LEWIS v R

Court of Appeal of the Northern Territory of Australia

Maurice & Asche JJ, Muirhead AJ

7, 8 May, 1, 2, 3, 17 July 1987 at Darwin

Criminal Law - Rape - Identification Evidence - Bite Marks - Forensic Odontology - Reliability for identifying rather than excluding suspects - Admissibility - Criminal Code s.192(1) and (4).

Criminal Law - Conduct of Defence Counsel - Impact upon jury - Rape in issue - Cross-examination of counsel - Policy

Evidence - Criminal Law - Forensic Evidence - Conflicting expert testimony - Novel scientific evidence - Duty of the Crown - Discretion to exclude.

Appeal - Unsafe conviction - Verdict of acquittal - Criminal Code s.411

Cases applied :

R v Carroll (1985) 19 A Crim R 410
R v Chamberlain (1984) 153 CLR 521; (1984) 51 ALR 225

Cases referred to :

Frye v United States 293 F 1013 (D.C.Ar. 1923)
R v Armstrong 11 A Crim R 363
R v James McCall (1920) 20 SR(NSW) 467
R v Sarek (1982) VR 971
R v Turner (1970) 2 All ER 281
Re Knowles (1984) VR 751

The Appellant in Person

Counsel for Respondent : R. Ellis

Solicitor for Respondent : Solicitor for the Northern Territory

Amicus Curiae : P. Tiffin

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
SITTING AS THE
COURT OF CRIMINAL APPEAL

CA No. 5 of 1986

ON APPEAL FROM THE
SUPREME COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA

No. SCC 91-92 of 1985

BETWEEN:

MICHAEL ANTHONY LEWIS

Appellant

AND

THE QUEEN

Respondent

MAURICE J

REASONS FOR JUDGMENT
(Delivered 17th July 1987)

I asked my brother Muirhead J. to deliver the first judgment. He has set out the extensive grounds of appeal relied on by the appellant and canvassed the evidence called by the prosecution and the defence at the trial. With the orders proposed by Muirhead J. I agree; substantially for the reasons he has given. There are some qualifications I would like to make and some additional remarks as well. I would like to have spent more time preparing these reasons, but that would have meant several weeks delay and so confident

am I the conviction should be quashed the interests of justice demand judgment be given now.

To Muirhead J.'s references about appeals against conviction where incompetence of counsel or some other form of malpractice is alleged, I would add Armstrong 11 A Crim. R 363; and Turner (1970) 2AII ER 281.

I do not think the question of whether this Court should simply quash the conviction or order a retrial ought to be influenced by any assessment we may make of the alibi evidence from the transcript; it seems to me to be pre-eminently a jury question. However, I am of the view that a retrial should not be ordered because without the weight of the odontologists' credentials, no reasonable jury would fail to entertain a reasonable doubt about the appellant's guilt. Having delayed justice for the reasons it apparently did, and even then seeking to rely on evidence of a kind and from a source so recently and authoritatively rejected in this country, I do not think the Crown ought to be given a second chance to put the accused in jeopardy.

This is a quite extraordinary case on its facts; extraordinary because, of the three eye witnesses who were called by the Crown, one positively excluded the

appellant as a suspect. No satisfactory explanation for his evidence consistent with the accused's guilt was suggested by the Crown. Other things being equal, his evidence must have given rise to a reasonable doubt on the vital issue of identification. Even without this remarkable contradiction in the Crown's case, it would have been extremely dangerous for the jury to have relied upon the evidence of the other two eyewitnesses. No doubt this was recognised by the Prosecutions Section of the Department of Law and goes a long way to explaining why the trial was put off for 18 months after the appellant was committed. The Crown needed forensic evidence; all it had was a photograph of bruise marks left by five teeth on the prosecutrix's boyfriend's chest and the decision of the Queensland Court of Criminal Appeal in Carroll (1985) 19 A Crim. R 410 unanimously denouncing expert evidence purporting to connect marks of this kind to a suspect as unsafe. The Crown appears to have been waiting to see if special leave to appeal from the Carroll decision was granted by the High Court. It was not. In spite of this, relying upon the leading forensic odontologist, Mr Bernard Grant Sims, whose evidence in the Queensland case had been declared unsound for the purposes of obtaining a conviction the Crown decided to press on.

Of the two dentists called by the Crown, Mr Sims was

by far the most qualified and experienced. The other, a local dentist with an interest in forensic odontology, Mr John Roger Plummer, described Mr Sims as the doyen of world experts in forensic dentistry. Doyen or not, in November 1985 the Queensland Court of Criminal Appeal in Carroll rejected similar evidence from him, confidently finding that it would be unsafe or dangerous to allow a verdict based upon it to stand.

One can extract from Carroll a principle similar, if not identical to that laid down in the famous lie-detector case: Frye v United States 293 F. 1013 (D.C. Ar. 1923):

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential forces of the principle must be recognised, and while Courts will go a long way in admitting expert testimony deduced from a well recognised scientific principle or discovery, the things from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs".

Frye is discussed generally by P.C. Gianelli, "The Admissibility of Novel Scientific Evidence : Frye v United States a Half Century Later" (1980) 80 Columbia Law Review 1197; by Ian R. Freckelton in The Trial of the Expert at pp. 167 to 174; and, in relation to

bite mark evidence, by A. Hale in "The Admissibility of Bite Mark Evidence" (1978) 51 Southern California Law Review.

An important part of the reasoning of the Queensland Court was that there was "a body of eminent opinion which holds that valid identifications cannot be made by reference only to bruise marks or they should be referred to only for the purpose of excluding suspects and not from [sic] positive identification" per Kneipp J. at p. 414. In other words, in the field of forensic dentistry there was not general acceptance of the reliability of the evidence adduced by the Crown, except perhaps for the purpose of excluding suspects. It could not be asserted that the Frye test has become law in Australia; nonetheless it provides a useful guideline in determining whether novel forensic evidence should go before a jury, and it cannot be argued that the underlying concerns it was formulated to meet are not as important today as they were in 1923.

It was Mr Sims evidence from which this conflict between experts appeared most clearly and the relevent passages from the Queensland trial transcript are set out at pp. 414 to 415 of the report. Those passages were read verbatim to Mr Plummer who, in effect, agreed with them. They were also put to Mr Sims who,

as might have been expected, adhered to them. However, he went on, in effect, to apologise for the lack of scientific research on which to base conclusions, pointing out that it was not easy to find subjects willing to be bitten.

Given the recency of the Carroll case and the novelty of forensic evidence positively identifying a suspect from bruise marks left on a victim's flesh, it behove the Crown in this case to carefully lay the ground for the reception of the opinions expressed by Mr Plummer and Mr Sims. It could only do this by proving the scientific reliability of the exercise they carried out. From my reading of the evidence, the Crown did not even attempt to do this; instead, it chose to rely on the witnesses' qualifications and experience in the field of forensic dentistry generally, and, in particular, upon the impressive curriculum vitae of Mr Sims and the confident way in which he expressed his conclusion.

The Crown hardly went beyond proving the uniqueness of human dentition, i.e. for all practical purposes, taking into account the size, shape and relative configeration of 32 teeth and their five surfaces, no two people have sets of teeth which perfectly match one another. But the question in this case was whether

bruise marks depicted on a photograph of human flesh could be matched with tracings of the biting surfaces of five adjoining teeth using a model made from an impression taken from the appellant's mouth. No experimental research was pointed to nor other studies which demonstrated the reliability of the deductions made by these witnesses from their exercises. On the contrary, the impression from Mr Sims's evidence is that the necessary research has not really been carried out. The extent of his own experience with bite marks in human flesh is 200-plus cases in over 25 years. This must have covered a variety of marks and wounds inflicted in a wide range of circumstances, examined under diverse conditions and for a number of purposes. It is not evident to me that it could provide a fund of experience from which to formulate the sort of deductive conclusion expressed by Mr Sims in the present case. If it could then it should have been made evident to the trial judge and the jury.

