably of galvanized iron. There a station-hand named Noel Craig and his wife and children had been living for some weeks. Some distance away at New Camp there were shearers' quarters and a shearing shed and there some four months earlier Craig had found that Dan Kelly, as it is convenient to call the deceased, had taken up his quarters. Some time in the earlier part of September, as it would seem from Craig's evidence, the prisoner, his wife and six children arrived in a car at New Camp. The prisoner's wife was Craig's sister and was of Maori extraction. They had been married for ten years but Craig had not seen them for the last seven years before they drove up to the out station with their six children in their car. Parker said he wished to look round for a job and asked could they stay. He and his wife and their youngest child slept in the car and the other five children slept in the Craigs' house. Shortly after the Parkers came Craig went in search of a sheep to kill and met Dan Kelly. Craig was accompanied by Parker and his wife and a nephew of Craig. Dan Kelly asked them to have a cup of tea at the shearers' huts and they all took tea in the kitchen. In the ensuing week Dan Kelly visited the house at New Camp on five or six evenings and once or twice in the day time. There were various purposes for the visits by day and in the evenings cards were played. The play went on so late on one night during the week that Dan Kelly was given a stretcher in the kitchen and slept there. On Friday (which was 13th October, 1960) Dan Kelly came over early in the afternoon during the hours he might have been expected to be at work. Some comment was made and Parker said to Craig that he was only coming over to hang about Joan, Parker's wife, and asked if Craig had noticed. A little later Parker again said that Dan Kelly was only "hanging around Joan". Craig says he made no answer. On Sunday morning (16th October) about half-past ten, Craig and Parker were about to set out for a neighbouring station

to borrow some tools. Dan Kelly was to go with them but after getting in the car he got out of the car to stay behind. Perhaps Kelly had come over that morning. Perhaps he had slept the night there. Parker commented to Craig that Kelly was still hanging around Joan. He called his wife Joan over to the car, according to Craig, and told her to go inside and do some work so that Dan Kelly would not hang round. Craig said that he and Parker were absent until about five minutes past one. They found Mrs. Craig and her children, Mrs. Parker and her children and Dan Kelly on their way to a dam about three hundred yards distant to swim. Parker whistled to his wife and called out to her, speaking Maori. What he said was not translated, though no reason appears for thinking that her brother, Craig, did not understand it. However, she turned round and stood while Parker drove over to her to talk to her. Craig told his wife to come and get his meal and began to use the tools he had obtained and to do some work. Kelly came to see what he was doing and then went into the house. About a quarter of an hour later Craig himself returned to the house and there he heard Parker say to Dan Kelly, "Why can't you find a single girl? Have you no principles?" Kelly replied, "I lost my principles years ago". According to the prisoner, during this conversation he referred to his wife being part Maori and thereupon Kelly made a response implying the worst intentions and of a kind most insulting to her. Parker returned too from talking to his wife in order to speak to Craig. She apparently had gone to the dam to swim, whence with the rest of the party with her she returned an hour later. Parker said to Craig, "I think there is something on between Joan and Dan Kelly" and asked Craig, "Don't you think so?" Craig replied, "It appears so". An hour and twenty minutes later Parker called Craig from the job he had returned to do. Craig went to him at his car and Parker said to him, "She is leaving with Dan and if she does I will get him. There are a lot of dark nights and one of these nights I will be waiting for him". Parker was a very small man and Kelly a big one and it seems that there had been some talk already of the futility of Parker attempting to deal with Kelly with his hands. A few minutes later he called Craig over to speak to him with his wife and children. He told them that he had got a job at Albury. Would she go with them there? The children said that they would like to go there. Craig says that Mrs. Parker said, "It's no good, Frank" and walked away. Craig said that Parker had already asked him to put Kelly off the place. Craig said that he would tell Kelly to go and in fact he did tell him to go. Parker got out of his car and told Kelly to get going while he was lucky: he said that if his, Parker's wife was going with him he had better go up to the gate and wait for her, he (Parker) would escort her to the gate. Next Craig saw Parker take a broken rod from the old Ford at which Craig had been working to his, Parker's car, get out his tool box and cut the end off. He, Craig, saw him proceed to file it: his evidence is that he asked him what he was doing, that Parker answered "Nothing": he wrenched it from Parker saying, "You had better give that to me", and that he had better pull himself together, he had gone off the deep end, and that he had the

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children to think of. Parker, he said, replied, "I won't be here to look after the kids—Joan will—and that other bastard will not be either". He then seemed to quieten down a little but went down to some trees and there wept and sobbed. He came back for a jacket and returned to the trees sobbing. Somewhere in this colloquy Parker said to Craig, "It is no good me fighting him, he would beat me by hand, he is too big, he fights too well".

In the meantime Mrs. Parker went off, with Craig's niece and nephew, in the direction of the road, where Kelly had already gone. They helped with three bags. It was the opposite direction that Parker took to weep in the trees or bushes. According to Craig's evidence it was after the three had gone in the same direction as Dan Kelly that Parker went down to the trees or bushes and cried. After about fifteen or twenty minutes Parker came back and asked for help in starting the car. It would seem that a track starting in the opposite direction from the vicinity of the shed or hut came out on the same road, which was called the Goolgumbla Road. The prisoner may have taken that track or road. Jerilderie lay to the south along Goolgumbla Road and the couple on the bicycle went south. The evidence seemed to show, in any case, that the prisoner left in the car about five minutes later and followed them. In a more general description of Parker's conduct before his wife left, Craig said that he seemed dazed, that he followed her about and seemed to be begging her (scilicet to stay). Craig said that Parker was emotionally very upset, that he was deeply in love with his wife and children and took great pride in them. There was a "knuckle duster" in Parker's car and both Parker and Dan Kelly habitually carried sheath knives. According to the evidence of a niece and nephew the three cases or pieces of luggage were carried up towards but not quit to the gate to the road. Then Joan Parker and Dan Kelly got on his bicycle and left. She sat in front of him, sideways, on the bar between the seat and the handle bars. She faced left. The prisoner overtook them. They dismounted. In a statement which the police took from the prisoner at the Jerilderie police station on the night of 16th October, 1960, and which the notation says he signed at 11.30 p.m., the following account appears of what occurred from this point: "I started the car up and drove up the road: getting up the road I seen Kelly doubling my wife on his push bike and as I got up closer to them they both got off the bike then stood alongside the road, he was standing on the gravel and the wife was standing on the grass. I aimed the front left hand mudguard at him and the bike after I hit him I swerved and put my foot down onto the accelerator as I was going off the road and I went through a greasy boggy patch and then swerved up over the wrong side of the road with the nose of my car facing towards the table drain. I got out of the car and I looked for the wife and at first I couldn't see her and when I first seen her she was laying in the table drain face down and I thought that I had killed her. I done my block, lost my temper and walked to where Kelly was and started hitting him,

then I heard the wife moan and struggling in the water. I left Kelly and pulled the wife out of the table drain and she was in agony then. It flashed through my mind that if it had not been for Kelly I wouldn't have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat. After I done that the wife struggled and tried to sit herself up on the bank. I pulled her up further and told her to lay still and from there I went over to Johnny Little's through the paddock and when I got to Johnny Little's he was not there". The statement goes on to describe how he, the prisoner, broke into the empty dwelling in order to obtain the use of the telephone, how he telephoned to the police at Jerilderie to obtain medical aid as well as to bring them to the scene. The statement concluded by a brief account of what he himself next did.

The prisoner gave evidence on his own behalf and gave an account of what he did to Kelly and there was medical evidence of the wounds and the cause of death. It is upon the evidence and the evidence already recounted that a detailed knowledge of the steps taken by the prisoner in the actual commission of the homicide depends. Perhaps some inference might be drawn or supported by the additional evidence of marks seen on the ground. Mrs. Joan Parker was put in the witness box but declined to give evidence.

The prisoner's account in his evidence in chief, led by his counsel, is as follows: "Q. From the time your wife told you she was going to go away with Kelly, have you a clear recollection of what happened or can you describe your recollection of what went on at the camp that morning? You have said something about a trance. Tell us again what the state of your mind was. A. Parts of it, yes I can remember fairly well. Parts are very hazy. The children, I remember this well, as I stand here, crying, begging the wife to stay, and I remember her saying No, she would not stop with a man she did not love and she would go with Kelly. Q. Do you remember walking down the bush and back again, or up the track. Do you remember any of that? A. No, I do not. Q. You did leave the camp in your motor car. Do you recall leaving in the motor car? A. I do recall leaving. Q. Why did you leave the camp in the motor car? A. I wanted to bring the wife back to the children. Q. Did you know where your wife had gone at that time? A. All I knew was they were going over to New Camp to get Kelly's gear. Q. They said that, did they? Had that been said in conversation? A. No, it had not been said in conversation, I just more or less took it for granted. He had no clothing or anything like that with him. All his clothes were at New Camp, so I assumed he would be going over there to get his clothing and things like that. Q. You said you went in the car to get your wife to come back to the children. Do you recall when you left the camp what was your state of mind towards Kelly ? A. I was not thinking about Kelly, all I was thinking about was getting the wife back and taking her back to the children. As regards Kelly I cannot explain anything, I cannot explain my feelings towards him. I had one set purpose in my

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mind when I left, the children, and that was to bring their mother back to them and stop her running away. Q. Did you have any intention to hurt Kelly or do anything to Kelly that you can remember? A. Definitely not. Definitely. I might have had intentions of having a fist fight with him, or trying to have a fist fight with him, or maybe to hurt him some way, but definitely no other intentions whatsoever. Q. When you got in the car do you remember anything about the knuckle duster you kept in the car? A. No, I do not remember at all. I could have picked it up when I got in the car. On that I am not really quite sure. All I do know is when I got out of the car apparently I had it with me. Q. You say 'apparently'. Can you tell us when you came up, as you have told us in the dock you came up, to the spot where Kelly and your wife were standing on the side of the road—do you recall that? A. Yes. Q. Do you remember how and where they were standing on the roadway and what they were doing? A. I cannot recall that quite well. I was driving up the lefthand side of the road. The wife was standing on the grass, what I took to be the grass at the side of that roadway, and Kelly would be standing on the gravel. Say for argument sake I am facing you now and you are coming towards me, she would be on his righthand side. Q. How was he standing? Was he side-on to the road, or how was he? Do you remember the details of the position in which he was standing? A. As I was coming up to them he was standing more or less as I am now, and I came up more or less from behind. Q. You came up more or less from behind him? A. Yes. Q. Do you recall whether they had their heads turned towards you or were looking at you or anything like that, or can't you recall? A. Yes, vaguely I can. Q. As you came up to them did something happen to you as you came up close to them? A. Yes, when I was driving up towards them myself, closer and closer, they were just standing there and I was driving up closer and closer, they were just standing there and I was driving up closer and closer all the time, and everything seemed to just go black. Q. What happened after that? What do you remember after that? A. I lost control of the car just then and thinking back deeply, more still now while standing here, I have a vague recollection of a voice saying to me, 'Frank, what is the matter with you?' The next thing I know I am over the other side of the road and the car is stopped. Q. Do you recall what happened then, or is there anything about it all that you can tell us about your recollection of what took place then? A. I got out of the car. I expected to see the wife standing there. I do not know, just I thought she would be standing there. I went to run over to her and she was not there, and I hesitated. I ran over and the further I got to the crown of the road I saw the wife laying face down on the table drain facing me. Kelly was lying up on the bank a bit further away from her. I do not know then, I just seemed to lose more or less control of myself, and I raced over and I started hitting him and bashing him with the knuckle duster. I can remember part of that pretty well. All of a sudden there was a moan and groan behind me. Something stopped, I stood up straight and looked around and here was the wife trying to push herself up out of the

