

23, 1971

IN THE PRIVY COUNCIL

No. 4 of 1971

ON APPEAL
FROM THE SUPREME COURT OF THE
STATE OF VICTORIA

BETWEEN

LEITH McDONALD RATTEN

Appellant

AND

THE QUEEN

Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

CASE FOR THE RESPONDENT

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- 10 1. This is an appeal by special leave from a Judgment dated the 16th day of September, 1970, of the Full Court of the Supreme Court of the State of Victoria sitting as a Court of Criminal Appeal, (Gowans, Gillard, and Barber, JJ.), which had dismissed the Appellant's application for leave to appeal against his conviction in the Supreme Court of the State of Victoria (Winneke, C.J., and a Jury) on the 20th day of August, 1970, on a charge of murder upon which the
- 20 Appellant had been sentenced to death.

2. The Appellant was presented on the charge that, he, at Echuca in the State of Victoria on the 7th day of May, 1970, murdered Beverley Joan Ratten.

p.1

3. The trial took place in the Supreme Court of the State of Victoria sitting at Shepparton (Winneke, C.J., and a Jury) between the 10th and 20th August, 1970. The prosecution called material evidence to the following effect:-

- 30 (a) Colin David Edwards Moysey, qualified medical

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pp.53-75

practitioner, said that on the 7th May, 1970, he attended at 59, Mitchell Street and saw the deceased lying on the kitchen floor; he examined her and ascertained that she was dead although there was no evidence of the actual cause of death. He had been attending her in relation to her expected child which was due approximately one week later.

pp.84-93

- (b) Jennifer Anne Kemp said that she and her former husband, Peter Charles Kemp, had moved to live in Echuca in 1964 and had become friends with the deceased and the Appellant. She said that her former husband and the Appellant went on shooting trips together very frequently. She had been having an affair with the Appellant during the fourteen months preceding the 7th day of May, 1970, and that sexual intercourse had occurred between the parties at regular and frequent intervals, the last such occasion being on the afternoon of the 6th of May, 1970; from about July, 1969, she and the Appellant had talked about the possibility of each party leaving their respective spouses and living together; the Appellant had told her that he did not think his wife would divorce him; that she wanted to leave her husband and live with the Appellant and that she believed, from what the Appellant had told her, that he wanted to live with her; she and the Appellant consulted a solicitor in Shepparton on the 5th of May, 1970; her understanding of the advice that they both received was that it would be impossible to get a divorce on the grounds of separation, which advice she discussed with the Appellant on the journey home from Shepparton, and he did not express any different view; she said that on the same day she had a discussion with her husband, which she related to the Appellant telling him that her husband had agreed that they should separate and had given her permission to put their home on the market; she described how the Appellant tried to persuade her not to put her house on the market as he felt that it would alert the deceased to
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their affair and that he did not want her to know of their relationship until after the baby was born. On Wednesday, 6th May, she had a further discussion with the Appellant and she thought that it was agreed between them that she should put her house on the market for sale. She told the Appellant that she thought he should tell his wife that he intended to leave her after the baby was born even if he did not tell her of the reason. The following day she spoke to the Appellant on the telephone and told him that she was moving out of the house and would stay with friends. He said he would come over to help her pack. He came over and persuaded her to stay in the house for the time being. She also described how the Appellant had said to her, on the morning of the 7th May, that he had told the deceased that he was going to leave her after the deceased had had her expected baby but had given no reasons; that the deceased was upset, and that he and the deceased had slept the previous night in separate rooms; that it was again agreed that they would go away together after the baby was born. She said that on the afternoon of the 7th May she went to an estate agent in Nathalia and put her house on the market.

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30 (c) Denise Mary Webb, a neighbour living some fifty yards from the last witness, Mrs. Kemp, said that in about April, 1970, in the course of a car journey with the Appellant and Mrs. Kemp, the Appellant said that he was going to leave the deceased after the baby was born, and go away with Mrs. Kemp after he had made adequate provision for the deceased financially; Mrs. Kemp had said in the course of the car journey in the Appellant's hearing that she hoped to divorce her husband and go with the Appellant.

