

IN THE PRIVY COUNCIL

No. 4 of 1971

## O N A P P E A L

FROM THE SUPREME COURT OF THE STATE OF VICTORIA

## B E T W E E N

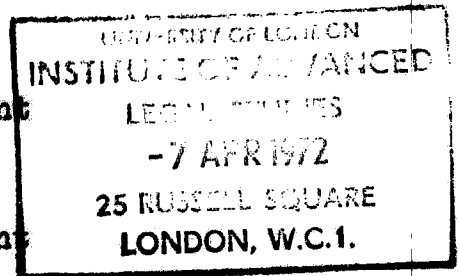
LEITH McDONALD RATTEN

Appellant

AND

THE QUEEN

Respondent



## CASE FOR THE APPELLANT

RECORD

- 10 1. This is an appeal, by Special leave, from a conviction by the Supreme Court of the State of Victoria (Winneke, C.J. and a jury) on the 20th August 1970.
- 20 2. The Appellant was presented for trial at the Supreme Court of the State of Victoria sitting at Shepparton on the 10th day of August, 1970 on a charge of having at Echuca in the said State on the 7th May 1970 murdered Beverley Joan Ratten. The trial lasted seven days. The Appellant was found guilty of murder by the jury, after a retirement of nearly ten hours, and sentenced to death by hanging. p. 1 p.519
3. The defence of the Appellant to the said charge was that the shot which killed the said Beverley Joan Ratten was fired when a shot gun which he was cleaning went off by accident.
- 30 4. The Appellant applied on the 21st August 1970 to the Full Court of the Supreme Court of the State of Victoria, sitting as a Court of Criminal Appeal, for leave to appeal against the said conviction of the 20th August, 1970. By a judgment given on the 16th September 1970, p.521/3 p.523/549

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the said Full Court of the Supreme Court of Victoria ordered that the said application for leave to appeal be dismissed.

5. The evidence established that prior to the time when the deceased met her death the Appellant was living with the deceased, who was his wife, and their three young children in Echuca, a small country town in the State of Victoria, in the house in which her death occurred. At the time of her death the deceased was over eight months pregnant. 10

6. The evidence adduced by the prosecution established the following facts :

- (a) that at about 1.15 p.m. on the 7th May, 1970 the said Beverley Joan Ratten died from the effects of a gun shot wound. The wound was about two inches in diameter and about six inches below the apex of the left armpit, in the mid-axillary line, in the region of the seventh, eighth and ninth ribs. The left arm must have been away from the body; 20
- p.269  
1.40  
p.268  
1.27  
p.279  
1.32
- (b) that the shot entered the body of the deceased at an angle of 45° to the horizontal and travelled forwards (towards the chest) and downwards through the body, causing instantaneous death by shooting away, inter alia, the apex of the heart;
- p.272 1.8  
p.271 1.34  
p.274 1.10
- (c) that at about the said time in the room of the house (the kitchen), in which the deceased met her death there were: an automatic rifle; a Winchester "Over and Under" shotgun; an old "side by side" shotgun, the metal work of which was rusty and from which the forepiece had been removed; and, various items of equipment including a scouring pad used for and consistent with the cleaning of guns; 30
- p.219 1.27  
p.233.1.22  
p.157 1.1  
p.233.1.10  
p.220 1.26  
p.247 1.23
- (d) that the left barrel of the old "side by side" shotgun, which the Appellant was holding, went off, and the shot therefrom caused the wound described above. The muzzle must have been about five feet from the point of impact; 40
- p.165 1.10  
p.224 1.25  
p.165.1.10