water. I went straight to her and pulled her from the water to the bank, her head at my feet, and she collapsed. From then on I do not know what really happened. The next thing I do really remember was the wife again trying to sit up. I went back to her and pulled her up further away from the water and told her to lay still and I would go and get help. It was while I was going over to get help that things started to really penetrate and come back to me. Things that seemed unreal. I started thinking. Q. What do you mean by that? A. It started to come back really that I seemed to visualise I had stabbed a chap and it started to come back and I remember as though I had stabbed him. Yet again it was not me that stabbed him. It was just as if I had been standing back and was looking on at myself stabbing him. That went on passing through my mind. I could not really work it out or understand it. All I could see was the picture of myself stabbing the chap. I got over to Liddle's (scilicet Little's) "place and forced my way in and rung up, and went back outside, and it was then I went out on the verandah and looked at my right hand and noticed blood all over it, and I started to wonder and worry just really what I had done. I could not realize it or believe it. I could not understand it. Then I started to tell myself 'I have done it'. I had killed a chap. Yet it still seemed so unreal. That is when I was laying on the back verandah. Then I thought—I do not know—I undid my belt and just left it laying there. I think I stopped there for two or three seconds, I am not sure. Then I think I went over and washed my hands, washed the blood off them. I think I stopped there for a while." (He is speaking of Little's verandah after he had telephoned to the police.) The medical evidence is to the effect that the government medical officer who, with the police, reached the scene of the homicide about 4 p.m. on 16th October, 1960, found Dan Kelly lying dead on his right side on the western side of the roadway across a table drain. Both his legs were broken below the knees. He had numerous wounds on the face, throat and neck and on the exposed part of the body. He was attired in a singlet and blue jeans. The body was warm but the man was dead. There were a great number of wounds on the face (the "knuckle duster" might have been responsible) but the only two of significance were one on each side of the neck. On the right side there was an incised wound about half an inch long made by a sharp instrument which had penetrated the larynx but had missed large blood vessels. There was a wound on the left side of the neck which had penetrated at a different angle and had severed the internal jugular vein. There was a great deal of blood. The knife had penetrated further into the muscles at the base of the tongue, deeply. There was a lot of blood. The "knuckle duster" and the prisoner's knife were produced. Both bones of the legs were broken at about fourteen inches above the ground. All this was borne out by the evidence of a post mortem. Death might be attributed to the combined wounds or to the wounds in the neck, particularly the last one, and the loss of blood.

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Mrs. Joan Parker's injuries were of course very severe but they were not of the same character as Kelly's and she lived.

The prisoner showed great remorse and anxiety over his wife and maintained that he did not mean the car to hit her. At the trial he took the position that he set out from New Camp to overtake them and get her back to the children and him and without thought of injuring Kelly, at all events beyond having a fight or the like with him, and that after driving towards them as he drew closer and closer to them standing there "everything seemed to go black" and he lost control. The description he gave in his evidence in chief has already been set out.

It is convenient to take from the report of the learned judge who presided at the trial a summary of some evidence and of the course taken. "Eventually, Mrs. Parker told her husband that she was running away with Kelly. The evidence indicated that Parker was greatly upset and pleaded with her not to go. Later in the day Mrs. Parker left with Kelly on his bicycle. Parker followed in his car and drove it at high speed at Kelly where he stood with his bicycle at the edge of the road. The impact broke both Kelly's legs and may have rendered him unconscious. Parker then attacked him, where he lay, with a knuckle duster which he kept in the car, and finally stabbed him repeatedly with a knife which he always wore. The circumstances of the killing were not in dispute. The evidence was that he then broke into a nearby house and telephoned the police. He was given a lift by Mr. Jukes who drove him to the police station. Mr. Jukes and the police officers gave evidence that Parker told them that he had intended to kill Kelly. In the witness box, Parker stated that he had not intended to kill Kelly, but only to bring his wife back to their children. It was argued on his behalf that the attacks were unpremeditated and instantaneous reactions on his part to an emotional crisis of overwhelming intensity. The jury were directed that, in the circumstances of this case, provocation was not available as a defence; that irresistible impulse is not available as a defence; and that a person who attacks another with a weapon likely to cause death or serious bodily injury will normally be taken to have intended the natural and probable consequences of his attack or, at least, will be regarded as having acted with reckless indifference to human life. They were also told that if they did not find the necessary mental ingredient established beyond reasonable doubt, then they should acquit the accused of murder and find him guilty of manslaughter because, on any view of the facts, Kelly's death was brought about by acts of Parker which were wrongful and dangerous—though it was for them to decide whether they were satisfied that the accused did, in fact, cause Kelly's death and caused it while doing a wrongful and dangerous act". Inasmuch as the evidence was that the prisoner had forced the knife into Kelly's neck and through his jugular vein, no question of intent to do grievous bodily harm arose, as far as I can see. He actually did it by the very act he consciously performed, that is to say, in itself it amounted to grievous bodily harm. It may be desirable to return to this question because

counsel for the prisoner in supporting this application attacked the charge to the jury in respect of the intent to inflict grievous bodily harm. But as I regard the manner in which it was treated as misconceived once the killing by the prisoner was made out to the complete satisfaction of the tribunal of fact, as clearly it was, I pass to what appears to me to be the crux of the case. The question upon which the fate of this application depends is, I think, whether it was right to withdraw from the jury the possibility of holding the homicide by the prisoner to be manslaughter and not murder because done under provocation of a kind which in the circumstances reduced, or might be regarded as reducing, what otherwise might be murder to manslaughter. It appears to have been treated as established, i.e. as proved, that the prisoner drove his car at the deceased, although perhaps he did not drive then or earlier at such a very high pace as the language of the judge's report might suggest. It seems to have been taken as proved, if not admitted, that he attacked Dan Kelly while lying on the ground and that after using the knuckle duster he drove his knife into each side of his neck or throat, death being the result, on the footing he killed him so that he committed the crime of murder, unless by something exterior to the killing or leading up to it the homicide was justified or reduced to manslaughter. Nothing seems to me to have been of more importance at the stage when the case was in the Court of Criminal Appeal than a consideration of the possibility of a jury finding manslaughter on the ground of provocation. On the application before this Court the Solicitor-General for New South Wales appeared for the Crown and he informed us that he conceded that there were substantial arguments that could be put for the applicant that provocation should have been left to the jury and that he would not oppose special leave being granted limited to that ground (transcript of argument, p. 24). When the learned Solicitor-General came to argue the application for the Crown he went somewhat further. After saying that he understood that before the Court of Criminal Appeal the prosecutor argued that the learned judge was right in withdrawing the issue from the jury, he went on to say that so far he (the Solicitor-General) had not said more than that there are substantial arguments that could be put for the appellant. The learned Solicitor-General proceeded: "If the court was asking me what I would submit, I would be inclined to say that on the whole I would submit that the issue ought to have been left to the jury, but there are some difficult questions, and that is a rather hesitant reply".

In dealing with any question of the law of homicide which is affected by its history there is more than one matter in its bygone history that must not be forgotten. There was of course the view that an act causing death must expose the man who did it to some prejudicial legal consequences and it was for the jury to find the circumstances and the court to give judgment as to the consequences. The several points involved in this statement appear from the following passage from Chitty's *Practical Treatise on Criminal Law* (1816), vol. 3, p. 739: "If upon the trial of the indictment for murder,

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the prisoner appear to the jury to be guilty of manslaughter, they may find him guilty of the latter offence, 2 Hale, 302. Where the killing be proved, but the circumstances show it to have been a misfortune, or to have arisen in self-defence, they anciently found the special matter, and left the court to judge of its effect; who, it is said, might give judgment for manslaughter, or even murder, though the jury concluded et sic per infortuniam, or sic se defendendo, 2 Hale, 302. And even if the court agreed with the jury as to the innocence of the party accused, the verdict was recorded, and his goods forfeited, Id. ibid. But it was long ago the practice, in cases of infancy and insanity, for the jury, under the direction of the court, to find a verdict of acquittal, 2 Hale, 303. Fost. 279. And Mr. Justice Foster ably contends for the legality of the practice of finding general verdicts of not guilty, in every case where the mind is free from crime, and the defendant has been merely the unfortunate instrument of another's destruction, Fost. 271 to 289. He thinks, however, that there are some cases in which the party has been guilty of neglect, where the judge may properly direct a special finding, and so compel him to sue out his pardon under the Statute of Gloucester, c. 9, which by that statute he is entitled to receive. All his personal property will, in this case, be forfeited, unless the king, in whom it is vested, thinks proper to restore it, Fost. 289. Where the jury doubt whether the facts proved amount in law to murder, they find a special verdict, in which the facts are stated as proved, and the inference is left to the judges; who may give judgment of death if they think the offence is murder, though malice is not stated in terms, nor the killing found to be felonious. 9 Co. 69. Palm. 548." See further Sir W. S. Holdsworth, H.E.L., vol. 3, pp. 311-315. The definition of murder was developed from the exclusion by statute of benefit of clergy and thus "malice aforethought" or malitia praecogitata came to look like the test of the capital nature of the homicide. The prevalence of duelling made this of daily importance. Sir W. S. Holdsworth wrote: "In 1604 the statute of stabbing (2 James I, c. 8), said to have been passed in consequence of the affrays between Englishmen and Scotchmen at James I's court, enacted that if a man stabbed another who had no weapon drawn or had not first struck at the stabber, and the person stabbed died within six months, the stabber should be guilty of murder. As Stephen has pointed out, the development of the law as to the circumstances under which homicide is committed with 'malice prepense', and so is murder, has superseded the necessity for the statute" (Holdsworth, H.E.L., vol. 4, p. 501).

But it had long been recognized that a homicide might be "reduced", that is extenuated, to manslaughter if it was the result of a provocation which the law would accept as sufficient extenuation to warrant the crime being treated as manslaughter. East (P.C., p. 238) after enumerating a number of examples says: "In all the instances above enumerated the party killing is supposed to have taken all advantages in the heat of blood over the person slain; but to have received such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and

keep it boiling to the moment of the fact: so that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive. And it has been shown, that in the case of a legal provocation, strictly so considered, this heat will extenuate the guilt of the party acting under its adequate influence, even though he made use of a deadly weapon. The same extenuation will apply even to lesser provocations, where the instrument or force, not being in their own nature dangerous, were so applied as to induce a reasonable presumption that correction and not destruction were intended to be effected. It has also been more than once observed, that the punishment inflicted upon any sort of provocation, whether in its nature admitted by law to be such, or taken only as explanatory of the act done, must not greatly exceed the offence received. This has been urged with caution; because in those cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety whether he cut off the exact pound of flesh." Now it is obvious that the manner of life of the period and the conceptions and moral relations which might in point of causality be responsible for homicide were in many respects remote from those of today. Sir W. S. Holdsworth observes (8 H.E.L., p. 302): "The readiness with which all classes resorted to lethal weapons to assert their rights, or to avenge any insult real or fancied, gave abundant opportunity for elaborating the distinctions between the various kinds of homicide, and, in particular, the distinction between murder and manslaughter". Holdsworth sets out two or three examples from the sixteenth and seventeenth centuries and goes on: "On the question what would amount to a provocation it was ruled in 1666 that mere words would not be an adequate provocation for homicide; 'but if upon ill words both parties suddenly fight, and one kill the other, this is but manslaughter, for it is a combat between two upon sudden heat'. But other cases show that this question gave rise to many difficult questions and divisions of judicial opinion. In cases where the death had not followed immediately upon, and was not solely occasioned by, the stroke, the law was inclining to the view that the person who gave the stroke was guilty of homicide; but that a person who, without using physical violence had occasioned a death by 'working on the fancy of another', or by unkind or harsh usage, which was nor ordinarily calculated to have this effect, was not guilty. The rules as to what facts would prove that a man had killed another by misadventure or se defendendo were being elaborated." Had Parker found Dan Kelly and his wife in adultery and then and there killed Kelly with his knife it seems clear enough that the jury might have held that he acted on sufficient provocation and that the crime was manslaughter only. There would in such a case be no delay in which the blood might cool and cease "his safer guides to rule". In the present case Parker had been engaged in an emotional attempt to prevent Kelly taking his wife away with him: it did not cease, the pursuit was but part of it. He had been insulted, taunted, he had listened to his children's prayers to his wife not to depart with his adulterous rival. He drove after

