R v COLIN CAMPBELL ROSS

OPINION PURSUANT TO SECTION 584(b) OF THE *CRIMES ACT* 1958

Introduction

1 We have been requested by the Attorney-General, the Honourable Rob Hulls, to provide him with an opinion on a point arising in the case of Colin Campbell Ross who was found guilty by a jury in February 1922 of the murder of a 12 year old school girl Alma Tirtschke on 30 December 1921.

The Law Applicable to References by the Attorney-General

2 An Attorney-General's reference is made pursuant to s.584 of the *Crimes Act* 1958 (the Act). That section provides as follows:

> **584 References by Attorney-General**
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> Nothing in this Part shall affect the prerogative of mercy, but the Attorney-General on the consideration of any petition for the exercise of Her Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence passed on a person so convicted, may, if he thinks fit, at any time either—
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> (a) refer the whole case to the Court of Appeal and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted; or
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> (b) if he desires the assistance of the judges of the Trial Division of the Supreme Court on any point arising in the case with a view to the determination of the petition, refer that point to such judges for their opinion thereon, and such judges or any three of them shall consider the point so referred and furnish the Attorney-General with their opinion thereon accordingly.

3 As can be seen, this reference is made under the second leg of this section.

4 The first leg envisages a consideration of the conviction (or sentence) by the Court of Appeal. Its role was described by Winneke P, Batt JA and Hampel AJA in *Re MJR*:[1]

> It is not in dispute that, upon such a reference, the court acts in a judicial and not in an administrative or advisory capacity and that, subject to a qualification as regards grounds disposed of by any previous appeal, it should determine the case referred by applying the same legal principles and exercising the same broad judicial discretions as it would in an ordinary criminal appeal brought

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1 (2001) 1 VR 119 at 120-1.

> pursuant to s 567(d) and determined in accordance with s 568(4) of the Act: [cases cited].
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> Where the "whole case" has been referred pursuant to s 584(a), prima facie the court is required to consider the case in its entirety subject only to the limitation that it is bound to act upon legal principles appropriate to an appeal. Thus, although all the material which accompanies the petition will be considered by the court, only that which is relevant and admissible will influence the result: [cases cited]. Accordingly, the court will have regard to the entire record of proceedings in various courts together with any new matter properly admissible upon the hearing. Where, however, the record shows that an appeal has already been heard and determined and that is one aspect of the case referred, it is not contemplated that, if the matter has already been dealt with regularly and disposed of in that appeal, it should be re-adjudicated upon the same or similar grounds in the absence of some new matter which makes reconsideration of those grounds necessary or desirable: [cases cited].

5 Accordingly, the method of approach of an appellate court specified in *Re MJR* would be relevant in a case such as the present one where the conviction has been the subject of appeals to the Full Court of the Supreme Court of Victoria[2] and to the High Court of Australia.[3] Each appeal was unsuccessful and Mr Ross was also refused leave to appeal to the Privy Council. Subsequently, he was executed on 24 April 1922.

6 The issues canvassed in the appellate courts included whether an alternative count of manslaughter should have been left to the jury; the admissibility of the confessional evidence; and the admissibility of the evidence of a number of new witnesses, some of whose evidence was discovered subsequent to the trial. Whether consideration would be given afresh by a court of appeal to these aspects of the case depends upon the meaning ascribed to the phrase "some new matter" which may, in turn, depend upon the law regarded by an appellate court as applicable to the case. We note the English approach enunciated in *R v Derek Bentley* (deceased)[4] when the Court of Appeal reviewed the safety of convictions sustained at an earlier time, namely, that the standard to be applied in respect of the conduct of that earlier trial, including the judge's directions to the jury, and the safety of the conviction, are those standards which currently apply. The Court in *Bentley's* case (Lord Bingham, Lord Kennedy and Mr Justice Collins) recognised that:

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2 [1922] VLR 329.
3 (1922) 30 CLR 246.
4 [1998] EWCA Crim 2516 at [3].

> Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases ... Where, however, this court exercises its power to receive new evidence, it inevitably reviews the case different from that presented to the judge and the jury at the trial.[5]

7 We express no opinion as to the correctness of the English approach. We do, however, accept the conclusion in *Bentley's* case that a pardon may be granted posthumously.

8 In the instant case, the law regarding the requirement to leave to a jury the offence of manslaughter as an alternative to murder has been recently examined in *Gilbert v The Queen*[6] and later in *Gillard v The Queen*.[7] In *Gilbert's* case the High Court decision in *Ross v The King* is discussed. The proposition advanced by the majority (Gleeson CJ, Gummow and Callinan JJ) in *Gilbert's* case, is to the effect that where manslaughter is not left to a jury, the relevant question in determining whether there has been a miscarriage of justice is whether the jury properly instructed would necessarily have returned a verdict of murder. This is arguably an approach more favourable to an accused than that adopted by the trial judge in *Ross*, albeit the majority seek to distinguish *Ross* on its facts.

9 It is inappropriate to speculate as to whether a Victorian Court of Appeal examining "the whole case" would reach the conclusion that the failure to leave manslaughter for the consideration of the jury in *Ross'* case, constituted a miscarriage of justice. Certainly, Isaacs J, having regard to the confession attributed to Ross by a witness Sydney Harding (which we will discuss later in this opinion), was of the opinion that a miscarriage of justice had occurred and a retrial should be ordered.

10 It is similarly inappropriate to consider whether a miscarriage of justice occurred by reason of the failure of the trial judge in *Ross* to give what has become known as a

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5 See also *Ellis* [2003] EWCA Crim 3356 at [7]; *Foster* [2003] EWCA Crim 178 at [7]-[8]; *Ashley King* [2000] Crim LR 835, CA; *Johnson* [2001] 1 Cr App R 403.

6 (2000) 201 CLR 414.

7 (2003) 139 A Crim R 100.

Faure warning[8] in relation to the evidence of admissions and/or confessions attributed to Ross by the witnesses Maddox and Matthews, and Harding, or, indeed, the failure of the trial judge to give the now standard warning as to the evidence of prison informers[9] in respect of the evidence of the prisoner Harding of a "jail yard confession".

11 The procedure adopted by the Attorney-General in this case has never, so far as we are aware, been previously utilised in Victoria (or Australia) to tender advice. It requires an opinion which is not a judicial determination.[10] Nor is the Attorney-General bound by any opinion furnished to him.[11] Moreover, we are not reviewing or purporting to review, the decision of the High Court. This opinion relates to matters of new evidence only.

12 We note that since the High Court decision in *Kable v New South Wales*[12] the constitutional validity of s.584(b) of the Act may be in doubt.[13] As Fox and Freiberg put in their book *Sentencing*:[14]

> The validity of the provision for the executive to obtain the judge's opinion under s 584(b) is now in doubt since the decision in *Kable v New South Wales*, in which the High Court held that the separation of judicial from executive and legislative powers under Chapter III of the Constitution also applied to State courts invested with federal jurisdiction. For the legislature to require judges of the Supreme Court to provide it with extra-judicial opinion advice in an administrative capacity which [sic] seems incompatible with the separation of powers upon which Federal judicial power is premised.

13 In any event, there are reasons why the requiring of advice may not be a sound option. One is that, unless the petitioner has been extraordinarily thorough, the process places judges in the unsatisfactory role of having to carry out inquiries as to the availability of additional potential sources of information. In the present case, it was considered necessary to examine contemporary newspaper reports, coronial records, depositional material, and an account of the trial written by Ross' junior

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8 (1993) 67 A Crim R 172.
9 See for example *Pollitt v R* (1991) 174 CLR 558.
10 See Re Ratten [1974] VR 201 at 212.
11 See *Thomas v The Queen* [1980] AC 125 at 134-5.
12 (1995) 186 CLR 51.
13 See also *Grollo v Palmer* (1995) 184 CLR 348 per Gummow J at 391.
14 *Sentencing (State and Federal Law in Victoria)* 2nd ed. 1999 Fox and Freiberg, p.1099.

counsel. Another potential difficulty is that the process involves the judges having no contradictor. Although the legislation would not preclude the seeking of oral or written submissions from the petitioners or the Director of Public Prosecutions to assist the judges in their consideration, such a course would turn the inquiry into a de facto appellate hearing and, arguably, defeat the purpose of the exercise.