It is timely that this Court should begin to lay down guidelines for the reception of forensic evidence in criminal cases where the issue of guilt has to be determined by a jury. There has been surprisingly little judicial discussion on the subject in Australia. In contrast, courts and writers in the United States have given it a lot of attention. In Chamberlain (1983) 51 ALR 225, at p. 256, Gibbs CJ and

Mason J agreed with the following passage from the judgment of Jenkinson J in the Federal Court :

> "Those means of evaluating evidence which the jury enjoys by hearing and watching witnesses, and which are denied an appellate tribunal, could not in my opinion have enabled the jury reasonably to have eliminated the doubt, as to whether the matter tested contained foetal haemoglobin, which a careful consideration of the transcript of evidence and the exhibits raises in the mind. It may be conceded, as counsel for the Crown submitted, that idiosyncracies of manner and voice may undermine confidence in the reliability of a witness. But the evidence of Professor Boettcher and of Professor Nairn claimed the consideration of the jury upon grounds which could not rationally be shaken substantially by those things which the eyes and ears of a jury receive, but which a transcript does not reveal. Each of them was giving his opinion on matters of science within disciplines of which each was a master, and at a level of difficulty and sophistication above that at which a juror, or a judge, might by reasoning from general scientific knowledge subject the opinion to wholly effective critical evaluation. The reasoning by which other expert witnesses criticized the conclusions of Professor Boettcher and Professor Nairn, as well as the reasoning by which the latter two witnesses supported those conclusions and criticized the conclusions of the others, were all matter for the jury's evaluation. But in my opinion no juror could reasonably have failed to acknowledge that, reason as he might, he was not in a position to assure himself of the correctness of a conclusion against the opinions of the two professors to the degree which would eliminate reasonable doubt as to that conclusion."

Forensic evidence, especially if it goes to a vital issue implicating an accused person in the commission of an offence, may often have a prejudicial effect on the minds of a jury which far outweighs its probative value. The jury, being people without scientific

training, may often be impressed by an expert's qualifications, appointments and experience and the confident manner in which he expresses his opinions. And yet it ought not be left to such matters alone to provide a foundation for the jury making an assessment of the probative value of forensic evidence, particularly where there are conflicts in expert testimony, or where it is acknowledged that other experts of more or less equal distinction are unlikely to agree.

For my part I think that whenever the Crown wishes to rely upon forensic evidence the prosecutor has a clear duty, not just to his client, the Crown, but to the trial judge and the jury to acquaint them, in ordinary language, through the evidence he leads, with those aspects of the expert's discipline and methods necessary to put them in a position to make some sort of evaluation of the opinions he expresses. Where the evidence is of a comparatively novel kind, the duty resting on the Crown is even higher: it should demonstrate its scientific reliability. It is not an answer to considerations that dictate these things be done to say the defence may draw it out in cross-examination; that is an abdication of the Crown's primary function in a criminal prosecution.

There is a tendency amongst academics, professionals and others who develop skills in a particular area to mystify their field, often by the use of what seems to the outsider to be arcane language. It is the role of a prosecutor to strip forensic evidence of its mystery so far as is possible; trial by expert must never be allowed to take the place of trial by jury. The inability to articulate the principal tenets that need to be understood, to describe in ordinary language the methods used and the reasons that point to a particular conclusion, these are the hallmarks of unreliable science and the not-so qualified expert.

I share all of Muirhead J.'s concerns about the forensic evidence in this case. There is a very considerable risk that the jury were awed by Mr Sims's credentials and the confident manner in which he expressed his conclusion, notwithstanding that its probative value in linking the appellant to the rape was not demonstrated to be great.

Mr Plummer was the first of the Crown's two forensic experts on the bite marks to be called. His principle academic qualification is a bachelor's degree in dentistry. Today he is an administrator; in the past he has practised general dentistry. He has dabbled in forensic dentistry but it could not be described as more than a sideline interest to him. So far as the

evidence reveals, he has never done any original research or published any learned papers of his own. He obtained a certificate for forensic science from the Darwin Community College following a two year part-time course. In 1985 he was awarded a Churchill Fellowship to study forensic dentistry for several months in Europe. On this trip he was associated with Mr Sims at his London base for a month. Mr Plummer is also a member of the Australian Society of Forensic Dentistry and attends conferences in forensic science from time to time. Early in his evidence Mr Plummer was asked :

> "Doctor, so far as identification of perpetrators of crime from bite marks is concerned, have you read a number of publications in relation to that? ... I have.
>
> Have you developed a degree of expertise in relation to that area? ... I certainly hope so."

Little else was done to qualify him before he gave the following evidence :

> "Doctor, assuming for the moment that there is correspondence between the bite mark and the impression of teeth that you obtained, what certainty is there that the same person is involved? ... A very high degree of certainty.
>
> On what basis do you make that assertion? ... There are a number of studies which have been done which would indicate the uniqueness of the human

dentition. I have seen studies which would indicate that of a series of over 300 cases in which the centre point of various teeth have been graphed, that - and this was on the 6 upper and 6 lower anterior teeth, which are the ones most commonly used in this area - they are for biting. There was no correspondence in any of these 360-odd cases."

It is apparent that he has no real first-hand experience of comparing bite marks in human flesh with tracings made from models of a suspect's teeth. Of course, the important thing is not so much the making of the comparision but what significance that has in excluding the rest of humanity from suspicion, something one would expect could only be assessed after considerable research done under controlled scientific conditions. For the conclusions he expressed about the reliability of the technique as a method of making a positive identification he was entirely dependent on the works of others. At no stage did he refer to scientific research which got closer to the facts of this case than the study referred in the answer I have set out above.

It ought to be said that the tracings made by Mr Plummer on an acetate sheet from a model of the appellant's teeth, when applied to the photograph of the bite marks, do not show a degree of correspondence such that to a lay observer it is apparent that the two match sufficiently to enable an identification to

be made.

Mr Plummer claimed it was sufficient to have four "points of identity" to make a positive identification. His mentor, the doyen whom he got to confirm his conclusions, Mr Sims, thought it could only be done with six "points of correspondence."

There can be no doubt that the mainstay of the Crown's case so far as it depended on forensic materials was the evidence of Mr Sims. Given the decision in Carroll - to which it seems the trial judge was not even referred before the evidence was led - one would have expected the prosecutor to have tried to adduce evidence from Mr Sims providing cogent reasons for taking a different view in this case from the view taken by the three members of the Queensland Court of Criminal Appeal about 12 months before. This was not done. When defence counsel introduced the line of lack of general acceptance to Mr Sims in cross-examination, the witness tried to dismiss it by saying: "[W]e have suffered in the past by a lot of over eminent predecessors who wrote about the exclusion rather than inclusion of persons, and a great deal of this work has been done in the sixties and up to the seventies, and a great deal more research has been done from 1970 onwards": Shortly after, he interrupted counsel to volunteer: "Well,

this comes up perennially actually, many authorities believe it's better to exclude than include, and if you want the reference it is on page 134, line 10, word 7, of Cameron and Sims" - referring to a book of which he is a co-author. This statement is more consistent with the evidence he gave in Queensland, as appears from the report of Carroll's case, which plainly refers to the current state of affairs and not something founded on out-of-date references as he initially suggested.

No details were given of any further research since 1970, apart from this statement :

> "There is a great deal of enthusiasm at the present moment and certainly in all parts of the world including the United States and here, where there's a great deal more bite mark evidence being carried out under scientific means."

If this was a reference to research in the form of the production of bite marks under controlled scientific circumstances - and one could not be sure that it was - and if the research had gained any sort of recognition in the scientific community, and if it shows a positive identification can be made from photographs of bruising left by five adjoining teeth, why didn't the Crown lead evidence of it and how is it that it appears not to have been brought out in the

Carroll case?