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them as they left. So far from there being an interval for cooling, time was occupied in events, speech on the part of Dan Kelly and also of his wife, and the mounting certainty that Kelly would take his wife from him. It is not for the court to find the facts but for the jury and certainly on the evidence the inference was open to them that after a persistent emotional effort to prevent the success of Kelly's attempt to deprive him of his wife and his children of her care, and after passionate appeals to Kelly and Joan Parker, met by Kelly with insults, the prisoner armed himself and followed them with no intermission or interval and in a completely distraught condition. We are not living in the conditions of the sixteenth, seventeenth or eighteenth century. According to the standards governing our society in the later nineteenth century and the twentieth century the succession of events and the conduct of Dan Kelly brought a very strong provocation to an emotional nature, a provocation still in actual operation when Parker came upon Dan Kelly with his wife. That at all events is a view which the jury were entitled to adopt. They might, if properly directed, have considered that (again to use Othello's words) "passion having (his) best judgment collied assayed to lead the way". See further *Lee Chun-Chuen* v. *The Queen* (1962) 3 W.L.R. 1461.

Much difficulty about provocation appears to have arisen from the dicta contained in the speech of Viscount Simon in *Holmes* v. *Director of Public Prosecutions,* (1946) A.C. 588, particularly at p. 598, upon which much of the obiter dicta in *R.* v. *Scriva* (No. 2), (1951) V.L.R. 298; (1951) A.L.R. 733, appear to rest. When Lord Simon says: ". . . where the provocation inspires an actual intention to kill, . . . or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies" I should have thought that the use of the word "seldom" implied that sometimes the doctrine nevertheless did apply. But in *Lee Chun-Chuen* v. *The Queen,* (1962) 3 W.L.R. 1461, at p. 1464, Lord Devlin (speaking for the Privy Council) said, "It is plain that Viscount Simon must have meant the word 'actual' to have a limiting effect and that he had in mind some particular category of intention. He cannot have meant that any sort of intention to kill or cause grievous bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defence. In the present case, for example, earlier in his summing-up the judge properly directed the jury that they could not find murder unless there was an intent to kill or cause grievous bodily harm. By telling them that if that intent was present, they could not find manslaughter, he was telling them that they must find murder or nothing and so in effect excluding the issue of provocation". In Attorney-General for *Ceylon* v. *Kumarasinghege Don John Perera,* (1953) A.C. 200, at p. 206, Lord Goddard for the Privy Council had said: "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act

of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm". In Lee Chun-Chuen's Case, (1962) 3 W.L.R., at p. 1465, Lord Devlin says this: "Their Lordships think it right to reaffirm the law as stated by Lord Goddard and to do so with special reference to Lord Simon's dictum, to which Lord Goddard did not advert. Lord Goddard's statement can be reconciled with the dictum only if the word 'actual' in the dictum is treated as the distinguishing feature. Their Lordships do not think it necessary to interpret the dictum any further than to say that it cannot be read as meaning that the proof of any sort of intent to kill negatives provocation. Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had it in mind that actual intent in the sense of premeditation must generally negative provocation. Their Lordships do not think that this part of his speech can safely be taken as a basis for a direction to a jury, since even with the most careful explanation it is liable to be misunderstood. Where, as in the present case, the substance of it was given to the jury without any explanation, their Lordships agree with the Supreme Court that it amounts to a serious misdirection in law". There has been an ever recurring tendency to treat "provocation" as merely something inconsistent with and therefore negativing malice aforethought, and no doubt that can be seen in the discussion of the reference by Viscount Simon to intention. In the constant use in definitions or descriptions of "provocation" of the word "sudden" the same desire appears to exclude cases of premeditation. On the facts of the present case a jury might readily have taken the view that no premeditated intention had actuated the homicide, that the prisoner had responded to the sustained mental torture by the deceased and his own wife until all self control broke. In the view of Lord Devlin (for the Privy Council): "If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not, of course, for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt" (ibid., (1962) 3 W.L.R., p. 1466).

I do not think that the criteria of "provocation" should nowadays be expressed in terms directed to duels and personal quarrels among men who ordinarily bear arms or to violence produced by violence. But however that may be, the jury might find all the elements of suddenness in the unalleviated pressure and the breaking down of control as the prisoner came to the end of his pursuit of the man taking away his wife. Unless the special provisions of the statute law of New South Wales require a different conclusion, I would treat the case as one in which the prisoner was entitled to a direction authorizing the jury, if they so chose, to find manslaughter and not murder.

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Dixon, C.J.

In *Holmes* v. *Director of Public Prosecutions,* (1946) A.C. 588, it was held that provocative words without action did not afford sufficient provocation to reduce to manslaughter a homicide that otherwise amounted to murder. This was not laid down absolutely, but subject to an explanation of what was meant by "mere words" and an allowance of the exclusion of cases where there are circumstances of a most extreme and exceptional character; apparently what was in contemplation were words of a "violently provocative" nature. It seems that considered as a general or abstract question, there had been varying views or dicta expressed. In New South Wales an attempt to settle the question by status was made and by the Criminal Law Amendment Act, 46 Vic. No. 17, s. 370, a provision was enacted in the following terms: "Where on the trial of a person for murder it appears that the act causing death was induced by the use of grossly insulting language or gestures on the part of the deceased the jury may consider the provocation offered as in the case of provocation by a blow. And where on any such trial it appears that the act or omission causing death does not amount to murder but does amount to manslaughter the jury may acquit the accused of murder and find him guilty of manslaughter and he shall be liable to punishment accordingly. Provided always that in no case shall the crime be reduced from murder to manslaughter by reason of provocation unless the jury find that (1) such provocation was not intentionally caused by any word or act on the part of the accused (2) that it was reasonably calculated to deprive an ordinary person of the power of self-control and did in fact deprive the accused of such power (3) and that the act causing death was done suddenly in the heat of passion caused by such provocation without intent to take life". It will be seen that the provision includes a statement of what one would suppose to have been the long accepted rule that a prisoner might upon an indictment of murder be convicted of manslaughter: Chitty's Criminal Law, vol. 1 (1916), p. 638. Apart from a desire to clear up the doubt as to mere words as provocation it is not easy to see why it was framed. In the Crimes Act, 1900, s. 23 represents the material parts of s. 370. The great importance of the provision in the present case lies in the concluding words "without intent to take life". When the prisoner thrust his knife into each side of Dan Kelly's throat the absence of all intention of every kind to take life might be too hard to credit. But having regard to the observation by Lord Devlin already quoted and upon general principles of interpretation it seems proper to understand the words in question as limited to premeditated intention. Further, the following account of the "modern law" of the "burden of proof" in relation to the subject, given by Lord Devlin in Lee Chun-Chuen's Case, (1962) 3 W.L.R., at p. 1466, must be kept in mind: "It is not of course, for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt". This of

course is qualified in application by the quotation from Lord Simon which follows. But it leaves it as a matter for the jury. Cf. the discussion in *Vallance* v. *The Queen* (1961), 35 A.L.J.R. 182.

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In my opinion the prisoner's case on provocation should have been left to the jury and the conviction of murder cannot stand.

Dixon, C.J.

In *Stapleton* v. *The Queen* (1952), 86 C.L.R. 358, at p. 365, we said: "The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous". That was some years before the decision in *Director of Public Prosecutions* v. *Smith*, (1960) 3 All E.R. 161; (1961) A.C. 290, which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied Smith's Case I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion and, perhaps I may add, explanation, to make it unnecessary to go over the ground once more. I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily and therefore if I left it on one side some misunderstanding might arise. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think Smith's Case should not be used as authority in Australia at all.

I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph.

I think that Parker should be tried again: that is unless it were thought better in all the circumstances to substitute a conviction of manslaughter for that of murder.

Taylor and Owen, *JJ.*

TAYLOR AND OWEN, *JJ.* This is an application for special leave to appeal from an order of the Court of Criminal Appeal of New South Wales which dismissed an appeal to that Court by the applicant from his conviction upon an indictment for the murder of Daniel Kelly on 16th October, 1960. The substantial point raised in the application is whether the learned trial judge erred in refusing to submit the issue of provocation for the consideration of the jury. Upon the hearing of the application there was considerable discussion concerning conflicting statements in *Holmes* v. *Director of Public Prosecutions* (1946) A.C. 588, and *Attorney-General of Ceylon* v. *Perera* (1953) A.C. 200, relating to the relevance of a proved

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intent to kill in relation to such an issue and, also as to the meaning and effect of s. 23 of the Crimes Act, 1900 (N.S.W.). Before discussing these matters, however, it is desirable to refer to the circumstances in which the killing took place.

Some six weeks or so before 16th October, 1960, the applicant and his wife, together with their six children, went to stay with the applicant's wife's brother, Noel Craig, who was a farm labourer employed on a station property near Jerilderie. Kelly lived some little distance away and he met the applicant and his wife about a week or so before his death. He immediately became friendly with them and commenced to visit the Craigs' home. Almost from the outset, it seems, he began to pay noticeable attention to the applicant's wife. She did not resent Kelly's attentions but the applicant did and spoke to her about the matter on a number of occasions. Nevertheless, Kelly continued as a constant visitor and things came to a head within a very short time. It seems that on 16th October, 1960, which was a Sunday, Craig and the applicant drove from the former's home to the nearby property of a friend of Craig for the purpose of obtaining some mechanical parts which were needed for the repair of items of farming equipment. They left about 10.30 a.m. and returned a few minutes after 1 p.m. Kelly had stayed at Craig's home on the Saturday night and was still there when Craig and the applicant drove off on the Sunday morning. Before they left the applicant had taken his wife aside and told her to keep away from Kelly "as the only reason he wasn't going with us was that he wanted to hang around with her". When they came back they saw that Kelly was swimming in the nearby dam and they observed that the applicant's wife and children were walking towards the dam. The applicant called his wife back and spoke to her but she then retraced her steps and went to the dam with the children for a swim. They returned to the house about an hour later when the applicant again spoke to his wife about the way "Kelly was hanging around her" and asked her "Couldn't she notice it herself"? She answered "Yes", whereupon the applicant said "Why didn't you tell me earlier instead of arguing with me about it. What do you think about it"? The only reply his wife then made was "Well, ask him". All she would say was "You see him". The applicant approached Kelly straight away, who said that he was in love with the applicant's wife and asked "What are you going to do about it? Anyway, are you in love with her"? According to the applicant the subsequent conversation was as is contained in the following passages extracted from the applicant's evidence and statements: "I said, 'Yes, she has borne me six children'. He said something about taking the wife in one hand and beating me with the other. I said my wife was a quarter caste Maori. He said he had never had a quarter caste Maori girl, that they ought to be pretty good. I approached Kelly about the way he had been hanging around the wife and asked him if he considered it was the right thing to do. He said, 'I don't know about that, do you love her'. I said, 'Yes, of course, she borne me six children'. I said, 'Do you think it is the right thing for a

