

McLean and Trinh v The Queen [2006] NTCCA 19

PARTIES: McLEAN, Ben William

AND

TRINH, Phu Ngoc

v

THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CRIMINAL APPEAL FROM THE
SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: No 5 of 2005 (20406191) No 6 of 2005
(20406192)

DELIVERED: 27 September 2006

HEARING DATES: 26, 27 and 28 April 2006

JUDGMENT OF: MARTIN (BR) CJ, ANGEL &
SOUTHWOOD JJ

APPEAL FROM: NORTHERN TERRITORY SUPREME
COURT, 20406191 & 20406192, 19 March
2005

CATCHWORDS:

CRIMINAL LAW

Appeal – appellant McLean – appeal against conviction – verdict unreasonable and cannot be supported having regard to the evidence – open to the jury to find that guilt proved beyond reasonable doubt – appeal dismissed.

CRIMINAL LAW

Appeal – applicant Trinh – appeal against conviction – inadmissible material placed before the jury – guilt proved beyond reasonable doubt, miscarriage of justice did not occur – leave to appeal refused.

Crofts v The Queen (1996) 186 CLR 427; *Weiss v The Queen* [2005] 80 ALJR 444; *Yunupingu v The Queen* [2004] NTCCA 10, followed.

REPRESENTATION:

Counsel:

Appellant McLean:	D Grace QC
Applicant Trinh	C McDonald QC
Respondent:	R Wild QC

Solicitors:

Appellant & Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McLean and Trinh v The Queen [2006] NTCCA 19
No 5 of 2005 (20406191) No 6 of 2005 (20406192)

BETWEEN:

BEN WILLIAM McLEAN
Appellant

AND:

PHU NGOC TRINH
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 27 September 2006)

Martin (BR) CJ:

Introduction

- [1] The appellant McLean and the applicant Trinh were convicted by a jury of the murder of two women, Phuangrsi Kroksamrong and Somjai Insamram. Ms Kroksamrong was the elder of the two women and was identified throughout the trial as “Mum” or “Poncee”. The younger woman was identified as “Noi”.

- [2] The appellant McLean appeals against his conviction on the sole ground that the verdict of guilty is unreasonable and cannot be supported having regard to the evidence. Leave to appeal has been granted.
- [3] The application by Trinh for leave to appeal was refused by a single Judge. Trinh seeks the leave of this Court to appeal on a single ground related to inadmissible material being placed before the jury in a transcript of an interview conducted by police with Trinh.

Facts

- [4] Very little of the Crown evidence was in dispute. It was common ground that the deceased were murdered on about Monday 1 March 2004. At that time both deceased were working as prostitutes out of the Palms Motel.
- [5] At the time of the relevant events both McLean and Trinh were aged 18 years. Late on Sunday 29 February 2004 Trinh rang Poncee in order to arrange for two women, including Poncee, to be available the next day for sex. The following day Trinh drove his father's white Toyota van to a store at Berrimah where he purchased a quantity of red rope, white cable ties and masking tape. He then filled the van with petrol. At 2.46pm Trinh called Poncee to confirm the arrangements for him to pick up both women and take them to his parent's home at Barr Road, Marrakai.
- [6] Poncee attempted to arrange for another prostitute ("Bunlue") to accompany her. Bunlue missed the telephone call and Poncee arranged to take Noi.

- [7] Both women paid rent for a week. Noi seemed happy and said she was going on a holiday.
- [8] At about 3.15pm Trinh went to the Palms Motel and picked up both deceased. Trinh drove the deceased to his parent's home at Barr Road. McLean was staying at Barr Road and was present when Trinh arrived with the deceased. There was no evidence that McLean was aware of Trinh's activities prior to Trinh's arrival with the deceased.
- [9] It was common ground that both McLean and Trinh had sexual intercourse with Noi. It appears that some sexual activity occurred between Trinh and Poncee.
- [10] At 10.41pm on Monday 1 March 2004 the credit card of Poncee was used at an automatic teller machine in Smith Street Darwin to make an account balance enquiry. Immediately thereafter an attempt was made to withdraw \$1,000 from the account which was followed by a withdrawal of \$700. At 10.43pm an account enquiry was made through the same ATM in respect of a second account held by Poncee. Immediately after that enquiry \$1,000 was withdrawn from that account.
- [11] At 10.55pm Trinh made a phone call to a friend from within one to one and a half kilometres of NT House. At 11.09pm Trinh called the same friend from within five kilometres of Chung Wah Terrace at Palmerston and at 11.10pm Trinh and the van he was driving were captured on a security video

at the Shell Service Station in Durack. At 11.27pm and 11.41pm Trinh called the same friend from within seven kilometres of Corroboree Park.

[12] At about midnight, Bunlue heard noises coming from Poncee's room at the Palms Motel.

[13] It was the Crown case that after murdering the deceased Trinh travelled to the city where he carried out the ATM activities to which I have referred and visited Poncee's room. On the Crown case Trinh then travelled home via the petrol station at Durack.

[14] There was no evidence that McLean accompanied Trinh. To the contrary, the attendant at the Service Station was positive that the driver of the van shown on the security film was alone in the front of the van. The attendant was unable to see if anyone was in the rear of the van.

[15] At about 8.30am on 2 March 2004 a bag belonging to Poncee was found on the Adelaide River bridge. Further access was gained to Poncee's bank account later that day.

[16] The bodies of the deceased were found in the Adelaide River at Corroboree not far from the bridge during the morning of 3 March 2004. The ankles of each deceased were bound together by cable ties. Each ankle was encircled by a cable tie and a third cable tie linked the cable ties around the ankles.

[17] A single cable tie encircled Poncee's right wrist. Red nylon rope provided a connection between the cable tie and a car battery.

- [18] Noi's wrists were bound together by three cable ties constructed in the same manner as the ties binding the ankles of both deceased. Red nylon rope connected the cable ties around Noi's wrists to a car battery. Noi also had white masking tape around her lower face.
- [19] In the opinion of the forensic pathologist, the most likely cause of death of both deceased was drowning.
- [20] As to Poncee's injuries, tissue was missing from the tips of her little and ring fingers of the left hand. In examination the pathologist expressed the opinion that the injuries were inflicted before death and that the original cuts had been sharp. In the pathologist's view such injuries could have been caused by sliding down brick work when Poncee's body was thrown from the bridge.
- [21] During cross-examination the pathologist agreed the injuries to the fingers were slicing type injuries likely to have been sustained at the same time. He also agreed that striking brick or concrete was more likely to produce abrasions rather than the crisp slicing type injuries sustained to the fingers. In the photographs of the bridge the pathologist was unable to see any surface likely to have caused such injuries. The injuries to the fingers would have bled copiously.
- [22] Poncee had sustained a deep bruise on the right posterior of her skull consistent with a blow before death with the potential to cause a loss of consciousness.

- [23] Deep bruising was found around the right corner of Poncee's mouth consistent with a blow having the potential to cause a lack of consciousness. Bruising was apparent on the front and back of the upper chest consistent with a blow or being caused when the body was falling. There was also bruising to the front of the back across the shoulders. The pathologist described the bruising to the chest as quite severe in as much as it had passed down into the deeper muscles. The pathologist agreed the bruising to the chest was consistent with being pushed against the railing of the bridge.
- [24] Noi had sustained a superficial ragged laceration to her left scalp. The injury could have been caused either before or after death. The pathologist also mentioned bruising to the arms.
- [25] On the Crown case the injuries to Poncee were evidence of a struggle or the application of physical violence prior to her body being thrown off the bridge. The Crown linked the evidence of injuries to the finding of beads in the van and on the bridge which were consistent with having come from a necklace being worn by Poncee.
- [26] On the bridge police found cable ties, including a cut or broken cable tie. A cardboard container for the rope, cable ties and the cable tie packet were located in the van.
- [27] A number of items were found at Barr Road including cable ties, a cut cable tie in a rubbish bin, a bundle of rope and two rolls of tape. Items connected with Poncee including her prescription medicine, diabetic kit and Centrelink

card were located together with a key that fitted the door to Poncee's room and a second key that fitted a tool box held at the bank in safe custody for Poncee. Remnants of the deceased's property were found in a burnt area at Barr Road.

- [28] The evidence established that Poncee's mobile telephone was used on 6 March 2004 in conjunction with the SIM cards of both McLean and Trinh.
- [29] From the time the bodies were discovered on 3 March 2004 until 7 March 2004 McLean and Trinh were seen working together and in each other's company socially. On 7 March 2004, following the identification through telephone records of Trinh as a person of interest, police made enquiries at Barr Road. The police vehicle became bogged near the home of Trinh's parents. Trinh and McLean appeared and, as described by the police officers, they ended up "having a chat" through the fence. Eventually, because it was a fairly hot day and the officers were exposed to the sun, Trinh and McLean were "kind enough" to invite the officers in and give them water. The officers advised the appellants that they were making enquiries following the discovery of two bodies in the Adelaide River and they had a "general chitchat" during which the officers established that the van belonged to Trinh's parents. The police did not specifically ask either McLean or Trinh about their knowledge of the women.
- [30] During the morning of 7 March 2004 McLean telephoned a Mr Humphris and asked if he and Trinh could stay at the home of Mr Humphris that night

because they were going to Brisbane. The conversation with the police having occurred during the morning of 7 March 2004, that afternoon McLean and Trinh drove to the home of McLean's mother where they said they were sick of the NT and were going to Brisbane. Later that afternoon they were driven to the home of Mr Humphris where Trinh made bookings to fly to Brisbane. Late that night they left the home of Mr Humphris in a taxi and travelled to the airport where they caught the early morning flight to Brisbane.

- [31] The appellants were arrested in Brisbane in the early hours of Thursday 11 March 2004. They were found hiding in a wardrobe.

McLean

- [32] The Crown evidence in the case against McLean established a strong circumstantial case that Trinh was involved in the murders. On the Crown case it was highly unlikely that Trinh acted on his own.
- [33] Independently of statements made by McLean, the Crown evidence established a close connection between McLean and Trinh at the relevant time and place and that McLean had sexual intercourse with Noi at those premises. As I have said, there was no evidence to connect McLean to the banking activities late on 1 March 2004 and the evidence connecting Trinh to the Shell Service Station on his own tend to point away from any involvement of McLean in those banking activities. While the Crown evidence did not suggest that McLean was involved in the purchase of the

cable ties, rope and tape found on or with the bodies, it was open to the jury to find that McLean was at the house when Trinh returned with those items and while some or all of them were used in connection with the deceased. The Crown evidence also established that McLean kept company with Trinh after the bodies were found and that immediately after the police visit to Barr Road on 7 March 2004 McLean travelled with Trinh to Brisbane.

[34] Notwithstanding the connection of McLean to Noi and Trinh in the circumstances described, the case was presented to the jury on the basis that the Crown could not prove guilt of the murders unless the jury accepted that the confessions made by McLean to police that he was involved in the murders of both deceased were true. The appellant gave evidence at trial that his confessions were false and that he was not involved in either murder. It necessarily follows from the verdicts of the jury that they rejected McLean's evidence and were satisfied beyond reasonable doubt that his confessions were true. In essence, the appellant submitted that the verdicts are unreasonable because the confessions lack credibility and are demonstrably unreliable. Counsel contended that in significant respects the confessions are contradicted by the objective evidence.

McLean's First Confession

[35] The first statement by McLean occurred immediately after his arrest in the early hours of Thursday 11 March 2004. This statement has been referred to as a "field interview". I have listened to the recording of the field

interview, but in setting out various passages from the interview I have relied upon the transcript provided to the jury as an aide memoire. Other than specific passages discussed later in these reasons, I have not endeavoured to check the accuracy of the transcript against my own understanding of what was said based on listening to the recording.

[36] After police stated they wanted to interview the appellant about the death of two women in Darwin, McLean was asked what he could tell police about that matter. He responded:

“I was in trouble and a friend helped me to get out of trouble”.

[37] McLean identified Trinh as the friend who helped him. He said he had spoken to his mother and told her he was in trouble, but did not tell her “exactly what went on”. McLean then gave a version of his involvement by reason of a connection with the “Hell’s Angels” which he said in evidence before the jury was false:

“Q. Okay. You said you were in trouble with somebody?

A. Yeah Hell’s Angels.

Q. How did that come about?

A. I was using speed and I ripped them off.

Q. How much did you rip them off?

A. About fifty thousand.

- Q. And how did this trouble with the Hell's Angels lead to the death of the two women?
- A. They said that they will knock me off unless I do them a favour. To repay the money.
- Q. And what was the favour?
- A. Get two prostitutes off the street.
- Q. And did they say anything else in relation to getting them off the street?
- A. Yeah they said that I had to kill them.
- Q. And did you and Phu [Trinh], or you, did you actually kill them?
- A. I didn't.
- Q. Alright, what happened?
- A. I drove the vehicle.
- Q. Which vehicle mate?
- A. The van that the cops have running tests and all that.
- Q. And who told you that they got the van up there?
- A. My bother Isaac.
- Q. So you drove the van, what happened the women?
- A. As far as I know they were killed and we dropped them off the bridge.

Q. So who was there when they were killed?

A. Me and Phu.

Q. How were they killed?

A. I think suffocation or strangled. I didn't watch.

Q. Alright where did this take place?

A. On the road towards Adelaide River.

Q. Do you know what time of the day or what day it was that this occurred?

A. No I don't.

Q. Do you know the names of the two women that we are talking about?

A. No I don't."

[38] McLean went on to tell police that Trinh picked the women up, but he did not know where that had occurred. He said he did not know how Trinh met them. McLean told police that at Trinh's house he and Trinh put the women in the back of the van and they were placed there "sitting upright". He said he drove the van from the house to the Adelaide River and that it took about 20 to 25 minutes. Asked when they died, McLean replied "At some point on the way there".

[39] McLean told police that as he drove to Adelaide River Trinh was in the back of the van with the two women. The statement continued:

“Q. And what happened to make you think that they had died?

A. We pulled over and went to dump them off the bridge (inaudible) and they were all already dead.

Q. They were already dead?

A. Yeah well they weren't moving or kicking or anything. If anyone's going to throw me off a bridge I'd be kicking or saying something.

Q. So they didn't kick and they weren't saying anything?

A. No.”

[40] McLean told police that the younger woman was the first deceased thrown off the bridge. He described where on the bridge they had stopped. The statement then continued as to how the deceased were tied to batteries:

“Q. Was there anything done to them prior to them going into the water?