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pp. 93-98

(d) Peter Charles Kemp, former husband of Jennifer Anne Kemp, said that he and the Appellant frequently went shooting together; that the Appellant's working knowledge of firearms was very good and that as far as safety precautions were concerned he had

pp. 99-118

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never known the Appellant to do anything foolhardy with a gun; he described how with the Appellant's consent in February/March, 1970, he had taken the gun, an old "side by side" shotgun Exhibit C (which fired the fatal shot), to one Stanley Gordon Thompson, a gunsmith in Shepparton; he later told the Appellant that the said Thompson had said, as was the fact, that the gun was not worth repairing; the gun was unloaded when it was returned to the Appellant.

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pp.116-128

(e) William John Madden, district telephone manager, described the working of the Echuca telephone exchange. He described how the operators knew, from a system of lights on the board, from what number a call to the exchange was made.

pp.137-152

(f) Stanley Gordon Thompson, the said gunsmith, described how he had examined what he believed to be the gun Exhibit C which had been brought to him by Peter Charles Kemp; he said that the gun, although defective in its locking mechanism, was not at a dangerous stage at that time; the gun did not discharge during bump testing; he thought that it would be reasonably safe to fire and that the only way he could discharge it was by pulling the trigger; the gun was empty when he examined it. The gun had an automatic safety catch; after firing the gun and then opening the same, the safety catch returned to the safe position. He tested the gun with the safety catch in the safe position and found that with hard pressure on the front trigger the safety catch moved away from the safe position thereby permitting the gun to be fired by further pressure on the trigger.

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pp.152-181

(g) Brian George Thompson, First Constable attached to the Firearms Identification Division of the Forensic Science Laboratory, identified the two cartridges removed from the gun, Exhibit C and said that one cartridge was discharged and the other was undischarged; both, however, bore firing pin impressions on the caps; the discharged

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cartridge was fired from the left barrel of the said gun and the undischarged cartridge had been struck on its cap by the right hand firing pin of the said gun; there was no way in which the right hand cartridge could have been struck by the firing pin without pressure being put on the forward trigger. On measuring the trigger pulls, the trigger for the right barrel (the forward trigger) was found to be $3\frac{1}{2}$ lbs, and that for the left barrel to be 7 lbs; the only way he was able to discharge the said gun was by pulling the trigger after it had been loaded; the mis-firing of the right hand barrel in his view was not caused by the pulling of the trigger for the left-hand barrel. He said that he had found cartridges similar to cartridges from the said gun, in a container in a canoe in the garage of the Appellant's home. He said that with the safety catch in the automatic position (as distinct from being manually operated into a fully safe position) the right hand barrel could be discharged by increased pressure on the forward trigger which he thought was 5 lbs and the left hand barrel by an increased pressure of 9 lbs. He was able to determine that the front end of the muzzle of the said gun was approximately 5 feet from the left side of the deceased when the fatal shot was fired; on the basis that the path of the shot - from the discharged cartridge - was at an angle of about 45 degrees to the horizontal plane, assuming the body to have been in a vertical position, then the wound could not have been inflicted with both the deceased and the Appellant standing unless the said gun was 40" above the wound and pointing downwards at an angle; such a degree of height would not have been achieved, even if the gun was held at shoulder height in the ordinary firing position, with the deceased standing vertically.

- (h) Betty Winifred Trinham said that at about 11 a.m. on the 7th May she called on the deceased. The deceased looked tired and drawn and looked as though she had been

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crying.