joker to walk into a house and turn around and do a thing like that, even if the woman turned around and showed him a bit of affection. If he was any decent sort of chap he would not take any notice of it'. I said, 'If it had been your wife and it was in your place, I know what I would have done because a chap that does things like that has got no principle at all'. He said, 'I lost my principle a long time ago'. I said, 'Yes, that's the bloody type of joker you are. No bloody principle at all'." The applicant then had a further conversation with his wife then she informed him that she was in love with Kelly. She added, "Three days ago we made arrangements to run away together". But she said that they did not want to tell him as they did not want to hurt him. The applicant, as he says, tried to make her see reason and asked her to stay "for the kiddies' sake". However, she was resolved to go, saying, "It's no use Frank, I couldn't stop with a man I don't love. I am in love with Kelly", and, in spite of the applicant's protestations and pleas, she remained adamant. Shortly afterwards the applicant asked Craig to tell Kelly to leave the place and this Craig then did. There can be no doubt that right up to the time that Kelly left the applicant was in a highly emotional state and shortly before he left he obtained a brake rod from an old Ford motor car and commenced to sharpen the rod. Craig took the rod from him and told him to "Pull himself together, that he had gone off the deep end and had the children to think of". The applicant was then alleged to have said "It will be no good me fighting him, he would beat me by hand, he is too big, he fights too well". According to Craig the applicant seemed to quieten down a little at this stage and Craig went back to his work. Before Kelly left the applicant told him that if his wife was going with him he had better get up to the gate and wait there and, shortly afterwards, the applicant's wife left in the direction of the road with her bags, assisted by her niece and nephew. There is evidence that after this event the applicant went off in the opposite direction and was weeping. Very shortly afterwards he came back to the house then went to his car and proceeded in it towards the gateway of the property which opened on to the main road. His wife and Kelly appear to have proceeded down this road on Kelly's cycle with the applicant's wife, so we are told, seated on the handle bars. According to the applicant's evidence at the trial he followed his wife because he wanted to bring her back. When he came within sight of them he saw that Kelly and his wife had dismounted and were standing beside the road. In the course of a statement made to the police the applicant said that he "aimed the front left-hand mudguard at Kelly and the bicycle and then swerved back on to the other side of the road". In his evidence, however, the applicant said that as he saw Kelly and his wife "Just standing there . . . everything seemed to just go black". Up to that point of time, he asserted in his evidence, the only purpose which he had in mind when he left in his car was to bring his wife back to their children and to stop her from running away. When Kelly was struck by the motor car both of his legs were broken whilst the impact, apparently, threw the applicant's wife into the table drain at the side of the road where he saw her lying face

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downwards. In his statement to the police the applicant said that he thought that he had killed her and he said: "I done my block, lost my temper and walked to where Kelly was and started hitting him". Then he heard his wife moan and struggling in the water. He left Kelly and "pulled his wife out of the table drain and she was in agony then". He then said "It flashed through my mind if it had not been for Kelly I would not have injured the wife, I pulled out my knife that I had in my belt and went back and stabbed him in the throat". Having done that he endeavoured to make his wife a little more comfortable, then went to a nearby homestead, forced his way in and telephoned the police and informed them of what had happened.

There is no question upon the evidence that the first attack made upon Kelly as he lay upon the ground was made with a knuckle duster which, it is said, the applicant had found some time before and which he had left in his car. With this instrument he struck Kelly a great many times about the face. Finally, he drew a small knife, which, it is said, he usually carried, and inflicted a wound upon Kelly which penetrated the larynx. Another wound in the neck severed the internal jugular vein and penetrated into the muscles at the base of the tongue. Altogether, it is said, there were more than ten and less than forty separate wounds on the face, forehead and throat. The medical evidence further tended to establish that the immediate cause of Kelly's death was the severance of the jugular vein.

In contrast to the applicant's evidence at the trial to the effect that he had followed Kelly and his wife for the purpose only of bringing his wife back, the applicant made a number of statements to the effect that he had formed the intention to kill Kelly before he set out in his car. To one witness, who appeared on the scene shortly after the occurrence, he said he had run over Kelly on purpose and thought that he had killed him outright. He asked this witness whether Kelly was still alive and when the witness replied that he appeared to be breathing the applicant said that he ought to be dead and "that he had meant him to be". According to this witness the main thing the applicant seemed to be worried about was the fact that he had struck his wife. To police officers later that day the applicant is alleged to have said that he intended to kill Kelly but did not mean to hurt his wife. He is further alleged to have said that he had set out to kill Kelly, that he was running away with his wife and that he had decided earlier that day to kill him. He added that if he had had a fight with Kelly he would have been beaten and so he had decided to kill him. Indeed, he is said to have stated that when he and Craig arrived back at Craig's house at lunch time that day Kelly was hanging around and he decided that he could not "beat him fighting and would kill him".

In New South Wales s. 23 of the Crimes Act makes some provision with respect to the issue of provocation in trials for murder. We say "some provision" because it was contended before us that the proviso appearing at the end of sub-s. (2) of that section applies only to cases where the

provocation alleged is constituted by grossly insulting language or gestures. The ground upon which this is asserted, as we understand the argument, is that sub-s. (1) purports to deal only with provocation so constituted and, accordingly, that the proviso subsequently appearing is limited in its application to provocation of that character. But, in our view, the first step in this argument is erroneous. What sub-s. (1) (and its precedessor—46 Vict. No. 17, s. 370) did was, in effect, to enlarge the content of "provocation" by providing that there should be comprehended by that expression "grossly insulting language" and "gestures". In such a case the jury might "consider the provocation offered, as in the case of provocation by a blow". At common law it was "settled" that words were not a "sufficient provocation" (*R.* v. *Taylor* (1771), 5 Burr. 2793, at p. 2796; 98 E.R. 446, at p. 467), though, where an assault was relied upon to establish provocation, accompanying or immediately antecedent words might be regarded as aggravating "the provocation given by the assault" (*R.* v. *Smith*, 1866), 4 F. & F. 1066; 176 E.R. 910). The object and effect of the prototype of sub-s. (1) was, therefore, to enlarge the common law notion of what constituted provocation and to entitle a jury to consider the additional matter in precisely the same way as provocation by a blow. As will be seen acceptance of the applicant's contention would mean that a jury would be required to consider provocation constituted by grossly insulting language or gestures in a manner quite different from that in which they would be required to consider provocation by a blow. Additionally it may be observed that sub-s. (2) of s. 23—apart from the proviso itself—has nothing to say concerning provocation. It is quite general and its provisions have been accepted as a statutory recognition of the common law right of a jury to return a verdict of manslaughter in any case even though the facts point to murder or nothing (*Brown* v. *The King* (1913), 17 C.L.R. 570, at p. 592, and *Beavan* v. *The Queen* (1954) 92 C.L.R. 660, at p. 662). Upon these views there are, in our opinion, no grounds for supposing that when the proviso specifies "that in no case shall the crime be reduced from murder to manslaughter by reason of provocation" except in certain specified circumstances, it is referring only to provocation constituted by language or gestures and not to provocation generally. Indeed consideration of what we have referred to as the "specified circumstances" must, we think, lead inevitably to the conclusion that no such severable reference was intended.

The proviso is in the following terms: "Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury finds:—(a) That such provocation was not intentionally caused by any word or act on the part of the accused; (b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and, (c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life." The first thing to be noticed about the proviso is that an accused person cannot

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succeed on the issue of provocation—whatever that term may be taken to include—unless the jury is satisfied affirmatively of the matters specified. This is, of course, clearly inconsistent with what was declared to be the law of England in *Woolmington* v. *Director of Public Prosecutions*, (1935) A.C. 462, at p. 482, and accepted in later cases such as *Holmes* v. *Director of Public Prosecutions*, (1946) A.C. 588, at pp. 597, 598; *Chan Kau* v. *The Queen*, (1955), A.C. 206, at p. 211; *R.* v. *Lobell*, (1957) 1 Q.B. 547, at p. 551; *Bullard* v. *The Queen*, (1957) A.C. 635; and as discussed and explained in this country in *Packett* v. *The King* (1937), 58 C.L.R. 190, and *The King* v. *Mullen* (1938), 59 C.L.R. 124. If, therefore, the proviso were to be taken to be intended to refer only to provocation by language or gestures the result would be that in cases involving an alleged provocation of that character the onus of proof would lie upon the accused, but, in cases involving other forms of provocation the onus of proof on that issue would lie upon the Crown once the issue fairly arose. And since, frequently, alleged provocation will consist, in part only, of language or gestures, the view of the proviso for which the applicant contends would produce the extraordinary result that the onus of proof would in any such case, lie, in part, on the Crown and, in part, on the accused. Or would it, perhaps, be necessary in such a case for a trial judge to instruct the jury, first of all, to determine whether the language complained of should be regarded merely as aggravating provocation by way of a blow, or whether the blow complained of ought, merely, to be regarded as aggravating grossly insulting language and then to instruct the jury appropriately as to the onus of proof in each case? These considerations confirm us in the view that, for the reasons already given, the proviso applies to all forms of provocation and that, in New South Wales, in so far as it makes provision for that subject matter, it is exhaustive.

Coming then to the matters which the proviso requires the accused to establish in any such case the first observation to be made is that no real issue arose upon the first of these matters. There was no suggestion that the provocation alleged was caused, intentionally or otherwise, by any word or act of the applicant and, if the issue of provocation had gone to the jury, the applicant would have been entitled to a direction that a finding in his favour should be made concerning this particular condition. But it was asserted that it was for the jury, and the jury alone, to determine whether, in the terms of the proviso, the provocation which he had received was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the applicant of such power, and, further, that his acts which caused Kelly's death were done suddenly, in the heat of passion caused by such provocation, without intent to take life.

Much of the discussion concerning par. (c) of the proviso revolved around the statement in *Attorney-General for Ceylon* v. *Perera* (supra, at p. 243) that—"The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation

An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has already regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm". However, a few years earlier, the House of Lords, in *Holmes* v. *Director of Public Prosecutions* (supra at p. 598), had declared that:—"The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognized, viz., the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule: *R.* v. *Manning* (Blackstone (Commentaries) (Book IV, p. 190)) justifies the exception on the ground that 'there could not be a greater provocation' ". It will be seen that in the later case the illustration of a husband surprising his wife in the act of adultery is given as a particular application of the general rule whilst, in the other, it is expressly given as an exception to the rule. The point which was the subject of consideration in these cases has been much discussed (see e.g. Russell on Crime, 11th ed., 578 et seq.), but many of the observations which have been made might have been more illuminating if they had proceeded upon a common understanding of what constitutes proof of an intent to kill. Such an intent is not necessarily or conclusively established by proof that "the offender had intentionally struck a deadly blow" (see Russell on Crime (supra at p. 578)) though much of the discussion that has taken place seems to have assumed that it is (cf. also *Stapleton* v. *The Queen* (1952) 86 C.L.R. 358; *Smyth* v. *The Queen* (1957) 98 C.L.R. 163; and *Director of Public Prosecutions* v. *Smith,* (1961) A.C. 209)). However this may be, it does not fall to us, we think, to attempt to reconcile the two apparently conflicting statements or to elect between them though what was said in Perera's Case was relied upon to urge that we should confine the operation of the proviso to s. 23 to provocation constituted by language or gestures only. But s. 23 has declared the law on the subject in New South Wales for a very long time and its predecessor was enacted at a time when it was by no means certain that the law was as Perera's Case now declares. Further we should add both s. 23 and its predecessor were enacted when, according to much authority, the onus on the issue of provocation lay upon the accused. In these circumstances, we are unable to perceive any reason why we should strain to give to the proviso any meaning other than that which upon its face it so clearly bears.