A. Yeah they were tied to a battery.

Q. Tied to a battery? Both of them tied to batteries?

A. To a battery.

Q. Each of them tied to a battery?

A. Yep.

Q. And what was that for?

A. That was to supposedly hold them under.

- Q. Who's idea was that?
- A. I come up with that idea we were supposed to use bricks but we had no bricks.
- Q. Where did the battery come from?
- A. I don't know just lying around the farm.
- Q. Out of a car at all?
- A. I dare say it would have been out of a car.
- Q. Did you get the batteries?
- A. I grabbed one, he grabbed the other.
- Q. So there was two batteries?
- A. Yeah (inaudible).
- Q. Alright were their hands or feet or anything done there with their hands, feet or mouth?
- A. Um I'm not sure about the mouth but hands were binded together and feet were binded together.
- Q. And what were they bound together with?
- A. Cable ties.
- Q. Where did those cable ties come from?
- A. I don't know, Phu got them."

[41] McLean told police that the younger woman objected to the binding of her ankles and wrists and he restrained her by holding her in a hug. The questioning then returned to the Hell's Angels and the appellant told police that the women were the "girls" that he had to get off the street. The questioning continued:

"Q. How did you know that had you seen photographs of them before?

A. Photographs, they showed us these two cause as it said already in the paper, the older women was already a well known prostitute.

Q. Did Phu see these photos as well?

A. Yeah I told him.

Q. You told him? And you approached him and told him I am in trouble with the Hell's Angels is that right?

A. Yeah.

Q. And where did the conversation with the Hell's Angels take place, this bloke called "H"?

A. In at the Vic Club at Darwin.

Q. Do you remember when that was, how long prior to the girls dying?

A. No I can't remember, months."

[42] McLean told police that he had been given the speed in bulk, but he did not think it was worth \$50,000. He thought it was probably something in the

order of \$10,000 to \$15,000. He said it was probably two months before the death of the women that he had been approached by H. He said he was given names and photos, but the names were too hard for him to pronounce.

The questioning continued:

“Q. And they had these photos. And they indicated that these are the two girls?

A. Yep.

Q. And you translated this to Phu did you? You told Phu?

A. Yeah.

Q. And Phu agreed that he would help you out of trouble is that what your saying?

A. Yeah.

Q. And by that you're saying, he rang the girls?

A. No I don't think that he called the girls.

Q. You don't believe that he called the girls. How did he make arrangements to go and get the girls?

A. Um he got told that they stay in a certain hotel room a lot of the time.

Q. So your at home, at Phu's place?

A. Yep.

Q. And Phu said I'm going to get the girls now, something like that?

A. Yeah.

Q. And you knew he was going to get them?

A. Yeah.

Q. And at the time he left you knew that when the girls came out that you were required to kill them?

A. Inaudible.

Q. So he returned with them in the van?

A. Yep.”

[43] Subsequently in the interview the appellant was again asked about how the batteries were tied to the legs:

“Q. You said ... who tied the batteries to the girls’ legs? Were they tied to the legs?

A. Yeah they were tied to the things that oh the cable ties on the ladies legs.

Q. How many cable ties did you put on their wrists?

A. It will be one on each side and one in the middle.

Q. Remember what colour the ties were?

A. White.

Q. How many cable ties did you put on their ankles?

A. It would be the same, three.

Q. Three? So when was the batteries actually tied to their feet?

A. When they were situated in the van.

Q. Where they tied to anything else?

A. No.

Q. So they were just tied to the batteries, and what did you tie the batteries to the legs with?

A. Cable tie.

Q. Cable tie. Yeah but I mean the battery to their legs.

A. To their legs was connected to the cable tie that I know of.

Q. That you know of?

A. Yeah.

Q. Was there any rope that ties the batteries to their legs?

A. Not that I

Q. Not that you?

A. Not that I seen no.

Q. Did you tie the batteries to their feet?

A. No I just cable tied them?

Q. That was at home?

A. Yeah. That was the same place where we got the batteries when we put them in the van.

Q. So you tied the batteries to them at home, is that right?

A. Yep.

Q. And then carried what them and the battery to the van?

A. No we sat them upright in the van and tied them to the batteries, so.

Q. And you don't recall using any rope to tie the battery to their feet?

A. No."

[44] In the transcripts of the field and second interviews a number of McLean's answers are followed by a question mark. For example, the answer cited in para [38] of these reasons "At some point on the way there" is transcribed with a question mark. Counsel for the appellant relied upon the existence of the question marks as demonstrating uncertainty in the mind of McLean when giving those answers. In response, counsel for the Crown submitted that the transcript is not accurate and that the particular answers under consideration were not given in the form of questions.

[45] I have listened to the particular questions and answers in both the field and second interviews to which counsel directed the Court's attention and to a number of other answers after which a question mark appears in the transcript. I am satisfied that the transcriber erred on each occasion. None

of the answers were given by McLean with an upward inflexion or in any manner suggestive of a question or uncertainty. Contrary to counsel's contention, there is a noticeable absence of uncertainty throughout both interviews.

McLean's Second Confession

[46] The second interview took place at the police station commencing at 1.57am on 11 March 2003 and concluding at 3.28am. It was recorded on video. I have viewed and listened to almost all of the second interview, but apart from specific matters mentioned later in these reasons I have not checked the typewritten transcript for accuracy.

[47] In essence, McLean again confessed to the two murders in substantially the same terms as the confession in the field interview. Having been given the formal caution and said that he did not wish to contact anyone, asked to say in his own words what he knew, McLean replied:

“Two ladies were killed as far as I know and they got killed by my friend and I and we did it to get me out of trouble. Myself, from the Hell's Angels. What else would you like to know?”

[48] McLean told police that about three or four months prior to the murder of the woman he was contacted at the Vic Hotel by a member of the Hell's Angels called H. He was given speed on credit and subsequently H approached him and said that McLean had ripped them off and owed them \$50,000. When McLean told H that he did not have any money, H hit him on the side of the face and said he had better get the money otherwise he

would be dead. During the subsequent conversation H told McLean that if he did a particular job they would call it even. There were two Thai prostitutes who were cutting their business, one of whom was well known. McLean agreed to do the job and was given photos of the women. He was also told their names, but he said that he was unable to pronounce the names. McLean said he was not told anything else other than he could see them at the Palms Hotel.

[49] The following passages from McLean's second interview deal with how Trinh became involved:

“Q. All right. So how was it that Phu [Trinh] became involved in this enterprise?

A. Um. I told him about it.

Q. When did you do that?

A. After that night?

Q. Which was what, a month ago?

A. Yeah.

Q. And whereabouts did that happen?

A. At my place

Q. In Stephens Road.

A. Yeah.

- Q. And so what did you say to Phu?
- A. I said I'm in some big trouble and he said how and I said I'd been using needles and he said I'm a dickhead for using needles and he said what sort of trouble and I said that I needed to kill two people otherwise I'm dead and he agreed to help me.
- Q. So Phu's jumped on board?
- A. Yep.
- Q. He's agreed to help you by killing two people?
- A. Yep.
- Q. And how did Phu know who to contact?
- A. I do not know how he got that information. I didn't give him no phone number or nothing.
- Q. So you didn't give him any names of the people that you were to kill.
- A. No I didn't know the names, I just described them. I said a couple of Asians one's well known as a prostitute.
- Q. So when did this happen, how long ago was this conversation?
- A. It would have been about four weeks from now.
- Q. And so you were unable to remember the names of these people, two ladies?
- A. No I can't remember them.
- Q. Or you were unable to recall them even for Phu is that correct?

- A. Yeah I can't pronounce them.
- Q. Well how did you indicate to Phu who they were?
- A. Just by description, I said they're well known, their normally at the Palms hotel.
- Q. Well OK. How did you describe ...?
- A. I described, I said there's one which is chubby, old and got long black hair and she's well known as a prostitute already. Said you normally see her around. That's what I got told. He said yeah, he said he think he'd seen them before and then I said that there was a younger one a lot darker skin with short hair, just average height like a little bit taller than me, bit shorter than me and just described them like that.
- Q. And what nationality did you go to a nationality?
- A. Yeah I told him they were Thai.
- Q. They were what?
- A. Thai.
- Q. Thai. And from that description that you provided to Phu he was able determine or ascertain who the two victims were to be?
- A. Yeah. Once I described the old well known one he said he's seen her around before.
- Q. Is there anything in particular about, I understand that the older one that there would be something particular about her because she's plump and old. But the young one is there anything in particular about her that would set her aside from other people of similar appearance?

A. Um just seen with her, I got told that she works for the older one so they normally come together.

Q. And you don't know the arrangement that Phu's made to get these ladies at the block do you?

A. No, no.

Q. All right. So you've gone ahead with the killing of the two ladies?

A. Yep.

...

Q. And when "H" has come to you and told you what he wants you to do and then you've gone back and told Phu about it, where was the plot I suppose hatched, for want of a better word, about what you were going to do? Did you discuss, where was that conversation?

A. That was at my place in my caravan. I live there with my mum.

Q. OK. So did you throw up certain idea's, was, were you bouncing ideas (inaudible), like did you work out how it was going to be done, like do you say, how did it come they were dumped in the river. Is that the sort of thing you talked about, discussed, that's the best way to get rid of a body or?

A. Yeah we discussed that it would be a good idea to put them there. The place is not too far to go.

Q. Did you discuss any other possible methods of disposing of people or?

A. Yeah we thought we could dump them out in the bush but we got no way of getting them there. It's too wet out there, too boggy. And we also discussed the idea of me running from the Hell's Angels.

Q. Yeah, okay, and what sort of pushed you towards the, um, throwing them in the river plot instead of running from the Hell's Angels and trying to escape. What was the reason there?

A. Cause Hell's Angels is well known and who knows they could know my family through, Assan knows my brother and I've been heard I've been told they do target families and inaudible."

[50] McLean said that Trinh picked the girls up in the Toyota van. He did not know where Trinh picked them up. He said the plan was to sleep with the prostitutes for consensual sex and then kill them.

[51] According to McLean's confession, he had penile vaginal sex with the younger woman. He said he believed Trinh had sex with the older woman. After sex they asked the women to sit on the couch and he and Trinh cable-tied their hands and feet together. The younger woman protested, but the older woman was just saying to agree. McLean held the younger woman while Trinh tied up the older woman.

[52] McLean told police that he and Trinh walked the women outside and put them in an upright position in the back of the van where they were cable-tied to batteries which had been obtained from the back of the house. McLean suggested the idea of batteries because there were no bricks available. Asked specifically who fixed the batteries to the bodies, McLean said it was done by Trinh while they were at home. He saw that happening, but he did not see any red rope either then or at the bridge when the deceased were thrown from the bridge.

[53] McLean said that after the women were tied to the batteries, they waited a while for it to get a bit later. While waiting they were talking about how they were going to do it:

“Q. So what was the proposed course of action you were going to take?

A. Um originally I was supposed to kill em but I couldn't do because I've never done it before and not particularly that type of person but it was originally to break their necks or strangle them and then dump them over the bridge with a weight tied to them.

Q. All right so can you tell me what did happen then if you couldn't do it?

A. Phu said he would help as a friend.

Q. So what did he do?

A. Um he rode in the back of the van on the way there.

...

Q. Can you tell me what happens when you've travelling to the Adelaide River?

A. Oh Phu said just drive slow, so I did, didn't look back or nothing.

Q. So you don't know what he was up to?

A. No, I knew but I didn't want to see it.

Q. All right well what did you know?

A. I knew he was going to kill em at one stage on the way.

Q. And do you know how he was going to do that?

A. Um we suggested either break their neck or suffocation.

Q. And do you know how he did it?

A. No.

Q. Did you talk about it after he did it?

A. No.

Q. So you've got no idea how he did it?

A. No cause he said he'd prefer not to talk about it in case I have nightmares."

[54] McLean told police that while driving to Adelaide River he had music on and did not hear any sounds coming from the back. He was not aware of any signs of struggle. He described stopping on the Adelaide River Bridge with the intention of disposing of the bodies as fast as they could and keeping an eye out for headlights.

[55] McLean described pulling up, opening the sliding door on the passenger side and helping Trinh throw the bodies over the side. He said Trinh turned the deceased around and passed him the legs. The skin of both women was wet and cold. Trinh had hold of the deceased's hands. They picked each body up and placed it over the other side of rail. The younger woman was first.

[56] McLean was asked why the older woman was wet. He responded:

“I do not know. Probably when the, I’ve been told, I don’t know but when a body passes they piss themselves or shit themselves”.

[57] Asked how the battery was tied to the younger deceased, McLean said it was bound by cable tie to her legs. He said the battery was tied to the feet or legs of the older woman. Asked specifically about red rope or cord, McLean said he was not aware of any such rope or cord. Nor was he aware of the use of any tape around the mouth or head of one of the deceased. He said there was no need to alter any of the restraints or cable ties in the process of moving the deceased and putting them over the side of the bridge.

[58] McLean said that the women were dead when they were thrown from the bridge. He said he assumed Trinh had killed the women, but he did not know how this had been done because it was quiet. He was unaware of the women being hit with anything. He was unaware of the missing finger tips.

[59] As to whether he saw anything after the deceased hit the water, McLean said they disappeared and bubbles rose. He was able to see the bubbles through use of a torch.

[60] McLean was asked about the state of the light on the bridge at the time the bodies were thrown from the bridge. He said it was “fairly dark” and he was able to make out basically the shape of the deceased being the outline of the body and “that’s about it”. He was unaware of anything falling out of he truck.

[61] McLean told police that he and Trinh did not talk on the way home. Asked why not, McLean replied “Cause he didn’t want me to know anything”.

McLean said that when he went to bed Trinh was talking on the telephone and he did not know if Trinh left the house. He slept all night.

[62] As to what happened to the clothing of the deceased, McLean said he did not know, but he believed that Trinh got rid of the clothing because the clothing was not in the house the next morning. He had last seen a pair of jeans on the floor and he thought there was a pair of shoes outside.

[63] Later in the interview McLean was asked about an area of burnt ground at the rear of the premises:

“Q. The police executed a search warrant at Phu’s place. There was out the back of the place there was an area of burnt ground. Are you able to tell me anything about that?

A. Yeah as far as I knew that was where we threw our rubbish and burnt it.

Q. Right, were you aware of any rubbish being thrown there between the time the ladies were at your place and the time you got rid of them?

A. Yeah I took rubbish out just before they got to our place, put them in the plastic bags on the pile.

Q. What about That was before what about after? After you got rid of the bodies, was anyone burning anything there?

A. Not that I know of I went to bed.

Q. The reason I ask you that is that we found in things in that fire that seemed to have originated from those ladies ie buttons from their jeans, shoes and stuff like that. Do you know anything about that?

A. No I didn't no."

[64] McLean described subsequent events and denied any involvement in the use of the deceased's credit cards. He spoke of the occasion when the police were bogged next door. As to the decision to leave Darwin, McLean said:

"As you know, you arrived and that's when we both said nup it's getting too close let's see if we can better our chances somewhere else."

[65] Toward the end of the interview, McLean was asked whether he gave consideration to contacting police. He gave the following answer:

"A. Yes, on the other day when my mum contacted me after she had been taken in for an interview. She said that I would be better turning myself in and I discussed about turning myself in and we came to the agreement of no. Cause, see if we can get away first.