14 However, bearing in mind the purpose of such an opinion - namely to assist in the exercise of the prerogative of mercy - we take the view that, unless and until the legislation has been the subject of appellate scrutiny, and despite the difficulties to which we have adverted, the judges of this Court should respond to a reference in the terms of the sub-section.

15 Pursuant to rule 2.12 of the *Supreme Court (Criminal Procedure) Rules* 1998, a reference under s.584(b) of the Act may be considered in private. This does not, of course, preclude the Attorney-General from providing a copy of any opinion to interested parties or, indeed, the public .

The Terms of the Reference

16 The genesis of this reference is a Petition of Mercy submitted by the families of both Colin Campbell Ross and Nell Alma Tirtschke (known as Alma Tirtschke), dated 4 October 2005. [It is an appendix to this opinion]. Having received the Petition, the Attorney-General, wrote to the Chief Justice, The Honourable Marilyn Warren A.C., on 20 October 2006. The relevant parts of that letter are in these terms:

> I am writing to inform you that I wish to seek the opinion of judges of the Trial Division of the Supreme Court of Victoria pursuant to s.584(b) of the *Crimes Act* 1958 on a point arising from the consideration of a Petition of Mercy in the case of Mr Colin Campbell Ross.
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> In February 1922, Mr Ross was convicted of murder and sentenced to death. Mr Ross unsuccessfully appealed to the Full Court of the Victorian Supreme Court and the High Court of Australia and was refused leave to appeal to the Privy Council. He was executed in April 1922.
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> In October 2005 I received a Petition for Mercy, signed by Elizabeth Eadie Everett, for the Ross family, and Bettye Georgina Arthur, for the Tirtschke family, on behalf of Mr Ross.

> The petition claims that fresh evidence has been uncovered, that was not available, or not known to be available, at the time of Mr Ross' trials or appeals, and which would have been likely to affect the outcome of his case. This fresh evidence essentially consists of new forensic evidence and new character evidence about one of the witnesses.
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> The question I am referring pursuant to s.584(b) is:
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> > "whether there was a miscarriage of justice in the conviction of Mr Ross in the light of the evidence now available."

17 Subsequently, in February 2007, the Chief Justice forwarded the material for our consideration. Thereafter, steps were taken to obtain material to which we have referred (including that in the possession of the Office of Public Prosecutions and that relating to the appeals).

18 At the outset of our consideration of this matter, we should record that we feel some doubt as to whether the broad question referred to by the Attorney-General constitutes a "point arising in the case" within the meaning of the relevant sub-section. However, it seems clear enough that two aspects of the case arise for consideration in terms of their possible effect on the outcome of the trial:

(i) the existence of new forensic evidence as to the origin of hairs found on blankets alleged to be on a couch in the wine saloon at the time of the death of Alma Tirtschke; and

(ii) the discovery of further evidence of the bad character of the Crown witness Harding.

19 In addressing these issues and to place them in context, it is necessary to briefly, and in general terms, outline the Crown case and the defence response to it. (Any consideration of the whole of the case by a Court of Appeal would require a more detailed examination.)

The Crown Case

20 The Crown case was that the accused, who kept a wine saloon in the Eastern Arcade, off Bourke Street, Melbourne, enticed Alma Tirtschke, who was then 12 years old, into his saloon. At about 3.00 p.m. he took her into a small room (referred to as the

"cubicle") where he supplied her with liquor. She remained their consensually until about 6.00 p.m. At about that time, and while Alma Tirtschke was under the influence of the alcohol, he had sexual intercourse with her and strangled her. It was the Crown case that Mr Ross then entertained a friend, Ms Gladys Wain (also known as Linderman) in the saloon from about 9.00 to 10.15 p.m. During this time, Alma Tirtschke's body was in the saloon but out of sight behind a curtain. After escorting Ms Wain to her city residence in King Street, Mr Ross went to his own home in Footscray by way of tram and train arriving about midnight. An hour later he returned to the saloon and stripped the deceased's body naked before placing it in a nearby lane known as Gun Alley. He then tore the deceased's serge dress into strips which he scattered along Footscray Road as he rode home on a bicycle.