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- (e) that upon the arrival of the police at the Appellant's house shortly after the incident the Appellant was in a distraught condition and remained so for a considerable time, and a physician who saw him within one hour of the said shooting gave him a sedative; p.225 1.1  
p.51 1.32  
p.331 1.30  
p.50 1.3.
- 10 (f) that at all times the Appellant consistently maintained that the shooting was accidental and that the said gun had gone off whilst he was cleaning rust from the metalwork;
- 20 (g) that during the fourteen months preceding the 7th May, 1970, the Appellant had been party to a relationship with one Jennifer Ann Kemp, which relationship included sexual intercourse between the parties. For some days prior to the 7th May 1970, the said Jennifer Ann Kemp, being dissatisfied with her marriage, had discussed with the Appellant the possibility of each party leaving their respective spouses and living together. Throughout the said discussions the Appellant had consistently told Mrs. Kemp that he was not prepared to leave his wife while she was pregnant and in any event, not until he had ensured that his family were properly provided for. Further, 30 he had attempted to dissuade Mrs. Kemp from leaving her home. Further, he was overheard to say to Mrs. Kemp, at the police station, on the morning of the 8th May, "It looks like you had better forget me now, after this"; p.57 /75  
p.60, 1.31  
p.69  
p.318 1.1
- 40 (h) that neither barrel of the gun would discharge unless pressure was applied to the trigger. In the right barrel, which was caused to fire by pressure on the forward trigger, there was an undischarged cartridge bearing the imprint of the firing pin indicating that there had been a misfire. A misfire would cause an audible click, but it would take a great deal of experience to know, from the p.169 1.16  
p.156 1.9  
p.179 1.1

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p.178 1.15		click, whether there had been a misfire or simply the hammer falling on an empty chamber. The pressure required to operate the forward trigger was three and a half pounds, which is a little below normal, and that required to operate the rear trigger was seven pounds, which is within the normal limits of between four and eight pounds. The safety-catch, which was designed to move to the safe position upon the gun being closed, was faulty in that it failed to engage properly. When so engaged the effect was merely to require an increase of about two pounds in the pressure necessary to fire either barrel. Once the front trigger had been pulled the safety catch ceased to have any effect;	
p.157 1.10			
p.157 1.18			
p.139 1.40			10
p.143.1.20			
p.169 1.6			
p. 171 1.5			
p. 218.1.28	(i)	that at all material times the five years old daughter of the Appellant and the deceased was near at hand;	20
p.195 1.1	(j)	that at 1.09 p.m. on the 7th May, 1970, one Stanley Rupert Ratten, the father of the Appellant, made a trunk call to the Appellant's house, which call lasted for 2.9 minutes. His conversation with the Appellant was perfectly normal and from time to time he heard the voice of the said Beverley Joan Ratten in the background apparently making comments which fitted in with the tenor of the conversation;	30
p.191.1.20			
p.195 1.4			
p.192			
p.196 1.6	(k)	that at about 1.15 p.m. on the same day a telephonist on the local telephone exchange answered a call from the Appellant's telephone. The call was made by a voice which was urgent, hysterical and with a high inflexion. The telephonist identified the voice as being that of a woman;	
p.201			
p.197 1.15			
	(l)	that at about 1.20 p.m. on the same day a police officer, calling from the local police station, telephoned the Appellant's house. Before the police officer had the opportunity to speak he heard a voice which was urgent, hysterical and with a high	40
p.242 1.4			
p.242 1.19			

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inflexion. It was not a part of the case for the prosecution that the speaker was anyone other than the Appellant;

(m) that the telephone in the Appellant's house was not in the kitchen, but in the room adjacent thereto;

(n) that, to outside observers, who knew the deceased, there was no sign of strain or stress in their relationship with each other.

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7. The telephonist employed at the Echuca Telephone Exchange, Janet Lucile Flowers, who had been employed there for about two and half years, gave the following evidence, inter alia, for the prosecution:

" Prosecutor - Did you receive a particular call in the early part of that afternoon, Thursday 7th May this year?

p.196 1.2

Witness - I did.

20 Prosecutor - Will you tell us in your own words what happened?

His Honour - What time was this?