Q. Sure. When your mother gave you that advice and let me say that I think that it was probably pretty good advice, what did you tell her about what you'd done?

A. I told her that I'd killed two people."

[66] Almost at the end of the interview, McLean said no one forced him to commit the crimes. Asked if there was anything else he wanted to say and encouraged that it was his chance to say anything that could be put before the Court to explain himself, McLean said:

“I’m just sorry for what I’ve done but I understand if anyone else is in my predicament, it’s either me or them, they would have made the same decision. Maybe I don’t know.

McLean’s evidence

- [67] McLean made a formal admission and gave evidence before the jury that his version to the police about the Hell’s Angels was false. In evidence McLean said he did not kill the deceased or assist in their death. He told bits of the truth in the interviews, but not the truth about the death of the deceased.
- [68] McLean said in evidence that during the morning of 1 March 2004 he and Trinh picked okra. During the midday break for lunch Trinh received a phone call and told McLean that he had to go into town and McLean should stay at the house. McLean went into the caravan and slept until early in the evening when Trinh opened the door saying “We have guests”. When he came out of the caravan he saw the two women. He did not know who they were and had never seen them before.
- [69] According to McLean, Trinh introduced the women and said they were working girls. The younger one was identified as Noi and she referred to the older woman as “mum”.
- [70] McLean said he had never been with a prostitute previously. He understood that Trinh and Noi had sex in the caravan after which he had sex with her. He and Noi had a shower. After Trinh finished with the older woman he and the two women spent about half an hour in the caravan listening to music.

[71] McLean told the jury that Trinh came to the door of the caravan and said he wished to talk with the women. They left the caravan and he remained in the caravan alone for between 20 and 40 minutes listening to music. Then he heard raised voices which could be considered as arguing. They seemed to be deep male voices coming from the front of the property. He left the caravan and saw Trinh with three or four Asian men who he had not seen before. He also saw a white four wheel drive like a Nissan Patrol or a Landcruiser and the headlights of another vehicle which he was unable to see clearly because of the van.

[72] McLean said that when he left the caravan the men stopped talking. Trinh turned around and escorted him back into the caravan. In the caravan Trinh told him to stay there and he would come to get him. McLean was inside the caravan for about 40 minutes before Trinh returned and told him he had to take the women to meet the men.

[73] According to McLean he and Trinh had an argument about whether McLean should accompany Trinh and the women. He said Trinh told him he did not want McLean to go as it was a matter for him to sort out and nothing for McLean to be involved in. McLean dressed and got into the driver's side of the vehicle. He saw two figures or outlines of bodies in the back of the van. It looked like they were sitting on the internal bump of the mudguard. He assumed it was the women, but did not speak to them because the argument continued. Trinh was concerned and did not want McLean with him. Trinh

said his past had caught up with him and it was something for McLean not to be involved in.

[74] McLean drove and headed towards Darwin with Trinh in the passenger seat. After a short time he gave up trying to convince Trinh to allow him to accompany Trinh. In response to Trinh telling him to pull over, McLean stopped about three kilometres from Trinh's home. He said there was a satellite dish on the side of the road and Trinh left saying he would toot the horn twice when he returned.

[75] McLean said he did not see the women again. He sat at the satellite smoking for some time and lay back and fell in and out of sleep. He was at the satellite dish for about four hours and thought about walking back to his mother's place, but that would be about five kilometres and he was too tired to even make the effort to walk back. McLean said he had his eyes closed lying back when he heard the horn toot twice and the van being driven by Trinh was nearby facing back towards Barr Road. No one else was in the vehicle. When they returned home he went into the caravan and fell asleep. He was not 100 percent sure, but he thought that Trinh made a phone call.

[76] During cross-examination McLean was asked why he was so tired while he was waiting for Trinh. He said he did not know. He agreed that he "pretty well" slept all afternoon and had been with the women for a few hours.

[77] McLean said in cross-examination that there was no aggravation with the women at the time that Trinh came to the door of the caravan and said he

had to speak to them. At that time Noi was dressed in a top and a g-string with a green towel wrapped around her. She had not put her pants on.

McLean agreed that the women left the caravan dressed “pretty informally”.

He said he did not see them again, but he assumed they were in the rear of the van when he and Trinh left the premises. He did not think much about how they were dressed or undressed. He did not check to see if they had taken their belongings.

[78] As to why he wanted to accompany Trinh, McLean said he was not 100 percent sure why, but he just wanted to be there with him. The questioning continued:

“Q. Why?

A. Well, there was four guys and only him.

Q. Why go at all?

A. Why not, I’m his friend.

Q. No, why should he go at all?

A. Why should he, I do not know.

Q. This is all nonsense, isn’t it?

A. No, it is not.

Q. Having got into the car to go with him, there are two women in the back you think?

A. I assume, yes.

Q. And you now know they weren't dressed properly?

A. Yes.

Q. And they were sitting there quietly, were they?

A. Yes.

Q. Being driven off to who knows where?

A. Yes.

Q. And not one of them, neither of them made any protest?

A. No.

Q. They were already tied up weren't they?

A. I do not know.

...

Q. And you're saying that these women in the back of this vehicle were restrained or unrestrained?

A. I don't know myself.

Q. You could see them, couldn't you?

A. Yes.

Q. You did see them, didn't you?

A. I didn't see them, I seen figures in the back that I assumed was them.

Q. And these are figures that didn't say to you: "Ben, please. Do something"?

A. I don't think they knew my name.

Q. Say that again?

A. They didn't call me by name the whole time they were there.

Q. They didn't scream out?

A. No.

...

Q. Why were you so determined to go?

A. I didn't know why I was so determined to go. I just wanted to be there for Phu.

Q. You didn't see this as a situation of danger did you?

A. No, not really but it could have had potential to be danger.

Q. But you were desperately keen to go with Mr Trinh and his friend?

A. Yes.

Q. To help him?

A. Yes if needed.

Q. Against these three or four big men?

A. I wouldn't say big. There was one big man.

Q. And there were two other cars I think you told us?

A. Yes.

Q. Why didn't you tell Mr Lade about this?

A. 'cause Phu didn't want them to know about the other guys being involved."

[79] As to why he did not say goodbye to the women, McLean said he was "pissed off" and not in a polite mood because he had argued with Trinh. As to why he did not stay in the van if he was so determined to remain with Trinh, he said Trinh "wasn't allowing it" and was "giving it to him verbally". It was just a fluke that they stopped near the satellite dish.

[80] During cross-examination McLean said that when Trinh picked him up at the satellite dish he did not say anything to him. Nor did he say anything to Trinh when they got home. He saw one of the women's shoes outside the door and the jeans, but he did not say anything to Trinh about the women having forgotten their clothes. He said he did not think much of it and went straight to sleep. The next morning he woke up and the jeans and shoes were gone, but he denied that there was any smell of petrol or fire in the air. He did not say anything to Trinh about what had happened the previous night or about the clothes being left behind.

[81] McLean said he heard on television during the afternoon of Wednesday 3 March 2004 about the bodies being found in the Adelaide River. His

reaction was to ask Trinh whether or not they were the women who had been at the property. Trinh said yes and McLean asked what the hell was going on and why did Trinh get McLean involved in this. He thought he was involved because the women had been at the premises and he had slept with Noi.

[82] McLean said that over a period of time he kept nagging at Trinh to find out information. Trinh told him the women had been strangled and had their hands and legs bound like handcuffs and batteries tied to them as a weight to hold them under. He was told they were thrown off the bridge. McLean asked Trinh who the women were and was told he was better off if he did not know. It was to do with Trinh's past and Trinh did not want McLean involved. On one trip into town Trinh slowed, put the van into first gear and idled across the bridge pointing out where the women were thrown off.

[83] McLean said that after the police had visited Barr Road, Trinh said they had to leave. Trinh told him that he had to go to Brisbane to sort something out. Mclean said he decided to go to Brisbane because Trinh told him to go with him as he did not want McLean to stay behind. Trinh said the people would go after McLean and he wanted McLean with him so he could keep an eye on him. Trinh sounded and looked serious when he said it and McLean believed him.

[84] McLean agreed in cross-examination that he and Trinh had been looking after the property for Trinh's father. There was okra to be picked every day

otherwise it would become too big. McLean agreed with the proposition that he and Trinh had deserted the property without telling Trinh's uncle.

[85] As to why he did not say to Trinh that Trinh should go to Brisbane by himself and sort it out, McLean said he did not think of it in that way as he was Trinh's friend. He said he would not desert his friend "in a time of need". When it was suggested he thought Trinh was a murderer at that time, McLean responded "No, I did not".

[86] As mentioned, McLean and Trinh went to the home of a witness, Mr Humphris, where they spent time before catching a taxi to the airport. McLean said in evidence that on the back balcony of Mr Humphris' flat Trinh told him that if the police asked McLean any questions he was to tell them that the women got picked up in a blue vehicle and he could not see the driver. McLean agreed to do so.

[87] McLean did not tell the police that the women were picked up in a blue vehicle. He said in evidence that he forgot about it.

[88] McLean gave evidence that on the way to the airport in the taxi Trinh told him to tell Trinh's friends in Brisbane that McLean was in trouble for a speed debt with the Hell's Angels and Trinh had helped McLean by killing two women to get McLean out of trouble. McLean said he could remember the name of only one Vietnamese friend, Vinh Giang. As to how he felt about giving that story to the friends of Trinh, McLean said he went along

with it because Trinh did not want his friends to know about the other people being involved.

[89] McLean said that after arrival in Brisbane, and having had a couple of hours sleep, Trinh went back over the story with him about being in trouble for a speed debt with the Hell's Angels and that Trinh had killed the two women to help McLean get out of trouble. Subsequently a friend of Trinh conveyed them to the home of another friend where, according to McLean, he spoke with Vinh Giang and told him the story about the Hell's Angels. Later Trinh told the story to Giang and another friend, Sam.

[90] During cross-examination McLean gave the following evidence about those conversations:

“Q. And when the police started asking you questions you forgot what story to tell?

A. Initially yes.

Q. Initially?

A. Yes.

Q. Told the wrong story for about three hours, didn't you?

A. Yes, that was the story I'd decided to go with because the only two people knew where we were and that's the story they had.

Q. Why was it necessary to tell Phu's friends that you were both murderers escaping from the Northern Territory?

A. I do not know.

Q. Didn't it seem a bit stupid to you?

A. I didn't think much of it at the time no.

Q. Were you boasting about it?

A. No, I was not.

Q. So you thought you'd stay with that story?

A. Yes.

Q. And rejected the blue car story?

A. Yes.

Q. That was the one that Mr Trinh had suggested at another time to you?

A. Yes, it was."

[91] McLean said that at the same premises he received a call from his mother and, while she was still on the line, he told Trinh he wished to turn himself in. Trinh responded in the negative saying things were not sorted out and they would use McLean's family against him. McLean told his mother that he could not turn himself in.

[92] McLean gave the following evidence about the conversation with police in the field interview immediately following his arrest:

"Q. Did you tell the truth when you spoke to the police at Frizzle Street?

A. Parts of.

Q. Did you tell the truth about your involvement in the killing?

A. No, I did not.

Q. Why did you tell that story that you told to the police at Frizzle Street to the police?

A. I said that story because there was only two people that knew the house that we were at other than Ben Hamilton himself and I thought that they had already told the police what we had told them.

Q. Who's them?

A. Vinh Giang and Sam.

Q. What do you mean what you'd already told them?

A. How we told them that I was in trouble a speed debt with the Hell's Angels and that Phu helped me by killing two women.

Q. And you told that story then to the police on the tape?

A. Yes, I did."

[93] During examination McLean was taken through the field interview in detail and asked about the various answers. It is unnecessary to canvass his explanation for every statement. In substance, he said he knew the details that he gave to the police from previous conversations with Trinh.

[94] McLean was asked why he told police in the field interview that both he and Trinh put the women in the back of the van. He replied:

“I gave that answer because the initial story was that I was in trouble with the Hell’s Angels for a drug debt and it was done for me so I thought I would put myself in some involvement.”

[95] McLean said he made up the answer that it was his idea to use batteries. As to why, he said:

“I implicated myself in some way, because after all this was supposed to be done for me, for my supposed drug debt with the Hell’s Angels.”

[96] As to why he told police the younger woman objected and he had restrained her in a hug, McLean responded “I don’t know. It was pretty well a lucky dip between my head”. He went on to say that all the details he gave about the Hell’s Angels were details that he made up around the basic story of being in trouble for a drug debt.

[97] As to why he told police that he was involved in dropping the women off the bridge, McLean said he was continuing with the story he had already given that he and Trinh did it together. He did not know whether the batteries were tied to the legs of the women. He made that assumption. He knew there were white cable ties in the van. As to giving details that there was a cable tie on each wrist and one in the middle, McLean said he did not apply the cable ties, but had been told they were like a handcuff and he assumed that it was the way they were made. He assumed the batteries were tied to the body by cable ties.

[98] In evidence McLean gave a similar explanation for his subsequent confession in the second interview that was recorded on video. He said he

confessed and gave the story about the Hell's Angels because it was only a short time prior to the interview that he had given that story. He maintained that the confession was untrue. He answered some of the questions in the interview based on information Trinh had given him and made other details up.

[99] As to telling police that the bodies of the deceased felt wet and cold, McLean said that he had heard on CSI [Crime Scene Investigation, a television show], that when someone dies their bowels loosen up or give way. He made up the answer that the bodies felt wet and cold.

[100] As to the detail that bubbles rose when the bodies disappeared under the water, McLean said he knew from fishing experience that if you drop something from a height, as the object goes under the water air bubbles come to the surface. He told the police the torch was yellow because he had seen a yellow torch at Trinh's place that was usually used at night to see what the dogs were barking at. He had seen a red torch in the van.

[101] McLean maintained that he told the truth when he said that when he got up the next morning the jeans and the shoes which had been outside were nowhere to be seen. He denied any knowledge of items belonging to the women being burnt at the back of the premises.

[102] McLean said he did not tell the truth when he told police that in speaking to his mother he told her he was in trouble with police and Hell's Angels. He said he told his mother he was in trouble, but did not give any reason or go

into any detail. His statement to the police that he told his mother he had killed two people was false, as was his statement that his mother had asked how much they were worth and whether they were screaming. As to why he gave that answer, McLean said:

“At that point in time I thought my story wasn’t holding up so I thought that if I told them I told my mum the same story, that they’d believe it.”

[103] On 12 March 2004 McLean was extradited from Brisbane to Darwin. On the plane he sat next to the window with a police officer, Ms Cummins, next to him. McLean agreed he “got along all right” with Ms Cummins and that she had chopped up his dinner for him. McLean then gave the following evidence in which he advanced a reason for lying to the police, namely, to buy Trinh time and explained why he did not tell Ms Cummins the truth:

“Q. Why didn’t you tell her the truth?