21 The Crown witnesses included persons who had seen Alma Tirtschke in the vicinity of the wine saloon during the afternoon of 30 December, as well as persons who deposed to observing a person they identified as Mr Ross in or near the Eastern Arcade on the evening of that date. These included a David Alberts, who claimed to have been asked by Mr Ross for a pencil between 7.00 and 7.45 p.m. in the eastern arcade; Alexander Olson, who asserted that he saw Mr Ross sometime between 9.00 and 9.15 p.m. in Little Collins Street near the Eastern Arcade; and George Ellis, who gave evidence of seeing Mr Ross walk in and out of the Eastern Arcade several times between 9.00 p.m. on 30 December and 12.50 a.m. on 31 December.

22 Apart from this species of circumstantial evidence, the Crown relied upon witnesses to whom, it was claimed, Ross had made admissions of his involvement in the killing of Alma Tirtschke.

23 In our examination of the evidence of these witnesses, we have relied upon detailed contemporary accounts of the trial appearing in The Argus newspaper from 21 to 27 February 1922[15] and a record of the trial entitled *"The Gun Alley Tragedy"* by T.C. Brennan (the junior counsel at the trial of Colin Ross)[16]. We have also had access to

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15 Accounts of the trial printed in The Age and The Herald are available in microfiche format.

16 Gordon & Gotch 1922.

the record of the coronial inquest heard on 25 and 26 January 1922 and the prosecution brief. The material in the latter reflects the former, but it cannot be assumed that the evidence given by the witnesses at the trial was identical to that adduced in the course of the coronial inquest.

24 The reason that we have had to resort to these evidentiary sources is that we have not been provided with any transcript of the trial itself. Indeed, it appears that no such transcript remains extant. However, having made a comparison of the evidence revealed in these various sources, we are satisfied that the evidence which we attribute to the various witnesses at the trial is sufficiently accurate for the purposes of this opinion.

Olive Maddox

25 The first of the relevant witnesses was Olive Maddox, apparently a prostitute, who was a relatively frequent visitor to the wine saloon. She deposed to having visited the saloon at 5.05 p.m. on 30 December with a friend Jean Dyson. She walked to the bar and ordered a drink for each of them before entering into the parlour area of the premises. The evidence disclosed that there was a small room off the parlour which had beaded curtains. This was quite distinct from the room known as "the cubicle" which was in another area of the premises, adjacent to and behind the bar. The witness deposed to seeing a young girl that she identified as Alma Tirtschke in the room with the beaded curtains with a glass in front of her. She could not tell whether the contents were white or whether the glass was empty. There were also two strange men in the room. Later, seeing Mr Ross in the area of the bar, she said: "Hello, Col. She is a young kid to be drinking." He replied: "Oh, if she wants it she can have it." After leaving the saloon at about 5.15 p.m., she returned about 40 minutes later. On this occasion, the little girl was no longer in the beaded curtain room nor did she see Colin Ross on that occasion.

26 Ms Maddox stated that she next saw Colin Ross on 5 January in Jolimont. At Ross' instigation, they began to talk about the case and he commented (inter alia): "The papers all say that she was a goody-goody, but that is only for the sake of the public.

She was a cheeky little devil", and, according to the account in Brennan's book, Ross added a disgusting comment which is not recorded. In the depositions, however, she deposes to Mr Ross saying: "She [Alma Tirtschke] was just at the age she would feel like as if she wanted a man."[17]

27 In cross-examination, the witness admitted talking to Ivy Matthews before speaking to the police about the matter and that she had initially been frightened to go to the police on account of her prior convictions. On the afternoon of Saturday 31 December she had been arrested for absconding from her bail and had remained in the watchhouse until the Sunday afternoon. She gave evidence of up to eight people having been in the parlour area of the wine saloon.

28 We note that if this evidence was correct, a number of other people would have been in a position to observe the girl in the wine saloon.

