New South Wales
Court of Criminal Appeal

CITATION :	**R v Crowther-Wilkinson [2004] NSWCCA 249**
HEARING DATE(S) :	12/7/04
JUDGMENT DATE :	27 July 2004
JUDGMENT OF :	Wood CJ at CL at 1; Dowd J at 232; Kirby J at 233
DECISION :	1. Appeal Dismissed; 2. Conviction and Sentence below confirmed.

CATCHWORDS :	CRIMINAL LAW - appeal against conviction - murder - plea of not guilty - co accused jointly indicted - whether verdict of the jury was unreasonable and cannot be supported having regard to the evidence - whether a miscarriage of justice occurred as a result of the failure of the trial judge to direct the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that he had planned the murder of the deceased - whether the trial miscarried by reason of the publication on the Internet, both before and during the trial, of two interlocutory judgments.
LEGISLATION CITED :	Crimes Act 1900 Criminal Procedure Act 1986 - s 108,

CASES CITED :	Crofts v The Queen (1986) 186 CLR 427 at 432 Glennon v The Queen (1992) 173 CLR 592 at 603 Hinch v Attorney General (Vic) (No. 2) (1998) 164 CLR 15 M v The Queen (1994) 181 CLR 487 at 497 Murphy v The Queen (1989) 167 CLR 94 at 99 R v Bell NSWCCA 8 October 1998 R v Crowther-Wilkinson and Cowie [2003] NSWSC 44 R v Crowther-Wilkinson and Cowie [2003] NSWSC 226 R v Crowther-Wilkinson and Cowie [2002] NSWSC 1207 R v Loguancio (2000) 1 VR 235 R v Yuill (1993) 69 A Crim R 450 R v Zaiter [2004] NSWCCA 35 Shepherd v The Queen (1990) 170 CLR 573
PARTIES :	Regina Simon Crowther-Wilkinson
FILE NUMBER(S) :	**CCA** 60129/04
COUNSEL :	M C Grogan (Crown) P Byrne SC with H Dhanj (Applicant)
SOLICITORS :	S Kavanagh (Crown) S E O'Connor (Legal Aid)

LOWER COURT JURISDICTION :	Supreme Court
LOWER COURT FILE NUMBER(S) :	70096/01
LOWER COURT JUDICIAL OFFICER :	Hidden J

IN THE COURT OF CRIMINAL APPEAL

60129/04

WOOD CJ AT CL

DOWD J
KIRBY J

Regina v Simon Crowther-Wilkinson

On 28 March 2003 the appellant, Simon Crowther-Wilkinson, was sentenced to imprisonment for 20 years with a non-parole period of 15 years for murder. His co-accused, James Cowie was found not guilty. He appeals against this conviction but not against the sentence.

The appellant had been a silent partner in a partnership with the deceased in a security company, Excell Security Pty Limited ("Excell"). The deceased's body was found floating in the Hawkesbury River wrapped in plastic, metal 3/8 inch steel galvanised chains and 12 mm D-shackles. The Crown case was that he had been shot once in the back of the head, consistent with a .22 calibre bullet having been fired by either the appellant or James Cowie, with the other present and assisting or encouraging the killer. The deceased's body had then been transported to the Hawkesbury River and dumped from a small aluminium boat.

Ground 1 – Verdict Unreasonable

Held: The Crown relied on 40 strands in a circumstantial case. The matters were all before the jury and properly taken into account by them. The Crown case was compelling and the test in *M v The Queen* (1994) 181 CLR 487 was not made out.

Ground 2 – A miscarriage of justice occurred as a result of the failure of the trial judge to direct the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that he had planned the murder of the deceased

The appellant did not seek this direction at trial. Rather it was positively indicated that it was not needed. The circumstances when this direction should be given are as stated in *Shepherd v The Queen* (1990) 170 CLR 573 and *R v Zaiter* [2004] NSWCCA 35.

Held: The Crown's case was pursued on the basis that the appellant instigated and planned the murder and was party to a joint criminal enterprise.
The proof of this lay in the overwhelming circumstantial case. Having regard to the way in which the case was conducted, and the acceptance at trial that the Shepherd direction was not required, leave under rule 4 should be rejected.

Ground 3 – The trial miscarried by reason of the publication on the internet, both before and during the trial, of two interlocutory judgments

Two interlocutory judgments were published on the Court's website (www.lawlink.nsw.gov.au/sc) during the trial. The first was in regard to the application of Mr Cowie for a separate trial (*R v Crowther-Wilkinson and Cowie* [2002] NSWSC 1207), and the second (*R v Crowther-Wilkinson and Cowie* [2003] NSWSC 44) concerned the admissibility of a statement Mr Cowie made to police.

Generally it is to be accepted that juries can be trusted to obey directions given: *R v Bell* NSWCCA 9 October 1998*, Glennon v The Queen* (1992) 173 CLR 592 at 6003, *Hinch v Attorney General* (Vic) (No. 2) (1998) 164 CLR 15 at 74, *Murphy v The Queen* (1989) 167 at 99, *R v Yill* (1993) 69 A Crim R 450 at 453/4, and *R v Laguancio* (2000) VSCA 33 at para 24. The authorities favour the view that the mere possibility of a jury having acquired prejudicial or extraneous knowledge during trial would be insufficient to give rise to an unfair trial or a miscarriage of justice: *Glennon v The Queen*, *Murphy v The Queen* (1988-89) 167 CLR 94.

The decision in *R v Rudkowsky* NSWCCA 15 December 1992 per Gleeson CJ (CrippsJA and McInerney J agreeing), (turning on whether the court can be satisfied that the irregularity has not affected the verdict and the jury would have reached the same verdict if the irregularity had not occurred) was distinguishable. It was there assumed that the jury had accessed the material which had been incorrectly allowed to go into the jury room.

The question for the Court turns upon a realistic appraisal of whether a miscarriage of justice eventuated because the presence of the material on the internet posed an unacceptably high risk of prejudice to the appellant.

Held: The ground of appeal fails. There is no evidence to suggest any juror accessed the internet; the jury were given directions to look at the whole of the evidence impartially and rationally; there was a general direction on the second day by the trial judge not to surf the internet; in the summing up the jury was again directed to decide the case purely on the evidence; most of the facts referred to in the judgments were placed before the jury and were self evident; and finally the case against the appellant was a compelling one.

Orders

1. Appeal dismissed;
2. Conviction and sentence below confirmed.

IN THE COURT OF

CRIMINAL APPEAL

60129/04

WOOD CJ at CL
DOWD J
KIRBY J

Tuesday 27 July 2004

Regina v Simon Crowther- Wilkinson

Judgment

1 **WOOD CJ at CL**: The appellant was jointly indicted with James Cowie on a charge that between 6 June 2000 and 7 June 2000 they murdered Graeme Andrew Adams. Each pleaded not guilty, and their trial commenced on 3 February 2003. Several pre-trial issues were heard and determined before a jury was empanelled on 10 February 2003. That jury was discharged on 12 February, and a new jury was empanelled on the following day.

2 On 28 March 2003 the jury returned with a verdict of guilty with respect to the appellant, and with a verdict of not guilty in the case of Mr Cowie. The appellant was thereafter sentenced to imprisonment for 20 years with a non-parole period of 15 years. He now appeals against that conviction. He does not seek leave to appeal against the sentence.

FACTS

3 The appellant and the deceased were partners in a security company, Excell Security Pty Limited (“Excell”), which was situated at 4/3 Warrah Street Chatswood. By reason of difficulties in relation to certain staff members who had transferred to the company from a failed security company, Blue Falcon, and who had outstanding claims for superannuation, the deceased’s position in Excell was as a silent partner. Although he was initially appointed as a Director he resigned that office on 30 June 1999.

4 It was common ground that the deceased had a meeting with the appellant, at Excell's office, on the evening of 6 June 2000. He failed to keep the plans which he had made to meet up with his partner, Janelle Johnson, at about 9:30 PM that night. Attempts to locate or to contact him that night, and on the following day, were unsuccessful. There was also evidence to show that he had not engaged in any financial transactions after this day, and the fact that he was last seen alive in the company of the appellant and Mr Cowie, was relied upon by the Crown as a significant strand in its circumstantial case.

5 On 12 July 2000, his body was found floating in the middle of the Hawkesbury River near Dangar Island, about 750 metres from Brooklyn. His head was covered by a beanie and wrapped in a plastic bag, which was held at the neck by an elastic octopus strap. A blue plastic sheet was wrapped

around him, and the lower part of his body was wrapped in two lengths of 3/8 inch, mild steel hot galvanised chain, and five 12 mm D-shackles. The lengths of the chains were 11.9 m and 5.7 m respectively and they had a combined weight of 32 kgs. They were free of rust or corrosion as were four of the shackles.

6 It was the Crown case that the deceased had been shot once through the back of the neck by a projectile that had shattered, but was consistent with having been a .22 calibre bullet. There was no exit wound. There was a hole in the beanie in line with the neck injury, and it was found to have propellant particles embedded in the fabric which were consistent with the shot having been fired at the back of the deceased's neck from close range.

7 It was the Crown case that the deceased had been shot, at Excell, on the night of 6 June 2000, either by the appellant, or by James Cowie, each having been present and assisting or encouraging the other, and that his body had then been driven up to the Hawkesbury River and dumped from a small aluminium boat, which had recently been hired by the appellant, in circumstances where it had been heavily weighted in the expectation that it would never rise to the surface and provide the key forensic links upon which the Crown relied.

8 Although the precise period over which the body of the deceased had been in the water could not be determined, there was evidence from Dr Langlois and Dr Berrents to suggest that the extent of decomposition, and the accumulation of marine growth on the clothes was such as to suggest that it must have been in the River for at least a few weeks. There was evidence to the effect that there were no injuries or fractures found of the kind which might have been expected had the body been dropped from the nearby bridge.

9 The absence of bruising to the neck of the deceased, Dr Langlois said, was consistent with the octopus strap and bag having been affixed after death, that is, after circulation had stopped. He also said that the brainstem injury would have resulted in immediate death. Since there was no exit wound or arterial damage, there would not have been any substantial bleeding. The use of the plastic bag and plastic sheets, he suggested, was consistent with attempts having been made to prevent, or to catch, any leakage of blood or bodily fluids. Additionally, he said, any fragments of tissue generated when the bullet struck the neck of the deceased would have been sucked back into the wound by reason of those fragments having been tiny, and by reason of the negative pressure that would have been created following discharge of the weapon.

10 These matters were relied upon by the Crown to explain the absence of any findings of blood or human tissue in the premises of Excell or in the Holden Rodeo utility of the appellant. The Crown case was that the body

was most likely carried in the boat later mentioned in these reasons.

11 The Crown case was entirely circumstantial, there having been no admissions made by either accused. This was the second trial faced by the appellant, an earlier trial having resulted in a hung jury. Mr Cowie had not been a party to that trial, having been discharged at committal. He had later been the subject of an ex officio indictment.

THE GROUNDS OF APPEAL

12 Three grounds of appeal are relied upon as follows:

(a) Ground 1 - the verdict of the jury was unreasonable and cannot be supported having regard to the evidence;

(b) Ground 2 - a miscarriage of justice occurred as a result of the failure of the trial judge to direct the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that he had planned the murder of the deceased; and

(c) Ground 3 - the trial miscarried by reason of the publication on the Internet, both before and during the trial, of two interlocutory judgments.

GROUND 1 – VERDICT UNREASONABLE

13 The relevant test as to whether the verdict was or was not unreasonable is in no doubt, being that stated by the majority in *M v The Queen* (1994) 181 CLR 487 at 497:

> “In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. 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.”