A. I wasn’t with her.

Q. I’m sorry?

A. I wasn’t with her. Are you talking about in my interview?

Q. I’m talking about when you were sitting next to her in the plane?

A. I didn’t see the need to tell her the truth.

Q. Why not?

A. Because I had already had told the story I’d told.

Q. Yes, but you told a mob of lies?

A. Yes.

Q. Big mobs?

A. Yes.

Q. Didn't you?

A. Yes.

Q. You'd been charged with murder?

A. Yes.

Q. You'd been extradited to come back to the Northern Territory?

A. Yes.

Q. Why didn't you tell Ms Cummins, this police lady who was kind to you, I suggest, tell her the truth?

A. Because I told the story for a reason, to buy Phu time.

Q. Well, tell us again what the reason for telling that big mobs of lies. Tell us?

A. At first there was only two people that knew where we were and they had obviously told the police where we were. They come and I told the story because I told Vinh Giang that I was in trouble with the Hell's Angels for a speed debt and I thought that he'd told the police the same. And I continued it because I thought that if I went with Phu, that he'd need time to sort it out. It wasn't sorted out when we were arrested as far as I knew.

Q. You thought it was going to help your friend Mr Trinh to tell the police that he'd killed two women?

A. No, not help. To give him time, buy him time to sort it out.

Q. And how was he going to sort it out while he's locked up for murder?

A. I don't know."

Trinh's Interviews

[104] Trinh was first interviewed "in the field" immediately following his apprehension. Subsequently he participated in a lengthy record of interview which was recorded on video. The Crown relied upon a comparison between the contents of the statements made by McLean and Trinh to the police as evidence that they had put their heads together to concoct a story.

Trinh's First Interview

[105] In the field interview, Trinh denied being involved in the murders. He said he picked the prostitutes up and drove them to the farm, but "later some people turned up at the gate, picked them up in a car and left". Trinh said he did not know the people who picked the women up. Asked what sort of car it was, he replied "Don't know".

[106] There was a break in the questioning. In the second part of the field interview Trinh repeated that the women had been picked up at the gate of the property at Barr Road and the conversation continued:

"Q. What car picked them up?

A. Um I don't really remember its, its dark, dark blue or something.

Q. Dark blue?

A. Yeah.

Q. What, okay if I said a four cylinder or six cylinder?

A. I don't know.

Q. Or four wheel drive?

A. Nah not a four wheel drive."

[107] Trinh said that he alone had picked up the women in his car. They told him that they had arranged for someone to pick them up and drop them back at their premises "for more business". He had spoken to the women approximately a week earlier to make arrangements for them to come to his place.

[108] It is unnecessary to canvass the remainder of the field interview.

Trinh's Second Interview – A Confession

[109] In a lengthy interview recorded on video, Trinh confessed to the murder of the deceased. After initial formal questioning and providing personal details, Trinh was asked about what had happened:

"Q. What can you tell us about it Phu?

A. Yeah, that I was involved, that I did it myself.

Q. Yourself?

A. Yep.

Q. How did you do it?

A. Um, just tied them up, just like, yeah.

Q. Yes and what else?

A. Threw them off the bridge.

Q. Which bridge?

A. Adelaide River.

...

Q. This is both females?

A. Yes both females.

Q. Okay you threw them off the bridge?

A. Yep.

Q. How, and what was the circumstances of you throwing them off the bridge?

A. I don't really know.

Q. What do you mean?

A. Just came over me suddenly, just, yeah. Don't really know what happened really. Yeah, just happened, couldn't control it.

Q. This is two women?

A. Yeah”

[110] Trinh told police that he transported the women to the bridge in his parents van. Asked about the condition of the women when he threw them off the bridge, he replied “dead by the looks of it”. He said he had choked them and they were not moving. Trinh said that on the way to the bridge he stopped on the side of the road, tied the women up with rope and then threw them off the bridge. As to how that came about:

“Q. Okay, and how did you come to be what was the situation for you driving to the location and all of a sudden on the way there you say you stopped and strangled them with a rope is that right?

A. Yep.

Q. What, how did that occur?

A. I don’t really know, just suddenly. Something just really irritated me, can’t remember what but just ticked me off really bad.

Q. Where were you driving to?

A. Driving to back home.

Q. Where from?

A. From my place.

Q. You were?

A. I took them to my house.

Q. Yes?

A. Yeah, we had sexual intercourse with them.

Q. Who's we?

A. Me and Ben, yeah.

Q. Okay.

A. It was meant to be like a surprise for Ben you know, yeah.

Q. Yes and what happened there at the house?

A. Oh, nothing much, we just had sexual intercourse and then afterwards I just dropped them off."

[111] Trinh said he had made the arrangements by telephone some days earlier.

He obtained the telephone number from a newspaper advertisement. He gave a detailed description of the arrangements and the events at the house involving sex.

[112] Trinh told police that when he set out to return the women to their home one was sitting in the front of the van and the other in the back. He thought it was the younger woman in the back. The questioning continued:

"Q. And where from your place to Darwin do you go over the Adelaide River bridge?

A. Yeah I have to go over that it's the one way out, yeah.

- Q. Um, okay, so can you remember the location where you said you strangled them?
- A. Um, just it's like a little bend. Then there's a straight like a straight to the bridge. It's not a really straight but flat land can't see nothing just yeah.
- Q. What did you strangle them with?
- A. Um my hands, yeah.
- Q. Your hands?
- A. Yeah.
- Q. All right well if your strangling one with you hands, what's the other one doing?
- A. Nothing.
- Q. Nothing?
- A. Yeah cause she was tied up already. I tied them both up first.
- Q. You tied them both ... you stopped you tied them both up?
- A. Yep and then afterwards I strangled the other one and then tied the other one.
- Q. So you tied one up?
- A. Yeah, tied both of them up first."

[113] Trinh said he tied the older woman first and the younger did not respond.

She just sat watching her friend being tied up. He thought he strangled the younger woman first. Neither deceased struggled. After he strangled the

deceased he tied rope around them and tied a battery to each of them. Trinh said the batteries just happened to be in the van because he and McLean had planned to dispose of them at the dump. He used cable ties to attach the batteries to the deceased. Trinh also said that he used the rope to choke the deceased and he thought it was red in colour.

[114] Trinh told police that McLean was at home when he carried out the activities that led to the death of the deceased and the disposal of their bodies.

[115] Trinh said that after he dropped the younger deceased into the river, the elder woman asked him to get some personal belongings from her home. She was tied up at the time she made the request. He drove her back to the hotel. She was tied up in the van. At the hotel he grabbed some of her things, including a black item that he thought had something to do with blood testing or blood pressure. He then untied one of the woman's hands and let her use the equipment.

[116] According to Trinh's statement to police, on the return trip he stopped at the bank and took money out for the older woman who was in the rear of the van. He said she told him to take whatever he wanted and he took out "heaps", close to \$1,600 or \$1,700. The deceased told him she needed the money to clear a debt. Later they met up with a man at the BP Palms and Trinh gave the man the money. The deceased remained tied up in the rear of the van. The arrangement to meet the man had been made earlier when

Trinh stopped and allowed the deceased to get out of the van and make a call from a pay telephone.

[117] Trinh said the older woman had already seen her friend thrown into the river and knew she was also to be dropped in the river. However, she did not call out when Trinh was paying the man. After making the payment he drove to the river and dropped the older woman into the river. He then drove home.

[118] Trinh told police he did not say anything to McLean until the finding of the bodies came on the news. He then told McLean that he had killed the women. They talked about what they would do. Subsequently detectives came to the property after which Trinh “just legged it back to Brisbane”. He did not stay with his family because he knew the police were looking for him.

[119] Later in the interview Trinh repeated that he strangled the older woman with the red rope. She did not resist or plead with him.

[120] As to the version that he had given to police in the field interview about the women leaving the property and Trinh not knowing what happened to them, Trinh said that version “was the plot”:

“Q. The plot?

A. That’s what I just told Ben to say.”

[121] Trinh repeated that McLean was not involved. When questioned about tying and strangling the women by himself, Trinh responded by saying he had a

knife and the women were probably scared. The mention of the knife first occurs well into the lengthy interview at p 34 of the 50 page transcript.

Trinh said he threatened the women with the knife until they calmed down.

[122] Trinh maintained that he knew nothing about the tips of fingers being cut off.

[123] As to the deceased's clothing, Trinh said he threw clothing out the back and burnt it. The burnt property included a purse. At the time of the burning McLean was in the caravan.

Trinh's Evidence

[124] Trinh told the jury that he lied to the police because he had to. Neither he nor his family were safe. He believed that if he mentioned any names of those involved he or his family would get hurt or killed by a person called Li and his group. He also believed that McLean's life was in danger from the same group.

[125] Trinh gave evidence about his background and events leading to him agreeing to do a job for Li (spelt Lee in the transcript of the trial Judge's directions). The trial Judge summarised that evidence, and Trinh's evidence concerning making the arrangements to meet Poncee, in the following terms:

“Then you heard a lot of evidence about his background which I will not take you to. You heard how he became an apprentice, a junior member of a group or a gang called the Vietnamese People Community when he was living with his parents in Brisbane prior to 2001. You heard how he felt that he wanted to get out of the gang because he was living a double life and so when he was given the

chance to come to the Northern Territory by his father he went and talked to a senior member of the group and told him that he wanted out and he was told that he would have to think about the consequences of that if he did.

He was asked if he spoke to that senior member again and he said:

'Yes, I did when my parents asked me to leave for Darwin if I wanted to go up Darwin with them. After that I knew that my parents were going and I went up to him and asked him - I told him that I was going to leave and I decided to leave and he agreed with my decision to leave and he would help me to leave.'

Then you have heard how he went to school for a period of time and then went back to Brisbane and he attended the Bremer Institute to do a course as a motor mechanic, a pre-apprenticeship course. It was designed to last between four and six months. He said he did not complete it and he told you why was because he was interrupted by the group.

He told you that he was known as De - D-E I think it is - in the group. He told you that he was told that Mr Lee wanted to see him at a café in the Brisbane Mall. He did not keep the appointment and the next day when he came out of his house in the driveway the car that he was driving around was smashed and all the windows were smashed. He did not call the police because he knew it was a warning because he did not show up and so he arranged again to see Mr Lee who was the senior member at the time but who is now a boss 'sort of thing' he said. He spoke to him in Vietnamese. Mr Lee offered him the opportunity to join his group mostly just gathering information and that for him.

'What did you decide to do?---I decided to run back - to leave back to Darwin where I was safe or where I thought I was safe.'

So back he goes to Darwin and towards the end of 2003 in December he started going out to town in Darwin clubbing mostly and to the casino. He said he had contact with Phuang Sri Kroksamrang when he returned from Brisbane in December, he contacted her by phone. Originally apparently she called him, she introduced herself and he said that he believed that it was Should who got her to ring.

Should, he has told you is another member of the group, a senior member and a friend of another member called - the transcript says Pete but I think it may be P, anyway it might be Pete.

Anyway the contact was in 2003 and he was - he said he was seeing if she could get him some ecstasy pills and she told him that she could get them. So this is how he first came to meet her and he told you that the pills she arranged for him to pick up at a place in Humpty Doo. He said that he would usually call a week in advance to order his pills and go and pick them up.

Then he was asked this:

'Now you spoke to her on the phone?---Yes, I did.' 'Which phone was that? Did it have a SIM card?---Yes, it did.' 'And did you have that SIM card with you in January/February of 2004?---January and February yes, I did.' 'Did you have that SIM card with you on 1 March 2004?---Yes, I did.' 'Did you have that SIM card with you on 2 March?---No, I didn't.' 'What happened between 1 and 2 March in relation to that SIM card?---I accidentally gave it to Long.' 'And whereabouts did you give it to him?---At Barr Road.'

Then he told you about how he had a discussion about ordering some ecstasy for Long and she rang up someone to ask for directions to pick up the drugs and gave him directions, that he did not want to go there so he arranged to drive her to Nightcliff and she went into an apartment and picked it up and came out and he dropped her off at the Palms Motel. It was at that time when he first realised that she was a prostitute or a working girl. He told you that he was just expecting that she was a drug dealer or something.

Then he gave us some information about Long, he said:

'Long was a junior member at the time when I knew him, he was working in the same group as me. He was about 26 this year.'

He told you how he met Long after his return in late 2003, that he was going to the nightclub with Ben and another guy, a neighbour Tau Nguyen, that he was the last one to go inside the entrance, he was paying for the entry fee and then someone tapped him on the

shoulder, Long. He told you how Long told him that he was no longer in the group that he was into real estate and he asked for his number and he told him he did not have a phone.

'Why was that?---Well, there was no reason for me to give him my number, you know, it was a bit awkward him asking for my number.' 'Did you meet Long again?---Yes, I did.' 'When was that second time?---Yes, it was, it was in the same nightclub about say a week after. I met him inside the club, he asked me if I could get him some drugs and then the same night he made arrangements for them to meet at Casuarina the next day or the next night.'

So he went home after the clubbing, went to sleep and worked and then after he finished work in the afternoon he went out to see Long at the coffee place next to the entrance at Casuarina.

There was discussion about property and land, rural land and the like. There was discussion about trying to get him some ecstasy and he said:

'Before I got to the coffee place I called up mum to see if she could get the ecstasy for him. She gave me a price around about - his order was around about a thousand dollars or so and she gave me directions to her place if I wanted to call her up again and meet her at the motel.' 'So what did you say to Long?---I told Long I knew somebody who could get it for him and I told him the price and he agreed with me and he went to the ATM and got out some money and gave it to me. I was about to leave and then he gave me a phone, a CDMA phone, he told me that I can call him when I get the stuff and if I could I could just call him back because he was waiting at the coffee shop for me.'

So what Mr McDonald is suggesting in his address to you is that this was really a set-up, this was a plant, sort of like a three card trick if you like he was given this phone in order that their communications would be made on this phone and not some other phone with the idea that ultimately he would get the phone back and he gave him a CDMA phone rather than an ordinary phone presumably because it did not have a SIM card.

Anyway he obtained the drugs he said and he went clubbing and handed the drugs over to him later on. Then they were at the Vic Hotel, he met Long there, had a conversation with him and whilst he was leaving the club a male approached him and Long and told him that Mr Lee wanted to see him and he told you that he went with a man to a car park in a beach at Cullen Bay. He had a conversation with this Mr Lee who asked him 'Why did I leave?' and he kept trying to convince him to rejoin his group. He said:

'I was listening to him, I didn't reply to his questions.' 'Was anything else said by Lee to you?---He told me to think about my decision if I would rejoin or not, he said he will give me time to think about it.' 'Was there any discussion about further contact?---Yes, he asked me for my number and I told him that Lee - I told him Lee's got my number, I couldn't remember the number' and that was a mistake, he meant to say Long, 'Long's got the number.' 'Was there any further discussion?---No, I just told him I'd think about it and went off.'