Ivy Matthews

29 Ivy Matthews, who had previously been employed as a barmaid by Colin Ross, deposed to visiting the wine saloon on the afternoon of Friday 30 December, and of observing a young girl in the cubicle. This observation occurred when Colin Ross had come out of the cubicle and as he opened the curtain. He poured a drink into the glass the nature of which she did not see and returned to the cubicle with it. The witness gave a detailed description of the child's hair and clothing, despite the cursory nature of her observations stating (according to The Argus) that she was aged about 13 and had auburn hair.

30 On the following day, having read of the murder of the little girl in the "Truth" newspaper, she had confronted Colin Ross at the wine saloon. She said: "I see about this murder; why did you do it?" He said: "What are you getting at?" I said: "You know very well; why did you do it, Colin?" He said: "Do what?" She said: "You know very well what you did. That child was in your wine café yesterday afternoon, for I saw her." He said: "Not me." After further allegations and denials, both in the

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17 Depositions, p 23.

wine saloon and later in Little Collins Street, the witness deposed to Mr Ross telling her that it was the child. "He told me that the child came to him while he was at the door, on the Friday afternoon. He said there was no business; there was no one there and he was standing at his door, and when the child came up and asked him for a drink he took her and gave her lemonade." Asked why he took her into the little room, Mr Ross had said: "On my life, Ivy, I did not take her in there with any evil intention, but when I got her there I found that she knew absolutely what I was going to do with her if I wanted her." According to Ms Matthews, Mr Ross described the little girl staying on and when a girl named Gladys came to see him he had told the child to go through the little room with curtains [presumably the room off the parlour] and he kept her in there until Gladys Linderman [Wain] left, and then he brought her back into the little private room [the cubicle].

31 After that, he stayed with her during the rest of the afternoon, with the full intention at 6.00 o'clock of letting her go; when 6.00 o'clock came she remained on. After 6.00 o'clock, when Stanley [Colin Ross' brother] went, he left them in there together, "... after that he said that he outraged the child; he said that between 6.00 and 8.00 o'clock he had outraged her."

32 The witness conceded that these were not the exact words used by Mr Ross. She said (also using her own words) that Mr Ross had told her: "After Stan went, I got fooling about with her, and you know the disease I am suffering from [this was gonorrhoea] and when in the company of young children I feel I can't control myself. It was all over in a minute."

33 The witness then wrote down the exact words used, which was a statement in coarse language that the girl had previously been tampered with.

34 According to Ms Matthews, Mr Ross went on to describe taking the body of the little girl and putting it into the beaded room wrapped up in a blanket. At about 9.00 or 9.30 p.m. he had brought Gladys Wain to the wine saloon and she had stayed until 10.00 o'clock. The witness also deposed to Mr Ross saying he had seen her to the

station or tram. Returning to the saloon, he had removed the body from the beaded room into the small room off the bar [the cubicle]. He then went to Footscray by train but came back between 1.00 and 2.00 a.m. by motor car. He also told Ms Matthews of putting the body in the street.

35 As to how the death of the child had occurred, the witness deposed to Mr Ross saying that he strangled her while he was going with her. He strangled her in his passion. He said he heard or saw where they were saying a cord had been around the child's neck but that was not so. He said: "I pressed round her with my hands. I did not mean to kill her; but it was my passion that did it." He said that she was dead before he knew where he was.

36 The witness was cross-examined to the effect that Mr Ross had dismissed her from her employment following the shooting case [a previous incident] and that, until the day she spoke to him about the tragedy, they had never spoken. In the interim there had been a legal dispute about whether she was an employee or partner in the business, and whether she owed Mr Ross some £10.

37 In the book "*The Gun Alley Tragedy*" T.C. Brennan refers to a number of additions in the witness' evidence between that given at the inquest at the trial. They are, however, not relevant for present purposes.