14 The trial, and the appeal, were conducted by the defence, on the basis that the Crown could not exclude, as a reasonable possibility that the fatal shot had been fired by Mr Cowie spontaneously, and not as part of a joint

criminal enterprise to which the appellant was a party. That, it was submitted, opened up the possibility that the appellant's criminality was confined to that of an accessory after the fact whose role simply involved assisting Mr Cowie in disposing of the body after the killing.

15 It was submitted that the Crown case against the appellant was therefore bound to fail unless he was shown to have been the shooter, or to have pre-planned the killing and to have been present aiding and encouraging Mr Cowie to carry out this act. Additionally, or alternatively, it was argued, at trial, that there was a reasonable possibility left open that a person or persons other than Mr Cowie and the appellant had been responsible for the murder.

16 These submissions require careful analysis of the evidence, which was relied upon as making out the Crown's circumstantial case.

(a) Evidence Relied Upon to show Pre-Planning

17 This evidence went to several matters:

(i) The Convening of the 6 June Meeting

18 There was evidence from Ms Johnson that by the time of his disappearance, the deceased was struggling financially, that he had been given a notice to move out of his rented accommodation at Leichardt because he was behind in the rent, and that he had expressed concerns in relation to the appellant's management of Excell.

19 In particular he had said that he had no idea of Excell’s current financial position, that it had not kept up repayments on his car, that he had been trying for a month to get hold of its financial statements, that the appellant had kept cancelling appointments, and that he did not really trust him. He also claimed that the key which he had been given to the Excell office did not fit.

20 Ms Johnson said that, over the five or six weeks before his disappearance, he had indicated that he wished to become more involved in Excell's business, that he had obtained the May 2000 general ledger and that he had made an appointment with his accountant to look into the business. A search of the deceased's home on 16 June located a number of financial records for Excell, including those for the month of May.

21 Ms Kristeller, the Excell administration officer, and partner of the appellant, confirmed that, in May 2000, the appellant had informed her that the deceased wanted to become more involved in Excell. She said that she and Mr Douglas, who had previously worked for Blue Falcon, were opposed to this, but that the appellant had said that he had a “right to be there”.

22 Mr Clarke, a former Blue Falcon employee who transferred to Excell, similarly said that about three months before he made a statement to police (on 31 July 2000), the appellant had informed him that the deceased wished

to become more involved in the business, and that he (Mr Clarke) had indicated he was not pleased because of his previous experience of not being paid on time when employed at Blue Falcon. The appellant said, on his account, that the deceased would not have anything to do with the business.

23 Each of Ms Kristeller and Mr Douglas, the Excell operations manager, gave evidence to the effect that the appellant had never seen anything to indicate that the deceased should not have access to the Excell books, while the former also said that she had not heard of any discussion in which the appellant had indicated a desire to keep the activities of Excell, including its proposed Olympic security contract, a secret from the deceased. In her statement to police she had said that the appellant had informed her that the deceased, as a silent partner, had a right to see all of Excell's material.

24 Karen Jones, Excell's former business manager, similarly said that the appellant had told her that the deceased could look at the books at any time. She also said that she had advised the deceased on 16 February 2000 that Excell was practically insolvent.

25 Mr De Hart, who was the appellant's accountant, gave evidence of the deceased expressing concerns to him, in relation to the financial position of Excell which he thought should be making bigger profits. He was shown a profit and loss statement for May, but indicated to the appellant, on 30 May, that in order to advise him, he needed more information, such as the general ledger. He did not, however, see the deceased again, after giving him this advice on 30 May.

26 Matthew Donnachie, an insurance consultant and friend of the deceased, said that, over the days leading up to 30 May, the deceased had a discussion in which he informed him that he was going to have a meeting with the appellant on the night of 6 June, in the course of which he indicated that he was frustrated about his lack of money and about not having been paid for the sale of Blue Falcon to Excell. According to him the deceased said "I'm going to have a showdown with Simon. I want to get the books. Skinny [Richard Skinner] said that I should get the books and have a look at them". It was his recollection that the deceased also said that he expected that the meeting would be "confrontational and he was going to have it out once and for all".

27 On 5 June he said that the deceased phoned him and left a message to the effect that he would come and see him to discuss the meeting that he was having on the following evening with the appellant. He did not however keep the appointment.

28 The deceased's mother, Patricia Adams, also said that the deceased had informed her on the morning of 6 June that he was short of money and that he had a meeting arranged for that night at Excell, with his partner, to fix

the problem.

29 Similarly Mr Skinner, a friend of the deceased, said that the latter had informed him on 6 June, of the meeting which had been fixed for that night, and mentioned that they were to discuss the appellant's need to obtain the signature of the deceased on a bank guarantee in relation to a contract. Whether this had related to an Olympic contract was uncertain, as he indicated, on reflection, that he may have learned of that contract in some later discussions. He said however that the deceased asked for his advice about signing the guarantee, and that his advice had been not to do so because of his debts. The deceased, on his account, then indicated that he would not sign the document. It was his impression from the conversation that the deceased had not known of the guarantee for very long.

30 Additionally he said, the deceased had made mention of his concerns in relation to the way in which the Excell business was being run and to his belief that he was not earning the sort of money he should have been receiving.

31 There was evidence from Ms Johnson to the effect that, on 6 June, the deceased had informed her that he was due to meet with the appellant, at Excell, at 7:30 PM. Mr Skinner said that the appellant had left his house at about 7 PM, after first phoning Ms Johnson, and arranging to pick her up later.

32 There was also evidence from Mr Douglas to the effect that the appellant had informed him, on 6 June, that there was going to be meeting with the deceased, that night at Excell's office. He confirmed having seen the appellant at these premises at about 6:45 PM, as did Mr Milner, who said that he saw the appellant and the deceased there, along with Mr Cowie and another man.

33 Finally, in this context, there was evidence of calls having made on the appellant's mobile phone to the deceased during the afternoon of 6 June, at 1:36 PM and to 2:12 PM.

34 In a statement made to police on 15 June 2000 the appellant said that he had a 50-50 partnership with the deceased in Excell, and that the latter received a monthly dividend of $350. He claimed that the meeting on 6 June had been amicable, and that he had been surprised by the disappearance of the deceased since he had been clearing his debts, and was in a good relationship with his girlfriend.

35 Mr Donnachie said that at some time, on or after 8 June, the appellant described the meeting to him in the following terms:

> "we had a fight which is not unusual for me and Graeme [the deceased]. It wasn't anything spectacular but yep, it was fine."

The fact of "the fight" was not mentioned to police by the appellant when he made his statement.

36 Ms Johnson also described asking the appellant, a few days after the disappearance, how the meeting had gone. He said that everything was fine, and that they had discussed two issues. One was a performance guarantee of $160,000 to $180,000 which was required by Chubb in relation to a contract for the Olympic period, for which he had secured a loan source. The second issue related to the prospect of Excell taking over the Workwatch business in which the deceased was involved. She said that, prior to this discussion, she had never heard any mention of these matters from the deceased or from anyone else.

37 She also said that the appellant suggested that the deceased may have done a runner because of pressure, and that he had been known to do that in the past. In this regard there were some evidence from other witnesses, although that was not accepted by Ms Johnson, that he had, at times, been unreliable, and had gone missing for a few days, or had not reported for security jobs. Evidence of this kind came from Mr Rodriguez, Geoffrey Clarke, James Douglas, and Mr Skinner.

(ii) The appellant’s inquiry of Mr Thompson as to whether he could supply him with some sub-sonic .22 calibre ammunition.

38 James Douglas gave evidence that a number of firearms were kept at the office of Excell, and were locked in a safe. None were of .22 calibre, and none were capable of firing a cartridge of this calibre.

39 Mr Thompson, the Excell Training and Marketing Co-ordinator, gave evidence that before he began to work with Excell in April 2000, he was asked by the appellant if he had any subsonic .22 ammunition, as he wished to shoot rabbits at his father's property at Glenorie. Mr Thompson said that such ammunition has a lower velocity and does not make the "crack" sound that is otherwise generated by a rifle or a pistol. He said that he supplied this ammunition before beginning to work at Excell, and also brought in other ammunition, including .22 calibre rounds, which were kept in the firearms room. He was not able to place the date of the subsonic ammunition discussion with any degree of certainty.

40 Mr Thomson gave evidence of a further very curious conversation which he had with the appellant, after the disappearance of the deceased, in which the appellant asked him if he knew of any friendly firearms dealers who could make it appear that firearms held by Excell were not on the premises at the time of the appellant's disappearance; and also whether firearms could be altered to make it appear as if a round fired from such a firearm had in fact been fired from another weapon. It was his response that

this could be done but that it would be obvious.

41 In cross-examination, he agreed that police had attended at Excell's premises in relation to inquiries concerning the robbery of an armoured van, in the course of which there were indications that the guns in Excell's safe would need to be examined, and taken away to be tested, and that the appellant had expressed concern that if they were taken away, or confiscated, then the business would be unable to operate.

42 Mr Thomson was an accredited firearm trainer, and he had conducted various courses, one of which had been attended by the appellant in December 1999. He said that students were trained to shoot at the centre of the largest part of their target. He said that he had been taught to explain that there may be better targets on the body, but that they were not ideal because they were small, fast moving and difficult to hit. The specific area which he said he demonstrated in this regard, was the area behind the head, just below the ears, that is, the area coinciding with the brainstem. In cross examination he explained that he had mentioned it, not to encourage the selection of this area as a target, but more to obviate questions that might flow from impressions which had been gained from watching movies, and to ensure that students avoided getting into trouble themselves by missing their target. He acknowledged that shooting someone in the brainstem was a very effective way of killing.

43 Mr Douglas said that he had attended courses conducted by Mr Thompson, but had no recollection of any reference being made to the brainstem as being a good place to shoot someone. Additionally he said that he saw no occasion for a security guard needing to shoot someone in the back of the head.

44 The evidence relating to the appellant's request to Mr Douglas for the supply of .22 ammunition, and the evidence which suggested that the fatal shot was of this calibre, were relied upon by the Crown to show premeditation and planning on the part of the appellant. In particular it was put that since the weapons kept at Excell in connection with its business were not of this calibre, then it followed that a .22 calibre firearm must have been brought to the meeting, for the purpose of being used that night.

(iii) The appellant's purchase of some galvanised chain and D-shackles of the kind that were found wrapped around the body of the deceased

45 The appellant made a formal admission that, on 30 May 2000, he had purchased 15 metres of 3/8 sized galvanised chain, and five 12 mm D-shackles from Matthew Weinecke of Hardware and General, Brookvale. He gave his name as Simon, and made the purchase on the account of Absolute Property Improvements. There was evidence to the effect that he was the proprietor of this business and that the details supplied to the vendor in support of the establishment of a monthly credit account coincided with his

personal details. A carbon copy of the purchase invoice was found at the office of Excell.

46 Mr Weinecke had asserted in his original statement that he recalled cutting the chain which had been purchased into three lengths, but subsequently corrected this to say that he could only remember cutting it once. He suggested that he may have confused the transaction first described, with the sale to a young manager from McDonald's who wanted the chains to stop customers entering the car park after hours. One person fitting that description (Daniel Peacock) was found, but it was his evidence that the 5/16 galvanised chain which he had purchased on 31 March 2000 had not been cut. It was his evidence that although he had ordered 15 m of chain he had in fact received chain to the length of about 19 m. He said that he had required it to rope off the back section of the car park. He also said that the salesman had used a measuring stick. He had not ordered any D-shackles.

47 By the time Mr Weinecke gave evidence he had served very many customers, and he had no independent recollection of the transaction. He had initially informed police that his standard method for measuring chain was to estimate one metre by holding one end of the chain at the middle of his chest and stretching the chain to the end of his outstretched arm. Further lengths were measured by doubling the chain over himself in that manner. There was some evidence from Detective Senior Constable Woutersz that a replication of this exercise resulted in a length of 1.1 metres rather than 1 metre.