He told you about this chap called P Yung who was in charge of the group, he also told you about how he had been trained in QA, which is basically getting information off someone. He said:

'It involved other members of the group, it involved the use of binding.'

He said that:

'Usually I use cable ties or rope.' 'What sort of cable tie?--- Usually the long thick ones.'

He said he had a discussion in the past with a senior member to try and get out and that was P Yung. Provision was made he said to keep him informed about his own safety and about other groups finding out about him through this Mr Should.

Anyway after this meeting with Mr Lee he decided to go fishing with Ben and sort of keep out of the way so he went on a fishing boat and he told you how that did not work out and how he had to get money from his sister to return to Corroboree and how he and Ben went back to work at the farm. Then he said that when he got back to the

farm there was contact from Long, Long called him up first, there were messages when he returned on his phone again:

'Asking me where I was and that and then later on at night he did call me, Long called me on the phone he handed me.' Did you speak with Long?---Yes, I did, he asked me to go out with him and I told him I didn't want to because I was working that weekend.' 'Any other conversation?---Yes, we did he asked what I was working as and I said on the farm. He started to talk about properties then and he asked if there was property around my area and I told him there was some property for sale.'

So this led to an arrangement where he would pick him up at Humpty Doo later on and that is what happened. So he takes him to Humpty Doo, shows him around, shows him where he lives, buys a 700 Samsung phone from him, shows him the Ernie Chin's sign, gave him \$200 for the phone and then returned to the farm and continued picking okra with Ben.

Then at around the end of February he said he met Phuang Sri Kroksamrang at Casuarina and had a discussion with her about the fact that she was interested in expanding her business. She mentioned if she could experiment out at Humpty Doo:

'She asked about the hotels there and all that and I told her I don't know any hotels but I know there was room for rent in my area.'

He said this was at Corroboree Park Tavern, the pub there:

'There were demountables at the back, you can rent a room - a single room there usually.' 'And did she discuss what she wanted to do in relation to the use of the hotel or tavern?---She said she wanted to expand her business, I thought she was going to work out there, that's what I assumed. So she asked me for a favour if I would drive her to Humpty Doo for a booking.' 'Did she say when the booking was for at the time?--No.'

He said he told her it was an easy favour so he agreed to do it.

'Did you have any further meetings with mum later in February?---Yes.' 'When was that?---Probably about the 27th or 28th.' 'Did you have any discussion then about Humpty Doo?---Yes, she did, she confirmed if I was going to do - to drop her off at Humpty Doo and take her back.' 'And she at that stage gave you a date?---Yes, she did.' 'What date did she give you?---She gave me 1 March I believe.' 'And did she say anything further about this job?---No, she just said it was a booking and it could take two days.'

Then he was asked about whether he had any further contact with Mr Lee. He said about a week after Long's visit to the property he called him up on Long's phone and he said that he has got an offer that 'I couldn't refuse' and he asked him what it was and he said that he could not talk on the phone but he said he would meet him that night.

So he went to a meeting area. It was the same place at Cullen Bay around about 1 in the morning. There was some discussion about why he had not been in contact with him which I will not go through with you but he said that he will get the groups off him if he did a job for him. This meeting was with Lee. It was a QA, a simple QA. I asked him who it was. He said it is someone I will know and he told you that the only person who he knew as a member of the gang was Long.

He was asked if in terms of his background experience he had ever seen cable ties used on a woman and he said no. He said he thought about it and he agreed to do the job because Long was the only guy he knew he could do this Q and A on. He said he would do it because he was offering him assistance.

He was offered men to do the job with him and he said he had no need for men. He asked where it would happen and he said he would tell him when he was ready; he gave him very little information about the job.

'What happened on 29 February?---That's when Lee called me to prepare for the job.' 'How did he ring you?---By Long's phone.' 'Did he give you any more information about the job?--He told me that it will be on tomorrow and he told me to get ready as in get ready as mean buy cable ties, rope, and he told me to buy extra tape for some reason. I didn't understand that

but I couldn't ask him why. He said he would give more instructions tomorrow when the job was ready and he told me to make sure my phone was on at 3 o'clock.'

He told you he thought it was a bit awkward because that was the day that he was going to drive mum to her booking so he called up mum and asked if she was still going to go on the booking. He contacted mum on his CDMA phone on the 29th and confirmed the booking with her.

Then on 1 March he said to Ben he was going to town. He did not tell Ben anything about what he was doing other than that. As he was driving into town he said he got a call from Lee on Long's phone asking if he was ready, if he had got the cable ties and the tape and he said, 'Yes, I've got it' and he instructed him saying he would meet with him later on the night and he would call him back.

So then he told you he pulled over to Super Cheap and bought the cable ties, rope and tape that Mr Lee had asked for. He said he bought the shorter ones rather than the bigger ones for some reason. He said:

'Because I thought they were not going to be used because it was Long so I just bought, you know, like Lee satisfied.'

So then he went and filled up his car with petrol and he also called mum to say that he was coming and when he was arriving.

Then he told you about picking her up at the Palms Motel and handing her \$200 from a few weeks ago that when he did not have enough money to pay off his ecstasy bill. Then he told you about how Noi and mum got in the van and they were talking about going down to the Corroboree Park Tavern to organise something with the pub owner.

'She just said if I could drive down to the pub later on.'

Then you have heard about how they arrived at Barr Road, he went in and woke up McLean."

[126] Trinh gave evidence about sexual activities involving the deceased and he and McLean. He said that later when McLean and the deceased were in the caravan his phone vibrated and he heard a male voice telling him to open the gate. It was Long and two vehicles entered the premises. He saw about six men and the only one he recognised was Long. He was introduced to Jojo. Long told him he did not have to do the job any more and asked if the girls were there. They started arguing and Long kept asking about the girl. One of the Asian men said he would get the girls and started walking towards the shed. Trinh agreed to get them and walked inside the shed.

[127] In essence Trinh told the jury that the men took over. On demand he handed over the bag of cable ties. One of the men removed ties from the bag and gave the bag back. Trinh “just threw” the bag in the van. It was at that stage he saw the men start to hold the women down and apply the cable ties.

[128] Trinh said the women did not want to be tied up. They were fighting. He gave details as to how the women were bound by their wrists and ankles with the cable ties. The men carried the women over their shoulders into a container used as a coolroom. Trinh asked Long who was in charge and he was told Li. He walked to one of the vehicles and window came down. Li was in the vehicle and Trinh told him this was not what had been agreed. Li replied in Vietnamese saying something like “change of plans”.

[129] Trinh described how McLean came out of the caravan and Trinh took him back inside the caravan. He told McLean his past had caught up with him.

[130] According to Trinh, after he returned outside he opened the coolroom and started to talk to the women in order to try and find out what they knew about what was happening. The men were talking amongst each other and kept looking at him. The women asked him to cut off the cable ties and he went to the caravan on the pretence of getting a pillow. While he was in the caravan he grabbed his mobile telephone and a pair of secateurs. He returned to the cool room and tried unsuccessfully to loosen the cable ties. He cut off the tip only because he believed he could not cut them loose entirely. After he had been in the coolroom for about 20 minutes one of the Asian men asked him what he was doing.

[131] Trinh said that he tried to find out from the men what was happening. He was unsuccessful. Eventually the men carried the women from the coolroom and put them in the van. Long told him to take them to town and he would give Trinh further instructions. Long said “don’t take too long” and made a smart remark to the effect that he did not want to look for Trinh again.

[132] Trinh said that the men left in the vehicles and he went to the rear of the van where he cut off the cable ties. Poncee told him that she did not know where the men wanted her taken. He went into the house to get a soft drink for Poncee and then to the caravan to tell McLean he was leaving. McLean insisted on accompanying him and they had an argument. He did not want McLean with him because he knew there could be dangers. McLean got into the driver’s seat and Trinh just told him to head to town.

[133] After they had left Barr Road and were on the Arnhem Highway Trinh received a call from Long saying there was a car waiting for him on the side of the road. McLean was still driving. Long told Trinh to bring the white guy along and that caused Trinh to tell McLean to stop the car and get out. There was a bit of an argument, but McLean stopped the vehicle near the satellite dish and stormed off.

[134] Trinh said he drove about half a kilometre before Poncee told him to help her bind herself up again. He pulled over and did so. After driving for a further kilometre or so he saw a utility on the side of the road and he followed that vehicle into the Djukbinji National Park. After stopping in the park Long and Jojo came to the driver's side of the van and another man opened the sliding door on the passenger side. He heard a voice say "It's not her". He saw that it was a man called Ezy. He saw Poncee removed from the van and carried away over the shoulder of the man towards one of the other vehicles. After sitting in his van for about five or ten minutes, Trinh got out and asked Long what was going on. He heard someone say "Make sure he's clean", which he thought could have been a reference to McLean.

[135] Later Trinh saw Ezy sitting on the side of his van talking to Noi. Ezy walked away and Noi started yelling and screaming. Ezy told Trinh to shut her up and he tried unsuccessfully to quieten her down. Ezy then told Trinh to use the tape to shut Noi up. Trinh attempted to cut a small piece for the top of Noi's mouth, but Jojo told him to go right around.

[136] Trinh gave evidence that Ezy told him to strangle Noi. There was talk about using a gun. Trinh felt angry and scared. He swore at Ezy and Ezy pulled a gun on him. Ezy pointed the gun at Trinh's head from a distance of about a metre or so. Trinh walked off. He heard Ezy say to Jojo something like "strangle her" and from the front seat of his van he saw in the rear vision mirror that Jojo had his hand around Noi's throat. It was only a glimpse before he got out of the van and walked away.

[137] Later Long told Trinh they were leaving. Long got into the driver's seat and Trinh was a passenger. Jojo was sitting behind the front seat. He thought Ezy was also in the back of the van and he believed Noi was there, but he could not see her. Trinh thought they were going to another location where he would be killed.

[138] After travelling over the Adelaide River Bridge one of the other vehicles and the van driven by Long stopped at the entrance to the Jumping Crocodiles. Long left the van and Ezy took over driving. The van did a U-turn and drove to the middle of the bridge where it stopped. The rear door was slid open and Trinh saw Noi lying in the back. He believed she was dead. He saw them carry Noi, but he stopped looking. He heard something fall in the water and Noi was no longer on the bridge. Trinh thought he was about to be killed.

[139] Trinh said they did a U-turn and headed back to Darwin. Near Windows on the Wetland they stopped behind the four wheel drive which appeared to be

waiting for them. Long told Trinh that he had to get the number of a person working at the Shell Petrol Station at Palmerston. Long gave him an address. At that time he saw Poncee being carried from another vehicle. She was put into Trinh's van. Trinh was told to stop asking questions and do what he was told.

[140] Long told Trinh that Poncee had some instructions for him. He was told to follow her instructions. Long left and the other vehicle departed. Trinh closed the sliding door and got into the van. He asked Poncee what had happened and what they wanted. She replied that they were asking questions about Trinh. She said she did not know what was going on, but Trinh thought she knew and was not telling him. Poncee said they needed to go back to her motel room and he started to drive towards Darwin.

[141] During the drive Long telephoned and asked where Trinh was. Long questioned why Trinh had not got the number of the person working at the Shell Petrol Station. Trinh told him he was going to the Palms Motel. During the conversation Trinh stopped the van because he could not hear properly. He asked Poncee if she wanted the cable ties cut off and she said no. Trinh cut the middle tie anyway. He convinced Poncee to sit in the front. He told Poncee that Noi had been killed and Poncee was crying.

[142] According to Trinh, he drove to the Palms Motel where he left Poncee in the van and, with her keys, entered her room and collected items she had requested. When he returned to the van, Poncee asked him to go to an ATM.

She told him to get some money out for her and gave him her key cards and pin. Before they got to the ATM he stopped the van because Poncee wanted to sit in the back again. She believed they were being followed.

[143] Trinh explained the various transactions at the ATM. After obtaining the money he re-entered the van and asked Poncee what to do next. Trinh decided to get the number that Long had requested and he drove out of Darwin towards Palmerston. Poncee was in the rear of the van. Trinh spoke of telephone calls while heading for Palmerston. In particular, on the outskirts of Palmerston the mobile phone rang and Long told him the petrol station that he would next reach was the place where he was to get the number. Trinh stopped at the station, refuelled and did what he was asked. Subsequently he received a further call from Long telling him to meet Long at a street and giving him directions. At the time he received the call he was on the Stuart Highway heading back to Corroboree. He changed directions. He eventually saw the other vehicles, stopped and got out of the van. Long asked for the number and he gave Long a piece of paper on which the number was written. Long asked if he had money and he spoke to Poncee. She gave him the money and the key cards and he handed them to Long who in turn gave them to Jojo.

[144] Trinh said that Ezy and Jojo looked into the van. Ezy came up to him and said something. Ezy seemed angry. Jojo walked Poncee out after which Ezy pointed to her and struck Trinh with his hand. He heard Poncee yelling out not to hit him. Ezy struck Poncee on the face. She went to ground.

[145] According to Trinh, he saw Jojo and Ezy put Poncee back into the van.

Long got into the driver's seat and told Trinh to get in. They were all in the van and Long drove until he stopped in the front of the turnoff to Windows on the Wetland. Trinh heard something in the back of the van. He turned and saw Ezy strangling Poncee with a rope. Trinh made a move to get into the rear of the van, but Ezy pointed a gun at him. Trinh got out of the vehicle.

[146] Trinh said he ended up back in the van and did not look behind him. Long stopped the van at the Adelaide River Bridge and he heard the side door open. He got out of his seat and jumped in the back. He was trying to obtain a pulse, but before he could do so Ezy grabbed his hand and told him to back off. Trinh said he tried to test for the pulse because earlier in the evening he had a feeling they were going to be killed and he had told Poncee to pretend to be dead.

[147] According to Trinh, he sat in the vehicle facing downwards. By the time he looked up he saw Jojo trying to push Poncee off the bridge. Asked if he saw a battery connected to Poncee, Trinh replied that he did not remember seeing anything connected, but he had seen a battery in the rear of the vehicle.

[148] Trinh told the jury that Long drove the vehicle away from the Adelaide River Bridge. Ezy and Jojo were still in the back. They returned to Barr Road. Another vehicle was at the front gate. At the Barr Road premises Long told Trinh that he was looking for his white friend. Eventually Long

started telling Trinh that tomorrow Trinh would have to meet him at the Humpty Doo pub. There was talk about helping Trinh get out of Darwin. After the men left Trinh drove to the place where he had left McLean and picked him up.

Trinh's Application

[149] Four passages of questions and answers were excluded from Trinh's second interview. Shortly before the video recording of the interview was played to the jury, a transcript of the interview was provided to the jury as an aide memoire. Six copies of the transcript were appropriately edited to remove the excluded passages. Through inadvertence the other six copies were not edited and contained the excluded passages.