Sydney Harding

38 Sydney Harding, who was a prisoner on remand at the Melbourne Gaol awaiting trial for housebreaking, asserted that the accused Ross had confided his guilt to him. This occurred on 23 January while the pair were in the prison yard with other prisoners. Mr Ross had told him that he had observed the girl in the Eastern Arcade opposite his place and that she seemed frightened. At about 2.45 or 3.15 o'clock (the witness was not sure) he had spoken to her telling her: "You have nothing to be afraid of. I own this place, and if you are tired you could come in and sit down." He said that he had taken the girl into the cubicle near the counter. This was not observed by other

customers who were in the parlour. He offered the girl a drink of sweet wine which she eventually accepted. Altogether he had given her three glasses.

39 Mr Ross told him that he was absent from the cubicle for about three quarters of an hour talking to a woman whom he knew, who had come to the door of the saloon. When she left he went back to the cubicle and found the girl asleep. His own girl [Gladys Wain] came to the saloon and he spoke to her until nearly 6.00 o'clock. At 6.00 o'clock he closed the saloon and went back into the cubicle. The little girl was still asleep and he could not resist the temptation. He was asked by the witness whether the girl called out and he said: "Yes she moaned and sang out" but that he put his hand over her mouth and she stopped and appeared to faint.

40 After a little time the girl commenced again to call out, and he went in to stop her, that in endeavouring to stop her from singing out, he must have choked her. He added that, "You will hear them saying that she was choked with a piece of wire or a piece of rope, but that was not so." He said he picked up her hand, and it appeared to be like a dead person's hand, because it fell just like a dead person's hand would do. Mr Ross had told him that there was a great deal of blood about, and he got a bucket and some water from the tap and washed the cubicle; but seeing that, by comparison, the rest of the bar looked dirtier than the cubicle, he washed the whole lot. He had said this was about 7.00 or 8.00 p.m.

41 According to the witness Harding, he was told by Mr Ross that he had time to clean himself and go for a walk around the town before meeting his girl. Subsequently, he entertained her in the parlour. Consequently, he could not see the girl. He said he took his girl home at about 10.30 p.m., caught the 10.40 train to Footscray and got on the electric tram for his home. Whilst on the tram he created a diversion so as to attract the attention of the passengers and conductors, so he could have them as witnesses to prove an alibi. Mr Harding said that he asked Mr Ross whether he came back to Melbourne by car and he said no, that he had a push bike. He returned to the wine saloon where he took the girl's clothes off and walked around the block to see if there was anybody about. He returned, rolled the body in a coat, or an overcoat, and

carried it to the lane. Ross said he returned to the wine saloon, made a bundle of the girl's clothes, put them on his bicycle and rode to Footscray. When he got to the first hotel on Footscray Road, he got off the bicycle and sat on the side of the road and tore the clothing into strips and bits. He went round with the bicycle and distributed the strips and bits along the road.

42 There were other comments allegedly made by Mr Ross, but this is the gist of what Mr Harding asserted was said.

43 It should be noted that the Crown called evidence from Mrs Violet Sullivan that, on 26 January, she had seen some navy blue serge in the Footscray Road near Macaulay Road. After reading of the alleged confession to Harding in the newspaper on 27 January, in which he said that he had strewn the serge of the girl's dress on the Footscray Road, Mrs Sullivan went back to the road, and, on the opposite to where she had seen it on the previous day, she saw a roll of serge. She picked it up and handed it to the local police.

44 Like much of the evidence in this trial, it was the subject of defence criticism and, as Mr Justice Isaacs indicated in his High Court judgment[18], the serge was in extremely good condition given that it had supposedly been scattered there by Mr Ross practically a month earlier. May Murdoch, an aunt of Alma Tirtschke, told the jury that three pieces of the serge were "very similar" to the material of which the girl's dress was composed. Another piece she discarded saying: "That has nothing to do with it, I should say."

45 This evidence was also subject to criticism by the defence. But it is unnecessary to canvas it.

Other Crown Witnesses

46 Another prisoner on remand, Joseph Dunstan, purported to hear disjointed portions of the conversation between Messrs Ross and Harding. Finally, there was evidence from a Francis Upton of entering the wine saloon about 12.30 or 1.00 a.m. on 31

18 Ibid p 266.

December, hearing a woman's voice saying: "Oh my God, darling, how are we going to get rid of it" and Mr Ross rushing out like a lunatic with his arms covered with something that looked like blood. When Upton asked for a bottle Mr Ross had thrust one into his hands and pushed him from the room without even waiting to take the money. Later Upton discovered there was blood on the bottle. It is not necessary to further go into this evidence because it was abandoned by the Crown Prosecutor who told the jury that he would not ask them "to swing a cat on it."