- pp.191-193 (i) Stanley Rupert Ratten, the father of the Appellant said that he made a trunk line call to his son's home shortly after 1.00 p.m. on the 7th May, 1970, to enquire after the deceased and see if she required more napkins; he spoke to his son and could hear the deceased's voice in the background; there was nothing at all unusual about the conversation. 10
- pp.194-195 (j) Beverley Faye Bush a telephonist at the P.M.G. Department Main Trunk Exchange in Melbourne described how she had handled the said trunk call, made by the Appellant's father to the Appellant; the said call commenced at 9 minutes past 1.00 p.m. and lasted for 2.9 minutes.
- pp.195-212 (k) Janet Lucille Flowers, telephonist at the Echuca Exchange, said that she was on duty on the afternoon of Thursday 7th May to handle local calls; she received a call from Echuca 1494 (the number of the Appellant's home) and said to the person calling "Number Please" and the reply was "Get me the police, please". She said that as she connected the call to the police number the caller said "59 Mitchell Street" and then hung up. The police answered the call but she disconnected without saying anything. The voice commenced calmly, although the caller was crying, but became hysterical; the voice was a female voice; Miss Flowers spoke to the monitor about the matter and then called the police and told the police that they were wanted at 59 Mitchell Street. The police acknowledged and hung up; she then looked at the clock and noticed that it was 1.20 p.m.; approximately two minutes after she had connected the call to the police station, she noticed one Judith Mary Bennett, an adjoining telephonist, connect to the police station number, then to Echuca 1494 and call that number. Miss Flowers said that no mention was made by the female caller of an ambulance. 20
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10 (1) Judith Mary Bennett, the said telephonist said that she was working on the left hand side of Miss Flowers, handling local calls, and received a call from the police station at about 20 past 1 on the afternoon of the 7th May; the caller asked what number had been calling the police station; she told him Echuca 1494 (she had heard this from Miss Flowers); whereupon she connected the caller from the police station to the said number. She said that it was only two minutes after Miss Flowers had spoken to the monitor that she received the incoming call from the police station.

20 (m) First Constable Ernest John Holly, of Echuca, said that he had received a telephone call at Echuca police station as a result of which he and Senior Constable Shaw set out for 59, Mitchell Street; whilst en route, he radioed back to the police station to ask who lived at 59, Mitchell Street; it took him about three minutes to reach 59, Mitchell Street, about a mile to a mile and a half from the police station. The deceased was dead when he arrived although he did not at that stage observe any blood or signs of injury. He observed the gun Exhibit C on the floor of the den (a small room between the kitchen and the lounge) and saw Senior Constable Shaw pick it up and break it; he saw a fired cartridge fall out of the left hand barrel, an unfired cartridge being in the right hand barrel - he saw the impression of a firing pin on the caps of both cartridges. On the table in the kitchen, there was a .22 rifle with a telescopic sight, a gun case, a rifle case, ammunition and cleaning gear. There was an under and over shotgun broken at the breech on the chair at the end of the table and beside the table there was a gladstone bag with ammunition and other miscellaneous items in it.

pp.217-229

(n) Senior Constable Warwick Sidney Shaw said that he accompanied First Constable Holly to 59, Mitchell Street. He said that the Appellant said that his gun Exhibit C had

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gone off while he was cleaning it. Later at the police station, the Appellant gave the same explanation. Still later at the Police Station when Senior Constable Shaw asked the Appellant, "Who rang here?" the Appellant said, "I did, I rang the exchange and asked them to send an ambulance."

pp.241-244

- (o) First Constable Bickerton described how he heard the receipt of the radio message from First Constable Holly, whereupon he rang the Echuca telephone exchange and asked where the last telephone call had come from and who lived there; the operator replied Echuca 1494 and connected him to that number, whereupon almost immediately the telephone was picked up and a voice said, "Help me, help me, for God's sake come quick, for God's sake come quick." The voice gave the address, 59, Mitchell Street. He then went to 59, Mitchell Street and having seen that the deceased was dead he radioed for an ambulance and a little later for a doctor. 10 20