On this view of the section the learned trial judge, in our opinion, acted correctly in withdrawing the issue of provocation from the jury. The

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reason why we hold this opinion may be stated shortly. The applicant followed Kelly and his wife either with the intention of killing the former or with no such intent. If he did follow them with that intent that is the end of the matter. It is, we think, not unfair to say the evidence that he did follow with such an intent is almost overwhelming. Indeed, the evidence is that the applicant so declared on more than one occasion and this evidence, so far as we can see, was not disputed. But in evidence at the trial he said that when he followed them he merely did so in order to bring his wife back and that he had no intention of killing Kelly at that time. If the jury were at liberty so to find then, whatever may have been the applicant's condition earlier in the day, he was not, when he set out to follow them, deprived of the power of self-control in any relevant sense. It may, perhaps, be said that the sight of his wife and Kelly together on the road was just another circumstance in the sequence of events relied upon as provocation and that this was the final event which caused him to lose his self-control. But no such case was made and, in any case, it was not the running down of Kelly which caused his death. On the applicant's evidence at the trial it was the sight of his injured wife, whom he, at first, thought had been killed, that determined him to kill Kelly. This is the alternative view which emerges from his evidence at the trial and on neither view was there a case of provocation to go to the jury.

There is, we think, a further reason why it was proper that this issue should not have been left for the jury's consideration. It has been said that the proviso is silent upon the question whether there must be some reasonable relationship between the provocation and the act or acts causing death. This is so in the sense that no express mention is made of this factor. But, surely, when the proviso requires that the provocation must be such that it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, it is speaking of loss of the power of self-control in relation to the act or acts causing death. In other words, the question is not whether there was some loss of the power of self-control, but whether the loss of self-control was of such extent and degree as to provide an explanation for or, to constitute, in some measure, an excuse for the acts causing death. And, of course, the provocation must have been of such a character as was calculated to deprive an ordinary person of the power of self-control to that extent. In our view the sequence and nature of the acts which caused Kelly's death were such that it was not open to a jury to find for the applicant on either of these matters.

Some subsidiary matters were also discussed upon the application but these were disposed of in argument and it is unnecessary to refer to them again. Accordingly the application for special leave should, in our opinion, be refused.

MENZIES, *J.*: Before 1883 when the provision which has since been re-arranged and is now s. 23 of the Crimes Act (N.S.W.) was introduced, provocation as a mitigating circumstance reducing a killing from murder to manslaughter was well understood. Prima facie it was murder for one person to kill another by purposely doing an act likely to cause death but if the doing of the fatal act was provoked by unsought conduct of the deceased which, when the act was done, had so inflamed the mind of the accused that he had lost control of himself and was conduct of the kind that could reasonably be regarded as likely so to affect an ordinary man, then the killing was manslaughter, not murder. Some conduct, however, could not in law amount to sufficient provocation and, in particular, words or gestures of themselves could not be enough—at any rate, where the fatal blow was given with a weapon likely to cause death or grievous bodily harm so that there was manifested an intention to kill: *R.* v. *Mawgridge* (1706), Kel. 119; 84 E.R. 1107; Foster's Criminal Law 290; East's Pleas of the Crown, vol. 1, p. 233. Insulting words could, however, be taken into account when they accompanied acts: *R.* v. *Sherwood* (1844), 1 Car. & K. 556; 174 E.R. 936; R. v. Smith (1866), 4 F. & F. 1066; 176 E.R. 910.

In his charge to the jury in *R.* v. *Kirkham* (1837), 8 Car. & P. 115; 173 E.R. 422, Coleridge, *J.*, used language which brings home today as clearly as doubtless it did to the jury he was addressing the sense and simplicity of the law on this subject that he was expounding. He said: ". . . as it is well known that there are certain things which so stir up man's blood that he can no longer be his own master, the law makes allowance for them. If, therefore, a person being stung and excited inflicts a fatal blow or wound, provided the provocation be sufficient, and acting upon him at the time, and recent, he will only be guilty of manslaughter; and in this the law does not depart from its original principle, because it then supposes that the individual was not guilty of malice prepense, but that what he did was done in a moment of overpowering passion, which prevented the exercise of reason; so that the general distinction is this: in the one case the man is cool, and must be taken to have malice; in the other, if he has had sufficient provocation, and has acted from tat provocation while it is fresh, then he has not malice. In some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express and actual malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence

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of those blows, but in consequence of previous malice, all the blows would go for nothing . . . I told you just now he must be excused if the provocation was recent and he acting on its sting, and the blood remained hot, but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because, though the law condescends to human frailty, it will not indulge human ferocity". In making the qualification imported by the words "provided the provocation be sufficient" and "if he has had sufficient provocation", Coleridge, *J.*, no doubt had in mind two elements, (1) that certain conduct could not in law amount to provocation and (2) that the conduct relied upon as provocation for a fatal blow must be such as might reasonably provoke such a blow from an ordinary man so that, for instance, a mere tap on the shoulder should not be regarded as sufficient provocation or a stabbing or a shooting: East's work op. cit. 23; see for modern statements *Mancini* v. *Director of Public Prosecutions,* (1942) A.C. 1, at p. 9, where Viscount Simon L.C. said: ". . . the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter" and *Packett* v. *The King* (1937), 58 C.L.R. 190, where at pp. 217 and 218, Dixon, *J.*, (as he then was), said: "At common law the test of provocation is not whether the occurrence is sufficient to deprive the particular individual in question of his self-control, having regard to his nature and idiosyncrasies, but whether it would suffice to deprive a reasonable man in his situation of self-control (*R.* v. *Lesbini,* (1914) 3 K.B. 1116)".

The citation that I have made from *R.* v. *Kirkham* make it clear that where there was a premeditated killing there could be no provocation having legal significance but does not exclude provocation as a mitigating circumstance where what was done manifested an intention to kill. That an intentional killing could in some circumstances be reduced by provocation to manslaughter is beyond question but it became doubtful whether or not that provocation which consists of one spouse taking the other in an act of adultery was the only instance of this: see *Holmes* v. *Director of Public Prosecutions,* (1946) A.C. 588, at p. 598; *R.* v. *Semina* (1949) 1 K.B. 405; *Attorney-General for Ceylon* v. *Perera,* (1953) A.C. 200, at p. 243. This doubt has been resolved in favour of the wider application of the rule in *Lee Chun-Chuen* v. *The Queen,* (1962) 3 W.L.R. 1461.

Looking at s. 23 of the Crimes Act (N.S.W.) in the setting of the law as it stood in 1883, it is reasonably clear that one of its purposes was to modify the rule already referred to that in general mere words and gestures could not in law amount to provocation sufficient to reduce a killing which would otherwise be murder to manslaughter, but the section went further. At first sight it is attractive to treat the proviso to sub-s. (2) as in reality a proviso to sub-s. (1) and so to regard the proviso as applying only to provocation by words or gestures, but further consideration of the section

as a whole seems to me to render such a construction inadmissible. Sub-section (2) has been regarded as a legislative affirmation that upon any indictment for murder the jury has the right to return a verdict of guilty of manslaughter rather than murder and as dealing with a subject matter different from that dealt with by the first subsection: *Brown* v. *The King* (1913), 17 C.L.R. 570; *Beaven* v. *The Queen* (1954), 92 C.L.R. 660. The reference in sub-s. (2) to an "omission causing death" demonstrates that the sub-section is not confined to the subject matter of sub-s. (1) which deals only with acts causing death. In consequence it seems to me a necessary construction that the proviso governs every case where the jury is required to consider whether a killing which could otherwise be murder is manslaughter by reason of provocation. So construed the proviso does substantially alter the common law, particularly in denying legal significance to provoking conduct in any case where the act causing death was done with intent to take life. It would not be impossible to read the phrase with which the proviso concludes (i.e. "without intent to take life") if the words stood in a different context as meaning no more than that the act causing death was done without premeditation but, having regard to the preceding words of par. (c) of the proviso, I do not think the phrase can be so understood. Although there is no doubt that the presence of premeditation leaves no room for provocation in law and does so clearly enough by virtue of the language of the proviso without the last words, it cannot be conjectured, let alone inferred, that the legislature intended to leave provocation open in every case of an intentional killing without premeditation: e.g., the shooting or stabbing of one who grossly insults another by calling him a bastard or a communist or some other opprobrious name.

Despite my suspicion that the draftsman of s. 23 did not have in mind all the instances of what could be sufficient provocation in law to reduce to manslaughter a homicide that would otherwise be murder, I have come to the conclusion that there is really no alternative to reading the section as applying to all kinds of provocation and as meaning that in New South Wales, unless the jury finds no intention to kill, it cannot acquit an accused person of murder and convict him of manslaughter simply on the ground that the act causing death was provoked by what the deceased said or did. It is to be observed that it is a positive finding of absence of intention to kill, not the absence of a finding of an intention to kill, which the section contemplates and its language shows that the burden of satisfying the jury of the absence of an intention to take life rests upon the accused. In 1883 such a provision was quite understandable but now, in the absence of a statutory provision so providing, it would seem that as a result of *Woolmington* v. *Director of Public Prosecutions*, (1935) A.C. 462, once provocation is raised the onus would lie upon the Crown to prove beyond reasonable doubt all the elements of murder including the absence of provocation sufficient to reduce the crime to manslaughter. The position apart from s. 23 would be similar to that established in *Chan Kau* v. *The Queen*.

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(1955) A.C. 206, where the issue of self defence appears and goes to a jury: see Mancini's Case (supra). Section 23, however, leaves no room for the application of Woolmington's Case or for the words of Lord Devlin in *Lee Chun-Chen* v. *The Queen* (supra) at p. 1466: "It is not, of course, for the defence to make out a prima facie case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt" and, because of its terms, in this case the problem which the learned trial judge had to decide was whether there was evidence upon which the jury could reasonably find the various elements described in pars. (a), (b) and (c) of the proviso to s. 23 (2) of the Crimes Act. Hardie, *J.*, decided there was not and accordingly declined to direct the jury that they could find the accused guilty of manslaughter rather than murder on the ground of provocation. His decision was upheld by the Court of Criminal Appeal.

The evidence upon which the question of the correctness of His Honour's ruling falls to be decided is set out fully in the joint judgment of Taylor and Owen, *JJ.*, and I will not recapitulate it in detail. It shows that about 3 p.m. on the day in question the deceased took the accused's wife away from her home, her husband, and her family; that she went with him willingly; that according to the accused's evidence in the conversation which the deceased had with him shortly before leaving the deceased used language to him that could be regarded as grossly insulting; that the accused contemplated attacking the deceased and because of his size and strength started to fashion a weapon to use, a pointed steel rod, which was taken away from him; that about 3.20 p.m. after the deceased and the wife had left the accused drove in his motor car after them; that when at about 3.30 p.m. he caught up with them they were standing beside the road and he ran them down and injured them both; that the accused then attacked the deceased who was at his mercy first with a knuckle duster and then with a knife, cutting his jugular vein; that when he had killed the deceased the accused telephoned the police and afterwards made a number of statements to the effect that he had done what he did to the deceased intending to kill him. The evidence to my mind affords no basis for a finding that the deceased's insulting language to the accused played any part in causing the acts which caused death and accordingly, if there is here provocation, it is essentially the deceased's conduct in taking away the accused's wife. Whether or not this could in law amount to provocation is a question that, so far as I have been able to discover, has not been considered as a separate problem but the observations of Viscount Simon speaking for all the members of the House of Lords in *Holmes* v. *Director of Public Prosecutions* (supra) suggests that it could not. The statement of Parke B. in Pearson's Case (1835), 2 Lewin 216; 168 E.R. 1133, points the same way. That learned judge said: "If a man kill his wife, or the adulterer, in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act, and only then". See too *R.* v. *Ellor* (1920), 85 J.P. 107, where the Court of Criminal Appeal said that

threats by a wife to a husband to commit adultery would not be sufficient provocation to reduce the killing of her from murder to manslaughter. These and other cases show a marked reluctance to permit any extension of Maddy's Case (1671), 1 Vent. 159; 86 E.R. 108.