48 Mr Weinecke, on another occasion, had indicated that he had used a measuring stick to measure out the necessary length of chain. It followed that his evidence was somewhat uncertain in relation to the length of chain in fact delivered, although it seems from the evidence of Detective Woutersz and Mr Peacock that his measurements tended to be somewhat generous, and not inconsistent with him having sold the two lengths of chain that were found wrapped around the deceased.

49 There was evidence from Desmond Ebejer, to the effect that his company, SPL Group Limited, imported and distributed chain of the subject kind to the hardware industry, and that the wholesale value of all of the chains, which it distributed, including those of the same size as that sold to the appellant, which was the heaviest stocked, was in excess of $1 million per year. The D-shackles, he said, were of a standard type sold in retail hardware stores.

50 A mild steel D-shackle of similar size and pattern to that found on the chains wrapped around the deceased, although somewhat shinier, was found attached to the tow bar of the appellant's Holden Rodeo utility. Mr Ebejer was of the view that this shackle had been zinc plated rather than hot dip galvanised.

51 David Bubb, a builder employed by Absolute Property Improvements, gave evidence to the effect that his name had been written on some of the invoices for purchases from Hardware and General that were found during the police search of the Excell premises, although that of the appellant was written on the invoice for the 30 May sale. He said that the appellant had never to his knowledge ordered materials for the business, and that there had never been an occasion when he had required the use of heavy chain or shackles.

52 James Douglas, who was employed to do labouring work for Absolute Property Improvements, gave evidence that its equipment was stored at Glenorie and that he had no recollection of seeing any chain or shackles there.

53 Paul Bettridge, who worked part-time for the company sometime between June and August 2000 said that he recalled seeing a length of heavy duty chain in a heap in the work shop area of the Excell premises, at Chatswood.

54 Melanie Kristeller had a conversation with the appellant, on 29 August 2000, which was recorded by police following the execution of a search warrant at Excell’s premises. It appears that she was reading from the list of documents, which had been seized and left at the office. She mentioned the 30 May receipt, and asked if the appellant had ever purchased any chain. It was his answer that he had not done so since the time when he had been building boats, 10 years previously. As noted later this conversation occurred at a time when the appellant suspected that his mobile phone and the Excell office were bugged.

(iv) The rental by the appellant of a small aluminium boat

55 It was the Crown case that the appellant had rented this boat from Hornsby Marine shortly before 6 June. Mr Herbert the proprietor of that business, gave evidence that he had one 3.8 m aluminium boat, with a 6 horse power outboard motor with three seats, including a removable middle seat, available for hire. It had written on its side "Hornsby Boats” and “Hire Me for $35".

56 When he was spoken to by police, in August 2000, Mr Herbert had no recollection of any person, matching the appellant's description, having rented this boat. He had been unable to find any details concerning its hiring, but acknowledged that his bookkeeping was haphazard. The hire charge for it, he said, varied from $50 to $70. It was his practice to obtain identification such as the hirer’s Drivers Licence number and a credit card number for security, and to write down the hirer’s details. He also said that he would put 500 ml of two-stroke fuel into the boat and then leave it to the owner to fill the tank with petrol.

57 During a clean out of his motor vehicle, in April 2001, he found a flyer under the seat, in his hand writing, which recorded "tinny hire Simon Wilkinson 31 Brooker Avenue Beacon Hill 8870DP AMP AMX 377 831 767 61004 5/00 5/3 $50." Mr Herbert notified police. 31 Brooker Avenue was the appellant's residential address, and the AMEX card number, and the licence number, coincided with the card and licence issued to him.

58 The $50 recorded on this document Mr Herbert believed had indicated a booking or holding deposit.

59 In cross-examination he did not accept that the appellant had been to Hornsby Marine more than once, or that the $50 was a quoted hiring rate. It was put to him that the appellant had expressed an interest in buying a boat, and that as a result he had agreed that he would let him hire the boat for a day, for $50. He said, in reply, that he would have only done that if the appellant had been interested in buying a "tinny".

60 During a search of the appellant's Holden Rodeo utility a post-it note was found which noted the address and phone numbers of Hornsby Marine. There was also evidence of call charge records which showed that a number of calls had been made from Excell to Hornsby Marine on 29 and 30 May 2000. Another post-it note found in the vehicle noted the address of the deceased and the words “desk, chair, bookcase, bar fridge, all else”.

61 There was, additionally, evidence from David Bubb, a builder employed by Absolute Property Improvements, to the effect that he had seen a small aluminium outboard boat and trailer in the workshop at Warrah Street Chatswood, in the "last week of May, first week of June 2000" for a few days. That boat, he said, was somewhat scratched and dented, with registration numbers or paint work on its side, and looked similar to the one depicted in a photograph, that was available for hire from Hornsby Marine, although he had acknowledged that it was a very common kind of boat. One afternoon, at about 5 PM, he said he saw it attached to the appellant’s Holden Rodeo utility, as he drove back to the premises. On the following day he said it was not there.

62 There was also evidence from James Douglas and Melanie Kristeller to the effect that they had seen a small boat, or a tin runabout, on a trailer, at the Excell office complex before 7 June. Stephen Thomson similarly said that he had seen a small aluminium boat at Excell, with a small outboard motor, around 6 horse power. He described it as having appeared to be new and in good condition, with three seats. A photo of the Hornsby Marine boat was shown to him. He said that it was a similar vessel, although it appeared older and less well kept. These sightings he placed, at the committal, "around the period of late April, possibly through to May.", although at trial he indicated that he was not sure of the exact date.

63 There was evidence to suggest that the appellant had an interest in boats, and the Excell search turned up several boating magazines, including one called "Trailer Boat".

(b) The Movements of the Appellant on the Night of 6 June

64 Of considerable relevance was the evidence relating to the whereabouts, and conduct of the appellant, after 9:30 PM.

(i) The appellant’s purchase of fuel and other items at 9:25 PM, and his departure from the Excell office at 9:58 PM.

65 The appellant admitted at the trial that at 9:25 PM he had used his Star Card account at the Caltex service station, Lane Cove, to purchased 63.05 litres of petrol, two bottles of Lucozade, one bottle of Coke, 230 grams of chips, some mints, a packet of Benson & Hedges cigarettes, and one packet of Winfield red cigarettes. This admission was supported by the service station records.

66 There was evidence that Mr Cowie preferred to smoke Winfield red cigarettes, that the appellant smoked Benson and Hedges, and that each drank Coke at work.

67 It was the Crown case that the appellant had made these purchases after the deceased was killed, in preparation for the trip that was needed to dispose of the body, and then returned to Excell to attach the boat to the utility and to load the body in it. It was its case that having attended to these matters he left the Excell premises with Mr Cowie after activating the security alarm, using his code CI, at 9:58 PM, as recorded on the Central Monitoring Log.

68 Both Mr Milner and Ms Kristeller gave evidence to the effect that after hours calls to Excell diverted to Mr Milner's mobile, it being his responsibility to attend various sites and to respond to alarm calls. His records for the night of 6 June show that he attended sites in response to alarm calls at 7:40 PM, at 8:02 PM, 8:35 PM, and 9 PM, as well as a call for another company at Chatswood Post Office. As a result, he was absent from the Excell office until 11:03 PM at which time the Central Monitoring records logged him de-activating the Excell alarm, which had previously been activated by the appellant at 9:58 PM.

69 He confirmed that while on his rounds he had received a call from Ms Johnson wanting his help in locating the deceased or the appellant, and that, after his return to Excell, he had phoned her back with the appellant's phone number. He also said that after receiving her call he had tried unsuccessfully to contact the appellant, and had left a message on his pager, at 11:05 PM. Although there was not any degree of certainty about it, Mr Milner did have a recollection of returning to the office briefly after having left Excell on his rounds at 7:20 PM, and of thinking that the meeting must have been brief, as there was no one there. However there was no

evidence of him returning and having de-activated or activated the alarm before the appellant’s return.

70 The call charge records for the appellant's phone showed that at 9:45 PM, that is, 13 minutes or so before he activated the Excell alarm, he made a call to the Excell landline, which registered at the Chatswood tower. It was the Crown case that this call was made by the appellant, with the knowledge that it would divert to Mr Milner's phone, and that his intention had been to make sure that he did not return to Excell while the appellant was leaving from there, with the boat, and the body of the deceased.

(ii) Mobile phone calls pointing to the presence of the appellant in the vicinity of the Hawkesbury River and Brooklyn.

71 Two conversations are of relevance in this context. The first of these occurred at 10:51 PM on 6 June 2000. On that occasion, a 39 second call was made from the appellant's mobile phone to the deceased's mobile phone. That latter phone was not working having been previously damaged. There was evidence that the deceased used the SIM card normally associated with it, from time to time on other mobile phones. The SIM card could also be used to receive messages.

72 This call was registered through the Mount White tower, which was shown to be capable of picking up calls in an arc extending up to 35 km, including the expressway area to the south of that tower. It was the Crown case that this call had been made by the appellant, while driving North on the expressway towards the Hawkesbury River, and had been for the purpose of checking whether the deceased's mobile phone was still on his person.

73 There was evidence to the effect that a 39 second call would have been consistent with the caller having listened to a message on the service called, and then hanging up without leaving a message, or with the caller having left a message of the necessary duration. Neither of these alternatives could be proved since left messages are routinely deleted after five days or so. So far as the evidence shows the deceased's mobile phone was never found.

74 The second call of relevance was made from Mr Cowie's mobile phone, to the mobile of Ms Johnson at 2:55 AM on 7 June 2000. This call was registered at the Brooklyn tower. Evidence was led to the effect that this Tower’s coverage was very insular, the dominant coverage area comprising Mooney Mooney and Brooklyn.

75 It was the Crown case that this call had been made by the appellant, returning a call which had been made by Ms Johnson to his paging service at 2:04 AM. That call had been made by Ms Johnson following the failure of the deceased to keep his meeting with her at 9:30 PM, and her failure to make

contact with him on his home service at 9:15 PM, 9:47 PM and 10:42 PM. She had also attended his house; and had phoned Excell at 10:08 and 10:45, on which occasions she had asked Mr Milner for the appellant's mobile number, which she did not receive until 1 AM.

76 Ms Johnson said that in the 2:55 AM conversation, the appellant confirmed that he had met with the deceased indicating that this had occurred at the Pizzeria in Willoughby Road. He had added, on her account, that he had known that the deceased had been due to meet her at 9:30 AM, because he kept looking at his watch. This, she said, she realised was untrue because the deceased did not wear a watch.

77 She said that the appellant also informed her that he had walked the deceased to his car after they had left the Pizzeria. He invited her to phone him in the morning if the deceased did not turn up.

78 At 6:28 on the morning of 7 June she phoned the appellant and left a message on his paging service. He returned the call, using his mobile, at 6:56 AM and, on Ms Johnson's account, repeated that they had eaten at a pizza restaurant on Willoughby Road. This call registered on the Crows Nest tower which, on the Crown case, was consistent with the appellant having made the call after having driven back from the Hawkesbury River.

79 Later that day several more calls were made by the appellant, using his mobile, which the Crown contended were consistent with him taking steps to return the boat to Hornsby Marine after using it to dump the body. They were as follows:

a) 3:53 PM, call to Matthew Donnachie, which registered on the Northbridge tower;
b) 3:54 PM and 4:46 PM call to Excell, which registered on the Northbridge tower;
c) 4:52 PM call to Ms Johnson, which also registered on the Northbridge tower;
d) 6:04 and 6:25 PM calls to Excell which registered on the Roseville and Wahroonga Towers; and
e) 6:27 PM call to Hornsby Marine.