There are a number of other unsatisfactory aspects to this witnesses' evidence. I can only regard as positive exaggeration his claim that he had had a "great deal" of experience identifying bite marks in living tissue when it is remembered that he put the level of his experience as being in the order of 200-plus cases over 25 years and, plainly, some, if not a significant proportion of this, included work on deceased persons.

One matter pointing to the unreliability of this means of identification is the fact, attested to by Mr Sims, that there is "no standard or really good defined definition of a point of correspondence" or, as he also put it "we can't satisfactorily define the correspondence in forensic dentistry". There is, therefore, an element of subjectivity in making a comparision. This probably explains why the witness objected to what had been done on previous occasions when attempts were made to set out points of correspondence - demarcation areas - as is done with fingerprints. That, he said, had the defect of channeling the on-looker's mind, which I take to mean revealing the exercise for what it was worth. He preferred to lay a tracing on a transparent plastic sheet over a photograph; that way "you can move it

around ... move it into the positions you want to".

Confronted with points that did not precisely correspond when the transparency was compared with the photograph, the witness resorted to speculation about the victim's probable movements at the time. This, it seems, is part of the subjective side of the assessment.

Mr Sims pointed out something else which is probably obvious when the tongue is run over one's teeth : there is a degree of subjectivity in preparing acetate tracings of biting surfaces.

There is more about Mr Sims's evidence that disturbs me and other worrying aspects to the claim that bruise marks can be used in the way they were in this case. As to the latter, Muirhead J. has mentioned some of them in his reasons: the problem of allowing for slippage, idiosyncratic bruising; the limitations inherent in the use of two dimensional photographs; and the expansion and contraction of the flesh with movement in the underlying musculo-skeletal structures. Each of these adds a variable of more or less indeterminite character to the picture. In this case it was further complicated by the peculiar factor of the extensive damage done to the appellant's teeth

when he was beaten up after the rape had occurred.

In the result, I think there has been a miscarriage of justice. I do not think the jury should have been permitted to place any reliance on the dentists' opinions. It really matters not whether that conclusion is supported by saying the evidence was strictly inadmissible, or its prejudicial effect far outweighed any probative value it may have had, or simply that it would be unsafe to place any reliance on it. Whilst the trial judge counselled caution in approaching the evidence, and his directions in relation to it cannot be faulted in any other way, he certainly did not go so far as to say it would be unsafe to place any reliance on it.

As to the other grounds of appeal, I am content to adopt Muirhead J's treatment of them.

On the question of whether this Court should order a retrial, I do not think we ought to consider the alibi evidence; its impact is quintessentially one for a jury to assess. On the other hand, without the forensic evidence, in my view the Crown did not have a case which it could prove beyond a reasonable doubt.

Accordingly, I would simply give leave to appeal and quash the conviction.

ASCHE J.: I agree with the judgment of Muirhead J. and the orders proposed by him. I make two brief comments.

First in fairness to Counsel who appeared at the trial and whose conduct of the trial has been attacked by the Appellant I see nothing in that conduct or the presentation of the Appellant's case before the jury which justifies the criticisms raised by the Appellant. From my own observations of the Appellant as he conducted his case before this Court I have no doubt that he would be a very difficult client who would assess the competence or otherwise of his Counsel on one test only; whether he won or lost.

Secondly, in view of the extremely fair summing up of the learned trial judge, it would be difficult indeed to be critical of anything he said. In particular he most carefully drew the jury's attention to the inherent dangers of the identification evidence. It is not anything specific in the summing up to the jury but rather the combination of factors which Muirhead J. has discussed which lead me to agree with his ultimate conclusions.

I also record my thanks for the help given by Mr Tiffin, whose appearance as amicus curiae greatly assisted the Court in clarifying and giving proper legal form to the arguments put by the Appellant.

IN THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

SITTING AS THE

COURT OF CRIMINAL APPEAL

CA No.5 of 1986

ON APPEAL FROM THE

SUPREME COURT OF THE

NORTHERN TERRITORY

OF AUSTRALIA

No. SCC 91-92 of 1985

BETWEEN:

MICHAEL ANTHONY LEWIS

Appellant

AND:

THE QUEEN

Respondent

MUIRHEAD A.J.

REASONS FOR JUDGMENT

(Delivered 17th July, 1987)

On the 24th October 1986 the appellant was found guilty of unlawfully assaulting a female with intent to have carnal knowledge accompanied by a circumstance of aggravation in that he had carnal knowledge of that female, the charge being laid

pursuant to Section 192 (1) and (4) of the Criminal Code. On the 28th October a conviction was formally recorded and the appellant was sentenced to 4 years imprisonment. A non-parole period of 2 years was fixed. As the appellant had been in custody since 12th May 1986 His Honour directed that the sentence should run from that date. He has thus been in custody for a term of 14 months.

By Notice of Appeal filed on 14th November 1986, the Australian Legal Aid Office acting on his behalf sought leave to appeal against conviction on grounds it is not now necessary to mention, save to say they were inappropriate. By Notice of Appeal dated 8th December the Crown responded by appealing against sentence on the ground that it was manifestly inadequate. The matter was called on the 7th May, the Chief Justice then presiding, and it is not necessary to detail the rather confused situation which emerged. It suffices to say that the appellant's counsel instructed by the Australian Legal Aid Office, sought leave to withdraw, which was granted. Mr Tiffin was asked by the Court to appear amicus curiae, and throughout the duration of the appeal it was conducted in part by the appellant, with considerable and patient assistance by Mr Tiffin. The appellant had been assisted in preparation by a fellow prisoner. He

sought leave to be represented by this man, not legally qualified, and this leave was refused. The appellant displayed persistence and some skill in his own submission. Difficulties were encountered but after the hearing resumed some weeks later a Notice of Appeal finally emerged, which this court accepted as amended grounds. On the first day, as one of the appellant's complaints (in fact his main complaint) was the conduct of his own counsel at trial, the court ordered that affidavits be filed to support this ground of appeal (now set out in detail in ground 8), and gave leave and made provision for cross-examination of the deponents on notice. In the result the matter resumed on 1st July last and the appellant's affidavit and affidavits sworn to by his mother and brother were filed. The Crown had available affidavits from the appellant's counsel at trial and his instructing solicitor.

I now set out the grounds of appeal which fall for consideration, omitting only the name of the complainant (which has been suppressed) and page references.

GROUNDS OF APPEAL

1. The Jury verdict cannot be sustained in the "combined" light of the following matters:

(A) The conflict between the evidence of Miss ..... and Detective Gage about how Miss ..... came to be at the Magistrates' Court on the 8th of February, and how she came to identify me as her assailant. (See Committal)

(B) There has been a miscarriage of justice in that the learned Trial Judge failed to warn the Jury in any, or any adequate way, on the dangers of relying on the expert odontological evidence - relating to identification of teeth by reference to bruise marks only.

(C) There has been a miscarriage of justice in that His Honour, the learned Trial Judge, erred in inviting the Jury to compare the crucial material, namely, the acetate tracings with photographs, and in that, the learned Trial Judge erred in allowing the comparative material to go into the jury room.

2. There has been a substantial miscarriage of justice because of the failure of the Crown to call at trial all the witnesses called at the committal; or alternatively, to place the evidence given by such witnesses, as might reasonably assist the defence case before that Jury in some other appropriate way.

The witnesses in question are:-

(1) Ms Joy Laraine Kuhl -
A forensic biologist employed by the N.T. police Department

(2) Leslie Bull -
An eye-witness

(3) Mark Gregory Dolton -

(4) David Jennings -
Possible eye-witnesses on the evidence of Miss ..... at trial.

3. There has been a miscarriage of justice because of the failure of the Crown to advise any evidence of the original descriptions given by the witnesses Miss ..... - Teau - and Bull.