pp.266-304

- (p) Dr. Robert Ewing Scott Charlton, pathologist said that he performed the autopsy on the deceased. He described the fatal wound as being two inches in diameter and about six inches below the apex of the left armpit in the mid-axillary line; the shot had entered the body at an angle of 45° to the horizontal plane assuming that the body was then standing in a vertical position, the shot travelling forwards and downwards; death was instantaneous and was caused by substantial destruction of the left ventricle of the heart, causing haemorrhage into the pleural cavity. 30

pp.305-333

- (q) Senior Detective Francis Kevin Coates said that he interviewed the Appellant at Echuca Police Station in the presence of Detective Donchue between 10.40 p.m. on 7th May and 4.20 a.m. on 8th May 1970 each question and answer being recorded in a Record of Interview, Exhibit "P". The Appellant said that he had received a telephone call from his father. After the call he went back into the kitchen where he had been cleaning his guns 40

pp.553-573

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including the gun Exhibit C. He said that he continued to clean the gun while the deceased made a cup of coffee or tea and the gun went off and the deceased fell to the floor. The Appellant said that a friend had taken the gun to a gunsmith but that it was not worth repairing. He said that he had intended to clean his Winchester gun and went to the garage to get the cleaning gear for that purpose when he saw the gun Exhibit C there and decided that it was an opportune time to clean it as well, so he took it into the kitchen. The Appellant said that he could not explain how the gun came to be loaded and that he did not recollect putting cartridges in the gun. He said that it was not his custom to prove a firearm before handling it because it was a strict rule at home that guns are never loaded. He said that he held the gun Exhibit C at waist height when it discharged. At first the Appellant said that he had had an affair with a woman which was no longer current but when pressed in relation to his affair with Mrs. Kemp, he agreed that it had been of a sexual nature since February, 1969. He said that he had called at Mrs. Kemp's home between 9.00 and 10.00 a.m. that day. He had considered leaving his home for Mrs. Kemp and had last discussed the matter with her that morning. He said that he was serious in his discussion with Mrs. Kemp. Later in Exhibit P, the Appellant said that there was no reason why the gun discharged. He said that he did not pull the trigger. The telephone call by a woman (given in evidence by Miss Flowers) was put to the Appellant, who said that he had made the telephone call in question but that he did not ask for the police but for an ambulance. He said that there was no other woman in the house apart from the deceased within an hour before the shooting. The Appellant said that the deceased was standing upright when the gun was discharged and that there was no possibility that she was on the floor or kneeling at that time. The Appellant said that he did not agree that it would be as long as five minutes between his telephone

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call for the ambulance and the telephone call from the police.

At about 4.30 a.m. on Friday, the 8th May, 1970, the Appellant went to 59, Mitchell Street with his solicitor and police officers for the purpose of demonstrating the position of himself and of the deceased when the gun discharged.

pp.574-575

After returning to the police station, a further interview was recorded with the Appellant in Exhibit "Q" at 5.10 a.m. The Appellant said that he had heard a click in the gun some short time before the gun discharged which he said could account for both cartridges bearing firing pin marks upon them.

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pp.345-460

4. The Appellant gave evidence on oath. He said that the shooting of the deceased had been accidental. He gave evidence in detail concerning his relationship with Mrs. Kemp; he said that on the one hand she was insistent that their relationship should be more permanent while he on the other was seeking to put her off. He agreed that he had visited a solicitor in Shepparton with Mrs. Kemp on the 5th May, 1970, and that in the evening of that day Mrs. Kemp told him that her husband had agreed to a separation and to the sale of their house. He said that both then and on the following day he tried to persuade Mrs. Kemp against selling her house. On the 7th May, 1970, in the morning, he telephoned Mrs. Kemp who told him that she had arranged accommodation for herself and that she was moving out of her house at lunchtime; he went and saw her and persuaded her not to leave. He returned home on the 7th May, 1970, and repaired the washing machine. While he was waiting for some glue to dry, he decided to clean his guns. When he went into the garage to fetch the cleaning gear, he saw the gun Exhibit C there; he noticed that it was rusty and decided to clean it. He took it into the kitchen. Having cleaned the barrel of another gun, a Winchester, he said that he started to rub off the rust from the gun Exhibit C. He said that at some stage he heard a clicking sound within the gun; he said that this