80 There was evidence of various calls that were made to Excell on the morning and afternoon of 7 June, by persons who sought unsuccessfully to speak to the appellant. They included Mr Donnachie, Ms Kristeller, and Ms Johnson. The pager records of the appellant show that messages were left for him by Ms Kristeller at 9:07, 10:59, 14:53, 16:44 and 18:36.

81 The fact that he was uncontactable, and had not been to the office that morning, was relied upon by the Crown as being consistent with him having had a late night. There was, however, evidence to suggest that it was not uncommon for him to arrive at the office in the late afternoon.

(iii) Did the appellant and the deceased have a meal at a pizzeria after their meeting?

82 As has been noted earlier, it was Ms Johnson's recollection that the appellant described having a pizza with the deceased at a restaurant in Willoughby Road.

83 There was evidence from Ms Kristeller and, that she had made several attempts to contact the appellant on the morning of 7 June by leaving messages on his paging service. It was not until the afternoon that she was able to contact him, at which time he mentioned having last seen the deceased in the vicinity of his car, which he had parked across the corner from the pizzeria on Willoughby Road, near the Willoughby hotel.

84 Karen Jones gave evidence that a week after the deceased’s disappearance, the appellant had indicated that he had apparently been the last person to see him. He said that they had eaten a pizza together and that he had paid for it.

85 The post mortem examination showed that there was no food present in the stomach of the deceased. Dr Langlois gave evidence that, due to the fat content of a pizza, he would expect it to remain in the stomach for at least a couple of hours, and up to an hour or more if half a pizza were consumed.

86 When Detective Sergeant Brown spoke to the appellant on 15 June, he was informed by him that the deceased had come to his office at Excell at 7:30 PM. He said that they had gone to Anto’s Pizzeria in Penshurst Street Chatswood where they had dinner, and discussed the wishes of the deceased, who he described as having a 50% interest in Excell, to become more involved in the business, the finance needed for an upcoming Olympic contract, and the prospect of incorporating Workwatch, another of the deceased's business interests, into Excell.

87 In this account, the appellant said that they had remained at the restaurant until 10 PM, that he had walked the deceased to his car, which was parked in McMahon Street, around the corner from the restaurant. Having done that he returned to his own vehicle. The deceased, he said, was wearing a black beanie, a jumper and sheepskin gloves. The assertion that the two men remained at the Pizzeria until 10 PM, the Crown claimed, must also have been untrue, having regard to the visit to the Caltex Service Station at Lane Cove. Moreover, the Crown contended that it was significant that the deceased had not tried to phone Ms Johnson after attending Excell’s premises in view of his arrangement to meet her, suggesting that he had been killed before 9:30 PM.

88 On 5 July the appellant went to Anto’s Pizzeria with police, and pointed out the location where he and the deceased had parked their vehicles. The owner of Anto’s, Hagop Gulumian, and an employee Shahan Rajoyan, gave evidence of recalling a very tall man attending the pizzeria at about 7:30 to 8:00 PM, by himself, and consuming the $6 pizza special. Mr Gulumian said

that this was not the man whom he had seen with police outside the Pizzeria on 5 July. Further, he said, the man he saw was different from the man depicted in the photograph of the deceased which was shown to him. He also said that by 9:30 PM, on 6 June, everyone had left the Pizzeria.

89 Mr Rajoyan described the man who had attended the Pizzeria as having blonde hair. He said however that he was wearing a green army jacket, with a blue shirt, and a tie with yellow dots. He also said that the man was not the same man as that shown in the photograph of the deceased, although there were some similarities as to hair colour and length.

90 It was common ground that the deceased had a distinctive appearance, being 6 foot 8 inches tall, 100 Kgs or more in weight and with spiky bleached blonde hair and eyebrows and that the appellant was of a similar height. The circumstance of two men of such an exceptional height attending the Pizzeria together, the Crown submitted, would inevitably have attracted attention and not been forgotten, especially if they had remained there until 10 PM.

91 Mr Skinner, who saw the appellant at 7 PM on 6 June, said that he was wearing a white/cream wool jumper, a blue business shirt, light brown slacks, and reddish brown shoes with a chunky sole. His hair, he had earlier described as having a "5 o'clock shadow". The clothes that were found on the body of the deceased matched this description, providing further support for the proposition that he was killed that night.

(iv) Mr Cowie's presence

92 It was the Crown case that Mr Cowie was present during the meeting, and afterwards, and that he had been needed to assist in moving the body of the deceased because of the size of the latter.

93 In this regard it relied on the use of his telephone by the appellant to make the 2:55 AM telephone call to Ms Johnson. It also relied on the call charge records which showed that at 3:47 AM, a call was placed from his mobile to his voice mail which also registered on the Brooklyn tower. This appears to have been a response to a voice mail message that had been left for him at 6:40 PM but not notified to his mobile phone until 2:54 AM, either because it had been switched off, or because it had been out of range.

94 Mr Douglas said that, as he was leaving on the night of June, at a time which he fixed as 6:45 PM or possibly 7:15 PM, he saw the deceased in the entrance area. The appellant, he said, was coming out of his office, and Mr Cowie was nearby. The appellant asked him to give Mr Cowie a lift to Chatswood railway station. He refused because he was tired, and the appellant said that he would drive him there himself.

95 Robert Milner, an Excell security guard, who was working the night shift from 5 PM on 6 June, said that when he arrived at the office he also saw the appellant, Mr Cowie and another male near the reception area. The

appellant said that they were having a meeting. Sometime later he saw the deceased go into the appellant's office.

96 There was also some evidence from Mr Thompson concerning Mr Cowie's financial dealings with the appellant. It was to the effect that Mr Cowie was paid in a manner that differed from that applicable to other employees who were not being paid regularly. Mr Thomson became aware, through a sheet of paper, and an observation made by the appellant before 6 June, that Mr Cowie owed moneys either to Excell or to the appellant.

97 There was also some evidence from Mr Milner that, at sometime after 6 June, the appellant asked him to deliver some money to Mr Cowie, and that, on another occasion, he was asked to deliver an envelope to him, which he believed contained money. An intercepted conversation between the appellant and Mr Cowie after the killing recorded a discussion in relation to a debt of about $4000 which was asserted to be outstanding from Mr Cowie to the appellant. The appellant admitted, that from 21 August 2000, he had suspected that the police might have bugged his mobile, and that after the 22 August search of Excell, he believed that the office at those premises was bugged.

(v) The discovery of the deceased's motor vehicle

98 There was evidence to the effect that, on 26 June 2000, the deceased's motor vehicle was found in Parkside Lane, Chatswood, by Council rangers. There was a lot of dust on its roof and windscreen, and an accumulation of debris and leaves under the back wheels, consistent with it having been there for sometime. However, it was free of any parking tickets which might have been expected to have been issued, had it been observed by a ranger policing the residential parking restrictions which were in place. Additionally, a local resident indicated that he had seen it on 25 June, and thought it unlikely that it had been there for two weeks or so, as he would have expected to have noticed it earlier, if that had been the case.

99 Former Detective Sergeant Brown gave evidence that it appeared to have been wiped clean of fingerprints. Senior Constable McGovern, who conducted a fingerprint examination, confirmed that he had found no fingerprints, either inside or outside the vehicle, not even on the glass surfaces. This he considered to be unusual, notwithstanding the depredation expected over time if a vehicle was left outside because he would have expected smudge marks to be evident both on the interior and exterior of the vehicle.

100 When the vehicle was searched on 29 June, police found a Gregory's street directory in the glove box. The left index fingerprint of Mr Cowie was found on the far right hand edge of Map 284 of the directory. That map included Parkside Lane, while the map on the following page included Warrah St where the Excell office was located. The fingerprint was

consistent with the turning of the page, and it was the Crown case that Mr Cowie had driven the car to this location, which is to be found on the way from the Excell address to the Lane Cove service station, after the deceased had been killed, and had used the book for directions. It was also the Crown case that the appellant picked him up from this location before driving on to the service station.

101 There was some evidence from Mr Donachie that Mr Cowie had, on occasions, driven with the deceased for insurance surveillance activities. However there had not been an occasion when they had driven into the Chatswood area for this purpose.

(c) The Existence of a Motive

102 In addition to the material previously noted concerning the expressed wish of the appellant to have a greater involvement in Excell, and his attempts to gain access to its financial records, there was some evidence which went to the question whether the appellant was concealing aspects of its business from him, or was otherwise operating the business to his disadvantage.

103 This had a relevance, additionally, in the light of the financial difficulties which the deceased was having at the time, which provided a reason for him to seek some greater involvement in, and return from, the company.

104 In this regard there was independent evidence of the appellant having been in financial difficulties, as well as having been involved in a marital dispute with his former wife Suzanne Rose, who claimed that he owed moneys to her. The documents recovered from his home included letters of demand and overdue accounts, and there was some evidence to suggest that he had become depressed to the point of receiving psychiatric assistance.

105 In addition there was evidence in relation to the collapse of the Blue Falcon Security business, and to the fact that the deceased had become liable for its debts. He had mentioned these problems to his solicitor Christopher Finn, to whom he also owed some moneys. Further, he made arrangements, on 4 June 2000 to borrow $4000 from Mr Skinner to pay for the registration of his car, which had lapsed in January, and to move house, pending the receipt of some moneys from his father.

106 There were, upon the evidence, several possible areas for contention, between the deceased and the appellant at the meeting, relating to the deceased’s express wish to have a greater interest in the business and more information concerning it, the moneys which he was owed in relation to Blue Falcon and needed, because of his financial problems, the request for a guarantee to be signed at a time when the appellant needed assistance for the Olympic contract which he had wished to keep for himself, and his desire to bring the Workwatch business into Excell. Some of these aspects require further amplification.

Access to Financial Information

107 The evidence showed that, following the failure of Falcon Blue in 1999, the contracts of its employees had been renewed by Excell. There was evidence from a number of witnesses, including Mr Douglas, to the effect that the deceased had taken steps to avoid these staff members becoming aware of his involvement in the Excell business, which was managed on a day-to-day basis by the appellant.

108 Mr Thomson gave evidence that he was informed by the appellant, in May 2000, that by reason of the Blue Falcon problems, the deceased had agreed to stay out of the Excell business for 12 months, which period was about to expire. He also said that he did not want Mr Thomson discussing the operations of the business, with the deceased. At this time, he said, locks were placed on the door to the appellant's office, as well as to the door to the office which was shared by him and Mr Douglas. Additionally, he said, a direction was given that the doors were to be kept locked overnight, as well as at any time that the deceased was expected to attend the premises. The deceased, Mr Thompson said, was not given a key to the office, of the appellant, or to that which he shared with Mr Douglas, or an alarm code for the premises. On one occasion, he said, when the deceased arrived at the office before the appellant, he was instructed by the latter, who he phoned, to tell him to wait outside.

109 Mr Douglas, however, gave as a reason for the lock to his office, that this was done for the security of the gun locker or safe. Ms Kristeller said that she was unaware of any suggestion by the appellant to the effect that the deceased should be locked out of the premises or prevented from accessing Excell’s books, or that its activities should be kept secret from him.

110 Karen Jones, who was employed as the Excell business manager, said that she understood that Excell owed the deceased approximately $35,000, by way of a loan, after having bought the Blue Falcon business across. The appellant, she said, had asked her, at some stage, how much was owed. Christopher Finn said that on 11 April 2000 the deceased had indicated that he was owed about $18,000 by Excell, and that he expected to receive some money from it, at which time the outstanding legal fees would be paid.