4. There has been a miscarriage of justice because of the failure of the Crown to advise before the Jury the results of tests which show that there was no blood found on the clothes worn by the alleged rapist of a heavily menstruating woman.

5. There has been a miscarriage of justice because of the failure of the Crown to advise before the Jury the results of tests performed on swabs taken from Miss ..... when she was medically examined shortly after the event alleged.

6. There has been a miscarriage of justice because of the failure of the Crown to give the defence any forewarning that the Crown would not be calling six Crown witnesses who testified at committal.

7. There has been a miscarriage of justice because of the failure of the Crown to prove the basis of their tender of my black ripple sole shoes.

See Chamberlain v. Regina - 58 ALJR 33.
"Where facts are in a Jury's judgment essential to its decision (sometimes called primary facts) such facts must be established beyond a reasonable doubt".

7.1. The tender of the black ripple sole shoes had a far greater prejudicial effect than any probative value that they had because the media reported "black ripple sole shoes".

8. There has been a miscarriage of justice in that I was not properly represented at my trial because of:

8.1. The failure of my counsel to act on my explicit instructions.

Particulars:

(A) Failing to call John Michael Lewis to give evidence of alibi.

(B) Failing to cross-examine Miss ..... and Detective Gage on the conflict in their evidence at committal concerning the circumstances surrounding Miss .....

identifying me as her assailant - at the court room - where I stood charged of another rape.

(C) Failing to cross-examine Detective Gage on her evidence at committal that she had seen an identikit picture prepared by Miss ..... and as to why it was not produced to the court at my trial.

* - Defence counsel called for its production at committal.

(D) Failing to cross-examine Dean Teau concerning whether Miss ..... had said to him - "He is trying to rape me" C.T. or "This bloke has just raped me" T., when they first spoke after the alleged assault.

(E) Failing to cross-examine Stephen Kilinko as to the behaviour of Miss ..... and her alleged assailant shortly after the offence alleged.

(F) Failing to object to the non-production of Crown witnesses who gave evidence at committal.

(G) Failing to cross-examine various police officers who gave evidence, as to what tests were conducted on the clothing seized by police from my home and to the results of such tests.

8.2. The failure of my counsel to conduct the defence case in a reasonable and competent manner.

Particulars -

(A) Failing to put the Crown to proof that a rape had occurred.

(B) Conceding that a rape had occurred without instructions from me to do so and against the weight of the committal evidence.

(C) Failing to take any or any adequate steps to ensure that all relevant evidence was before the Jury, whether by way of oral evidence or by was of agreed facts or by some other means.

Evidence that should have been before the Jury but which was not; included the evidence of the following persons:

Ms Joy Kuhl
Leslie Bull
Mark Gregory Dolton
David Jennings

(D) Failing to object to the tendering of my black ripple sole shoes by the Crown.

(E) Failing to object to the acetate tracings and photographs going into the Jury room with the Jury when the Jury retired.

8A. That there has been a miscarriage of justice in that the appellant was not properly or competently represented because the appellant's counsel at trial, being aware of the importance of the odontological evidence in this case, and being aware from the Carroll case that there is a body of expert opinion which says identification based on examination of teeth and comparison with bruise marks is not reliable, failed to secure an expert to give expert evidence of such unreliability.

9. (A) The learned Trial Judge misdirected the Jury about the evidence relating to when Teau had first seen a photograph of me.

(B) The learned Trial Judge erred in that he directed the Jury falsely that Miss ..... gave a truthful answer about not being able to breathe during the alleged attack upon her.

10. There has been a substantial miscarriage of justice when the defects in the conduct of my trail are looked at in totality.

For the sake of completeness it is necessary, utilizing court files, to chronologically set out some matters which preceded the trial, as the appellant has been involved in two other charges, and three hearings

in this court, for offences which allegedly pre-dated the offence in question.

24.7.1984	Alleged offence against female M
21.12.1984	Alleged offence against female S
18.1.1985	Alleged offence in this matter
8.2.1986	Arrested on present and another or other charges
30.4.1985-2.5.1985	Committal proceedings on present charge
4.6.1985	Trial for alleged offence against M - Appellant acquitted
18.9.1985	Trial for alleged offence against S - Trial aborts and Jury discharged
23.9.1985	Second trial for offence against S - Appellant acquitted
20.10.1986	Trial, the subject of the appeal commenced.

I mention this for two reasons. The first is relevant to his ground that his counsel negligently applied himself to the defence. Some of his submission implied that the case slipped away from him, that his counsel disobeyed his instructions, was weak in his defence and made improper concessions. Having observed and heard the plaintiff for 4 days I am not by any means satisfied that this was so. The appellant displays an understanding of court procedures, is an assertive person and not likely to sit back when his interests are neglected. The second is that he was

clearly a person who was likely to come under police suspicion in the course of the police search for the unknown assailant of the prosecutrix in this case, particularly as he and she had been at the same disco earlier during the night in question, a disco to which he appears to have been a regular visitor.

I am not fully aware of the reason for the delay between the date of the appellant's committal for trial on 2nd May 1985 and his trial 17 months later. It does, however, appear to be common ground that there was an association with the Queensland case of Carroll, where forensic odontology evidence became a critical issue. (See Carroll (1985) 19 A Crim.R 410). The same issue was raised in this case and Dr Sims, one of the experts there concerned was here an important witness for the Crown. The Court of Criminal Appeal delivered its reasons in Carroll on 27th November 1985 and we were told the parties were awaiting an appeal to the High Court. Apparently, special leave was refused. I note with some concern, in view of the nature of the forensic evidence, that the transcript reveals no discussion concerning Carroll and it may be the Trial Judge was unaware of the judgment of the Court of Criminal Appeal in Queensland.

I turn now to a brief summary of the factual background. On the night in question the prosecutrix had spent some hours at the Victoria Hotel in Darwin with friends, including her boy friend, with whom she was living, Dean Teau. Apparently she had a disagreement with Teau and she returned to her room at Lameroo Lodge. There she showered and, accompanied by an employee of the Lodge, she visited a disco - Squires. She stated in evidence that she was menstruating heavily and she decided to return to the Lodge - only a short walk. As she left she was 'hassled' by a young man, she claims to have been the accused, who clearly wished to accompany her home. She rejected the approach but the man followed her. As she crossed a lawned area adjacent to Spillett House, itself adjacent to the Lodge, the man desisted and she saw him standing behind her adjacent to a swing. She continued on only to find herself grasped, thrown to the ground and raped, despite her screams. She complained of feeling ill and the man offered to take her to hospital. She and her assailant walked out on to Mitchell Street, where he hailed a taxi. Fortuitously, Dean Teau arrived at the same time, she called out words to the effect she had been raped and Teau attacked her assailant who, by this time, was seated next to the taxi driver. The assailant was pulled from the car and Teau applied a headlock, but

her assailant escaped after biting Teau severely on the chest. The fracas was witnessed by the taxi driver Kilinko (who gave evidence) and by one Bull who was seated in a nearby car. He gave evidence at the committal proceedings but the prosecution could not locate him at time of trial, not an uncommon situation in Darwin with its transient population. Endeavours by defence counsel to have his depositions put before the Jury were unsuccessful as the Criminal Code and the Evidence Act contain no provision for this to be done. The taxi driver Kilinko radioed the police, who quickly attended the scene. The prosecutrix was taken to hospital and gave such information as she could to the police. The appellant was not spoken to by the police for some days afterwards. As a matter of history, the following day the appellant was severely assaulted by some men, as a result of which he received facial injuries and damage to some teeth which required the attention of a dentist. I mention this as it was common ground that by the time the prosecutrix was asked to identify him, he bore a beard. On the evidence, which was not really in dispute, this was due to difficulties in shaving after treatment for his facial injuries. The suspicion which might otherwise attach to the altered appearance was thus explained. Police investigation at the scene yielded no forensic evidence involving the appellant. The girl's