[150] The applicant submits that irreparable prejudice was caused when the excluded passages came to the attention of the jury and that the directions of the trial Judge were inadequate to cure or alleviate the prejudice. As a consequence the applicant contends that a miscarriage of justice has occurred.

[151] The video recording of the interview was tendered as an exhibit.

Immediately before the playing of the video and the provision of the transcript to the jury, his Honour said to the jury:

“His Honour: The evidence in this case is, Ladies and Gentlemen, the tape which you will shortly be played, that you can see and listen to. That's the evidence of the case, not the transcript which is going to be given to you for the purpose of

enabling you to follow what you see and what you hear on the tape. And at the end of playing this tape, that document will have to be returned, because it is not part of the evidence of the trial.”

[152] After the playing of the video, the jury were given a morning break. The transcripts remained in court. During the break the jury requested permission to read the transcript in the jury room, but that course was not permitted. Upon resumption of the evidence, the trial Judge gave a further direction:

“His Honour: Ladies and Gentlemen, we are going to resume the next part of the tape. I want to emphasise to you that this document is not the evidence. It’s what you hear and what you see which is the evidence. So if what you read in this document is not what you hear, it’s what you hear which is the evidence and not what you read. Okay. Yes.”

[153] After the balance of the video was played, counsel for the applicant cross-examined the police officer for a short time before the luncheon adjournment. The transcripts remained in the court. The jury did not have access to them during the luncheon adjournment. However, it is apparent that members of the jury had realised that a number of their transcripts were different from both transcripts read by their fellow jurors and the content of the recording. The Judge received two notes from the jury:

- “Some jurors transcripts contained sections that are not in other jurors transcripts or the tape.”
- “We understand that the transcript is just a guide to interpret the evidence of the tape, however in a particular section (page 13) the

guide is wildly different to the evidence presented.

Page 13 of some jurors transcripts mention a conversation over ecstasy.”

[154] There were four passages of edited material which appeared in the six unedited copies of the transcript. The first passage was a conversation at p 13 concerning ecstasy which is specifically mentioned in one of the notes from the jury:

“[Edwards: What else happened there [Barr Road], you had sex, what else happened?]

Trinh: Um, yeah, just had another its called ecstasy.

Edwards: Ecstasy?

Trinh: Yeah, I had an ecstasy before I got there.

Edwards: And where did that come from?

Trinh: Um, I bought it off a friend.

Edwards: And who was that?

Trinh: I don't really know him he just provides us with drugs and that down there, so, yeah.

Edwards: You had ecstasy okay?”

[155] The second passage also concerned ecstasy and appeared at p 33 of the transcript:

“Edwards: You said you'd taken some ecstasy that day?

Trinh: (inaudible) yeah.”

[156] The third passage concerned a different topic and appeared at p 36 of the transcript:

“Edwards: So if John Humphris told the Police, he provided a statement to the Police, that he took you to the airport, what do we make of that?

Trinh: I don’t know, he’s a liar.

Edwards: Means you’re lying.

Trinh: Yeah I said he didn’t take me and you said he did so.

Edwards: Well I’m just saying he provided a statement, maybe Mr Humphris is lying I don’t know, its just what I’m asking you?

Trinh: I don’t know why he said that so.”

[157] The applicant did not suggest that the inclusion of that third passage caused any prejudice. There was plainly a misunderstanding on the part of the questioning police officer. Mr Humphris gave evidence. He did not say that he took Trinh and McLean to the airport. He said they caught a taxi. The erroneous admission of that passage was not of any significance.

[158] The final passage appeared at p 47 of the transcript:

“Edwards: Have you been treated for any type of illness?

Trinh: Um yeah I tried yeah anger management and all that.

Edwards: And when was that?

Trinh: When I was back at doing school Sunnybank? At a shrink (inaudible).

Edwards: Sorry?

Trinh: Like went to a shrink and that. Just talked about it.

Edwards: And since that time have you had any problems?

Trinh: Oh it didn't work for me, stopped going there just yeah the doctor didn't really bother, just went to school and that, just I took not go to school, yeah just a bit, hey so that was just privately so (inaudible) money, didn't work so I was like nup, try controlling this."

[159] After considering the transcripts and hearing submissions, the trial Judge brought the jury into court and thanked them for the notes. He told the jury that he was "hopeful of being able to deal with that in due course". His Honour added that in the meantime there were legal matters with which he was required to deal and rather than keep the jury waiting any longer he had decided to send them home for the rest of the day.

[160] The trial Judge heard further submissions in support of Trinh's application for a discharge of the jury. His Honour then gave extempore reasons for refusing the application. He referred to the appropriate principles and relevant authorities. The essence of his Honour's reasons for rejecting the application appears in the following passages:

"First, one has to consider what is the nature of the prejudice of here, I think the high point of the nature of the prejudice as set out in the

submission of Mr McDonald, that the combination of reference to having seen a shrink about an anger management problem whilst he was a student and the fact that he admits in a record of interview to taking ecstasy at the time, may provide an explanation for why it is he admittedly committed the murders in this case.

The defence say that – as I understand it – that the record of interview is in fact untrue. Now, I'm not sure exactly of how untrue it is but my understanding is – and I think it is a fair inference, that the accused will have to give evidence in this case because the record of interview in this particular matter is in effect a confession to murder. I will therefore assume that the defendant will give evidence to the effect that he did not cause the death of the women and that somebody else did.

I am told also that there is no defence relating to mental state and I draw the inference that this is the kind of defence which is going to be run because of the nature of the cross-examination of the Crown witnesses.

Mr McDonald, however, has kept his cards very close to his chest and has not revealed in open court exactly what the nature of this defence is, as yet. As that is of course his entitlement. But I must decide the matter on the material which is available to me now.

On the other hand as Mr Wild point out, the jury already know that Mr Trinh takes drugs because there are other passages in the record of interview which were not objected to, which indicates that he smokes marijuana or smoked marijuana on a particular day when he was – on the day in fact that he was arrested by the police in Queensland. And there is a further passage in the record of interview – again not objected to – where the accused admits on the day of the alleged murder to have stopped to obtain drugs from his supplier.

So far as that is concerned I accept that the material is prejudicial but what I have to consider is whether or not the matter is able to be substantially cured by direction such as to ensure there is a fair trial. One of the matters that I've taken into account, of course, is the stage at which this has occurred. I bear in mind that it is relatively late in the Crown case. However, there is still one more witness to be called whose evidence is likely to be lengthy.

Then no doubt, I would anticipate that either Mr Trinh or Mr McLean would give evidence, depending on which of the two defendants seeks to open his case first. And I take it that it will likely be Mr McDonald.

In the context of this case however, I think there is little prospect that the jury are likely to be adversely affected by this material. And I say that for a number of reasons. Firstly I think this is a very conscientious jury. I'm heartened by the fact that it was the jury itself that drew my attention to the problem which I think shows their willingness to act impartially and fairly.

And also I note in the notes that they've conveyed to me that they're well aware that it is the tape which is the evidence and not what is on transcripts. I think this jury will listen to any direction that I give them. I therefore think that in all the circumstances this jury is capable of conforming to judicial direction to put that particular material out of their minds. I am fortified by that view also by the fact that there is so much other material which is relevant to the issues in this case that this material is rather insignificant in the context of the whole case and therefore I reject the application to discharge the jury."

[161] After the trial Judge delivered his extempore reasons, the jury returned to the courtroom and were given the following directions:

"HIS HONOUR: Yes, Mr Foreman, ladies and gentlemen. Thank you firstly for your note yesterday, your two notes yesterday relating to the transcript of the video tape.

Can I just reinforce what I have said to you already, and it's obvious that you understand this. The evidence is the video tape, it's not what's on this transcript, so you are to ignore anything that you have been told quite wrongly and I might say inadvertently by what has been unfortunately put to you in that transcript.

Record of interviews often contain material which is irrelevant or which needs to be excluded from the record of interview for reasons of inadmissibility of evidence, and usually what happens is that the parties get together, at some time well before the trial and agree on

what material should be excised and the tape is then edited and the transcript repaired accordingly.

Sometimes the parties can't agree on what material was to be excised and then it is up to the judge to make a ruling. Whatever happens however, it is quite normal and I can barely think of a case – well, I won't say that. I would say that in more than half the cases, record of interview have some material excised from them so there is nothing greatly unusual about that and it is in fact the duty of counsel to make sure that material which is not admissible is excised from records of interview, and they have to do that whether they like it or not. So, unfortunately in this case, some of the material which should have been excised was retained in an earlier form of the transcript and it was mixed up – got mixed up with the proper transcripts and given to some of you.

So that's what happened and I invite you – I strongly urge you to put those matters out of your minds, they are not evidence and you are to ignore them completely and concentrate purely on the evidence in this case and nothing more.

Remember what I said at the very start of this case, the accused is entitled to be tried on the evidence and solely on the evidence and any matters especially prejudicial matters may come to your attention just have to be ignored, that's your sworn duty as jurors and I have confidence in you that you will obey those instructions."

[162] The topic of the transcripts was not mentioned again except indirectly in the final directions given to the jury. The trial Judge said:

"In this case the Crown has tendered two tape recordings of a record of interview one of which was taped and another one which was video taped by each of the accused men and you will have also had the opportunity to read transcripts of the records of interview at the time when those tapes were played. You will remember that the transcripts were not admitted into evidence and that the evidence is the tapes – in other words it is what you heard and what you saw on the tapes that is the evidence.

You will be able to listen to the tapes again when you retire and see the video when you retire, if you wish it. You must decide for yourselves what the accused said on the tapes and on the video.”

[163] The essence of the applicant’s submission is found in the following passage from the applicant’s written outline of submissions:

“What the material provided to the Crown case was motive to a hitherto unexplained and horrible crime. The stage at which it was introduced was critical – the very time of the Appellant’s record of interview was being considered by the jury and at the outset of which he immediately implicated himself. The material was potentially a powerful consideration in assessing (as the jury had to) the Appellant’s credibility and bona fides.

...

At the time of the irregularity the Appellant was soon to go into evidence in his defence. Consistent with the cross-examination of some of the Crown witnesses and the view conducted, it was the defence case that a Vietnamese criminal gang which included a hit man was responsibility for the killings.

Thus, the introduction of this prejudicial material into the jury’s deliberations (supplying as it did a motive) came at a most critical and for the defence, a most damaging time. Motive here was highly relevant as it tended to explain an otherwise bizarre, brutal and otherwise (for two 18 year old okra pickers) an incongruous crime. The Appellant had no opportunity to deal or explain away this unlikely motive given the modus operandi of the killing.

...

The Appellant was denied the opportunity of having his sworn account assessed without the contaminating influence of the irregularity which had occurred. At the time the credibility of the Applicant was critical. His sworn explanation was doctored negatively by the irregularity. The Appellant’s evidence became incurably infected.”

[164] As to how the excluded passages provided a motive, during submissions counsel for the applicant said the material would enable the jury to infer or speculate that the accused was “drug addled” and had an anger management problem. Counsel pointed out that during the second interview the applicant told police that he did not really know how he came to strangle the deceased except that it happened just suddenly as something just “really irritated” him and “just ticked [him] off really bad”. The applicant also said in that interview that it “just happened” and he “couldn’t control it”.

[165] In considering the potential prejudice of the passages in questions, it is necessary to have regard to the nature of the Crown case. The Crown did not suggest that either Trinh or McLean was affected by drugs at the time the deceased attended at the house and during subsequent events. Nor did the Crown suggest that anger played any role in the commission of the crimes. The Crown relied upon the purchase by Trinh of cable ties, rope and tape in advance of the killings as evidence that the killings were premeditated and cold blooded. Neither appellant suggested that they or their co-accused were affected by drugs or acted in anger.

[166] In addition, no objection was taken to the following passage in the second interview in which Trinh was answering questions about driving to pick up the deceased from the Palms Motel:

“Q. Okay did you stop anywhere on the way in to get them? You talked about going in the bank did you stop anywhere else?

A. What on the way to get them?

Q. Yes.

A. I stopped at the dealer's house like the dealer's place where he was.

Q. Yeah.

A. In the shop so pick up some drugs, yeah. That was it.

Q. Okay anywhere else?

A. Picked up a drink or something."

[167] Irrespective of the excluded passages, without objection evidence was placed before the jury that Trinh purchased drugs shortly before he picked up the deceased from the Palms Motel. No explanation was proffered to this Court for the decision not to object to the admission of that passage in the interview. It is reasonable to assume that a forensic decision was made not to object to that passage. That decision is understandable in view of the evidence given by Trinh in his defence. He told the jury that his first contact with Poncee was in December 2003 by telephone when he called her to see if she could provide ecstasy for him. Trinh said that Poncee told him she could obtain ecstasy and subsequently she provided ecstasy to him on a regular basis:

"Q. What happened then?

A. After I call her in 2003?

Q. Yes?

A. I would ask her to pick up some – a couple of ecstasy's for me when I go clubbing and that so that I don't have to meet the dealer myself, because I don't want the groups to know that I was up here, I thought that dealers could be connected with the other members down south.

Q. And did she get back to you?

A. Yes, she did.

Q. Was she able to give you what you asked for?

A. Yes.

Q. And how was that delivery effected?

A. Can you repeat that please?

Q. How did you get the pills that you asked her for?

A. She arranged for me to pick it up at a place in Humpty Doo.

Q. In the city area?

A. No, in the rural area the farming areas where all the mango farms and that are in Humpty Doo.

Q. What was the arrangement to pick these pills up, how many pills are we talking about?

A. Probably two at that stage.

Q. And how did you pick them up?

A. I would call usually a week in advance to order it and then I would go pick it up.

Q. At that time did you know that Phuangrsri – well, at that time what name did you – what name or names did you know her as?

A. Only knew her by mum.

Q. At that time, did you know whether she was a sex worker?

A. In 2003?

Q. Yes, sorry, yes?

A. No, I did not.”

[168] The issue of drugs was an intrinsic part of Trinh’s defence that Poncee was involved in drugs with the Asian crime gang thereby explaining why members of the gang would murder Poncee. In addition to the passage to which I have referred, Trinh gave evidence that on the first occasion he met Poncee personally he had a discussion with her about ordering ecstasy for Long. He told the jury that on occasion when he went to the Palmerston Hotel to pick up his ecstasy Poncee would talk about expanding her prostitution business. This evidence is to be considered in conjunction with evidence given by Trinh of his involvement in gangs and how he came to Darwin in order to try and get away from the gangs, but “there was no such thing as leaving the gang”. Trinh spoke about hearing stories of other persons who tried to leave gangs who got killed or hurt. This evidence was relevant to Trinh’s case that he was asked to do a job by Li and Long and to

explain how he came to be involved with the deceased. The evidence was also relevant to Trinh's claim that he was scared that he or his family and McLean or his family would be hurt.