Workwatch

111 Mr Kron gave evidence that, in late 1998, he and the deceased established this business, which was designed to secure employment for graduates from the Secta training academy, where the deceased was employed as a part time lecturer. It was his account that it was about to be incorporated at the time that the deceased went missing, and that although it had not generated any substantial earnings by June 2000, he thought that it had considerable potential, particularly as the Olympics were approaching.

112 He said that he and the deceased had asked Mr Cowie to design a web page for it. His failure to do so, he said, led to a heated argument at a hotel between the deceased and Mr Cowie, which left the former fuming. The deceased, he said, reluctantly agreed, later, to having Mr Cowie back, but his continued unreliability led to him being replaced. This occurred before the disappearance of the deceased. He indicated, however, that subsequently there had been something of a reconciliation, in that the three men had met at a hotel to have a drink together.

113 Mr Kron said that the bulk of the Workwatch material was placed on the computer of the deceased at his house. After his disappearance he had that information downloaded, before the computer was taken, with his consent, by the appellant.

114 Later, he said, he saw the computer at Excell, and was informed by the appellant that he wanted the Workwatch files. When he replied that they had been downloaded, he was informed by the appellant that the deceased had spoken to him about moving Workwatch to Excell. Mr Kron said that he reacted with disbelief, since the deceased had made no mention of this to him. All that the deceased had mentioned, in the context of Excell, was that he expected it to be a client of Workwatch.

115 The appellant, he said, asked for the access codes at this meeting. When Mr Kron tried to contact him after the body of the deceased had been found, to discuss the matter further, he did not call him back. Mr Kron also said that the appellant indicated that he was keeping the possessions which he had taken from the deceased's house in satisfaction of a debt of $2500 which he claimed was owed to him.

116 It also came as a surprise to Ms Johnson when the appellant mentioned to her that, at the 6 June meeting, he had discussed the transfer of the Workwatch business to Excell. She added that, within the following week, the appellant offered his warehouse to store the deceased's belongings. She recalled him asking for the computer and files relating to Workwatch. She told him that he needed to speak to Mr Kron and understood that he had given his approval. She first removed the deceased's personal files including those relating to Workwatch. On 20 June, she said, the appellant and Mr Douglas came to the deceased's house and took the computer, and Workwatch files along with the fax machine, answering machine, filing cabinet and some other items.

117 Ms Kristeller, however, said that the deceased had expressed an interest in February or March 2000 about Workwatch being involved with Excell, and had discussed that with the appellant.

The Olympic Contract

118 The general manager of the Olympics Division of Chubb Security, Terence Crotty, gave evidence of the tender which was advertised in July

1999, seeking expressions of interest for the provision of security guards for the Sydney Olympic Games. A tender was submitted by the appellant on behalf of Excell, in relation to the two month “Alliance period” between 1 September 2000 and the end of the Paralympics. It was the Crown case that the appellant had kept this proposal, and the contract that was later entered into with Chubb on 6 January 2000, a secret from the deceased. In that regard a copy of the document addressed to "Dear potential employee", and headed "Olympic employment opportunities", was found at the office of Excell, which noted that any queries concerning it could be addressed to the appellant, or to Mr Thomson or Mr Douglas. There was no mention of the deceased, even though he was the controlling 51 percent shareholder in the business.

119 The value of the contract was $1,621,534.80 and Excell was required to provide a 15 percent bank guarantee ($243,230) to protect Chubb in the event of it failing to meet its contractual obligations. The appellant requested a revision of the contract to $1,677,030 because of GST, and a reduction of the guarantee to 10 percent ($167,703). The contract was subject to the provision of the bank guarantee, which was never provided. It required the provision of 70 guards on weekdays and 60 on weekends during the alliance period. Mr Thompson said that the appellant had informed him that the contract would deliver profits in the order of $300,000 to $400,000.

120 In May 2000, NBC began to carry out work on the Olympics site. Chubb subcontracted Excell to provide three to four guards per day for this purpose. When guards began to fail to appear, Chubb became concerned about Excell’s ability to perform the contract for the Alliance period. It was also concerned in relation to the non provision of the guarantee. It was shown that invoices were submitted to Chubb, commencing with the week ending 24 May, and for the subsequent weeks up to the time of the deceased’s disappearance, in weekly sums of $4450.

121 Mr Donachie gave evidence that, in March 2000, the appellant spoke to him in relation to the Chubb contract. He said that he needed finance for wages, uniforms and the security bond. He sent the contract to Mr Donachie for perusal. Mr Donachie said that he did not speak to the deceased about it, even though he was one of his best friends.

122 Steve Lawton (a finance broker) gave evidence that in April 2000 he was given a number of documents by the appellant, via Mr Donachie. It included a statement of the appellant's assets and liabilities, his tax returns for 1997 and 1998, the financial statement for the period 1 July 1999 to 30 March 2000, and the Chubb contract.

123 He then prepared a preliminary or draft spreadsheet, showing profit and cash flow projections for May to December 2000 in respect of the Olympic contract, upon the basis of the information supplied. The spreadsheet was faxed to the appellant, but was never submitted to any

financial institution because Mr Lawton was waiting for further information from the appellant which did not arrive. He agreed that the actual invoices sent to Chubb by Excell were significantly less than those anticipated on the spreadsheet.

124 Karen Jones gave evidence that Excell had little money, that paydays were stressful and the Group Tax was not being paid. She was made redundant on 8 December 1999 when cost cuts were made. She warned the deceased in February 2000, that the company was practically insolvent.

125 Mr Thomson gave evidence that a factoring company (Scottish Pacific)had been engaged in June by Excell in order to provide the necessary moneys to float the project, and that this had also led to cash flow problems, as it received the payments for the guards. Mr Crotty was informed of its appointment in June.

126 Mr Thomson said that he had a number of discussions with the appellant in relation to the project, which the latter felt should be separated from the normal operations of Excell because of the effort he had put into gaining the contract. This was relied upon by the Crown to show that at 6 June the appellant still regarded the project as viable.

127 Further evidence to show that the contract was still potentially on foot at that time was provided by the fact that, on 27 June, Mr Thomson assisted the appellant with an application for finance, and by the fact that in August 2000 Chubb advised that it was limiting Excell's work to the Olympic games period, for which it would be paid $615,000. The contract was eventually terminated on 5 September 2000, as a result of Excell's nonperformance.

128 Together these matters were relied upon to show that by 6 June 2000, the appellant had a motive to kill the deceased, by reason of his desire to keep the Olympic contract away from him, and by reason of the likely confrontation that would arise at the meeting.

129 There was on the other hand some evidence from the former wife of the deceased, as well as from Karen James, Melanie Kristeller, Michael Rodriguez and James Douglas that they had been unaware of any animosity having been expressed or shown between the appellant and the deceased. Moreover, the appellant contended, the evidence showed that he had been open in relation to the Olympic contract, to the point of discussing it with a person whom he knew to be a close friend of the deceased. There was also some evidence from Mr Kron, to suggest that the deceased had been aware of the Olympic contract before 6 June.

(d) Other Suspects

130 The appellant raised, through cross-examination, the possibility of other persons, in particular those who had been partners of the deceased in Falcon Blue, having been responsible for the killing, because of the bad

blood that had developed between them, following, or at the time of, its failure in 1999.

131 Those partners were Andrew King and Peter Murrant.

132 Ms Johnson said that the deceased had expressed concern that his partners in that venture had been taking money from the business, and had attributed the blame for its collapse on that alleged fact. She said however, that he had never expressed any fears concerning them.

133 There was evidence to the effect that the deceased had little idea of the way in which to run the business, that employees and bills had not been paid on time, and that superannuation payments had not been made for a number of years.

134 In March 1998, it was shown, the deceased had requested his accountant, Erik de Hart to carry out an audit.

135 Additionally he had expressed concerns to friends and associates in relation to the Police Integrity Commission inquiry into the practice of police moonlighting as security guards, and in relation to his belief that he was being deceived by his partners.

136 In the second half of 1999, it appears that he was interviewed by Police Internal Affairs concerning the moonlighting problem, and concerning Blue Falcon's activities, in the course of which Mr Murrant's name had been mentioned.

137 Each of Messrs Murrant and King had in fact resigned from Blue Falcon by April 1999, and the deceased was advised in due course, to cease trading by reason of the financial difficulties in which the business found itself. As noted elsewhere, this left him in the position where he was liable for its debts, including some claims by persons who claimed to have been injured at premises guarded by it.

138 These problems were discussed by the deceased with his solicitor, Christopher Finn, and also with his accountant Mr de Hart.

139 He indicated to the former, on 11 April 2000, that he had problems with his overall indebtedness, including a MasterCard debt of $25,000 which he believed to have been Mr King's responsibility, as well as some other residual debts of the business. He indicated that, while he could not pay the legal fees due to Mr Finn, he hoped to receive some money soon.

140 During April he informed his accountant that his former partners did not trust him because they believed that he had given information against Mr Murrant to the Police Integrity Commission, that he was worried about what

Mr Murrant might do, and also that he thought he was being followed to see if he was, in fact, supplying information.

141 There was evidence from Mr Rodriguez, a financial consultant and former security guard with Blue Falcon that on one occasion, while the Blue Falcon business was still operating, there had been a physical altercation between the deceased and Mr King following a discussion about the cash flow, and the problems with superannuation payments.

142 Richard Skinner, a friend of the deceased, gave evidence to the effect that the relationship between the former partners had been “strained”, and that there were bad feelings, but it was his impression that this came more from the deceased. Suzanne Rose, the deceased's former wife, gave evidence to similar effect as to the ill feeling which had developed towards the end of the business, which had led the deceased to feel bitter. She did not, however, consider that there had been "nastiness". Paul Kron also spoke of tenseness between the parties, and acknowledged having said, in his statement, that the deceased had expressed hatred for Messrs Murrant and King.

143 Mr Murrant, who was spoken to by police in July 2000, gave evidence of having first met the deceased in 1998, at a time when they were both police prosecutors, and of having invited him to join Blue Falcon. He acknowledged that Mr King and the deceased had not got along together, and that there had been issues as to the deceased’s management of the business, and cash flow problems. He had apparently resigned from the Police Service in September 1998, following the issue of a Loss of Confidence letter from the Police Commissioner, in relation to his secondary employment in the business.

144 Mr Murrant said that he had been called to give evidence at the Police Integrity Commission inquiry in 1999, and arising out of that exercise was later convicted of giving false evidence, and sentenced to periodic detention. He said that he had not blamed the deceased for what had occurred to him, in this regard, and denied having been involved in his murder. He had no recollection of being told by Mr King that the deceased had been an informer, and had no knowledge of whether or not that had been the case.

145 It was his evidence that, consistently with his normal practice, he had been having dinner at the local restaurant with one or more of the members of his family and a close friend, whom he named, on the evening of 6 June preparatory to reporting for periodic detention at Parramatta on the following day. He was unable to provide details of the restaurant which they had attended this night, although he named those in the Bondi area that they had used for such dinners.

146 His various accounts to police concerning the dinner were somewhat

vague, and not entirely consistent, but there was evidence from the close friend, Anthony Raiche, that tended to corroborate their practice of dining together on the nights before Mr Murrant went into periodic detention, although he too could not be specific as to where they had dinner on the night of 6 June 2000, or as to who had been present.

147 This witness confirmed that the Police Integrity Commission experience had been hard on Mr Murrant and that the latter had made both favourable and unfavourable references to the deceased. Detective Sergeant Morgan said that his inquiries showed that while the deceased had not been an informant, Mr Murrant had indicated to him a belief to the contrary, and said that he appeared to have held some animosity and resentment towards him.