Witness - Well, it was shortly after one o'clock, I would say it would have been about a quarter past one. I plugged into a number at Echuca, 1494 and I said - I opened the speak key and I said to the person 'Number please' and the reply I got was 'Get me the police please'. I kept speak key open as the person was hysterical.

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His Honour - You what?

Witness - I kept the speak key open as the person was in an hysterical state and I connected the call to Echuca 41 which is the police station. As I was connecting the call the person gave her address as 59, Mitchell Street.

His Honour - Then what happened?

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"Witness - As she hung up the police station answered their phone. I didn't speak to the police, I closed the key and referred to the officer in charge, Mr. McCullum, and said that I had been given certain information, was I allowed to give this information to the police, and he replied 'Yes'. So then I said to the police they were wanted at 59, Mitchell Street. The policeman said 'Right' and then hung up."

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p.197. 1.9

Prosecutor - What sort of a voice was this that spoke to you and said 'Get me the Police please' and then gave you the address of 59, Mitchell Street?

Witness - The person was a little bit calmer at first but the voice changed as she kept on speaking and it went into an hysterical state.

Prosecutor - What was the sex of the person speaking?

Witness - A female voice?."

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p. 201 1.4

When cross-examined by Mr. Lazarus of Counsel for the Appellant, the said Janet Lucile Flowers gave the following evidence inter alia:

" Mr. Lazarus - At what stage could you determine the voice was hysterical, Miss Flowers - or did you determine the voice was hysterical?

Witness - After the person had said, 'Get me', she went into an hysterical state from then on.

Mr. Lazarus - Well, the 'police please' was in an hysterical state, was it?

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Witness - Yes, it was.

Mr. Lazarus - Could you understand what was said?

Witness - I could understand what was said

Mr. Lazarus - And what made you describe it as hysterical, Miss Flowers? ... Well, ... The 'police please'?

"Witness - The person was very calm at first, although I could tell she was crying.

Mr. Lazarus - Could you?

Witness - Yes.

Mr. Lazarus - Now perhaps we can start with that. That is on the words 'Get me', is that right?

10 Witness - Yes, she was crying, but she wasn't hysterical until after she said - 'the police please', she started to get hysterical then.

Mr. Lazarus - Let us just take it in order - 'Get me', you could tell at that stage the voice was crying, is that right?

Witness - That is correct.

Mr. Lazarus - Now how could you determine that, were there noticeable sobs?

Witness - Yes, there were.

20 Mr. Lazarus - What, there was a sob before the 'get' or after?

Witness - Well, it was in the conversation.

Mr. Lazarus - Well, you have only got 'get me', you see?

Witness - In the 'get me' she was sobbing, the person was sobbing.

Mr. Lazarus - Well, it was a sort of - (sob), 'get' (sob) 'me' (sob), is that right?

Witness - No, I think she'd only sobbed once, she'd only sobbed.

30 Mr. Lazarus - Had she sobbed before she said 'get'?

Witness - No, she didn't.

Mr. Lazarus - Or After?

Witness - After

Mr. Lazarus - So it was 'get', then a sob, and then 'me', is that right?

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Witness - Yes.

Mr. Lazarus - And was it a long sob or a short sob, how would you describe this?

Witness - I'd describe it as a short sob.

Mr. Lazarus - All right, well we have got 'Get' - this is calm, the word 'get' is calm, is it?

Witness - Yes.

Mr. Lazarus - All right, 'get' is calm, then sob 'me' is calm?

Witness - Yes

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Mr. Lazarus - And then hysteria?

Witness: - Yes.

Mr. Lazarus - Now the hysteria, I take it, started at the 'the', did it?

Witness - That is correct.

Mr. Lazarus How did the hysteria sound to you Miss Flowers?

Witness - Well, as the person kept on speaking it became very high-pitched.

Mr. Lazarus - At what stage did it become very high-pitched, at the 'the', at the start of the 'the'?

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Witness - At the start of the 'the', and by the time she got to giving the address it was a yell.