[169] Finally, regard must be had to the directions given to the jury about the topic of ecstasy:

"I now want to take you to the subject of ecstasy. There is evidence in this case given by Mr Trinh himself that Mr Trinh used ecstasy and that he got his ecstasy through Poncee. The evidence was given to show the relationship which existed between Trinh and Poncee on 1 March 2004. It was necessary for that relationship to be put before you in order to explain how it was that Mr Trinh agreed to drive Poncee and Noi to Barr Road on 1 March and to explain how it was that the sex workers would agree to provide their services to the accused for free but it is not otherwise relevant to this case. In particular there is no evidence that Mr McLean consumed drugs except as part of his false story concerning the Hells Angels.

I remind you that there is no evidence that either Mr Trinh or Mc McLean had consumed ecstasy or any other drugs on the evening of the murders. You cannot infer that drugs had anything to do with the murders; there is simply no evidence of that. If the Crown wanted to suggest that drugs had something to do with this case then the Crown would have needed to prove not only that a particular drug had been consumed but how much of that drug was consumed and what effect did the taking of that drug have on the person who consumed it.

The Crown would have needed to have called expert evidence from a pharmacist or a physician as to the possible effects of consuming whatever the drug was and the defence would have had an opportunity to call evidence to rebut that. None of this has been done. It would be grossly unfair to the accused to draw an adverse inference against them when that matter has not been raised by the Crown. I remind you that your sworn duty in this case is to try the case on the evidence and on the evidence alone."

[170] I am unable to discern any error in the approach of the trial Judge. His Honour was in the best position to assess the nature and extent of the

prejudice in the context of the live issues at trial and the evidence already given. His Honour gave firm and appropriate directions to the jury that they were to ignore anything in the transcript which did not reflect the content of the video recording and, sensibly in my view, explained that excision of irrelevant material from record of interview is a normal practice.

[171] The ultimate test is, of course, whether the trial has miscarried. In determining this question, this Court must reach its own independent view. The way in which this Court should approach its task is set out in the joint judgment of Toohey, Gaudron, Gummow and Kirby JJ in *Crofts v The Queen* (1996) 186 CLR 427 at 440 – 441:

“No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. As the court below acknowledged, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.

Nevertheless, the duty of the appellate court, where the exercise of discretion to refuse a discharge is challenged, is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind. The appellate court must also decide for itself whether, in these circumstances, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice. In other words, can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable? *Glennon v The Queen*

(1994) 179 CLR 1 at 8-9; *Maric v The Queen* (1978) 52 ALJR 631 at 635; 20 ALR 513 at 521.”

[172] In a general sense, any reference to an accused using drugs can be said to be prejudicial. However, in the circumstances to which I have referred, in my opinion the prejudicial effect of the excluded passages was negligible. The Crown presented a very strong case against Trinh. The evidence given by Trinh was, in my view, entirely unconvincing and lacking in credibility. The excluded material concerning ecstasy was of no consequence.

[173] As to the passage concerning anger management and seeing a “shrink”, notwithstanding the references in the interview to being “ticked off” and “unable to control it”, in my opinion this passage was also of no significance. As I have said, it was the Crown case that these were premeditated murders committed in a calculated manner and, apart from those references in the interview to being “ticked off” and “unable to control it”, there was no evidence suggesting that Trinh acted in anger. Counsel for Trinh did not seek a specific direction concerning this aspect.

[174] I am satisfied that, “but for the admission of the inadmissible evidence, the conviction was inevitable”. Having made my own independent assessment of the evidence, I am satisfied that Trinh was proved beyond reasonable doubt to be guilty of the murders and that a miscarriage of justice did not occur: *Crofts; Weiss v The Queen* [2005] 80 ALJR 444. I would refuse the application by Trinh for leave to appeal.

McLean's Appeal

[175] At the heart of McLean's submission that the verdict of guilty is unreasonable is the proposition that the jury should have had a doubt about the reliability of McLean's confessions because information given in the confessions was in conflict with proven facts. Counsel contended that those conflicts proved that McLean did not have personal knowledge of circumstances accompanying the murders which he would have possessed if, as stated in his confessions, he drove the vehicle and was present at the time the deceased were pushed off the bridge. Counsel urged that at the least the conflicts must create a doubt about the reliability of those confessions.

[176] There were four primary areas of fact upon which the appellant relied. First, the manner in which the deceased were restrained and tied to the batteries.

[177] In his confessions McLean said that the hands and feet of the deceased were bound together with cable ties. He said that the legs of the women were tied to batteries by way of cable ties. He did not attach the batteries, but watched Trinh do so. This attachment occurred after the women had been sat upright in the van.

[178] On more than one occasion in the confessions McLean said he was unaware of the use of any rope or red cord. He said he was unaware of the use of masking tape on Noi.

[179] As I have mentioned, the ankles of each deceased were bound together by cable ties. A single cable tie encircled Poncee's right wrist and Noi's wrists were bound together by cable ties.

[180] The batteries were not connected to the deceased by cable ties. Red nylon rope provided a connection between the cable tie encircling Poncee's right wrist and a car battery. The same type and colour of rope connected the cable ties around Noi's wrists to a battery.

[181] Red rope was wound seven times around the neck of Poncee and twice around Noi's neck. Masking tape was wrapped around Noi's head a number of times.

[182] The second area of conflict between the confessions and facts counsel contended were proved independently related to the temperature of the legs of the deceased. McLean said he had hold of the legs and, asked to describe what they felt like, he answered "wet and cold". The forensic pathologist gave evidence that at the time the deceased were dropped from the bridge, they were not dead. The pathologist was unable to comment on whether the deceased were unconscious when dropped from the bridge, but injuries to Poncee's skull were capable of causing a loss of consciousness. As mentioned, rope was wound around the necks of both deceased.

[183] Independently of McLean's statements to the police, the only evidence capable of bearing upon the question as to whether the deceased's legs

might have been wet was the evidence of the pathologist that the bladders of both deceased were empty. The pathologist gave the following evidence:

“Q. You made a note about the bladder. You identified the bladder?

A. It was identified yes.

Q. And what was your comment about that?

A. I’ve noted here that it contained no urine. This was the urinary bladder. It contained no urine.

Q. What does that tell you?

A. Not meaning to be facetious, it’s obviously empty. In my opinion there’s no consistent finding as to between full bladders and empty bladders at post-mortem.

Q. A person who’s in the last throes of life as it were, can anything affect their bladder?

A. It may do. That’s certainly the case. It may do, but it’s by no means a constant finding in my experience.

...

Q. You say that maybe in some cases. Why is that?

A. They may have voided before sometime and not filled it up, not had something to drink. There’s a whole host of quite normal psychological reasons why that may be the case.”

[184] In evidence before the jury McLean said he was not present and did not take hold of the legs. He said he made up the answer in the confession. As to why he described the legs as “wet and cold”, McLean said:

“I’d heard on CSI and that, that when a body, someone dies, when they pass away, that their bowels loosen up or give way.”

[185] The third area of conflict concerned McLean’s statement to police that he had a conversation with his mother in which he admitted that he had killed two people. In the field interview, McLean said that in a telephone conversation from Brisbane with his mother who was in Darwin he told her he was in trouble. Asked if he told her how much trouble, McLean replied:

“A. No I just said a fair bit. Didn’t tell her exactly what went on. I just told her I was in trouble.

Q. Do you think that she knows what the trouble is?

A. Yes I do.

Q. Did she ask you directly about it or anything like that?

A. Yes she told me that if I was in trouble with the cops I should turn myself in.”

[186] During the second interview, McLean said he told his mother he was in trouble with the police and the Hells Angels:

“Q. What did you tell her?

A. I told her that I was in trouble. She said with who and I said police and the Hells Angels and she just said what have I done wrong. Why did you do it?

Q. Did you tell your mother any particulars of what your trouble was all about?

A. Drugs yep told her.”

[187] The passage in the second interview I have cited occurred at p 26 of a 44 page transcript. Recorded at p 38 of the same transcript is the first statement by McLean that in a telephone conversation he told his mother he had killed two people:

“Q. Yep, did you give any consideration at any time of contacting either NT police or New South, Brisbane or Queensland police?

A. Yes, on the other day when my mum contacted me after she had been taken in for an interview. She said that I would be better turning myself in and I discussed about turning myself in and we come to the agreement of no. Cause, see if we can get away first.

Q. Sure. When your mother gave you that advice and let me say that I think that it was probably pretty good advice, what did you tell her about what you’d done?

A. I told her that I’d killed two people.

Q. Did you?

A. Yeah. And she asked the question of how much they were worth and were they screaming when you dropped them off the bridge, cause the paper said they were alive.”

[188] McLean’s mother was called by the Crown. She gave evidence that during the morning of Monday 8 March 2004 police attended at her home. While police were present her son telephoned. He sounded stressed and told her he had something to tell her. She replied that the police were present and she would get back to him later.

[189] The appellant's mother gave evidence that after the police had left her premises she went to the Corroboree Tavern and rang the appellant. Her evidence in chief about that conversation was as follows:

“Q. And what did you say to him?

A. What the hell's going on? The cops have took Phu's van away. We love you. Whatever's going on tell the cops. Go to the cops. Let them know.

Q. What did he say to you when you said 'What the hell's going on'?

A. Nothing. He did say he was sorry, but basically other than that he loved me too and - - -

Q. How long was that telephone call?

A. Maybe a minute, two minutes if that”.

[190] According to the appellant's mother, following the second telephone conversation she gave a statement to the police. Later that day she spoke again with the appellant:

“Q. So do you recall what was said in that conversation?

A. Yeah, basically, 'Please go to the cops. We love you' and he basically said he can't. I asked why. He didn't answer. He just said 'I can't'.

Q. How long did that phone call last?

A. God knows? I was in tears, hanging on the phone. Nothing was really said between us. Only short.”

[191] The appellant's mother went on to say that apart from discussion about the police taking away Phu's van, there was no other discussion in the telephone conversations about the cause of the police interest.

[192] The appellant said in evidence that he told his mother he was in trouble, but he did not give any reason or go into detail. He did not mention drugs and Hells Angels.

[193] As to the subsequent statement in the interview that he had told his mother he killed two people, the appellant said that statement was untrue as was the subsequent answer about his mother asking how much they were worth and whether they were screaming when dropped off the bridge. Asked in examination why he made that false statement to police, the appellant said:

“At that point in time I thought my story wasn't holding up so I thought that if I told them I told my mum the same story, that they'd believe it.”

[194] In cross-examination, asked again why he made up that answer, the appellant said:

“Because I didn't think that they'd believe the story if I didn't tell them – I told them because I thought – I told the one person I love, my mother that, that they'd believe that it was the truth.”

[195] After reference in cross-examination to the statement concerning whether the deceased was screaming when dropped off the bridge, and asked why he made the entire story up, the appellant said:

“I made it up to go with the story to make it believable”.

[196] The fourth area of conflict concerns the appellant's answers about seeing the women go into the water through the use of a torch. The appellant told police that the torch was yellow in colour. A yellow torch was found at Trinh's house, but the torch found in the van was red.

[197] In substance, the Crown responded to the propositions put by the appellant by suggesting that it was open to the jury to conclude that the manner in which the deceased were restrained and attached to the batteries changed during the trip from Trinh's premises to the bridge. A cable tie of the type used on the deceased was found on the bridge in a broken condition. According to the appellant's confession, while travelling from Trinh's premises to the bridge, Trinh was in the rear of the vehicle strangling the deceased. On the Crown case, the appellant was unable to see what was occurring in the rear of the vehicle and the red rope and tape could have been used by Trinh during the trip without the appellant being aware of that use. Once on the bridge, it was dark and, on the appellant's confession, he was watching for the lights of any approaching vehicle. The Crown contended that it was open to the jury to conclude that the appellant was unable to see the rope or masking tape. In addition, given the darkness and the appellant's concern about the possibility of a vehicle approaching, it was likely that the appellant was not paying attention to such details at the time he assisted Trinh in dropping the deceased from the bridge.

[198] The Crown submitted that upon a consideration of the confessions in their entirety, the confessions contained extensive details of the appellant's

involvement, many of which were supported by independent evidence and were unlikely to have been made up by the appellant on the basis of information given to him by Trinh. The details pointed tellingly to the appellant being involved. To the extent that there were conflicts between the appellant's accounts to the police and facts proved by other evidence, those conflicts were put to the jury and the jury was in the best position to assess the significance or otherwise of the conflicts in the light of all the evidence, including evidence given by both McLean and Trinh. The jury had a distinct advantage in seeing and hearing McLean and Trinh give evidence.

[199] There is no complaint about the adequacy of the summing up. In particular, there is no complaint about the directions concerning the burden of proof, the effect of rejecting the evidence given by Trinh or McLean and the issues of importance for the jury's consideration.

[200] The learned trial Judge gave detailed and helpful directions to the jury. In the context of the initial directions concerning the burden of proof, his Honour spoke of the effect of rejecting the evidence of Trinh or McLean in the following terms:.

“One of the consequences of that [the burden of proof always being on the Crown] – and I will be explaining this to you in more detail in a little while – is that merely because – if you were to take the view that you rejected the evidence of Mr Trinh, for example, in its totality because you thought it was all false – that would not necessarily mean that you would have to convict him. You would still have to be satisfied that the Crown has made its case out. I will

explain that to you in more detail later. The same, of course, would apply to Mr McLean.”

[201] As to lies, the trial Judge directed the jury that, generally speaking, lies were relevant to the credibility of the evidence given by the accused, but warned the jury to “be very careful not to jump to the conclusion that because he has told lies, that he must be guilty”. In addition, as to particular lies told by Trinh and the admitted lie by McLean about owing money to Hells Angels for a drug debt and being told to kill two prostitutes as a means of paying off that debt, his Honour gave an *Edwards* direction about which there is no complaint. In the course of that direction, his Honour discussed with the jury reasons other than a consciousness of guilt why both Trinh and McLean would have told lies.

[202] The trial Judge directed the jury that statements made by each accused to the police in the absence of the other accused could not be used as evidence in the case against the absent accused. After explaining that each accused was not required to give evidence, his Honour repeated the earlier direction about the effect of rejecting the accused’s evidence generally or with respect to particular issues:

“What I have to tell you is this, and it is important that you remember it, the Crown still has to prove that each accused is guilty beyond reasonable doubt. If you disbelieve what an accused has said to you, whether in total or whether it just relates to a particular issue or issues, all that means is that you do not accept the accused’s evidence. You cannot convert denials; for example a statement by an accused person, ‘I did not kill so and so’; you cannot convert that into positive evidence that he did, you would still have to be satisfied beyond reasonable doubt as to the truth of the evidence concerning

the essential elements of the charge in relation to each accused based on the remaining evidence of the case.”