blood-stained dress, superficial injuries, dirt and the like were wholly consistent with the alleged rape. Two tampons recovered at the scene were consistent with her account. Medical specimens taken from the girl, and later from the appellant revealed no evidence to identify the appellant as assailant. Clothing later seized from the appellant revealed no relevant blood, hairs or the like to associate him with the crime. It was common ground that the accused was present at Squires disco that night and it was also common ground that he wore black rubber soled shoes. The police discovered one shoe print in the area by the swings, where the girl last saw the man standing. His shoes were seized and went into evidence although forensic efforts to match the relatively clear shoe print with the appellant's shoes had failed. The shoes was of a type worn by many. The appellant has consistently denied that he was present when the alleged rape occurred and he made no admissions. After arrest, the appellant willingly supplied body samples and underwent a dental examination. Dental work, with his consent, was carried out by an odontologist, Dr Plummer, who took impressions and made a model of his teeth. These were 'matched' with the bite marks (more strictly bruises) depicted on a photograph taken soon after Teau had been bitten. The photo was taken from one angle only. At trial Dr Plummer and Dr Sims, Honorary Senior

Lecturer in Forensic Odontology, University of London, gave evidence for the Crown and with some confidence expressed the view that the wound inflicted on Teau's chest as depicted in the photograph was caused by the appellant's teeth. As a matter of interest, Dr Sims gave evidence for the Crown at the trial of Mrs Chamberlain and later upon the trial of Carroll in Queensland (supra). His evidence in the latter trial related to matching of photographs of a bite on the dead child's leg, the same processes being involved.

By reputation Dr Sims is an eminent man in his field. The defence also called a specialist in Orthodontics, Dr S.D.Dalitz, also a man well qualified. His emphasis was a little different to that of Dr Sims and Dr Plummer, but he did not take issue with the techniques they applied.

At trial the relevant evidence called by the Crown and which fell for consideration by the Jury fell into two main categories:

(1) Evidence of lay identification of the accused as the assailant; and

(2) Evidence concerning the bite marks.

The accused gave sworn evidence denying his guilt. In addition to the witness, Dr Dalitz, his counsel called his mother, who deposed to the time of his arrival home on the night in question and a friend, Dennis Herbert, who swore he drove the accused to his home from Squires early that morning and spoke as to the time of the journey.

I propose to deal with the matter under four main heads:

1. The appellant's grounds based on the negligence and conduct of his counsel.

2. The evidence of identification.

3. The odontological evidence.

4. The time factor and the alibi evidence.

CONDUCT OF COUNSEL:

I propose to deal with this shortly. It is not unusual for a disappointed litigant, especially a convicted accused, to blame his counsel. In this case the Crown was represented by most experienced Queens Counsel, Mr Glissan Q.C. The accused was represented

by junior counsel not of great experience in the Criminal Court. It can be said the scales of the quality of representation were not evenly balanced, but that can be said after most forensic tussles. It provides in itself no ground of appeal. The relevant authorities are referred to in re Knowles 1984 VR 751 @ 766-767. (See R v. Sarek (1982) VR 971 @ 982-983; R v. James McCall (1920) 20 SR (NSW) 467 per Cullen CJ. @ 472).

The appellant's grounds 8.1, 8.2 and 8A particularize his complaints and I do not propose to deal with them seriatim. During the conduct of the appeal the appellant's principal complaint centred on his counsel's failure to put the fact of rape in issue. He says he wished this to be done. Having read the depositions I consider so to act would not have been in the appellant's interests. His defence was simply "I was not there". The evidence of a rape having occurred was in my view overwhelming. Counsel, in planning the conduct of the defence, must be mindful of its emotional impact upon a Jury. To put a Jury "off side" by an abortive attack on a rape victim's evidence is not wise when the vital issue is identity. To have contended that the prosecutrix in her condition, and at that place, consented to sexual intercourse would have been an exercise in futility. It could have served no

purpose and, in my opinion, would have jeopardized the appellant's prospects of acquittal. I am satisfied this was counsel's advice, that it was good advice and that the appellant did not at the time take issue with it.

In considering the appellant's complaints I have read not only the transcript, counsel's addresses and the summing up but also (as we were invited to do) the depositions in the Magistrates' Court. I will return to one or two aspects covered by these grounds later. I am far from persuaded that leave should be granted on this ground and I would reject the appellant's application that his counsel and solicitor should be called for cross-examination on these issues. There are firm reasons of policy for this decision. As re Knowles illustrates there are cases when the conduct of the trial and the decision to call or not call evidence may, as it were, speak for themselves and be examinable. To enlarge the scope would place the law in an intolerable position. As my brother Asche commented in the course of the appeal, one would need a battery of appellate judges to cope with the appeals of those prisoners who are likely to become wise after the event, the event being the jury's verdict of guilty.

EVIDENCE OF IDENTIFICATION:

The evidence of identification was most unsatisfactory. The prosecutrix and the appellant were strangers. After the event the prosecutrix desisted from attempts to put together an 'identikit' facsimile. This may have been, as she said in evidence, because she was tired and distressed. She identified a yellow shirt, introduced into evidence after seizure from the appellant's home, as the shirt her assailant wore. As the Trial Judge reminded the Jury, the shirt, on the appellant's evidence belonged to his brother. Her evidence at trial was that her attacker wore "a light coloured cotton shirt". The yellow shirt she identified did not prove any association under examination by the forensic biologist Mrs Kuhl. On 8th February, about 3 weeks after the rape the police arranged a line-up for identification purposes. The appellant had agreed to participate but his solicitor apparently advised him not to. She was then taken to the Magistrates' Court where she saw the appellant. She said she recognized him as the person who raped her (19). She said "He had changed his appearance ---- he had his hair cut short, and had started growing a beard". Upon return to police headquarters she asked to see the appellant again and she was taken into a court room where he was seated and she again told the

police the appellant was her assailant. Her evidence in cross-examination of this second appraisal of the appellant was as follows:

> "I think you went back to the police station and spoke with Detective Lee Gage, a woman? ---- Yes.
>
> Did you say to her words to the effect that there's some sort of problem with identification? ---- No. I identified Lewis, but he had his hair cut and he had grown - he was trying to grow a beard.
>
> All right, you said that. My question was, you went to Lee Gage and said "There's some sort of problem with identification", didn't you? ---- I didn't. They weren't the words I used, no.
>
> You said words to the effect that it might be the person, or a similar person, except that a person that you saw in the foyer had a beard and a bit shorter hair; isn't that what you said to Lee Gage? ---- Something like that, yes.
>
> So you couldn't at that stage be sure? ---- I was sure, except that he had changed his appearance.
>
> You said just in answer to my previous question that it might be the person, except that he had a beard and shorter hair? ---- Well, I knew it was Lewis but he'd just changed his appearance, that's all.
>
> Then you were escorted back to the courthouse by some police officers and a second identification was made? ---- Yes.
>
> At that stage did the police say, "Look, come back and have another look"? ---- They just said - yes, not exactly that but they said - they took me back a second time to the courthouse.

HIS HONOUR: Would you mind repeating what you just

said? ---- The police took me back to the courthouse to make identification the second time.

MR ADAMS: Had you told them about seeing the man with the beard and the shorter hair who might have been your assailant? ---- Yes.

It was then that they said come back for another look? ---- Yes".

Dean Teau's evidence was far from satisfactory on this issue and on the facts, of his encounter his opportunity to observe was limited. He agreed with defence counsel that he was "pretty drunk" that night. "In fact you were blind, to use your words, weren't you? Yes, pretty out of it". He also purported to identify the appellant after seeing him in the Magistrates' Court. He was cross-examined upon his evidence in the committal proceedings:

"Read the whole page if you like, but about a third of the way down, I suggest, you'll see some marking which I have made? ---- "Were there many people seated in the court?"