Mr. Lazarus - Would it be an accurate description in your mind, Miss Flowers, of a voice that you heard on this occasion to say that it was - the voice was urgent?

Witness - Yes.

Mr. Lazarus - Sounded urgent?

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Witness - Yes.



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Mr. Lazarus - Was hysterically spoken" or hysterical?

Witness - Yes.

Mr. Lazarus - Contained a high inflexion?

Witness - Yes "

8. The Appellant gave evidence on oath and described, inter alia, how he had been handling the gun. He had been aware of the click of a firing pin going forward. Immediately after

p.374 l.10

10 the gun went off he rushed to the telephone picked it up and yelled for help and for an ambulance to be sent to 59, Mitchell Street. He kept repeating this until he was aware of somebody answering and then hung up and ran back to see what he could do. He did not believe he had asked for the police. Shortly afterwards the 'phone rang', and he ran in to answer the 'phone and was asked if he needed help and he said, "Yes, for goodness sake get here quickly."

p.379 l.16

p.380 p.14

20 9. That a witness for the prosecution, one Lawrence Henry Bickerton First Constable of Police, gave evidence that at about a quarter past one on the afternoon of Thursday 7th May 1970, he was on duty at the Echuca Police Station. Shortly after that time as a result of something he heard and saw he picked up the 'phone.

"Prosecutor - And what did you do?

p.242 l.4

30 Witness - I spoke to the girl on the exchange. I asked her where the last call came from and who lived there. She told me the number, 1494, and that she didn't know who lived there. She also asked did I want to be connected, I replied, 'Yes', and she connected me through to that number. Almost immediately the 'phone was picked up and a voice said to me, 'help me, help me, for God's sake come quick, for God's sake come quick.' I then said, "What address?"

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The voice said '59 Mitchell Street, I then

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hung up, verified the address to First Constable Holly on the radio, got Detective Moxham and left the station and went straight round there.

Prosecutor - How could you describe the voice, the one that said 'Help me, help me etc.'?

Witness - Well it was urgent, it was hysterical, very quickly spoken, with a high inflexion."

The witness did not express an opinion as to the sex of the person speaking.

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p.8

10. That at the commencement of the trial a submission was made on behalf of the Appellant that the evidence of the witness Janet Lucile Flowers as set out in paragraph 7 hereof was inadmissible. The learned Chief Justice, in ruling that the evidence was admissible, said:

p. 39/41

"Mr. Lazarus and Mr. Walker who appear for the accused have challenged the admissibility of certain evidence contained in the deposition given by Miss Flowers, who was a telephone operator at the Echuca exchange. Mr. Walker who has argued the point very ably, has contended that there is no principle of evidence on which this evidence would be admissible. In fact he contends that any principle there is, such as res gestae or the principle of the exclusion of hearsay evidence, tends to show that the evidence is inadmissible. Secondly, he contends that even if the evidence is strictly admissible, having regard to its nature and the particular circumstances of the case, the prejudicial effect of it would be so great as compared with any probative value it might have, that the Court should in the exercise of its discretion exclude it. There is I think no doubt these days that there is a general power in the Court to exclude evidence which is otherwise strictly admissible in accordance with the rules of evidence.

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Mr. Howse for the Crown, however, had contended in substance that this evidence is admissible, I think on three possible

bases. He firstly contends that it is part and parcel of an interconnected series of events which occurred over an exceedingly short period of time on the day in question, and that to exclude this portion of the evidence would tend to make the series of events unintelligible in the eyes of an intelligent jury, broadly speaking that the evidence is admissible along the lines of the High Court decision in R. v. O'Leary.