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would explain how the cartridge in the right hand barrel came to have a firing pin indentation upon it. He said that the clicking sound did not strike him as being unusual; he said that the deceased was then vacuuming in another part of the house. He said that his cleaning operations were interrupted by the trunk line call from his father. After the telephone call, he returned to the kitchen, picked up the gun and started to clean it again. He then said that the deceased was in the kitchen: "We were talking about the conversation that I had had with my father and I turned around to speak to her and then it discharged." He said that he went straight to the telephone to get help and called for an ambulance. He said that a little later the police rang and he told them to get there quickly. He said that after Mr. Kemp had returned the gun Exhibit C to him, after taking it to the gunsmith, he had no intention of using it again. He said that the deceased was standing upright when the gun discharged. He said that when he got the gun back from Mr. Kemp he did not know whether it was loaded or unloaded.

pp.4-39

5. At the commencement of the trial a submission was made on behalf of the Appellant that certain evidence contained in the deposition of the witness Miss Flowers as set out in paragraph 2 (k) herein was inadmissible because it was hearsay and did not form part of the res gestae or, alternatively, that the prejudicial effect of such evidence outweighed its probative value and that it should not be admitted. The evidence objected to was that a female voice had said to Miss Flowers over the telephone "Get me the police please. 59, Mitchell Street."

pp.39-41

6. The learned Chief Justice rejected the submission and ruled that the evidence of Miss Flowers was admissible on any one of three bases. First, he ruled that it was part and parcel of an interconnected series of events which occurred over a short period of time and that to exclude such portion of the evidence would tend to make the series of events unintelligible in the eyes of an intelligent jury. Secondly, he

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admitted such evidence to rebut an account given by the Appellant to the police that it was he who made a telephone call for an ambulance after the shooting occurred. Thirdly, he found that the evidence was admissible in order to show the relations existing between the Appellant and the deceased at the relevant time. The learned Chief Justice recognised that he had a discretion to reject evidence but refused, in the exercise of his discretion, to reject the evidence. 10

pp.460-462

7. At the conclusion of the evidence, it was submitted on behalf of the Appellant that the case should not be left to the jury on the issue of murder. The learned Chief Justice rejected

pp.462-469

that submission. It was further submitted on behalf of the Appellant that there was no evidence on which a jury properly directed could find that the Appellant had been guilty of criminal negligence that resulted in the death of his wife, the deceased. The learned Chief Justice rejected the further submission and said that he would leave the issue of manslaughter to the jury as an alternative verdict. He said that he would warn the jury that it would not be proper for them to reach a verdict by way of compromise and the Appellant's counsel said that he would, in his address, do the same. 20

pp.471-515

8. The learned Chief Justice began his summing-up by directing the jury upon the nature of their duty, the respective functions of judge and jury in a criminal trial and the burden of proof. He then considered the meaning and effect of circumstantial evidence and the necessary elements which the prosecution had to establish to justify a verdict of murder. He then told the jury of the alternative verdict of manslaughter which was always open to a jury if the evidence permitted it and told the jury that it would be wrong to compromise. He defined the element of criminal negligence and distinguished it from civil negligence. The learned Chief Justice considered the evidence of Miss Flowers and said: 30 40

p.487

"If you were satisfied that Miss Flowers was right and it was the deceased woman who made the call for the police, then that would falsify or rebut the statement

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made by the accused man that it was he that made that call The other way in which the evidence could be used is to say:- 'Well, it shows what the relationship was between the accused and his wife at that time'."