148 Mr King gave evidence to the effect that he had joined Blue Falcon in 1984, as the security manager, that he had left the company in 1991, and had then rejoined it in 1996 upon the deceased's invitation, in a managerial role. He was a shareholder and director, but had no direct financial interest in it. He said that he became aware of problems with the payment of superannuation to the Australian Tax Office, which led to the disagreement with the deceased. This he described as "a bit of a push and shove which was over before it started, and we then sat down and discussed it". On his account there was no anger, just frustration in relation to the deceased's apparent lack of understanding of the problem.

149 The investigation into Mr Murrant, he acknowledged, had placed a strain on the relationship. In May 1999 he said the deceased offered to resign upon conditions that he, Mr King, would take over Blue Falcon, that the company would take responsibility for its debts, and that the company would return his phone and pay him some money. He declined the offer, and resigned himself. At the time, he agreed the company had many debts, including moneys owed to staff for superannuation and wages, and operational expenses, as well as a MasterCard debt.

150 He said that when he spoke to the deceased in May 1999, the latter indicated that he had informed upon them to the Police Integrity Commission.

151 On the night of 6 June 2000, he said that he had been at the Swiss Grande Hotel at Bondi Beach drinking with the assistant coach of the Australian Socceroos, for whom he was providing security. It had initially been intended that he would accompany the team to a concert at the Hordern Pavilion, but that had been cancelled by reason of transport problems. He denied having anything to do with the killing, and also denied holding any resentment towards the deceased in relation to the Police Integrity Commission inquiry, at which he had been required to give evidence.

152 There was no evidence to connect either of these men to the killing, and senior counsel for the appellant acknowledged, in the course of his submissions (TT 24/3/03 p 7) that he did not suggest that they had been responsible for it.

153 The appellant did not call any evidence, but did raise his good character so far as it was established, in the course of the Prosecution case, that he had no criminal history, and was not known by his work associates to have been prone to violence.

154 The Crown relied upon what were said to be 40 strands in a circumstantial case, to show that the appellant pre-planned the murder and was criminally responsible, either as having been the shooter, or as a party to the joint enterprise. In summary, and combining the strands which overlap, that case depended on the following circumstances:

> (i) the appellant's purchase of the chain and D-shackles on 30 May;
>
> (ii) the appellants phone calls to Hornsby Marine on 29 and 30 May and on 7 June, and his hire of the aluminium boat;
>
> (iii) the fact that the deceased was last seen alive in the company of the appellant and Mr Cowie at Excell's office on the night of 6 June;
>
> (iv) the fact that the clothing found on the deceased's body matched the description of that which he had been last seen wearing while in their presence;
>
> (v) the length of time his body had been in the water before discovery;
>
> (vi) the fact that the body had been weighted in such a way that it would not have been expected to resurface;
>
> (vii) the attitude of the deceased and the appellant towards each other at the time of the meeting, which had been fixed for 6 June, and the potential for confrontation that existed;
>
> (viii) the untruths in the appellant's statement to police, on 15 June, concerning, in particular, the visit to the Pizzeria which he said had been made, and the time at which they left those premises, and also concerning the deceased having consulted a watch, even though he did not have one;
>
> (ix) the fact that no attempt was made by the deceased to phone Ms Johnson, after the meeting on 6 June, in circumstances where he would have been running late to meet her at about 9:30 PM if he were still alive;

(x) the fact that no food was found in the stomach of the deceased at post mortem;

(xi) the 9:45 PM phone call by the appellant to Excell, which could only have been intended for Mr Milner;

(xii) the appellant's purchases at the Caltex service station at 9:25 PM and his activation of the security system at 9:58 PM.

(xiii) the phone calls that were made from the Brooklyn/Hawkesbury River area by the appellant at 10:51 PM on 6 June, and at 2:55 AM on 7 June, and at 3:47 AM by Mr Cowie on that day;

(xiv) the finding of the car of the deceased in Parkside Lane on 26 June, in circumstances suggesting that it had been wiped clean of fingerprints, but in which a fingerprint of Mr Cowie was found on one side of a Gregory's road map for the relevant area;

(xv) the absence of the appellant at work until the late afternoon of 7 June;

(xvi) the lie told by the appellant to Ms Kristeller on 29 August 2000 to the effect that he had not purchased any chains in recent years, which was made at a time when he suspected that his phone and office were bugged.

(xvii) the nature of the execution of the deceased by a single shot fired to the back of his neck, from behind, while he was wearing a beanie, without any signs of a struggle, and the steps that were taken to contain any potential evidence of the place of its occurrence;

(xviii) the fact that the appellant and Cowie had access to .22 ammunition and were familiar with the use of firearms;

(xix) the fact that the appellant had been present at a training session where the effectiveness of a shot to the back of the lower head had been discussed.

(xx) the conversations which the appellant had with Mr Thompson after the deceased's disappearance concerning the steps that could possibly be taken in relation to firearms, either to alter them or to cover up their presence.

(xxi) the close relationship between the appellant and Mr Cowie, and the need for two people to have been involved in moving and dumping a body wrapped in plastic and tied up with chains;

155 In my view, this combination of circumstances was compelling, and supported no reasonable inference other than that the appellant planned and organised the killing of the deceased on the night of 6 June.

156 He had a motive and he had the means to commit the crime, including the disposal of the body, and there was evidence which was consistent with him having been in the area of the Hawkesbury River, where the body was dumped.

157 Further, there was evidence of him having lied in relation to material matters, and to have acquired chains and a boat shortly prior to the disappearance.

158 It may be accepted that the request for a provision of .22 subsonic ammunition had initially been made at a time that was sufficiently remote from 6 June, as to be, at best, equivocal, in relation to the existence of any long term planning. However, the same cannot be said of the purchase of the chains and D-shackles or the hire of the aluminium boat.

159 A question admittedly arises as to the length of chain wrapped around the body, which was in excess of the 15 metres, which the appellant had ordered. That was a matter for the jury, which, upon the evidence, was well entitled to conclude that the measuring system used by Mr Weinecke was somewhat generous, and that his recollection was imprecise.

160 There was evidence that the meeting had been organised several days, at least, before 6 June, and that it was not something that had been arranged at the last moment, that is, in circumstances where there would have been no occasion for the pre-planning of a murder.

161 Counsel for the appellant, who addressed each of the forty strands in the Crown case, in his address to the jury, focussed before us on four particular areas of the evidence that, in his submission, mitigated against the appellant’s involvement in the killing, or in its pre-planning.

162 The first was the request of Mr Cowie to be taken to the railway station, which it was contended would not have occurred had the killing been planned, since Mr Cowie’s assistance was needed to remove the body. The second was the placing of the call to the deceased’s mobile service at 10:51 PM which, it was contended, suggested that he was unaware of his death. The third related to the attendance at the Lane Cove service station, and the purchases that were made, it being contended that had the killing been pre-planned, then those items would have been procured in advance. The fourth related to the fact that the evidence, concerning the Olympic contract and motive, did not always go in the same way in support of the Crown case theory that details of the contract and of Excell’s business were being withheld, or that relations between the appellant and the deceased were seriously strained.

163 These were properly matters for the jury to weigh, but none of them was, in my view, such as to require this Court, or the jury, to have entertained a reasonable doubt. The first two matters and particularly the

second, were entirely consistent with having been ruses to deflect suspicion, or in the case of the 10:51 PM call, to check whether the deceased's mobile to which the appellant had made earlier calls that day, was still on his body. No other reason for such a late call was apparent, particularly if the meeting had ended amicably, as the appellant said to police and to others.

164 The third pre-supposes that criminal activity will be meticulously planned in every aspect. Trial experience shows that such an assumption is dubious, otherwise conviction rates would undoubtedly be much lower. In any event, there was no particular necessity for the body to have been moved immediately, particularly as there was a more urgent need to move the deceased's motor vehicle from the area outside the Excell office. It had to be moved quickly since there was a risk of the deceased's girlfriend, or other persons, coming to the office looking for him.

165 It is the case that the appellant also challenged the Crown case theory concerning the steps that were taken after the killing, upon the basis that to have left the body at the premises unattended, even for a short time, risked its discovery, in view of Mr Milner's likely presence. That is a fair comment, but it was a matter for the jury to consider in the light of the possibility that the body may well have already been placed in the boat which was on a trailer and concealed from vision.

166 The most positive evidence to suggest that the appellant had indicated an intention to reserve the Olympic contract for himself, and to keep the deceased in the dark both about it, and about the business, came from Mr Thompson. So far as there was evidence to the contrary, in particular from Mr Douglas and Ms Kristeller, that was an issue which the jury were in a better position to judge, since it involved an assessment of the credibility, and apparent certainty of recollection, of those witnesses.

167 In any event the Olympic contract was not the only matter in issue, or likely to be the subject of the potential confrontation, of which the deceased had said that he expected would occur at the meeting.

168 Similarly, Counsel pointed to what he asserted was the prepondence of the evidence that the relationship between the appellant and the deceased was cordial. That depended largely upon the observations of other employees of Excell or associates of the appellant, who also acknowledged that the deceased was rarely seen at the office. In those circumstances the evidence of the witnesses who were close to the deceased and privy to the concerns, which he had expressed to them, had greater weight. Again, however, this was a factual question in respect of which the jury were in a better position to judge.

169 While disavowing any submission that the deceased's former partners in Blue Falcon, or the former partner of Ms Johnson had been involved in the killing, Counsel did submit that the evidence concerning the sighting of a tall blond man at the Shell service station on Willoughby Road, on the night of 6 June, who used the public phone at that location, left open a reasonable possibility that this person was the deceased, giving rise to the further

possibility that he was killed after leaving the appellant and dumped by someone else in the Hawkesbury River.

170 The evidence concerning this sighting was vague in the extreme, and an examination of the call charge records for the phone did not turn up any call to a person known to the deceased. No other person came forward to report having received a call from the deceased and the one person who might have expected a call, Ms Johnson, said that she had not heard from him.

171 The jury were properly entitled to consider this aspect of the case to have been a false trail of the kind that commonly emerges in a murder investigation, particularly in the light of the evidence pointing to the presence of the appellant and of Mr Cowie, later that night, in the area where the body was later recovered.

172 Another matter put by counsel for the appellant at trial, and on the appeal, was that had the killing been pre-planned, or had the appellant been responsible, then the forensic trails concerning the chains, the boat hire the purchases at the Lane Cove service station, and so on, would not have been left behind. The Crown response, which similarly was a matter for the jury to assess, was that there never was any expectation that the body would be found, and hence no concern in relation to those forensic trails.

173 Finally it was submitted by the appellant that the reasonable possibility of Mr Cowie spontaneously, without any warning or preconcert, shooting the deceased, could not be excluded. There was no evidence, in my view, that would have left this open as a reasonable possibility. In particular there was no motive for him to have committed such an act, the prior argument having, on the evidence, been a passing incident followed by an amicable meeting at a hotel some weeks later.

174 The matters which counsel identified were all before the jury and they are properly to be taken into account by us in determining whether a reasonable doubt should be entertained of the kind referred to in *M v The Queen*. I am not persuaded that this case is one where that test has been established. On the contrary, it appears to me that the combination of circumstances relied upon by the Crown, taking into account all of the criticisms identified by counsel for the appellant, remains compelling.

175 The acquittal of the co-accused, Cowie, does not, of itself, involve an inconsistent verdict, or give rise to a reasonable doubt in relation to the appellant. The jury may have had a reasonable doubt, in the context of the Crown case, which depended upon the appellant having been the shooter, or the person who had pre-planned the killing, as to whether Cowie's involvement had been other than that of an accessory after the fact.