If, however, what the deceased said and did could, independently of s. 23 (2), amount to provocation, I do not think there was any evidence to justify the learned trial judge in putting provocation to the jury because there was no evidence upon which the jury could find that the accused did not intend to cause the death of the deceased. It seems to me that the critical time was after the deceased had been knocked down by the accused's car and that what then occurred left no room for doubting that the accused killed the deceased intentionally. Although other points were raised, the one I have dealt with is the only one that could warrant the granting of special leave but for the foregoing reasons I consider special leave to appeal should be refused.

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WINDEYER, J. This is an application for special leave to appeal from a decision of the New South Wales Court of Criminal Appeal. The applicant, the prisoner, is serving a sentence of penal servitude for life for murder. On his arraignment he had pleaded not guilty. The jury returned a verdict of guilty, adding a strong recommendation for mercy. The circumstances must arouse compassion and may justly attract clemency. But it cannot be said that there was not evidence that would fully support the verdict. Nevertheless, I think this is a case in which this Court should give special leave to appeal, because I consider that the question of provocation should have been put to the jury with a direction as to the circumstances in which provocation reduces to manslaughter what would otherwise be murder. If the case is one for special leave then, in considering whether the appeal should be allowed, we must approach the matter as if we were a court of criminal appeal. It then becomes of little importance that on the facts the verdict may seem to have been right, if the jury were not properly directed on a material issue and this misdirection might have affected their decision.

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Counsel for the applicant earnestly criticized the summing up of the learned trial judge on many grounds. In substance they come down to two: first that the possibility of a reasonable doubt that the prisoner had an intent to kill or inflict grievous bodily harm was not sufficiently put to the jury by His Honour; secondly that His Honour was wrong in the ruling he gave as to provocation.

As to the first of these, the evidence may be summarized as in the Court of Criminal Appeal Sugerman, J., summarized it: "At most", he said, "it amounts to no more, in effect, than that what the appellant did was done under the compulsion of blind rage and that at his trial he had no clear recollection of all the details, though he recollected them clearly enough

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immediately after the event". Perhaps one should add to this the accused's statement that his conduct was brought to its violent climax because the sight of his wife departing with the deceased suddenly brought to his mind the memory and emotions of his childhood when his own mother had deserted her home. The learned trial judge dealt with this aspect of the defence as follows: He told the jury that counsel for the accused sought to explain the attacks upon the deceased as "unpremeditated and instantaneous reactions to an emotional crisis of overpowering intensity, an emotional crisis claimed to have been brought about not only by the acute problems on that afternoon besetting the accused but also to a large measure by a somewhat similar experience in his early impressionable childhood in New Zealand". His Honour then said that counsel relied upon this to show an absence of intent to kill or inflict grievous bodily harm and that he invited the jury to acquit the accused of murder and to bring in a verdict of manslaughter. As to this His Honour said: "Our law does not recognize or allow either as a complete or partial defence to a charge of murder, the fact that the accused committed the act or acts resulting in the death, by reason of some overpowering or even irresistible impulse or whilst subject to some severe emotional stress or strain". There was no suggestion that the prisoner was insane. Therefore, provocation set aside, His Honour's direction so far was, in my opinion, unobjectionable. But it is complained for the prisoner that His Honour went on to say: "In the case of an attack, whether premeditated or not, on another person with a weapon or instrument likely to cause death or serious bodily injury, the law normally—that is to say assuming the person in question is of the age of reason and is in law responsible and accountable for his actions—treats the person who has made the attack as having intended the natural and probable consequences of the use by him, under all the circumstances present of the weapon or instrument".

Any reference to the natural and probable consequences of acts is apt to-day to let loose a flood of debate about so-called "objective" and "subjective" tests, a debate that can readily become far removed from the realities of the case in hand. I have stated my own understanding of the basic principles as this Court has stated them and as I accept them, and I need not repeat what I said in *Vallance* v. *The Queen* (1961), 35 A.L.J.R. 182, at pp. 194, 195. In every case where intent is in question the question is what did the accused—the man before the court—intend. Of that, the acts he did may well provide the most cogent evidence. In some cases the evidence that the acts provide may be so strong as to compel an inference of what his intent was, no matter what he may say about it afterwards. If the immediate consequence of an act is obvious and inevitable, the intentional doing of the act imports an intention to produce the consequence. Thus to suppose that a sane man who wilfully cuts another man's throat does not intend to do him harm would be absurd. A sane man who intentionally belabours another with a knuckle duster while he is lying helpless on the ground and then stabs him with a knife, cutting his throat, cannot rationally

be said not to have meant to do him grievous bodily harm at the least. Moreover, it might well be thought that such deeds must have been done with a reckless indifference to human life. That, I think, is what His Honour meant to convey to the jury and what his summing up taken as a whole would have conveyed. He was speaking of the facts of the case the jury had to try. He had refused to put the question of provocation to the jury. If he were right in that, then I do not think that the rest of what he said could have misled the jury. He later recalled them and told them, quite explicitly, that if they were not satisfied beyond reasonable doubt that the accused in fact had the intent or the reckless indifference—as described in s. 18 of the Crimes Act, 1900 (N.S.W.)—necessary to constitute murder, he should be acquitted of murder; that if they thought that what he did amounted to manslaughter they should convict him of manslaughter; and that on these matters the facts were for them alone to determine. I do not think the jury were left in any doubt as to that issue or as to their powers and responsibilities in coming to a verdict in this case, although I agree that the expressions that His Honour used about natural and probable consequences could, in other contexts, be misleading.

I pass to the next matter—His Honour's charge concerning provocation. He said: "There is one other point that I think I should deal with briefly, and that is the matter you have heard mentioned from the bar table from time to time throughout this case—namely the question of provocation. Provocation can in certain cases be relied upon by an accused to reduce what would otherwise be murder to manslaughter. I have ruled that this is not one of those cases gentlemen; I have ruled that as a matter of law, with the result that you are not in this case concerned with any question of provocation".

With respect I think His Honour here came to a wrong decision. The question for him was a difficult one. He gave it careful consideration. He had not the benefit of the most recent pronouncement of the Privy Council on the topic. Both at the trial and in the Court of Criminal Appeal counsel for the Crown supported His Honour's ruling. But in this Court the Solicitor-General, having himself considered the matter, said, in a helpful survey of the facts and the law, that the Crown would not oppose leave to appeal, because he conceded that there was some evidence of provocation to be submitted to the jury. In these unusual circumstances we should, I think, give great weight to the matters to which the Solicior-General directed attention—but without surrendering the discretion involved in deciding whether or not the case is one for special leave to appeal.

The central question of law is what is the scope and effect of s. 23 of the Crimes Act, 1900 (N.S.W.), which re-enacts s. 370 of the Criminal Law Amendment Act of 1883 (N.S.W.). This is not expressed to be a complete code supplanting the common law concerning provocation: whether

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or not it does so is one question that arises. It is therefore convenient to consider first the common law background of the New South Wales statute at the date it was enacted.

The application to-day of the common law principles by which murder may be reduced to manslaughter is illustrated by such well known recent decisions as *Mancini* v. *Director of Public Prosecutions,* (1942) A.C. 1; *Kwaku Mensah* v. *The King,* (1946) A.C. 85; *Holmes* v. *Director of Public Prosecutions,* (1946) A.C. 588; *R.* v. *McCarthy,* (1954) 2 Q.B. 105, and others referred to during the argument. These common law rules are derived from a series of cases occurring mainly in the seventeenth and eighteenth centuries, and depend upon rulings of single judges or decisions upon special verdicts or in some cases rulings of the twelve judges given at Serjeants' Inn after respites or reprieves. Some of these cases arose in times when men commonly wore swords and were often very ready to draw them from their scabbards upon a sudden quarrel. Questions of provocation and of self-defence were originally often entangled. Chance-medley still had a place in the law. And the law of murder and manslaughter was still being developed. All homicide had once been felonious. And only in 1547 had the distinction between murder and manslaughter been finally settled by the last of the statutes which made homicide of malice aforethought a non-clergyable felony, leaving other punishable homicides clergyable. Malice aforethought thus became the essential element in the non-clergyable crime of murder. Originally the word "aforethought" probably had more or less its natural meaning involving some degree of premeditation, describing at least a deliberate and calculated act. "Malice prepense", said Coke, "is where one compasseth to kill, wound or beat another and doth it sedato animo": 3 Inst. 50. Killing of deliberate intent was murder, for it was done of malice aforethought. Killing upon a sudden falling out when swords were drawn and blows exchanged was at first said not to be so. But even in Coke's time malice prepense had largely ceased to mean premeditated harm. Murder had come to be defined as an unlawful killing with malice aforethought, express or implied. And malice aforethought, it was said, was implied in any intentional killing. It mattered not whether it was planned or done suddenly, in cold blood or in heat. But if it were provoked the case might be different. For, said Coke, there is malice "if one kills another without any provocation on the part of him that is slain". And Holt, who wrote the report of Mawgridge's Case (1706) that appears in Kelyng's Reports, approached the matter in the same way. A sudden killing was done of malice, just as was a planned killing, provided it was without provocation. And thus it has been put from the time of Hale—who spoke of "such provocation as will take off the presumption of malice". Pleas of the Crown, I, 451—to the case of *Holmes* v. *Director of Public Prosecutions,* (1946) A.C. 588, where Viscount Simon said that the whole doctrine relating to provocation depends upon a negativing of malice. To his Lordship's words in that case and their effect I shall come later. Sir

James Fitzjames Stephen in his History of the Criminal Law (1883), III, p. 87, adopted the same view. "The whole law of provocation rests . . . upon an avowed fiction—the fiction of implied malice. Malice is implied when a man suddenly kills another without provocation. What is the provocation which will rebut the legal presumption of malice in cases of sudden killing?"

It might have been better if the earlier writers had used some other words than "malice" to express the notion of wilful wickedness in the expression *malitia praecogitata*. "Malice aforethought" might then have had a less artificial and less confusing meaning and a less troubled history. However that may be, it is clear enough that the rule that a sufficient provocation could reduce the guilt of homicide from murder to manslaughter was founded at bottom on an appreciation that there are differing degrees of moral responsibility in homicide, that for what a man does on a sudden and serious provocation he is less to blame morally than for what he does deliberately and in cold blood. Thus it was that Blackstone said that the difference between manslaughter and murder "principally consists in this, that manslaughter arises from the sudden heat of the passions, murder from the wickedness of the heart": Commentaries, IV, 190. The doctrine of provocation alleviating a homicide, so as to make it manslaughter not murder, thus developed alongside the development of the defences of misadventure and self-defence, which became grounds of excuse for homicide, instead of making it merely pardonable as originally they had. By the doctrine of provocation the common law judges and the old writers, Hale, Hawkins, Foster and others, thus brought the law of homicide a stage further in its progress from strict liability for an act causing death to a concept of guilt being the result of a state of mind.