The Defence Case

47 Insofar as the defence was concerned, Colin Ross consistently denied any involvement in the death of Alma Tirtschke. In a signed statement to investigating police (Senior Detective Frederick Piggott and Senior Detective John Brophy) on 5 January 1922, Mr Ross described observing a girl [who fitted Alma Tirtschke's description] in the Eastern Arcade walking towards Bourke Street. This was between 2.00 and 3.00 p.m. on 30 December. It was a quiet day and he was standing in front of his shop. He gave an account of retiring inside the premises, meeting Ms Gladys Linderman [Wain] there at about 4.00 p.m. and talking with her until 4.45 p.m. in the private room [apparently the cubicle]. After a further 10 minute conversation in the Arcade, he saw her out into Little Collins Street returning to the wine saloon where he remained until 6.10 p.m. before going to his [Footscray] home. After tea, at about 8.00 p.m., he returned to the arcade where he had previously arranged to meet Ms Linderman at 9.00 p.m.[19]

48 They went into the saloon where they remained until 10.45 p.m. After escorting Ms Linderman to her King Street home, Mr Ross stated that he went to Spencer Street station where he took a train and then a tram to his home. He arrived at 11.50 p.m. and remained there for the rest of the night. In the course of his statement, Mr Ross told the investigating police: "I did have two blankets in the saloon. They were used as a rug or a cover for the couch to lie down on in the afternoon." [This was the couch

19 In his evidence at the trial, Mr Ross said that the appointment was so that Ms Wain could look at some linoleum from the saloon. The lease was due to expire on 31 December and he was leaving the place. Ms Wain essentially confirmed this account stating, in her evidence, that Mr Ross had promised her mother first preference for the linoleum and any furniture she required when the saloon was closed.

located in "the cubicle".] We note that the statement effectively includes what Mr Ross had previously told the investigating police when questioned in the wine saloon on 31 December.

49 There was a further conversation between Mr Ross and the police when they visited his Footscray address on 12 January 1922. Apart from an alleged conversation about blankets located at the premises (to which we will refer shortly) nothing was said which added to Mr Ross' earlier comments to the police.

50 In short, on the account of Mr Ross, Alma Tirtschke was never in the wine saloon and he was never in the City in the early hours of 31 December 1921.

51 The trial evidence of Mr Ross, effectively reflected his accounts to the investigating police. He denied making any admissions as to his involvement in the killing of Alma Tirtschke to the Crown witnesses Maddox, Matthews and Harding.

52 The evidence he gave of his movements on Friday 30 December was, in part, corroborated by family members, his mother Elizabeth, and brothers Thomas, Ronald and Stanley, and family friends Gladys Wain, Mary Kee, Agnes Linderman, Oscar Dawsey, Herbert Studd and James Patterson. For example, Mrs Elizabeth Ross stated that her son had come home at about 7.00 p.m. for his evening meal. Having later gone out, he had returned at midnight and retired to bed. However, none of the witnesses to whom we have referred, corroborated the movements of Mr Ross between 6.00 and 7.00 p.m.; albeit, on his mother's account, it could be inferred that this time would have been occupied in travelling by public transport to Footscray.

53 Another aspect of the evidence of the witnesses Stanley Ross and Gladys Wain was that they had not observed any girl resembling the description of Alma Tirtschke in the wine saloon on that afternoon.

54 In the course of the trial, the defence attacked the veracity of the evidence of Maddox, Matthews and Harding. Discrepancies in the alleged admissions attributed to Mr Ross were pointed out and the credit of each of them was impugned.

55 Moreover, the defence pointed to the motivation of each of them to lie. In the case of the two women, it was a share in the £1,000 reward offered by the State, and in the case of the prisoner Harding, a share of the reward and the alleviation of his predicament in prison where he was awaiting trial for housebreaking.