10 Having directed the jury that their verdict should be unanimous, the learned Chief Justice summarized the case for the prosecution. He then dealt with the necessary elements which the prosecution had to establish to justify a verdict of manslaughter. In relation to manslaughter, the learned Chief Justice gave the following directions:-

p.481

20 "Manslaughter is always wrapped up as an alternative verdict in a count of murder. But it is an alternative charge, gentlemen, it is a truly alternative charge. What it means is this, that when you have determined - if you do - that the accused is not guilty of murder, it is then, and only then, - then and only then - that you will turn your attention and consider, "Well, is he guilty or not guilty of the alternative charge of manslaughter"."

pp.481-482

30 "In other words, manslaughter is a truly and completely alternative charge in this case. 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."

p.514

40 "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 guilty or not guilty of murder. If you decide he is not guilty of murder, then

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start afresh to consider whether you are prepared to say that he was negligent and that his failure to make sure in the circumstances that the gun was unloaded was negligent so far and away above that of ordinary civil negligence, so far and above that necessary to call for compensation, so gross, so culpable, so wicked, showing such a reckless disregard for the life and safety of his wife that it deserves to be punished at the hands of the criminal law." 10

The learned Chief Justice dealt with the Appellant's case in detail and concluded his summing-up by saying:-

p. 515

"When you return to Court you will be asked by my associate words to this effect, 'How say you, do you find the accused guilty or not guilty of murder?' If you are satisfied to the degree I have told you that he is guilty of murder, then it is your duty to say so: Guilty. If you are not satisfied to the extent that I have told you, then it is your duty to say 'Not Guilty'. If you say 'Not Guilty', you will then be asked, 'How say you, do you find the accused guilty or not guilty of manslaughter?' And you will give your verdict, according to the directions about manslaughter that I have just given to you." 20

9. No application was made on behalf of the Appellant at the end of the learned Chief Justice's direction to the jury for any re-direction nor was any submission made on behalf of the Appellant that the learned Chief Justice had incorrectly stated the position in relation to manslaughter. The jury returned a verdict of guilty of murder and the Appellant was sentenced to death. 30

10. The Appellant applied for leave to appeal against his conviction to the Full Court of the Supreme Court of the State of Victoria (Gowans, Gillard and Barber, JJ.) sitting as a Court of Criminal Appeal. No ground of appeal related to the Chief Justice's direction on the issue of manslaughter nor was any argument directed to the 40

Full Court on this issue. Leave was refused on the 16th September, 1970.

pp.523-549

10 The Judgment of the Court was delivered by Gowans, J., who said that the grounds of appeal concerned three subject matters. One ground related to an enquiry from the jury after they had retired to consider their verdict with respect to evidence of when the canoe, in which some ammunition was kept, had last been used and the answer given by the learned Chief Justice. It was held that the learned Chief Justice had reviewed the evidence correctly and that there was no merit in the point raised.

20 The second ground of appeal concerned the evidence given by Miss Flowers and principally complained that her evidence was wrongly admitted. The Full Court held that Miss Flowers' evidence was admissible to prove that the telephone call was from a woman and that such woman called for the police and not for an ambulance; on that basis, it would have been necessary to warn the jury that the evidence should not be regarded as tending to prove anything that was happening in the house at the time of the telephone call. As it was sought to prove the state of the relations between the Appellant and the deceased at the time of the telephone call, Miss Flowers' evidence amounted to hearsay, which could be admitted if it was part of the res gestae. The Full Court held that the statement of one person involved in a relevant event, which is contemporaneous with and directly concerns that event, may be related by another person who hears it; that principle is an exception to the hearsay rule. The statement of the deceased that she was in a state of apprehension from the Appellant's aggressive conduct could be given in evidence by another who heard it, if the statement was made in a spontaneous utterance which was part of what was happening in the house so immediately before the shooting as to be part of that happening. It was held that the factor of contemporaneity was present because the res gestae included not only declarations made at the time of the act being done, and immediately afterwards, but also declarations made

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immediately before. It was further held that the implications of the words spoken over the telephone did not require to be curtailed so as to exclude any reflection on what the Appellant might have been doing at the material time. The res gestae principle was an exception to the hearsay rule and permitted of the proof of facts which the hearsay rule would exclude.