It is not every provocation that will extenuate guilt and reduce murder to manslaughter. It must, to use the antiquated language of the eighteenth century, as repeated by East in his *Pleas of the Crown* (1803) I, 238, be: "such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact: so that the party may rather be considered as having acted under a temporary suspension of reason than from any deliberate malicious motive". Constantly repeated expressions are a "sudden provocation", an acting "on the sudden" and "in the heat of passion". The provocation must cause a "transport of passion and loss of self-control". As a comprehensive explanation, what Tindal, *C.J.*, said to the jury in *R.* v. *Hayward* (1833), 6 C. & P. 157, may be quoted: He told them that the question for their consideration would be "whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding; in which case the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only: or whether there had been time for the blood to cool, and for reason to resume its seat,

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before the mortal wound was given; in which case the crime would amount to wilful murder". To this may be added, as a more modern example, what Devlin, *J.*, as he then was, said in his direction to the jury so warmly approved by Lord Goddard in *R.* v. *Duffy* (1949), 1 All E.R. 932. It began: "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind".

Because the doctrine of provocation thus depends upon an uncontrolled, unreasoning and impulsive act, some writers, among them Mr. J. W. C. Turner in his edition of *Kenny's Outlines of Criminal Law* (1958), p. 154, have spoken of it as a case in which the law recognizes an "irresistible impulse". But I think that term is better avoided in this connexion. The law is concerned with an irresistible impulse as ordinarily understood only when it is a manifestation of the insanity of an insane man. It is concerned with an act done under provocation only when it is the act of a sane man. What is insisted upon, if provocation is to avail as a defence, is that the action of the accused should be a normal reaction of an ordinary man. It may be that, on psychological analysis, the impulsive act of a sane man and an insane impulse are similar, in that in each case there is an act done, without deliberation or volition, in immediate reaction on the presentation of a situation. But law looks at them differently, whether or not it is psychologically proper to do so. I thought that in this case the argument for the applicant failed at times to recognize the distinction. It was not suggested that the accused was insane; yet it seemed that it was urged at the trial, and in some sense repeated to us, that because of provocation and distress of mind he acted without intent to do what he did. But to rely upon provocation it was necessary to show that the provocative conduct of the deceased aroused in the prisoner an intent, in the legal sense, to do the act he did, not that it robbed him of the capacity to form an intent.

As a result of early cases in which the question of murder or manslaughter was submitted to the ruling of the judges, two rules became established concerning particular forms of conduct which would or would not suffice. At one end of the scale stood the case of a husband suddenly discovery his wife actually in the act of adultery. If he thereupon immediately killed her or her paramour, it was not murder but manslaughter. It was so held in 1671 in *R.* v. *Maddy*, 1 Vent. 158; and ever since this has been taken to be a rule of law. It is ordinarily said to depend upon the doctrine of provocation. But it may be that it has an older derivation; for in many parts of Europe in ancient times a husband finding a man in adultery with his wife might lawfully kill him upon the spot: see Blackstone, Commentaries, IV, 191; Puffendorf, Bk. II, C.V. 15.

At the other end of the scale stood pronouncements that reproaches, however grievous, and insulting words or gestures, however offensive, would not count as provocation if they were unaccompanied by any assault or blow. A blow might be answered by a blow causing death; and that would be manslaughter. But mere words, not being menaces, would not suffice to justify or explain a blow: if death ensued, that would be murder. Perhaps the rule that words alone would not suffice was not always quite strict. The early writers drew a distinction between homicide upon a grave provocation and homicide upon a slight provocation. A slight provocation would not excuse the use of a deadly weapon manifesting an intention to kill; but if the man provoked "had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill and had unluckily and against his intention killed, it had been but manslaughter": Foster, Discourse on Homicide, 3rd ed. (1792), p. 291. But it was only in exceptional cases, if at all, that mere words would count, even as slight provocation. And this is perhaps still the common law rule: see Holmes' Case, supra.

Between the two extremes of the common law—killing an adulterer taken in the act, which was always but manslaughter, and killing provoked by mere words which was nearly always, if not always, murder—are many rulings of the judges concerning provocation on particular facts. Many of them show how different in weight and character are the things that matter in one age from those which matter in another. The remarkable proceedings in *R.* v. *Taylor* and *Smith* v. *Taylor* (1771), 5 Burr. 2793, and the cases of *R.* v. *Brown* (1776), 1 Leach 148; *R.* v. *Snow* (776), 1 Leach 151 and *R.* v. *Smith* (1866), 4 F. & F. 1067, are some examples of the way in which judges dealt with particular facts. In the last of these Byles *J.* said that if two military officers met in the street, and one called the other a coward and a scoundrel, and spat in his face, and he immediately drew his sword and stabbed him, he thought it would be manslaughter. This as late as 1866. The spitting would prevent it being a case of words alone. But he said " if to take a case at the other extreme, an ordinary quarrel arose between husband and wife, and the wife spat at her husband, and the husband thereupon killed the wife, this, I think, would be murder". At one period it seemed that in this branch of the law principle might founder in a quagmire of single instances. It has been rescued by the recognition that the question is ultimately one of fact, to be determined by the application of general principles to particular facts, rather than by seeking for analogies among cases decided in earlier times in different social conditions. The cases of adultery and of mere words, however, remain apparently more or less hard and fast rules of law.

Sir James Fitzjames Stephen by his History of the Criminal Law and his other works had a large part in putting provocation on a basis of general principle. Articles 245 and 246 of his Digest of the Criminal Law (1877) sum up the common law. They may be aptly quoted here in full for they

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accurately stated the law as it was at the very time when his cousin, Sir Alfred Stephen, was engaged in the work of reforming it in New South Wales by the statutory provisions on which this case turns:

Article 245, "Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm".

Article 246, "Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind".

The last passage was approved in the judgment in Mancini's Case, supra. It is important because of the last few words which recognize that the whole doctrine is referable to the state of mind of the accused. But there is this qualification—the matter must be considered from the standpoint of the mind of an ordinary man in the circumstances.

I leave now the rules of the common law and turn to the New South Wales Crimes Act, 1900. The relevant provisions are s. 18, which defines or describes murder and provides that every other punishable homicide shall be taken to be manslaughter, and s. 23. Both these provisions are part of the great reform of the criminal law of New South Wales made by the Criminal Law Amendment Act of 1883. This measure modified, added to and consolidated the previous statute law of the Colony and codified some parts of the common law. In particular it did away with the old phrase "malice aforethought" as an element in murder, by an express statement of the circumstances in which murder shall be taken to have been committed. This was the result of s. 9, now s. 18 of the Crimes Act. And by s. 370 it enacted the provisions that are now s. 23 of the Crimes Act. Section 23 is in the identical words of s. 370; but its sentences are now numbered as two subsections, instead of being in an unbroken sequence. That makes no difference to the construction of the section. The Act of 1883 was the delayed product of the work of the Royal Commission on Law Reform, appointed in 1870, which in 1871 had presented its report, with a draft bill for the reform of the criminal law annexed. Several attempts to have the bill passed proved abortive. It was not until 1883 that it became law. And by then it had undergone changes and had had many new provisions added, so that as ultimately enacted it differs in many ways from that submitted by the Royal Commission. I mention this because the Solicitor-General brought to our notice the comments on s. 370 appearing on pp. 145 and 203

of the Criminal Law Manual (1883) by Sir Alfred Stephen and Mr. Alexander Oliver. This is an interesting work because Sir Alfred, when Chief Justice, had been President of the Royal Commission; and, having retired as Chief Justice, he was a member of the Legislative Council on the various occasions when the bill was before parliament; and Mr. Oliver, the parliamentary draftsman, had been secretary of the Royal Commission. The authors therefore said in their introduction that they "naturally entertain for the measure which they edit a paternal regard". But parents do not always well understand their children. Draftsmen are no exception. I greatly doubt therefore whether, even if this contemporary commentary on the Act were directly in point, we would be entitled to base any conclusion on it. It would be a different matter, perhaps, if the report of the Royal Commission had referred to the particular matter with which we are concerned. It might then be permissible to look at it, not for interpreting the enactment, but for ascertaining the particular defects in the earlier law that it was intended to remedy: *Assam Railways & Trading Co. Ltd.* v. *Commissioner of Inland Revenue,* (1935) A.C. 445; *South Australia* v. *The Commonwealth* (1942), 65 C.L.R. 373, at pp. 410, 439. But, in fact, the report, although it deals with murder and manslaughter, says nothing about provocation: and the original proposals of the Commissioners did not include any provision dealing with that matter. Section 370 was thus an afterthought. If it were legitimate to refer to its origin and legislative history, it might be found more correct to say it was the piecemeal result of parliamentary afterthoughts. But it is not legitimate to consider how in the course of its parliamentary history this provision came to take the form in which it was enacted. It must be construed as it stands and now as part of the Crimes Act, 1900.

It is obvious that the purpose and effect of what is now sub-s. (1) was to abrogate the common law rule that insulting words or gestures alone cannot amount to a provocation sufficient to reduce a killing from murder to manslaughter. That much is clear. But is this its only purpose? Does sub-s. (1) govern and control the whole? That is the first question. If it does, some difficulties would disappear. But the language does not really admit of this construction. Subsection (2) refers to "the act or omission causing death". Subsection (1) and the third requirement of the proviso refer only to "act" not to "act or omission". This is understandable, because provocation may explain an act done in the heat of passion; but it can hardly explain, still less excuse, an omission to act. On the whole, therefore, I think that sub-ss. (1) and (2) are quite independent provisions—sub-s. (1) merely enlarging the class of provocative conduct that can suffice to reduce a killing to manslaughter, sub-s. (2) being a general provision, and the proviso a statement of conditions that must be fulfilled for provocation to extenuate murder. Subsection (2) presents no difficulty as a general proposition. It was at common law always open to a jury who found that a killing was unlawful to refuse to find the element of malice aforethought necessary to make it murder

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and thus to bring in a verdict of manslaughter. That they may sometimes do so from motives of mercy or compassion, although the facts point only to murder, means that their verdict is unreasonable, and in that sense improper, not that it is unlawful or beyond their power: see *Beavan* v. *The Queen* (1954), 92 C.L.R. 660, and cases there referred to: also *Packett* v. *The King*, 1937, 58 C.L.R. 190, at p. 213. It has been suggested that sub-s. (2) is unnecessary if it be nothing more than an enunciation of a common law rule. But it should be remembered that, in relation to murder and manslaughter, the Act of 1883 was intended to be a restatement of common law doctrine, but shorn of some of the extravagances of malice aforethought and constructive malice. At common law murder was reduced to manslaughter by a provocation sufficient in Hale's words "to take off the presumption of malice", that is to say to remove the implication of malice aforethought that the deed created. As the new statutory provisions supplanted the old learning concerning malice aforethought, an express preservation of the jury's right to acquit of murder and convict of manslaughter was prudent. And as the common occasion for doing so was when provocation existed the proviso is not out of place. I go now to it.

It states accurately and succinctly certain elements of the common law concerning provocation, as understood in 1883. But it is not an exhaustive statement of the law on the topic, for it does not expressly provide that the manner of retaliation must not be disproportionate to the provocation. That doctrine has come in for some academic discussion and criticism in text books and periodicals: see Criminal Law Review (1954), p. 744 and p. 904; Russell on Crime, 11th ed., I, p. 610. But it has an early and respectable origin in the distinction that the old writers made between a slight and a grave provocation, and it is soundly related to the ordinary reactions of an ordinary man. An insult may arouse strong resentment; but an ordinary man does not on that account so far forget himself as to use a deadly weapon. Whatever criticism be made of it, the rule that the act provoked must bear some reasonable relationship to the provocative act is now authoritatively recognized as part of the common law: *Lee Chun-Chuen* v. *The Queen*, (1962) 3 W.L.R. 1461, at pp. 1468, 1469. And, although not expressed in s. 23, it must be understood: cf. *Attorney-General for Ceylon* v. *Perera*, (1953) A.C. 200.