Read it to yourself now at this stage? ---- Right.

Yes, could I have that back, please? You gave that evidence to the learned magistrate on 1 May 1985? ---- Yes.

Approximately 4 months, maybe 5 after the attack on your de facto wife? ---- Yes.

At the stage of giving your evidence, you went into court and you said it was full, the court room? ---- Yes.

I think you were asked this, "When you looked in, did you make any observations in relation

to any persons in that room?" Do you agree with being asked that question? ---- Yes.

I think you answered - and disagree with me if you like - "I've seen one bloke in there who looks something like him"? ---- Yes.

Is that what you said then? ---- Yes.

You were asked, "Do you recall on - " and that's all the question that's recorded, and your answer, "But I couldn't be positive, you know"? ---- It was 4 months later and the bloke had changed his appearance and he looked like the bloke it was".

"Your evidence on that occasion boiled down to this: you were blind, he was stocky, and you can't remember anything else? ---- That's what it says on the paper there.

That's what you said in May 1985, isn't it? ---- Yes.

And now you're saying you can be confident that it was Mr Lewis? ---- I was pretty confident then.

That's not what you said? ---- It was 4 months later, and the bloke had grown a beard, so I couldn't be positive, you know, I would be lying if I said I was positive, if I'd said, "That's the bloke".

Both the prosecutrix and her de facto husband Teau, had seen the appellant subsequently - in fact, there had been an altercation between the two men about a week before trial.

The evidence of the taxi driver Kilinko was important on this issue. He was called by the Crown to describe what he saw when his taxi was hailed by the

attacker and from which that man was forcibly extracted by Teau. Towards the conclusion of his evidence in chief he was asked:

> "I think sometime after that, on 8 February 1985, you were asked to go to the police station, and then to the Magistrates' Court, is that right? ---- I'm not sure of the exact date but, yes I ---
>
> No but there was a day, some weeks later, when you did that? ---- Yes.
>
> You went to the Magistrates' Court, is that right? ---- Yes.
>
> You looked around but you were unable to see anybody that you could identify as the person that first got into your cab? ---- That's right".

He also had been asked to attempt an identification at the Magistrates' Court and he pointed out "a man who was closest in appearance to the man who got into my taxi" a man who he stated in evidence was not Mr Lewis. After his cross-examination closed the Trial Judge thanked him for his evidence and gave him permission to leave. He stood his ground and said "Its just Your Honour that I feel obligated to the ----". He was told to say no more and left. After the adjournment that immediately followed, defence counsel applied for leave to recall the man. The Trial Judge acceded to this request. Defence counsel referring to the man who had seated himself in the front seat asked:

"Now, the man that got in the cab, he sat, was it in the front seat? ---- Yes.

Are you able to describe that man? ---- Yes, he was a big man with sandy coloured hair, coarse sandy coloured hair. He looked to me, he had Swedish features, and he looked like a - like a seaman to me. He was that type of fellow, a big rough stocky build.

I'll ask you directly, Mr Kilinko, was it that man? ---- No, that's not that man".

Mr Glissan then cross-examined him and perhaps succeeded in demonstrating that his ability to observe his passenger was limited in time and that events were hectic. The fact is that in contrast to the prosecutrix and Teau, there was no evidence to suggest Kilinko had consumed alcohol, the passenger was seated alongside him for a brief spell, the interior lights of the taxi were on and it was Kilinko who immediately radioed the police. There was no suggestion in cross-examination on this issue by the Crown that the description of his temporary passenger given in court differed to any description he may have given the police after the event. It is a pretty safe assumption that he would have been asked for a description. The Trial Judge in his summing up emphasized the importance of his evidence, stressed he was a "sober man --- a disinterested person merely trying to tell the truth as he recollects it". I will return to Kilinko's evidence later when considering the alibi evidence.

His Honour dealt with the evidence of identification with care and in accordance with authority. He concluded his remarks:

> "If that evidence stood alone, ladies and gentlemen, it's a matter for you to make up your minds about it but you might well consider that bearing in mind the intrinsic danger of eyewitness identification, and the differing evidence which those eyewitnesses have given you, you might decide that you could not safely find a verdict of guilty against the accused".

ODONTOLOGICAL EVIDENCE

I now turn to the odontological evidence, but first it is necessary to consider briefly the injury to his teeth which the appellant had suffered between the time the prosecutrix was raped and Teau was bitten and the time of Dr Plummer's tests on 8th February 1985.

Dr Dragevic attended the appellant on reference from the casualty department of the hospital at 9pm on 19th January, the day he had been severely assaulted. She found a fracture of a previously restored upper tooth on the left hand side. An upper tooth on the opposite side had been "pushed" inwards, was tender and associated with lip bruising. An adjacent tooth was tender, but not mobile. A lower tooth on the right was chipped at the rear. The four

central teeth on the lower jaw were tender "but not particularly mobile." Another tooth on the lower right had a "tiny chip" which was not in her view, associated with the assault. She attended to the upper tooth which had been displaced - i.e. she "repositioned" it. She saw the appellant a couple of days later when he complained that the lower teeth were sore. She extracted a very sensitive tooth from the upper right jaw. On 31st January she ground two teeth on the upper right and two teeth on the lower right - apparently to relieve pain experienced on biting. She was unable to speak as to the extent of the grinding back. That was the extent of treatment prior to Dr Plummer's tests. Dr Dragevic had made no note that the teeth she ground were mobile. Her recollection is they were tender not mobile - i.e. loose. The appellant complained they were loose for some time.

I previously commented that in the struggle with the man he pulled from the taxi and upon whom he applied a headlock, Teau was bitten on the chest and he suffered severe bruising and possibly some laceration, as a result of this event. The nature of the teeth marks is shown on Exhibit 16. It occurred on the right side of the chest some centimetres above the right nipple. Teau was a well built young man and that area of his chest was relatively firm and flat, when he was

standing erect with arms by the side as depicted in the photo. It was common ground these bruise marks were left by about 5 teeth of the lower jaw. No teeth marks attributable to upper teeth were visible.

On 8th February 1985 Dr J.R.Plummer, a dental surgeon with experience in Forensic Dentistry, which has apparently gained reputation as an accepted physical science, performed work for the purpose of determining whether the appellant's teeth caused the bruise marks. The technique was similar to that applied in Carroll. It involved the taking of impressions of the teeth and the production of a model of the teeth - i.e. a true three-dimensional replica of teeth in the upper and lower jaw illustrating their individual characteristics, relationship one with the other and the general arch. By the use of a clear cellulose acetate sheet the outline of the chewing edges of the teeth was then traced by the use of a fine pen. This was then applied to the photographed bruise, the dimensions of which were known (and signified by measure in the photo) for the purpose of determining whether there was correspondence. Dr Plummer determined, and expressed his view with confidence, that the appellant's lower teeth had caused the injury. Soon after he had done his tests Dr Plummer wished to confirm his opinion with another odontologist, Dr Ken

Brown (who gave evidence in Carroll). He found he and Dr Sims, who he described as "the doyen" in this branch of science, were then in Brisbane. He visited that city and displayed the models, the acetate overlay and the photographs to Dr Sims, who 'confirmed' his opinion. Some time later, in the course of a Churchill Fellowship in London, he again conferred with Dr Sims concerning the matter.

Dr Plummer told the Jury that "a correspondence can be easily seen between the marks on the photograph and the incising edges of these teeth". He stated the work carried out by Dr Dragevic beforehand did not affect his opinion. He stated it was "possible but highly unlikely" that another person in a population of 65,000 (Darwin's approximate population) could leave a similar impression in human flesh. He himself was "100% certain" that the marks were left by the appellant's lower teeth.