Ground 2 - A miscarriage of justice occurred as a result of the failure of the trial judge to direct the jury that they could not convict the appellant unless they were satisfied beyond reasonable doubt that he had planned the murder of the

deceased

176 Senior Counsel who appeared for the appellant at the trial, and on the appeal, did not seek the direction, which, it is now contended, should have been given. In fact, in the course of the discussion which was held prior to the addresses, a positive indication was given (T 1390/1) by Counsel that it was not required, it being accepted that the Crown circumstantial case fell into the strands in a cable category, rather than the links in a chain category.

177 The circumstances where a direction should be given, as to the proof of an essential intermediate fact beyond reasonable doubt, were identified in *Shepherd v The Queen* (1990) 170 CLR 573 and *R v Zaiter* [2004] NSWCCA 35 at paras 10 to 13.

178 The Crown here pursued its case, throughout, upon the basis that it was the appellant who had been the instigator of the killing, who had planned it, and who had been party to a joint criminal enterprise. It was accepted, and the jury were directed, that unless he was found guilty, Cowie must be acquitted.

179 In these circumstances, it was obvious to the jury that they had to be satisfied, beyond reasonable doubt, before convicting him, that he had either personally shot the deceased, or that he had organised and planned the killing.

180 The proof of that degree of participation depended upon the strands in the circumstantial case, previously identified, which were in my view overwhelming. The fact that he planned and organised the killing arose by inference from those circumstances.

181 The jury were appropriately instructed that the Crown case had to be proved beyond reasonable doubt. Having regard to the way that the case was conducted, and to the acceptance by experienced Senior Counsel, at trial, that a *Shepherd* direction was not required, leave under rule 4 of the *Criminal Appeal Rules*, to raise this ground, should be refused.

Ground 3 - The trial miscarried by reason of the publication on the Internet, both before and during the trial, of two interlocutory judgments

182 This ground related to the publication, on the Court's website (www.lawlink.nsw.gov.au/sc) during the trial, of two interlocutory judgments delivered by Hidden J on 17 December 2002, and 13 February 2003 respectively.

183 The first of these (*R v Crowther-Wilkinson and Cowie* [2002] NSWSC 1207) concerned the application of Cowie for a separate trial. In the course of the reasons that were given for refusing the application, his Honour set out the outline of the Crown case as follows:

> "(a) Wilkinson and Cowie were close associates and, as I have said, Cowie was employed in the business at the

relevant time.
(b) The two accused had been in regular telephone contact up to and just after the disappearance of the deceased.
(c) The deceased was last seen alive a little after 7 pm on 6 June, 2000, when he attended a meeting with Wilkinson and Cowie at the business premises at Chatswood.
(d) On 12 July, 2000 the deceased was found floating in the Hawkesbury River near Brooklyn. He was dressed in the same clothes he had been wearing at the Chatswood meeting. The cause of death was a single gunshot wound, believed to be of low velocity, to the back of the head.
(e) Wilkinson had attended a course in terminal ballistics, where he was instructed about the effectiveness of shooting a person in the lower brain stem.
(f) As I have said, the body was weighed down with chains. Equipment of that kind had been purchased by Wilkinson about nine days prior to the deceased's disappearance.
(g) The deceased was a tall man, who weighed 135 kilograms with the chains around him. It would need two people to dispose of his body.
(h) The deceased's motor vehicle was found abandoned at Chatswood, but at a location different from that of the business premises.
(i) Cowie's fingerprint was found on the Chatswood page of a street directory in the car.
(j) In a statement, Wilkinson said that after the meeting at Chatswood he joined the deceased for dinner at a pizzeria in Willoughby and they parted at 10 pm. The owner and an employee of the pizzeria did not recognise either the deceased or the accused being present that night.
(k) Wilkinson also stated that, after the meal with the deceased, he returned to work and checked his emails. A forensic examination shows that his emails were not checked on that occasion.
(l) Wilkinson purchased a tank of petrol at a service station at Lane Cove at 9.25 pm on 6 June, 2000. Confectionary and cigarettes, including the brand smoked by Cowie, were also purchased.
(m) Telephone records and other evidence, the detail of which I need not recite, suggest that Cowie's mobile phone was in the Brooklyn area in the early hours of 7 June, 2000 and that Wilkinson used it to make a call.
(n) When interviewed, Wilkinson denied having been in the Brooklyn area.
(o) Wilkinson denied owning or having access to a boat. An Excell employee had observed a twelve foot aluminium boat at the business premises. Wilkinson said that he had

borrowed it.
(p) According to the same employee, Wilkinson asked him after 6 June, 2000 if he knew of a dealer who could alter firearms, so that it could not be ascertained if they had been fired.
(q) The deceased had expressed concern at not receiving accurate information about the business profits. He had told a friend that he intended to confront Wilkinson on 6 June, 2000.
(r) Wilkinson was in the process of obtaining a contract to supply security staff for the Olympics. He had said that he did not intend to share this venture with the deceased.
(s) There is evidence from a witness that, after the disappearance of the deceased, Cowie said that Wilkinson owed him "big time."
(t) Cowie's statement to the police was exculpatory. He said that after the meeting at Chatswood he went home and surfed the internet. Police evidence would show that he did not do so.
(u) There is evidence from another witness of a physical confrontation between Cowie and the deceased in 1999, creating ill-will between them."

184 An observation was made to the effect that: "It may well be that the case against Mr Cowie is not as strong as that against Mr Wilkinson"; however that was tempered by a later observation that "this is not a case in which the evidence against one accused is significantly stronger than, and different from that against the other."

185 There was evidence to show that this judgment had been available on the Court's website from 5 February 2003.

186 The second judgment (*R v Crowther-Wilkinson and Cowie* [2003] NSWSC 44) concerned the admissibility of an exculpatory statement that was made by Mr Cowie to the police on 4 August 2000 but which the Crown wished to tender, upon the basis that it contained a lie as to a material circumstance. It was held to be inadmissible by reason of non-compliance with s 108 of the *Criminal Procedure Act*, since it had not been the subject of a tape recording. Relevantly the reasons for judgment noted:

"6 Much of the statement deals with background which, the Crown prosecutor told me, is uncontroversial and able to be proved by other evidence. However, the later part of the statement deals with the events of 6 June 2000 and contains material which is, of course, important. It was that night that the deceased disappeared and it was then, on the Crown case, that he was killed. Mr Cowie was an employee of a security company, of which Mr Wilkinson and the deceased were the proprietors. Mr Cowie's statement records his activities that afternoon and the arrival of the deceased at

> the business premises in the early evening for a meeting with Mr Wilkinson. He goes on to say that Mr Wilkinson and the deceased decided to go out and have a meal, that all three left the premises, that he was driven by Mr Wilkinson to a suburban railway station and dropped off, and that the deceased followed them in his own car. When he alighted from Mr Wilkinson's car, the deceased blew his horn or flashed his lights and he waved back. The effect of his statement is that that is the last he saw of the deceased and that he had nothing to do with his death."

187 After noting that, to this point, Mr Cowie had not said anything about the evening which could amount to an admission, his Honour continued:

> "8 It is what follows that the Crown relies upon as an admission. The statement goes on to recount that Mr Cowie then proceeded to his home where, as he put it, "I surfed the Internet and caught up on my emails." The Crown can produce expert evidence that his computer was not used for that purpose that night, and it was to be the Crown case that that part of his statement is a lie designed to mislead the police about his whereabouts at a crucial time."

188 His Honour then went on to note that the police officers concerned had said that it was not until they had compared this statement with the statement that had earlier been taken from the appellant, and had noticed an inconsistency in their accounts as to the events following the meeting, that Mr Cowie had come under suspicion.

189 There was evidence that this judgment was available on the Court's website from 7 March 2003.

190 An additional judgment (*R v Crowther-Wilkinson and Cowie* [2003] NSWSC 226 dated 28 March 2003) was also published on the Court's website, granting the Crown leave to cross-examine Mr Weinecke. No point was taken in relation to this judgment, no doubt upon the basis that the witness was later cross-examined in the presence of the jury.

191 Evidence was placed before us to show that the Supreme Court site is easily accessed, either directly, if the address is known, or via common search engines such as Google, Yahoo, Alta Vista, Ninemsn and so on, without charge. No barriers exist to access, passwords are not required and there is no need to register access to the site. Inquiry using the case name is sufficient.

192 There was also evidence to show that internet access via a recognized search engine, under the name of an accused, will return articles posted on the websites of the newspapers circulating in the Sydney region. By way of example, a current inquiry using the name of the present appellant threw up an article posted on the Sydney Morning Herald website of 9 May 2002 reporting on the first trial.

193 As at April 2003 other articles on the websites of the Daily Telegraph and regional and interstate newspapers, referring to the earlier trial of the appellant in the Supreme Court, were available, although they have since been deleted.

194 The evidence additionally showed that at the relevant time the judgments in question were freely available without the need to subscribe, or to enter via a password, on the Lexis and AustLII sites. Additionally it showed that an inquiry using the appellant's name, via a search engine, would have located the Daily Court List of 6 June 2002, showing his first trial to have been part heard before Bell J, and that one click on the Lawlink tab, on that page, would have facilitated a search for any judgments that had been delivered.

195 No additional complaint is made in relation to any material that may have been available on the internet beyond the two specific judgments which I have mentioned.

196 In order to deal with this ground, it is necessary to recall that a jury was empanelled on Monday 10 February 2003. However, that jury was discharged on Wednesday 12 February 2003 due to the illness of a juror.

197 A further jury was empanelled on Thursday 13 February 2003. Although the transcript did not record his Honour's opening remarks to the jury that day in full, a summary was noted in, inter alia, the following terms:

> "(His Honour informed the jury of the following: The legal representatives and their function; normal sitting hours; function of his Honour; invariably argument discussed in the absence of the jury and the reason why; function of the jury, being judges of the facts; separate verdicts in respect of each accused; Crown had the burden of proving guilt beyond reasonable doubt; *to consider the evidence impartially and rationally with a decision based only on the evidence* ; to keep their own counsel in and about the course (sic) precincts, avoiding contact; not to discuss the case which (sic) any person except fellow jurors when all together in the jury room:…" (Emphasis added)

198 A direction to the jury to similar effect, namely that "you must decide the case only on the evidence you have heard and seen in this courtroom, and you must have regard to nothing else" was given by his Honour during the summing up (SU T p 4).

199 After the short adjournment, and before any evidence was led, it became necessary for his Honour to discharge a juror, and the trial thereafter proceeded with the remaining 11 jurors. Following the opening addresses, and at the end of the first day of the resumed trial, his Honour made some further observations to the jury, including a warning to keep their own counsel during the trial.

200 Before adjourning for the day, the transcript records the following

exchange:

> "HIS HONOUR: we might talk over – remind me, it is probably a good idea these days to caution the jury about surfing the net about cases generally or in particular. I think that ought to be done, and I will do it first thing tomorrow, unless you want me to do it this afternoon.
> (All counsel – no your Honour)"

201 Whether or not the negative response of counsel was in fact an indication that they did not want the warning to be given at all, or whether it was an indication that they did not want it done that afternoon, is not entirely clear. Whatever be the case in that regard, the transcript for Friday 14 February, summarises the observations which his Honour made to the jury at the commencement of that day's hearing:

> "In respect of the general directions given yesterday his Honour stated he had emphasized the need to discuss the case and now added to that the following: *Not to go surfing the net for information about cases or criminal trials, which may not be accurate.* Especially to bear in mind they would hear the evidence first hand and in respect of the necessary legal matters these would be given by counsel and his Honour.)" (Emphasis added).

Counsel were apparently content with the terms of this direction, and did not request any greater specificity.

202 The concerns, which have arisen from time to time, in relation to the effects on jurors of adverse publicity, occurring either pre-trial or during the trial, do raise somewhat similar considerations.