[203] As to McLean’s interview, the trial Judge dealt with the contents of the interview at length. Having referred to McLean’s statement that he did not know of anything other than cable ties used to bind the deceased, his Honour said:

“You will note there that he does not know about rope which is a point that Ms Cox has made and he has apparently got the batteries in the wrong spot. But does he actually say that he cable tied the battery to the legs or is he saying that it is Phu – he left the batteries there and it was Phu who he expected to cable tie the batteries to the legs. He may not have known about the rope if in fact it was Phu who did the strangling and he was not looking. Although you might think well, he must have seen it, he must have seen the cable ties or the rope at the bridge at the very least, but then it was very dark so did he or did he not?

You have heard – by the way while we are talking about darkness this is a point that will come up later, that the vehicle had an internal light which operated when the doors opened, including the sliding door.”

[204] Subsequently when referring to a statement by McLean that he opened the sliding door of the vehicle and helped Trinh throw the bodies from the bridge, the trial Judge reminded the jury that if the light was working the light would turn on when the door was slid back.

[205] The trial Judge reminded the jury at length about the evidence given by McLean. Those directions were followed by a detailed examination of the evidence given by Trinh. His Honour then summarised the submissions of counsel.

[206] The trial Judge's directions as to the points made by counsel must be considered in the light of the address by senior counsel for McLean who was the last counsel to address the jury. At the very outset of her submissions counsel reminded the jury that the Crown case could not succeed without the confessions and put to the jury that the confessions were "nonsense" and were merely a repetition of a story that Trinh told McLean to tell Trinh's friends. Counsel urged that McLean implicated himself in the story to the police in order to "make it make sense, to put himself there with his good friend". In counsel's words:

"It is nonsense and it's demonstrably plainly wrong in crucial areas and it's wrong because he repeated what he was told, he got information and he repeated it about the two women. The bits that he wasn't told, he made up, like the batteries tied to the legs, or he denied what was suggested to him, like the rope, the tape, he didn't know about that because he wasn't there. They are just a few things. I'll take you to more of those items later in my address to you."

[207] Counsel reminded the jury at some length about the evidence given by McLean. She urged that he obtained details from Trinh over the days following the murders and that those details were used by McLean when he expanded the story to the police about the Hell's Angels and his involvement in the murders. Counsel reminded the jury of the evidence of McLean that he gave the story to Trinh's friends because Trinh did not want his friends to know anything about other people being involved. She added "So that's why he told this ridiculous story."

[208] Counsel canvassed the evidence given by both McLean and his mother concerning the telephone conversations and McLean's evidence that he made a false statement to the police about those conversations because he thought his story was not holding up. Counsel put to the jury that they should accept McLean's evidence that he thought the police would know that he could not lie to his mother.

[209] A number of matters in the interviews were discussed by counsel as demonstrating that McLean made up the story. First, counsel reminded the jury of the statements about the batteries and put to the jury that McLean "got that crucial piece of evidence wrong". She pointed out that McLean did not see red rope wrapped around the necks of the deceased and tied from each deceased to the batteries. She pointed out that the batteries would have been lifted with the bodies and it was plain that his statements did not make sense because McLean was not present.

[210] Counsel put to the jury that McLean was wrong in his thought that bowels had loosened up because the deceased were, at the most, unconscious, but alive when they went into the river. As counsel put it, the bodies would not have been cold; they would have been warm. She pointed out that there was no evidence that the women had urinated in the vehicle and suggested that this was another example of McLean inventing a story to make it sound more real.

[211] Counsel reminded the jury that McLean did not know anything about tape being wrapped around the younger deceased. She urged that if he had been present he would have known about it. Counsel emphasised that even the officer in charge had misgivings about the reliability of the confessions because of the discrepancies between the confessions and details proved by other evidence. She reminded the jury about the support for McLean's evidence found in the evidence given by Trinh. She emphasised that McLean was not in the vehicle later that night when Trinh called at the petrol station.

[212] Counsel then referred at length to the evidence concerning McLean's honesty and good character. She urged that McLean gave a false account of his involvement which he mistakenly and stupidly thought would help Trinh buy time until Trinh could sort things out. She put to the jury that they should believe McLean's evidence, but if they did not believe him they should still acquit him because his account was reasonably capable of belief and the Crown had failed to negative his account as a reasonable possibility.

[213] At the end of her submissions counsel repeated that the only evidence to establish guilt was found in the record of interview and said:

“the batteries tied to wrong place, the ropes all wrong, the cable ties incorrect, the wet and cold it is not good enough, it's not good enough to support a conviction.”

[214] It was against the background of those submissions that the trial Judge reminded the jury of points made by counsel for McLean relating to the reliability of the confessions:

- “She submitted that the Crown needs what McLean told the police to secure a conviction and what he told the police was a mere repetition of what Trinh had told him. It was clearly wrong and it was made up of lies and bits that he simply made up.”
- “So she said it is true that he told lies to the police but he did it for a reason which he thought was a very good reason. She said he was not shaken in cross-examination, that when spoken to by the police, he got it wrong as to where the batteries were tied and she suggested that he took his clues on that score from the police.

She submitted to you that he did not see the red rope at all, although it was tied around Poncee’s neck seven times and around Noi’s twice and two batteries. She submitted that as to the bit that both women felt wet and cold, the reason he said it was because he saw this on CSI. And in any event, at that stage, they were alive when then went into the river. She made the point that the batteries would have had to have been lifted out of the van if tied to the legs, and it was just ridiculous. The whole thing is a lie and really that is the end of the record of interview, she says.”

[215] The jury could not have been in any doubt as to the critical importance of the confessions to proof of guilt. It was made clear to the jury that unless the jury was satisfied beyond reasonable doubt that the confessions of involvement in the murders were true, the Crown would not have proved guilt of the murders. Similarly, it was also made clear that the conflicts between details given in the confessions and facts proved by independent evidence were of critical importance in the process of determining whether the Crown had proved that the confessions were true.

Principles

[216] This Court must make its own independent assessment of the evidence. The principles by which the Court is to be guided are not in doubt. They were explained by this Court in *Yunupingu v The Queen* [2004] NTCCA 10 at [38] – [40] in the following terms:

“[38] Section 411 of the Criminal Code Act provides that the Court of Criminal Appeal shall allow an appeal against a finding of guilt if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. In *M v The Queen* (1994) 181 CLR 487, Mason CJ, Deane, Dawson and Toohey JJ expressed the test in the following terms (493):

“Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.”

[39] In *MFA v The Queen* (2002) 213 CLR 606, Gleeson CJ, Hayne and Callinan JJ confirmed in a joint judgment that the test is that stated in *M* in the passage cited. In a separate joint judgment, McHugh, Gummow and Kirby JJ accepted that the test is as stated in *M* and added the following observations [56]:

“The majority in *M* pointed out that “[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced” [*M* at 494]. In such a case of doubt, it is only where the jury’s advantage of seeing and hearing the evidence can explain the difference in conclusion about the accused’s guilt that the appellate court may decide that no miscarriage of justice has occurred [*M* at 494 – emphasis added]:

“If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.”

[40] In *M*, shortly before the passage cited by McHugh, Gummow and Kirby JJ, the following passage appears (493):

“But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations.” (footnote omitted).”

Conclusion

[217] In my opinion, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. It was open to the jury to be satisfied that

the confessions were true. The jury had the distinct advantage of seeing and hearing both McLean and Trinh give evidence. The directions were plain that even if the jury disbelieved the evidence of McLean, it did not necessarily follow that he had been proved guilty of the murders. The trial Judge directed the jury in clear terms that it was still necessary for the jury to be satisfied beyond reasonable doubt that the evidence proved guilt beyond reasonable doubt. As I have said, it was similarly plain to the jury that they could not find McLean guilty of the murders unless they were satisfied beyond reasonable doubt that the confessions were true.

[218] The conflicts between details in the confessions and facts proved by other evidence, and the significance of those conflicts to an assessment of whether the jury was satisfied that the confessions were true, could not have escaped the attention of the jury. The Crown advanced explanations for those conflicts. It was open to the jury to accept those explanations and find beyond reasonable doubt that the confessions were true. In this process the jury's assessment of McLean as a witness was of significance.

[219] An assessment of the reliability of the confessions is not divorced from other evidence tending to connect McLean to the deceased and their murders. As I have said, independently of McLean's interviews, the evidence admissible against McLean established a strong case that Trinh murdered the deceased and connected McLean closely to the deceased shortly before their deaths. That evidence proved that it was highly unlikely that Trinh acted on his own and demonstrated that at all relevant times

McLean lived at Trinh's home and kept very close company with Trinh.

That evidence established that not long before the deceased were murdered the deceased were at the home of Trinh where McLean had sexual intercourse with the younger deceased. Finally, the evidence established that McLean kept close company with Trinh after the bodies were found and it was open to the jury to conclude that McLean fled to Brisbane with Trinh in order to escape the attention of the police who were investigating the murders.

[220] As to the confessions, having listened and watched the interviews, I was struck by the calm and relaxed manner of McLean throughout the interviews and by the absence of hesitation in providing extensive details of the events and his involvement. McLean gave his answers with a somewhat flat effect. At times he made specific points by way of correction and, in effect, volunteered details. Notwithstanding the conflicts between the facts proved independently of the interviews and details given by McLean to which I have referred, numerous details given by McLean were proved by independent evidence to be true.

[221] The interviews do not convey the impression of a young person relying upon what he had been told, falsely filling in gaps in his knowledge and fabricating implication in the murders. To the contrary, the interviews convey a compelling impression of reliability and of a calm and relaxed young person willingly acknowledging his guilt.

[222] As to the conflicts relied upon by counsel for the appellant as demonstrating a reasonable possibility that the confessions were unreliable, in my view reasonable explanations existed for the errors. The jury was entitled to find that the manner of attachment of the batteries was changed by Trinh in the rear of the van while McLean drove to the bridge and that in the darkness, while disposing of the deceased, McLean failed to notice the rope and masking tape. On the bridge McLean undoubtedly appreciated they were exposed and was concerned to keep a lookout for vehicle lights and to dispose of the deceased quickly.

[223] As to the legs of the deceased feeling wet and cold, it is unknown whether one or both deceased voided because they were scared or whether their legs could have become damp through some other cause. McLean told police that he was cold while he was waiting for Trinh near the satellite dish. Both deceased were unconscious and the jury may have taken the view that their legs could have felt cold to McLean in a state of anxiety on the bridge. Alternatively, the jury may not have been able to resolve this or other issues, but nevertheless have been satisfied that the confessions to involvement were true.

[224] I do not regard the issue of what McLean told his mother as of any significance. The jury may have rejected the evidence of McLean's mother. Similarly, in my view there is no significance to the fact that McLean said he saw the women go into the water through the use of a yellow torch whereas the torch in the van was red. A yellow torch was found at Trinh's

house. The jury were entitled to take the view that McLean was mistaken in his recollection.

[225] As to McLean's evidence, I do not have the advantage of the jury in seeing and hearing McLean. Given the disadvantage, my impression of McLean's evidence is not favourable. His explanations for making false confessions lacked credibility. In addition, it must not be overlooked that McLean supported Trinh's evidence and the jury rejected Trinh's evidence.

[226] Upon a detailed consideration of all the evidence, and in particular having regard to the conflicts relied upon by counsel for the appellant and my impressions gained from both the interviews and McLean's evidence, I have not experienced a doubt about the guilt of the accused. It was open to the jury to find beyond reasonable doubt that McLean's confessions of involvement in the murders were true and to find that McLean's guilt had been proven beyond reasonable doubt.

[227] McLean's appeal should be dismissed.

Angel J:

[228] I would dismiss the application by Trinh for leave to appeal for the reasons given by the Chief Justice.

[229] I agree that McLean's appeal should also be dismissed. On the whole of the evidence it was in my view open to the jury to be satisfied beyond reasonable doubt that McLean was guilty. He confessed to being a party

with Trinh to the killings. That confession was largely consistent with the Police investigation. The discrepancies between his confession and forensic evidence are explicable on account of Trinh trussing and strangling the victims in the back of the van whilst McLean was driving the van and victims to the Adelaide River. The dark night and haste with which the bodies were dumped off the bridge and the excitement of the occasion could well account for his not having seen the red rope and masking tape and making an erroneous assumption as to how a battery was tied to each victim. These were all matters for the jury to consider and adjudge.

[230] Aside from his confessions there was circumstantial evidence pointing to his guilt. He had been a friend of Trinh since school days together and worked and resided with Trinh at all relevant times. At the Trinh property where he resided Police found various items belonging to the victims. Cable ties, rope and tape similar to that used to truss the victims was found at the premises. Burnt remnants of the victims' clothing were on site. Other cable ties and beads from a broken necklace of one of the victims were found both in the van kept on site and at the Adelaide River Bridge.

[231] The bodies of the victims were first discovered on 3 March 2004. Trinh and McLean were together over the following week. On 6 March 2004 McLean used one of the victim's mobile phones. On 7 March 2004 at about 9.40 am Detective Sergeant Lade and Senior Sergeant Brayshaw visited the Trinh property. Trinh and McLean were together there. Having seen the Police off they chained the gate on the property and abandoned it, at a time when

the owners, Trinh's parents, were absent overseas. At 1.00 am on 8 March 2004 they flew together to Queensland to evade Police and avoid apprehension. On 10 March 2004 they were eventually found hiding in a wardrobe together in a house in Brisbane.

[232] The behaviour of both accused was consistent with their joint involvement in the two murders. The manner of trussing the two victims and the mode of disposal of their bodies suggested it was highly unlikely the murders were committed by one person acting alone.

[233] The reasons given by McLean for retracting his confession and saying it was false were unconvincing.

[234] I agree with the respondent's submission that the advantage of the jury in seeing and hearing the witnesses can not be underestimated in the present case, particularly as both accused men gave evidence, evidence which was starkly different to what they told Police in their records of interview. In the course of their evidence the accused admitted telling lies at various times to various people.

[235] The jury was entitled to disregard McLean's evidence in court and be satisfied beyond reasonable doubt of his guilt. The jury's verdict of guilty was not unreasonable. There was in my opinion no miscarriage of justice.

[236] Like the Chief Justice, upon a consideration of all the evidence I have not entertained any doubt about the guilt of McLean. Having listened to the oral

tape recording and seen the Record of Interview I concur with the Chief Justice that the confessions appear to be reliable and McLean appeared to be a person calmly acknowledging his guilt.

[237] McLean's appeal should be dismissed.

Southwood J:

[238] I am grateful to his Honour the Chief Justice for having had the opportunity to read his Reasons for Decision. For the reasons given by the Chief Justice I would dismiss both the appeal by Trinh and the appeal by McLean.

[239] On the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that McLean was guilty. The jury's verdict of guilty was not unreasonable. The confessions of McLean appear to be reliable and he fully acknowledged his guilt. There was, in my opinion, no miscarriage of justice.

[240] Upon a consideration of all the evidence including seeing and hearing the oral tape recordings and the records of interview I do not entertain any doubt about the guilt of both Trinh and McLean.