To come now to the three matters that the statute states a jury must find before they can, in reliance on provocation, find a verdict of manslaughter instead of murder: The first, that such provocation was not intentionally caused by the accused, is merely a repetition of the old common rule that a contrived provocation will not suffice, Richard Mason's Case (1756), Foster 133, is an early example. There the judges said: "the blows were plainly a provocation sought on his part, that he might execute the wicked purpose of his heart, with some colour of excuse."

The second requirement, that the provocation was "reasonably calculated to deprive an ordinary person of the power of self-control and did in fact deprive the accused of such power", is merely a statement of the central principle of the common law of provocation.

The third requirement is "that the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life". This also, as I read it, merely describes an element of the common law. The words are a single composite description of an act provoked. The phrase ought not, I think, to be read as if, broken into parts, it stated several matters to be considered separately and independently of one another. It is true that the words "without intent to kill", if they be read as a separate specific element, and unqualified by their context, cause difficulties, as did the dictum of Viscount Simon in Holmes' Case, supra, that "where the provocation inspires an actual intention to kill or inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter very seldom applies". But the Privy Council has recently put an end to academic controversy about Viscount Simon's dictum by saying that "it cannot be read as meaning that proof of any sort of intent to kill negatives provocation. Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had in mind that actual intent in the sense of premeditation must generally negative provocation: *Lee Chun-Chuen* v. *The Queen*, supra, at p. 1465. It is in that way that the words "without intent to take life" in s. 23 of the New South Wales Act ought, I think, to be understood. To read them as if they described the absence of an intent such as is involved in the concept of mens rea, the sense in which the words "intent to kill" are used in s. 18 of the Act, would be to treat the Act as having overturned completely the law of provocation in New South Wales by removing the foundation on which it rests. To read them in that way and to give them that consequence seems to me, with respect to those who think otherwise, unnecessary and unjustifiable. Rather they should, I think, be read secundum materiam. They are part of a phrase expressive of an element in the common law doctrine of provocation, the fundamental assumption of which is that the provocation produces, in the words of East, a "suspension of reason arising from sudden passion", a frame of mind inconsistent with "deliberation or reflection". It is this which removes from the act done the element of presumed malice which makes homicide murder at common law. The distinction is discussed in an article by Dr. J. Ll. L. Edwards, The Doctrine of Provocation in the Law Quarterly Review, vol. 69, where, at p. 549, the author says: "The essential distinction constantly stressed . . . is between a preconceived, planned intention to kill and a sudden, spontaneous intention to kill." This, I consider, is correct, and I adopt a suggestion made by Barry J. in a learned article on this subject in Res Judicatae, vol. 4, at p. 133. The words "without intend to take life" in s. 23 mean, I think, using His Honour's words, "a

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premeditated intent to kill, which must really mena an intent to kill not primarily aroused by the provocation".

In New South Wales the law concerning provocation is to be found in s. 23, not in the common law. But, for the reasons I have given, I regard s. 23 as consistent with the common law. Indeed it is an affirmation of it—not an alteration, except that it enlarges its scope by putting provocation by insulting language or gestures, in the same position as provocation by a blow. That is how the section has been understood: R. v. Withers (1925), 25 S.R. (N.S.W.) 382.

Was the learned trial judge right in withdrawing the question of provocation from the jury's consideration in this case? The general rule is that if there is any evidence on which a jury, acting reasonably, could find the issue of provocation in favour of the accused the question must be left to them to decide as a question of fact; but if there is no such evidence the judge ought not to leave the question to them. Where this rule is statutory, as in the Tasmania Criminal Code, it has been explained by Dixon J., as he then was, in *Packett* v. *The King*, supra, at p. 217 by saying that "the reason why the question whether any matter alleged is capable of constituting provocation is made a matter of law lies in the main in the necessity of applying an overriding or controlling standard for the mitigation allowed by law . . . The Court is entrusted with the duty of ruling whether the matter relied upon is capable of depriving an ordinary man of his self-control". The same considerations prevail where the matter depends upon common law alone, or upon the impact of common law doctrine upon statutory enactment (as in New South Wales). As Lord Devlin said in an extra-judicial utterance—his Hamlyn lecture on Trial by Jury (1958), p. 86—there is a theoretical difficulty in reconciling a direction to a jury that they cannot acquit of murder on the ground of provocation with the decision in Woolmington's Case, (1935) A.C. 462. But however that may be, the common law rule is now well established. If there be any material on which a reasonable jury might find that there was such provocation as could in law extenuate the crime, the question whether it did so must be left to them under proper directions as to the conditions or elements that must exist in fact if it is to have that effect. It is for them to consider whether those conditions in fact existed. Unless they are sure they did not, the accused is entitled to the benefit of their doubt. That is to say at common law, as now understood, it is for the prosecution to prove that the killing was unprovoked; and the question of provocation ought not to be withdrawn from them, the jury, if there be evidence which could create a reasonable doubt: see *Chan Kau* v. *The Queen*, (1955) A.C. 206; *Bullard* v. *The Queen*, (1957) A.C. 636; *Bharat* v. *The Queen*, (1959) A.C. 538; *Lee Chun-Chuen* v. *The Queen*, supra, at p. 1466.

But where does the onus of proof of provocation lie by the law of New South Wales? The language of s. 23, read by itself, clearly means that it is for the jury to decide on a trial for murder whether there was provocation,

but that they are not to allow it to extenuate the crime unless they find the several matters laid down by the proviso in fact existed. That is not surprising, because in 1883, and for long afterwards, indeed until Woolmington's Case in 1935, few lawyers would have questioned that at common law the proof of provocation as a mitigating defence lay on the accused. Sir Michael Foster had said that "whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him, till that presumption is repelled by contrary evidence": op cit. 290. We know that this is not now the law, although the history of the law of homicide left little room for doubt that formerly it was. What now are we to make of statutory provisions about provocation which when enacted assumed the law to be as Sir Michael Foster stated it? The answer it not easy. There are some cases in which statutory language has not stood in the way of the application of the modern doctrine: see *The King* v. *Kahu,* (1947) N.Z.L.R. 368, and *Kwaku Mensah* v. *The King,* supra. The statutes in question in those cases were in less explicit terms than is s. 23. But it seems that the provisions of the Criminal Code of the Gold Coast, which were in question in the latter case, must have been read as requiring the accused to establish his defence of provocation, had it not been for the strength and length of the golden thread discovered by Woolmington's Case. Is the language of s. 23 too stubborn and intractable to yield in the same way? Is the section to be classified as one of the "statutory exceptions" to which Viscount Sankey referred? It certainly was not enacted to create an exception: quite the reverse. It was not meant to deprive the law of New South Wales of any basic principle of the common law. And, although I recognise the difficulties, I am not prepared to say that it does prevent the reception into the criminal law of New South Wales of a rule that has now been received as a fundamental principle of criminal justice in other lands whose law is founded on the common law. In the spirit of Woolmington's Case and according to the principle of the cases referred to above, I think we should regard s. 23 as laying down the conditions necessary for positively reducing murder to manslaughter by reason of provocation; but as not touching the negative position when the jury are in doubt whether the crime of murder, which means, and always has meant, an unprovoked killing, is established. If it be that I am wrong in this view, then I hope the section will be repealed and recast in a form in harmony with the modern views of responsibility for homicide that prevail elsewhere. But whether I be right or wrong as to the effect of s. 23 on the onus of proof matters not to my conclusion that this case was one in which the question of provocation should have been submitted to the jury, and that they should have been directed as to the several matters set out in s. 23, which would arise for their consideration as questions of fact. Taking these in order:

The conduct of the dead man during the hour or two before he met his death could be thought by a jury to be "reasonably calculated to deprive an ordinary person of the power of self-control". He had ignored the com-

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plaints of the accused against his attentions to his wife and had derided his remonstrances against his apparent plan to seduce her from him; he had taunted him by lascivious boasting of the enjoyment he expected to have by adulterous intercourse with her; he had jeered at his small stature and physical inability to prevent him taking his wife away; and then he had taken her off on his bicycle, she going with him despite the entreaties of the accused and of the eldest of the six children whom she was deserting. A jury could find too the next requirement, namely that this conduct did in fact deprive the accused of the power of self-control. They would have to consider all the circumstances. The accused was emotional, weeping, filled with resentment, in a state of mind in which he could bear no more and anything more might throw him into a transport of passion.

The statute next requires that the act causing death be done "suddenly, in the heat of passion without intent to take life". This is not quite the same thing as saying that it must be done in the heat of a sudden passion. It is not, I think, required either by the statute or at common law that the first beginning of emotion must not be earlier than just before the fatal act; nor do I think it is necessary that the provocative conduct should be a single isolated act. It may be an episode in a series of incidents, an episode which, because of what had gone before, proved to be beyond endurance and led to an onset of ungovernable passion. In this case the act causing death was the stabbing and cutting of the throat of the victim. Was there any evidence that this act was done suddenly in the heat of passion in the relevant sense? I think there was. It was for the jury to say what conclusion they would draw from it. There are cases in the books in which an accused, after some provocation, went off to get a knife or other weapon and then returned with it and killed. That was not treated as necessarily preventing reliance upon the provocation. All the circumstances must be considered. General statements about passion having time to cool do not, I think, enter much into a case such as this. It does not turn on a precise counting of the time, two hours or so, over which the episode of the afternoon extended. During the whole of that time the passion and emotion of the accused were mounting, not declining; and during part of that time his resentment and distress were being aggravated by new insults and further taunts that the jury might think would make any man in that situation the more ready to lose his self-control. They might think that, to use again the words of East that I have already quoted, the conduct of the dead man "would in human frailty heat the blood to a proportionate degree of resentment, and keep it boiling to the moment of the fact". But was it open to the jury to say that the fatal act was not only done suddenly and in passion, but also without intent to take life, in the sense, as I undersand it, those words bear in the statute? There was much against this. The accused, before he went in pursuit of his wife and the man whom he killed, had spoken of killing him. On catching up with them, he lost no time in actually killing him. And afterwards he told more than one person that he

had meant to kill him, and that he had set out to do so. These utterances were however themselves the products of continuing emotion. In his evidence he said that he set out in his motor car with the thought only of trying to get his wife to come back; that his attack was not premeditated, but that he lost control of himself when he saw his wife and the man together on the road; that his actions were done in a fury that then came over him and without his really knowing what he was doing. A jury might not accept this. They might think that what he did, although done in a time of great tribulation, was not done of a spontaneous impulse, but wilfully and vengefully and after some deliberation. But these it seems to me were the very matters that the jury had to consider. That their conclusion may have been right is immaterial if the trial miscarried because they were not rightly directed as to what was the question they had to consider. I would recall what Fullagar *J.* said in *Mraz* v. *The Queen* (1955), 93 C.L.R. 493, at p. 514. He spoke of "the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried". In this case, far from the Crown doing that, the Solicitor-General has appeared before us to say that there is a very real possibility that justice, justice according to law, has miscarried. It is not that the trial was not carefully and fairly conducted by the learned trial judge. It was. But in a difficult situation he, mistakenly as I see it, withdrew from the jury's consideration a matter they should have been directed to consider.

I would grant special leave to appeal, allow the appeal and order a new trial.

Special leave refused.