The Full Court concluded that the evidence of Miss Flowers was relevant and admissible as tending to prove the state of the relations between the Appellant and the deceased at or about the time of the gun being discharged. There was no question of a wrongful exercise of discretion by the trial judge in declining to exclude the evidence as being more prejudicial than probative.

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A further ground of appeal concerned the directions given by the learned trial Judge in relation to what was called "identification evidence" in relation to the voice in the telephone call. The Full Court analysed the relevant directions of the trial Judge and held that it could not be said that the attention of the jury was not appropriately drawn to the matters they would need to have in mind.

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The third subject matter of the grounds of appeal was that the learned trial Judge should have directed the jury as a matter of law that there was insufficient evidence to support a conviction of murder and that the verdict was against the weight of the evidence and was unreasonable. After a close analysis of the evidence, the Full Court concluded that the trial Judge was under no duty to withdraw the case from the jury and that the verdict was not unsupported by the evidence, nor was it unreasonable.

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pp.550-552

11. The Appellant was given special leave to appeal by the Judicial Committee on the 10th February, 1971.

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12. The Respondent respectfully submits that this appeal should be dismissed. It is submitted that there was no material misdirection of the jury upon the law or upon the facts by the

learned Chief Justice in his summing-up.

There is no provision for majority verdicts in criminal cases in the State of Victoria. The case against the Appellant was put by the Respondent as one of deliberate murder and was an entirely different case from the case which might arise from one possible view of the facts, namely manslaughter arising from an accidental killing due to criminal negligence. The learned
10 Chief Justice was, it is humbly submitted, therefore quite correct in directing the jury that the count of murder should be disposed of one way or the other before they went on to consider the issue of manslaughter.

13. The Respondent submits that the learned Chief Justice correctly admitted the evidence of Miss Flowers as to the telephone call for the reasons given by him in his ruling.

It is submitted that the reasons given by the
20 Full Court for admitting the evidence of Miss Flowers are correct and should be upheld.

If, contrary to the foregoing submissions, the evidence of Miss Flowers should not have been admitted upon the basis that it could be used as evidence of the relationship which existed between the parties at the time, then it is submitted that it was clearly admissible as being contrary to the Appellant's account of the circumstances of his wife's death and as
30 evidence of a material part of the facts and circumstances of the case. The exclusion of the evidence would, it is submitted, have resulted in a misleading account being given to the jury as to how and in what circumstances the police arrived at the Appellant's house so quickly after the shooting. The Respondent therefore submits that having regard to all the facts and circumstances of the case, the admission of such evidence upon the bases that
40 it was admitted could have caused the Appellant no miscarriage of justice and that even if such evidence had been admitted upon a narrower basis the verdict of the jury must have been the same as that given.

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It is further submitted that if, contrary to the foregoing submissions, the evidence of Miss Flowers should not have been admitted and a miscarriage of justice was caused to the Appellant by the admission of such evidence, a new trial should be ordered pursuant to section 568(2) of the Crimes Act No.6231 (Victorian Statutes).

14. The Respondent humbly submits that this appeal should be dismissed and the judgment and order of the Supreme Court of the State of Victoria should be affirmed for the following, among other 10

R E A S O N S

1. BECAUSE the jury were correctly directed both on the facts and the law of the case.
2. BECAUSE the jury were correctly directed upon the issue of manslaughter.
3. BECAUSE the evidence of Miss Flowers was correctly admitted in evidence. 20
4. BECAUSE the jury were correctly directed upon the evidence of Miss Flowers.
5. BECAUSE of the other reasons in the judgment of the Court of Appeal.
6. BECAUSE the Appellant has suffered no miscarriage of justice.

B. L. MURRAY.QC

STUART N. McKINNON

No. 4 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE
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B E T W E E N

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CASE FOR THE RESPONDENT

FRESHFIELDS.

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