Dr Bernard Sims, no doubt a leader in this field, confidently expressed the opinion "that the teeth on the model represented the teeth which made the bite mark". (202) It is apparent that in his cross-examination the appellant's counsel drew upon Dr Sims' evidence in Carroll and a section of his

evidence referred to by Kneipp J. (@ pp.414-415) was put to him.

In evidence, Dr Sims when referring to differing expert opinion explained:

> "This is the problem we have in all bite marks procedures, that it's very difficult to pursue scientific research into bite marks, as you can well imagine. Most of our bite mark experience is gained from practical means, perhaps on cadavers, and certainly in cases of rape and assaults and affrays, but it is very difficult to conduct any sort of scientific research. For number one, if you think, it's very difficult to get volunteers to be bitten on various portions of their body, sometimes quite painfully. You can get no end of volunteers to do the biting. It's difficult to get hold of research in this position, and it - it still falls in the great deal for most of us who work in the practical field of things, we are sometimes a little bit dissociated from the scientific areas. There's - there's not very much compatibility. This is why we have to have those symposia to get together. Unfortunately, as well, most of the references which refer to the exclusion of persons rather than the inclusion of persons, are those papers which are written in the 1960s and 70s. Professor Fernhead's quotation is 1961. He hasn't written anything on bite marks since that time.
>
> There is a great deal of enthusiasm at the present moment and certainly in all parts of the world including the United States and here, where there's a great deal more bite mark evidence being carried out under scientific means.
>
> Doctor Fernhead I think was your tutor at one stage? --- He is responsible for getting me into forensic dentistry, yes.

I think, it is true to say that over the years you agreed to disagree? --- Over many years. I still do it every time I see him.

Part of the problem with bite marks - identifying assailants by way of bruising in human flesh, I take it, is the fact - or can be - that often one only has a photograph to work with, not the actual body as it were? --- That's correct".

It is, I think, accurate to say that Dr Sims' personal views were not shaken, but he was not dogmatic and he unhesitatingly explained some of the difficulties involved. His evidence in cross-examination concluded with this passage:

"With the factor, with with factor that bruising marks often only come from photographs and in this case have come from photographs, there can be distortion whilst the bite was being made and perhaps afterwards if the victim's moved and with the art involved in tracing, you'd have to agree that when there's only 5 or 6 teeth in this case, you'd have to agree, would you, that no one could be 100 percent certain that Mr Lewis' teeth had left those bit marks? - I don't think anyone could be 100 percent sure in any case unless one was an eye witness, but in the material which has been provided to me, and certainly the differentiation of those marks and the significant dentition of the accused, it's my opinion that those teeth are his teeth which have produced that mark.

If someone was to say they were absolutely 100 percent certain, and they were clear about that; in this case I think you'd agree with me that they were overstating their position? --- Very much so".

The appellant's counsel called Dr G.D.Dalitz, an expert in Forensic Dentistry, from Melbourne. He had heard the Crown evidence on this topic. He expressed the view upon Dr Plummer's workings that the teeth that left the marks were "similar - not a perfect match". His evidence, or the manner in which it was transcribed, is a little confusing. An attempt was apparently made by the appellant's counsel to demonstrate to the Jury, by means of a cast made by Dr Dalitz of a patient's teeth and an acetate tracing from that cast, some similarity with the photo of Teau's wound. But objection was taken and the evidence was disallowed as the cast had not been put to the Crown's experts in the course of cross-examination. The balance of his evidence is not readily comprehensible.

> "Doctor, I think you've been present in court for the last couple of days? --- Yes I have.
>
> And you were here when Bernard Sims was both examined and cross-examined? --- Yes.
>
> I take it that his is an opinion which you would respect? --- Yes.
>
> And an opinion with which you would not like to disagree? --- No.
>
> And indeed an opinion with which you haven't really in your evidence disagreed? --- No, that's correct - I haven't disagreed.
>
> No, you haven't. Doctor, so far as that is concerned, you were asked in relation to the teeth impressions that you took and translated onto the acetate, whether or not

> they matched, and you said in each case there were some similarities, and you were present when Mr Sims was asked about each of the same ones that you were asked about, in turn that's number 2, number 5 and number 4? --- Yes.
>
> You heard what he had to say about the errors in matching that could be demonstrated? --- Yes.
>
> I would take it you agree with what he said? --- No.
>
> You don't agree with what he said? --- Not particularly.
>
> Is there any particular matter that you want to refer to in that regard - in relation to 2, 4 or 5? --- Not especially. You've mentioned the arch width of our learned friend, but it's not different.
>
> Is that the only real distinction you draw? --- You could pick points about all these - the point - there was a point in my exercise there".

It is probable he was referring to the exercise in which he wished to demonstrate another arch or arches, including that displayed in a cast taken from defence counsel a few days before. Against the background of this case and my previous and subsequent remarks I am uneasy about the impact of this evidence upon the Jury. There are several reasons for this.

The science of Forensic Odontology is developing still - perhaps with some acceleration over the past decade. Here there was only bruising by the lower teeth - admittedly unusual. The cutting edges of

the teeth alone are matched - it can not be a three-dimensional test. The photo was at only one plane. If Teau was applying a headlock the contour of his chest flesh cannot be assessed with certainty. The biter was in a headlock. The teeth may have slid - the flesh at the site of the bruising may not have been held firm by the "nip" effect of a bite by both jaws - i.e, the skin may have moved. There is still a body of opinion that casts some doubt on the processes of positive identification by these means, as opposed to the exclusionary purposes referred to in evidence. (See Gradwohl's Legal Medicine Chapter 10 @ p.141). "The interpretation of such marks requires experience in order to assess whether the suspect is responsible or not, and it is often simpler to exclude a particular person rather than to identify positively the person who made them --- In order to record the marks accurately the victim must adopt or be placed in the position in which the attack took place. Any movement will distort the tissues, rendering the measurements inaccurate". (Dr Sims was a co-author of this chapter). This branch of forensic science has not advanced to the stage of say fingerprints or ballistics. The result is a matter of judgment, not easily, or at least accurately demonstrable to a Jury, the techniques depend on human skills, not only in interpretation but in preparation.

Taking these factors into account and being mindful of the dental treatment the appellant had undergone between the date of the crime and the making of the cast, I find myself very uneasy and in the position of the members of the Court in Carroll above. I refer to passages from the judgment of Kneipp J.:

> "The evidence clearly established that the study of the characteristics of human bite marks and consequent identification of persons responsible for such marks, fall within a field of expertise, and the witnesses called for the Crown (no expert was called for the defence) are all experts in that field. Their evidence was that each person's dentition is unique, so that comparison of a person's dentition with bite marks may be the basis of a conclusion as to whether or not his teeth produced the marks. But plainly the reliability of the conclusion will depend on a variety of factors, and one of the factors will be the type of mark which has been produced. The biting of part of a person's body may produce lacerations, or indentations in the form of impressions made in the skin without any lacerations, or mere bruising. In the present case, there were not any lacerations or indentations. There was bruising only; and whatever might be the reliability of identifications made where there are lacerations or indentations, it seems to me that the effect of the evidence is that one can only have serious reservations as to its reliability where there are bruise marks only. ----
> "Unfortunately, the bases for the disagreements between the schools of thought were not canvassed. Mr Sims supported his view by reference to his experience. But a number of problems were acknowledged during the course of the evidence. Some related to the difficulty of accurate reproduction of the bruising. A photograph of part of a human body results in reproduction in two dimensions of a three-dimensional object, with possible distortion. The bruise marks in question were on a curved surface, and

> this might also cause distortion. The shapes of bruise marks can alter if the body is placed in a different position from that in which it was when the marks were made. The marks here were near the knee, and their shapes might be affected by changes in tensions of the skin caused by extension or flexion of the knee joint. The reproduction of relevant dentition marks on an acetate also involves a change from three dimensions to two, and the marking of the tracing is not a mechanical process but a matter of judgment. The final step, that of comparing the tracing and the photographs, is also a matter of judgment".