Secondly, he submits that the evidence is admissible, if it is accepted by the jury, to rebut an account given by the accused to the interrogating detectives, as to how he came to make a 'phone call for the purpose of summoning assistance for his wife after the accident occurred. There is, according to the depositions, the evidence that the accused told the police that he had made a telephone call about this time, it was he who made the call, not his wife. The inference is that that call was made after this unfortunate shooting occurred, and that it was conduct on his part completely inconsistent with criminal conduct of the kind now charged against him by the Crown. Mr. Howse contends that if the jury accept the evidence that it was a woman who made the call, it was not the accused, then that evidence is highly relevant to rebut that aspect of the explanation given by the accused. Thirdly, he contended that the evidence was admissible in order to show the relations existing between the accused and his wife at the relevant time, and he relied upon the recent decision of the Full Court of Victoria in R. v. Wilson which was subsequently upheld by the High Court. There is no doubt that evidence which is capable of explaining the conduct of the accused as charged in the presentment is admissible for that purpose.

Having considered the matter and weighed up the arguments one against the other my opinion is the evidence is admissible and it is admissible on any one or all of the three bases contended for by Mr. Howse. The only other problem therefore for me is whether I should exclude it in the exercise of discretion, on the basis that Mr. Walker has

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contended for. But having regard to the basis on which it is in my opinion relevant and admissible, I feel quite unable to say that it is so lacking in probative values compared with any prejudicial effect it may have, that it ought to be excluded. In my view if the jury is properly directed, and they must be assumed always to follow directions that are given to them, I think that it is quite impossible to say that the prejudicial effect in this case outweighs the probative value in the relevant sense for this purpose. In my opinion, therefore, the evidence objected to is admissible, it is relevant and admissible and should not be excluded."

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At the time of making the said ruling, the learned Chief Justice would not have been aware that the witness Lawrence Henry Bickerton had been unable to identify as male or female the voice of the person whom he heard when he telephoned the Appellant's house.

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11. There was no direct evidence implicating the Appellant in an intentional killing and, with the exception of the evidence of the witness Janet Lucile Flowers, the circumstances were equivocal.

12. The Appellant respectfully submits that the evidence of Janet Lucile Flowers set out in para. 7 above was inadmissible, because it was hearsay evidence. Evidence of a statement made to a witness by somebody not called may be admissible if it is tendered to establish, not the truth of the statement, but the fact that it was made; but this is not such a case. The present case does not fall precisely either within the category of cases in which the evidence is tendered to establish the truth of the statement, or within the category of cases in which it is tendered to establish the fact that the statement was made. The evidence was tendered in this case to establish the state of mind of the person making the statement. It was tendered, if not to establish the truth of the statement, at least to establish the truth of what the jury were invited to infer from the words said by the witness to have been used.

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This purpose is closely akin to the purpose of establishing the truth of the statement. In both cases the value of the statement depends upon subjective considerations and cannot safely be judged without cross-examination of the maker of the statement. The evidence of Janet Lucile Flowers, therefore, in the Appellant's respectful submission, was hearsay evidence, and inadmissible unless it fell within one of the recognized exceptions to the hearsay rule.

13. The only exception suggested as applicable was that relating to evidence of res gestae. The Appellant respectfully submits that the statement made over the telephone cannot be regarded as having formed part of the res gestae. According to the case for the Crown, it is to be supposed that the deceased made this statement, hung up the telephone, and returned from the room in which the telephone was to the kitchen. Only then was she shot. On this view, the statement made to Janet Lucile Flowers was not, in the respectful submission of the Appellant, so closely associated with the shooting as to be part of the res gestae.

14. The Appellant further respectfully submits that the Learned Chief Justice was not in a position to exercise his discretion properly when determining whether to admit the evidence of Janet Lucile Flowers. The Crown had not informed him that Constable Bickerton was unable to identify as male or female the voice of the person to whom he spoke when he telephoned the Appellant's home.

15. The Full Court of the Supreme Court of Victoria, by the judgment of the 16th September 1970, held that the evidence of Janet Lucile Flowers had been admissible as evidence of res gestae, and the learned Chief Justice had exercised his discretion rightly in admitting it.