203 There have obviously been cases where it has been considered necessary to halt a trial mid stream, where that kind of publicity has been particularly prejudicial. The principle which has been established in relation to this kind of event and other prejudicial happenings, is one of necessity; that is, there has to be a "high degree of need", in order to avoid a miscarriage of justice, before a discharge will be ordered: *Crofts v The Queen* (1986) 186 CLR 427 at 432.

204 In most instances, it has been accepted that sufficient directions can be given to overcome the problem, since it has been recognized that jurors can be trusted to obey the directions that they are given: *R v Bell* NSWCCA 8 October 1998, *Glennon v The Queen* (1992) 173 CLR 592 at 603, *Hinch v Attorney General (Vic) (No. 2)* (1998) 164 CLR 15 at 74, *Murphy v The Queen* (1989) 167 CLR 94 at 99, *R v Yuill* (1993) 69 A Crim R 450 at 453/4, and *R v Loguancio* (2000) 1 VR 235 at para 24.

205 This is an important assumption, which underpins the retention of jury trials (see *R v Gilbert* (2000) 201 CLR 414 per McHugh J at para 31). I do not believe that it has been fatally flawed by the experience in the two recent cases decided in this State to which I will later refer (*R v K* [2003] NSWCCA

401 and *R v Skaf* [2004] NSWCCA 37).

206 The authorities concerning prejudicial publicity tend to suggest moreover that the *mere possibility* of a juror having acquired prejudicial or extraneous knowledge, during a trial, is not normally a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice.

207 For example, in *Glennon*, Mason CJ and Toohey J said at 603:

> "Likewise, the suggestion that there was a substantial risk that at least one juror would have acquired knowledge, before the verdict was given, of the respondent's prior conviction was again a matter of mere conjecture or speculation. The mere possibility that such knowledge may have been acquired by a juror during the trial is not a sufficient basis for concluding that the accused did not have a fair trial or that there was a miscarriage of justice. Something more must be shown. The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial."

208 In *Murphy v The Queen* (1989) 167 CLR 94, Mason CJ and Toohey J said at 99:

> "…it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in R v Hubbert (1975) 29 CCC (2d) 279 at 291:
>
> > 'In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.'"

209 Counsel for the appellant drew attention, however, to the decision of Hampel J in *R v McLachlan* [2000] VSC 215, in support of the proposition that the availability on an internet site, accessible to the public, of information concerning an accused that was not before the jury, did present an unacceptable risk of injustice. In that case there was material available on the Crime Net site which provided information in relation to the accused who was facing a retrial. The trial was a short one and the problem was compounded by a Radio National segment in relation to the Crime Net site that had been put to air during the trial.

210 A different result occurred in *R v Cogley* [2000] VSCA 231 where the

Supreme Court of Victoria, Court of Appeal upheld the decision of the trial judge not to discharge the jury when it was discovered, during the jury deliberations, that similar information relating to an accused, who was being retried, was available on the Crime Net site.

211 In *Cogley* the appeal was dismissed upon the basis that the trial judge had properly taken into account the relevant circumstances, and that he had been best placed to determine whether a miscarriage might have occurred if the jury were not discharged. The relevant circumstances noted were three in number: first, that nearly all of the relevant information on the Crime Net was known to the jury from material led in the trial; secondly, that his Honour had assessed the jury to have been conscientious and attentive in the performance of their functions; and thirdly, they had been told by his Honour to disregard the fact of the first trial, and to decide the case on the evidence before them.

212 These decisions do point to the need to decide each case upon its own facts. They do not provide authority for any general proposition that the possibility of juror access to material concerning an accused, that is not before the jury, will lead to a miscarriage of justice.

213 The problem of internet access raised its head in the this state In *R v K* [2003] NSWCCA 406. In that case evidence emerged, after the trial had concluded, to show that there had been juror access to information that was available on the internet, which revealed that the accused had previously stood trial for the murder of his second wife. That disclosure was held, in the particular circumstances of a case, where the accused was on trial for the murder of his first wife, to have involved a sufficient risk of prejudice, amounting to a miscarriage of justice, such as to require the Court to set aside the conviction, and to order a new trial. The potential prejudice related to the risk of the jury applying tendency/coincidence reasoning, or of it regarding the material as having raised bad character, even though neither of those aspects had been relied upon by the Crown.

214 The relevant test was accepted to be that which had been stated in *R v Marsland* NSWCCA 17 July 1991, and applied in *R v Rudkowsky* NSWCCA 15 December 1992, where Gleeson CJ (with whom Cripps JA and McInerney J agreed) said:

> “The appellant was entitled to be tried and to have his guilt determined according to law. In determining whether there has been a miscarriage of justice in a case such as the present it is important to bear in mind that in this context the word *"justice"* means justice according to the law. It is not for this Court to decide for itself after perusing the evidence whether we agree with the jury's verdict. Nor is it for this Court to decide whether, even if the irregularity had not occurred, it is likely or even probable that the jury would have reached the same conclusion. We are not (sic) here to decide whether or not the appellant received a fair trial and whether or not his conviction was one entered in accordance

with the legal rules that govern the trial of a person in a case such as the present.

However, as has been pointed out by counsel for the Crown, the circumstances that there has been shown to have been an irregularity in the trial does not necessarily mean that the conviction must be quashed and there must be a new trial. It is common ground in this appeal that the test to be applied is that which was stated in the case of *R v Marsland,* that is to say, whether we can be satisfied that the irregularity has not affected the verdict and that the jury would have returned the same verdict if the irregularity had not occurred. That, it is accepted on both sides, is the test to determine whether in the events that have happened in a case like the present, there has been a miscarriage of justice"

215 In my decision, with which Grove and Dunford JJ agreed, I identified the desirability, for the future, of judges directing juries, inter alia, to refrain from undertaking any independent research or inquiries, whether via the internet or otherwise, concerning the accused or the case before them.

216 I also made the following observations:

"80 The case is one of potential ongoing importance, having regard to the extent of the information which is now available on the internet, concerning criminal investigations and trials, not only via online media reports and services, but also via legal databases and the judgment systems of the Courts. The problem is compounded by the greater familiarity which the current generation has with the use of information technology, and the ever reducing cost of acquiring and using that technology.

81 It may well become the case, as a matter of habit arising out of the way that ordinary affairs are conducted, that the inevitable reaction of any person who is summonsed as a juror, will be to undertake an online search in relation to the case, to ascertain what it may involve."

217 It was not my intention, in these passages, to suggest that the mere possibility of some independent research or inquiry being undertaken by a juror, or the absence of a direction of the kind suggested, should inevitably result in a retrial. Rather, I had in mind the pragmatic desirability of judges taking steps that might limit the possibility of extraneous and potentially prejudicial research being undertaken.

218 Similar problems have arisen in other cases, which were conveniently noted by this Court (Mason P, Wood CJ at CL, Sully J) in *R v Skaf* [2004] NSWCCA 37. That was a case where, despite a general warning by the trial judge, two jurors decided to undertake a private view at night, and to conduct an experiment, at the scene of an alleged sexual assault. Identification of the attacker in that case was very much in issue, and there

could have been no certainty as to whether or not the view, and the experiment which the two jurors had undertaken, replicated the lighting and other conditions of the night of the attack, or were even undertaken, in the same location. Again, it was considered necessary, applying the same test as that applied in *Marsland, Rudkowsky* and *K* (at para 242), to order a new trial.

219 On this occasion, recommendations were made (at paras 278 to 286) to reinforce those which were made in *R v K*, not in terms leading to an automatic retrial if they were given, but for similar pragmatic considerations to those mentioned above.

220 It was submitted that the irregularity in *Rudkowsky* had been "potential" rather than "actual", since there was no direct evidence as to whether any of the jurors had in fact read the prejudicial document which, by mistake, had been included in the material placed before them.

221 Consistently with the line of authority examined in *R v Skaf*, the exclusionary rule in relation to jury deliberations must be preserved, such that evidence cannot be received as to what jurors did in the course of their deliberations, or as to what bearing some irregular event or piece of information had for their verdict.

222 The risk of prejudice must be weighed independently of those considerations. *Rudkowsky* is clearly distinguishable in that it was there known that the offending material had been in the jury room, having been included with the exhibits which it was their task to examine. *Rudowsky* was argued, and decided, upon the assumption that the jurors had accessed the material. The present case is far removed from it.

223 As I have observed, there is no evidence in this case to show that any juror accessed the judgments, or either of them, so that the case is not on all fours with *Marsland, Rudkowski, K,* or *Skaf* where there was a *proven* irregularity. Rather, it is concerned with the existence of a source of information concerning the case, which a juror might *possibly* have accessed. Whether that occurred or not is a matter for speculation.

224 It follows that the *Marsland/Rudkowsky* test is not directly applicable, although I consider that some guidance can be gained from it and from the decisions concerning the existence of adverse publicity. So viewed, the question becomes one as to whether the presence of the material on the internet posed an unacceptably high risk of prejudice to the appellant, thereby occasioning a miscarriage of justice.

225 In my view, that question should be answered in the negative, for the following reasons:

> (a) There is no evidence whatsoever to suggest that any member of the jury accessed the internet;
>
> (b) On the first day of the trial the jury was given an instruction to

consider the evidence impartially and rationally with a decision based only on the evidence;

(c) On the morning of the second day of the trial his Honour gave the jury a direction not to surf the internet, which was cast in general terms, no doubt in order to avoid any hint that a search against the name of the accused might produce a positive result;

(d) The jury were directed again, during the summing up, to decide the case solely on the evidence before them;

(e) The information contained in the two judgments was for the most part placed before the jury although it would seem that, as a result of his Honour's ruling, item (t) identified in the outline of the Crown case in the first judgment of Hidden J was not before the jury; and that, as a result of a ruling of Bell J at the earlier trial, items (k), (n), and (o) were also not placed before the jury.

(f) The observation in the separate trial judgment to the effect that the Crown case against the appellant was stronger than that against Mr Cowie, was entirely innocuous, being nothing more than a comparative evaluation, and in any event, that was a circumstance which must have been abundantly clear to the jury;

(g) The case against the appellant was absolutely compelling, such that his conviction would have been inevitable, whether or not the judgments were accessed by one or more members of the jury.

226 It may be observed that a similar view was taken by the Supreme Court of Queensland Court of Appeal in *R v Long* (2003) 138 A Crim R 103, where the availability of pre trial and internet publicity concerning the appellant, who had been charged with murder arising out of the notorious Childers Backpackers fire, was held not to give rise to a sufficient risk of prejudice so as to constitute a miscarriage of justice.

227 Before parting from this ground, I accept that there can be a significant difference between publication of material concerning an accused on populist sites or in those that are maintained by newspapers and media outlets, and those which are official sites maintained by courts or by recognised law publishers, in that greater weight and credence will attach to the latter. That may be an important, or even decisive, consideration in a case where actual access by a juror is shown.

228 However, the observations made in the decisions concerning prejudicial publicity remain very pertinent where it is not known whether there has been any access, and particularly where a direction has been given early in the trial to jurors to decide the case on the evidence and not to search the internet, as occurred here.

229 These observations should not be taken as undermining the importance

of the appearance of justice being maintained. Rather they reflect the circumstance that not every event that may have conceivably affected a criminal trial will necessarily lead to a new trial. On the contrary, appellate review depends upon the precise circumstances of the case, and upon a realistic appraisal of whether, in the light of those circumstances, there was an unacceptably high risk of prejudice to the accused.

230 I would dismiss this ground of appeal.

231 I would propose the following orders:

1. Appeal dismissed;

2. Conviction and sentence below confirmed.

232 **DOWD J:** I agree with the proposed orders and reasons of Wood CJ at CL.

233 **KIRBY J:** I agree with Wood CJ at CL.

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Last Modified: 08/06/2004