It may be that this type of forensic evidence is becoming important in the forensic field but as I understand the evidence there is no established universal view as to its reliability in identifying, as opposed to excluding, a suspect. Bruising or its degree must be variable when teeth and the body are in motion and the admissibility of expert evidence in this situation may be a matter of some doubt. Speaking for myself I do not consider it was of itself a sufficient foundation for conviction. There may be cases where it will be a link in a chain of circumstantial evidence, but here upon my view there was no chain. There was no other reliable circumstantial evidence, save for the appellant's presence at Squires earlier that night, linking him with the rape.

TIME FACTOR AND ALIBI EVIDENCE:

The appellant told the Jury he left Squires at about 1.15am to 1.30am and was driven home by his friend Dennis Herbert, who gave evidence to this effect and who was pretty battered under cross-examination in the process. Mrs Lewis, the appellant's mother, swore he arrived home at about 1.30am. The Crown objected initially to this 'alibi' evidence as no Notice of Alibi had been given pursuant to Section 331 of the Code. However, it emerged that the committing magistrate had not informed the appellant of the requirements of the Section 331(3) and the evidence was given. Whether or not it was truly alibi evidence, depended on the evidence as to the time of the rape, and I refer to it briefly.

The prosecutrix, who had consumed alcohol earlier, said she arrived at Squires at about 12 o'clock and she left about 5 minutes later (6). On her evidence the rape took place soon after midnight. Clearly, she was in error. Teau, who agreed he was drunk, stated he left the Victoria Hotel where he had been drinking in the "early hours of the next morning". Karen Byrne, a barmaid at Squires, said she last saw the appellant there "about 1 o'clock (66). Barry Clee, the duty manager, stated he had seen the accused

earlier in the evening. He left and returned "at about quarter past one" (69). He did not then see the appellant or his friends. David Bannister, another barman, told the Jury he last saw him at 12-12.15am (71). These estimates do little to assist. But the taxi driver Kilinko said he was hailed at about 2am and this must have been very shortly after the rape occurred. He radioed the police from his cab shortly after and he said the Police arrived "quickly". Detective Moseley was called to duty to investigate the matter at 2.30am and Lee Gage, the other detective, said she came on duty about 2.15am. The Crown for some reason did not call the police who answered Kilinko's summons. I would have thought such evidence would have been available. The only finding that could properly be reached is that the rape took place shortly before 2am. If, therefore, the accused had reached home between say 1.30am and 2am, he could not have been involved.

Both the accused and Herbert had been drinking heavily. They had attracted the attention of employees at Squires earlier that evening. Herbert had a criminal record of which Mr Glissan Q.C. made good use in both cross-examination and address. The Jury may have disbelieved both of them - indeed the 'alibi' evidence may have rebounded against the appellant as

Crown counsel submitted it should. Undoubtedly, there were features of it which were unsatisfactory. Although I bear in mind the care one must take, without the advantage of seeing a witness, it is clear to me that the evidence of Mrs Lewis fell into another category. Her testimony was that on the night in question she returned home about midnight and went to bed. Hearing a car pull up she looked through the louvres and saw Herbert's car. The appellant entered, and knowing her two sons had gone out together she asked as to her son John's whereabouts. The appellant replied he had gone to the casino. The appellant went to his room and she heard music. She stated this was at 1.30am. John arrived home 30 minutes later and she asked him to turn the music down. She said she relaxed then. "I was happy that they were both home." Under close cross-examination, she said she was "positive" of the time, "absolutely sure" as she had a bedside clock. She said "I never can really relax until they get home. That's the way it is", an understandable parental sentiment. Her evidence was relevant on another matter, the length of the appellant's hair at the time. She swore it was always relatively short.

This was most important evidence. If the Jury considered it was possibly true then it followed the accused could not have been convicted of the rape

which occurred at about 2am. The Trial Judge dealt with it shortly and without emphasis. He said:

> "Then Mr Lewis also gave evidence which generally supported Michael Lewis' account of his coming home in the early hours of 18 January. According to Mrs Lewis he came home at about half past 1 that morning. Again, I don't propose to take you to any detail in her evidence, but that's the general thrust of her evidence, to support her son's account".

With respect I consider the evidence as to times deserved closer examination in the summing up.

There are other aspects of the trial which cause concern. As I have said, the rubber shoes the appellant wore on the night in question, of a type commonly worn, were introduced in evidence as an exhibit. They were seized with a view to matching with the shoeprint found near the swing and depicted in Exhibit 10 - a pretty clear print. As the evidence of Detective Metcalfe indicated, attempts to match the appellant's shoes to the shoe mark by tests in Victoria failed. It is a reasonable inference this was because they could not be matched. The Trial Judge suggested to the Jury that they could not safely "link" the appellant to the crime by reason of this shoeprint. It may have been advisable to go further and emphasize that they may indeed conclude it was not made by the

appellant's shoe. His counsel did not object to the tender. The danger is that the shoes being an exhibit, the Jury may have been left with an impression that there was an association between the shoe and the print when on the evidence the only inference was that there was no such demonstrable link. The shoe should not have been in evidence. It may have been marked for identification, but in the absence of proof linking it with the shoe print it should not have been dignified as an exhibit. It had no probative force, but the Jury may have been led to think otherwise by its mere presence in the jury room.

Section 410 of the Code provides for appeal from conviction by leave on a question of fact or mixed questions of law or fact. Section 411 provides for the determination of the appeal:

> "The Court on any such appeal against conviction shall allow the appeal 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 or that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal".

Sub-section (3) provides that if the Court allows an appeal it shall quash the conviction and

direct a judgment and verdict of acquittal. Section 413 empowers the Court to order a new trial if a miscarriage of justice can be more adequately remedied in that manner.

I have reached the conclusion that the verdict cannot be supported, having regard to the evidence. The grounds of appeal submitted by the appellant himself are not really appropriate as he encapsulates most of his complaints in grounds which relate to his counsel's conduct. It is not desirable that leave should be refused because the grounds are inappropriate when a prisoner is unrepresented. I would grant the appellant leave to amend his grounds of appeal by including the following broad ground: "Having regard to the evidence given at the trial, it is unsafe to allow the verdict to stand".

I have considered the matter in its entirety. The evidence of identification of the accused as the person at the scene is entirely unsafe. The evidence raises a very real possibility that the accused was at his home when the rape occurred. It would be unsafe to allow the conviction to stand on the basis of the odontological scientific evidence. There being no admissions and no other forensic evidence linking the accused to the rape, save the fact that he was at

Squires during the evening in question, there was just not sufficient evidence to justify his conviction.

I would give leave to appeal on the ground set out above, subject to the amendment and I would also give leave to appeal on grounds 7 and 10. I would not give leave to appeal on the other grounds.

I am persuaded that the Jury, acting reasonably, should have entertained such a doubt as to entitle the accused to an acquittal. See Chamberlain (1984) 153 CLR 521 per Gibbs CJ. and Mason J. @ 534:

> "To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt. The function which the Court of Appeal performs in making an independent assessment of the evidence is performed for the purpose of deciding that question."

I do not consider it appropriate to order a new trial. That is what the appellant seeks in his amended grounds, but it is probable that he was influenced by remarks from the Court, when the consequence of the appeal being allowed because of his counsel's conduct was being discussed. It is well over 3 years since the rape took place. It is probable that the prosecutrix is now the mother of a child. The

evidence produced by the Crown is unlikely to be stronger - in fact if the Crown calls the witnesses it was unable to call, its case may be weaker. The evidence of the witness Bull was important from the defence view as to time and was favourable to the appellant as identification. A long interval elapsed between committal and trial. The appellant has already served 14 months of the sentence imposed.

I would allow the appeal and quash the conviction. In conclusion I would thank Mr Tiffin for the assistance he gave in his somewhat difficult role as amicus curiae.