16. The Learned Chief Justice, in the course of his summing up, directed the jury at length and with great care upon the nature of their duty and the respective functions of judge and jury in a criminal trial. He then gave them directions upon the essential ingredients of the offence of murder and the matters upon which

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they must be satisfied before returning a conviction for this offence. He next told them that it was open to them, if the evidence permitted, to find manslaughter, if they thought it to be a proper conclusion on the facts. Before dealing with the essential ingredients of the offence of manslaughter he gave them the following direction :

p.481, 1.50

"In other words, manslaughter is a truly and completely alternative charge in this case. 10  
You will not consider the question of manslaughter until you arrive at a point where you are unanimously satisfied that the accused is not guilty of murder. Do you follow that? Of course if you found him guilty of murder well then you do not worry about manslaughter. But neither do you worry about manslaughter until you reach the stage where you decide that he is not guilty of murder. It is then and only then that 20  
you start afresh and say, "Well now let us consider the question of manslaughter in accordance with the rulings that the trial judge gave us". Do you follow that?"

p.482 1.13

He also said:

p.514 1.30

"Then, gentlemen, so far as manslaughter is concerned, remember what the defence says about that. Remember what I told you - no compromise about this, no compromise about it. Do not consider manslaughter until you have made up your minds about whether he is 30  
guilty or not guilty of murder. If you decide he is not guilty of murder, then start afresh to consider whether you are prepared to say that he was negligent ...."

17. The Appellant respectfully submits that the learned Chief Justice erred in so directing the jury, in that a jury is not required to be satisfied either unanimously or at all, that a person is not guilty of the murder with which 40  
he is charged before they are allowed to consider whether or no manslaughter has been committed. The Appellant respectfully submits that, by so directing the jury, the learned Chief Justice effectively deprived him of his

right to have the case against him considered in the round, and that he has thereby suffered a grave miscarriage of justice. The Appellant submits, further, that the facts and events of this case demonstrate the likelihood that such miscarriage took place. Even considering the evidence adduced by the prosecution in isolation from the evidence of the defence, the case for the prosecution, it is submitted, was finely balanced as between murder and manslaughter. Although the jury eventually returned a unanimous verdict of murder, they did so only after a retirement of nearly ten hours. Further, although they returned after four hours to ask to be reminded of one matter of evidence, and were recalled after a further three and a half hours so that the learned Chief Justice could point out an ambiguity in the evidence of which he had earlier reminded them, they were not recalled by the learned Chief Justice for the purpose of being asked if they were in difficulty and as to whether he could give them further assistance. In all these circumstances the Appellant respectfully submits that there must be uncertainty as to whether or not the verdict was reached genuinely and spontaneously, and as to whether or not the jury, if they had been properly directed, would not have returned, after much less than ten hours, with a verdict of manslaughter.

18. The Appellant therefore respectfully submits that for the reasons aforesaid grave and substantial injustice has been done, that his conviction ought to be quashed, and that he ought to be granted such further or other relief as, in the premises, will be just, for the following (among other)

R E A S O N S

1. BECAUSE the evidence of Janet Lucile Flowers set out in paragraph 7 of this Case was inadmissible:
2. BECAUSE the learned Chief Justice exercised his discretion wrongly in admitting the said evidence:

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3. BECAUSE the learned Chief Justice misdirected the jury as to the circumstances in which they might consider a verdict of manslaughter:
4. BECAUSE by the said misdirection the jury were prevented from giving fair consideration to the whole of the case:
5. BECAUSE there is no certainty that the verdict of the jury was genuine or spontaneous:
6. BECAUSE in all the circumstances it would be unsafe to allow the conviction to stand

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J. G. LE QUESNE

GERALD DAVIES



No. 4. of 1971

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF THE STATE  
OF VICTORIA

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B E T W E E N

LEITH McDONALD RATTEN      Appellant

- and -

THE QUEEN      Respondent

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CASE FOR THE APPELLANT

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