The Prior History of Sydney Harding

56 The cross-examination of Sydney Harding elicited concessions from him that he had previously been convicted of housebreaking, larceny, assault, and escaping from custody as well as receiving 14 days solitary confinement for making false statements against two warders. It does, however, appear that he had been convicted more than the 11 times he was prepared to admit in cross-examination. Thus the prior record of Sydney Harding was one of the matters raised in the Petition of Mercy. In this regard the Petition is couched in the following terms:

> 10. In the case of prosecution witness Sydney John Harding, it should be noted that at the time of giving evidence in the trial of Colin Campbell Ross he had 27 convictions in Victoria, including several for making "false representations" and "false verbal statements" [refer Central Register of Male Prisoners VPRS 515: Vols. 58 and 61, Folios 128 and 133 respectively for prisoner No. 30865/32060: Sydney John Harding.]
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> The Crown attempted to check Harding's military record which still has attached to it the letter of requisition from the Crown Solicitor [see Australian Archives ACT: WW1 Records Series B2455: Personnel Dossiers for 1st Australian Imperial Forces Ex-service Members; ex-service member no. 14163/65464: Sydney John Harding.] Since the record was not subpoenaed, Base Records merely issued to the Crown Law Office on 3 February 1922, a typed one page summary headed "Particulars of AIF Service of Sydney John Harding" [ibid]. While this page noted several incidences of misconduct (including desertion, drunkenness, and making threats of violence to a senior officer), it omitted to record numerous offences committed during Harding's service including for example that he enlisted five times, including once under an alias; that he made a false statement to his superior officer; that in his last period of enlistment (30/7/17 - 20/9/17) he was convicted of false answers on his attestation papers and fined 40 shillings; that an inquiry into the probity of his answers on his earlier enlistment papers was then undertaken to see whether, on those also, prosecution should be made against him for false answers [ibid].
>
> Unfortunately the military only checked his answers for discrepancies between each set of attestation papers and against its own record of his enlistment. If the military had the resources to check civil records it would have disclosed that not one but *everyone* of Harding's solemn attestations contained multiple perjuries, the most conspicuous of

> which was his consistent negative answer to question 9: "Have you ever been convicted by the Civil Power?" When he answered "no" to this question for the first time, upon enlisting in Melbourne on 10 November 1915, his convictions in Victoria numbered 18 (excluding five further offences committed while a prisoner and dealt with internally by the prison authority). [Compare the answers on his attestation papers in Australian Archives ACT: WW1 Records Series B2455: Personnel Dossiers for 1st Australian Imperial Forces Ex-service Member No. 14163/65464: Sydney John Harding with the Central Register of Male Prisoners VPRS 515: Vols. 58 and 61, Folios 128 and 133 respectively, for prisoner No. 30865/32060: Sydney John Harding.]
>
> It should be noted that the letter of requisition from the Crown Solicitor is dated 23 February 1922; the penultimate day of Ross' trial, a commanding officer has annotated the letter to indicate the particulars were "supplied 3/2/22" indicating the Crown Solicitor's letter is the second request for Harding's record, and that the particulars issued on "3/2/22" had not apparently been received by the Crown.[20]

57 Assuming all of this information to be correct (and we have no reason to doubt its accuracy), the defence would have been furnished with additional material with which to impugn the witness Harding's credit. However, we are not of the opinion that the absence of this information would, of itself, be sufficient to constitute any miscarriage of justice. The jury was made well aware by the trial judge of the defence arguments that the witnesses Maddox, Matthews and Harding were disreputable and had perjured themselves. Indeed the judge noted that the Crown conceded that they were of bad character. Nonetheless, the jury, having heard the evidence of the accused and his supporting witnesses, chose to accept sufficient of the evidence of these Crown witnesses to find Ross guilty beyond reasonable doubt of the murder of Alma Tirtschke.

58 That, however, is not an end to the matter because the evidence of each of them was bolstered (and made more credible) by what may be described simply as "the hair evidence". It is that evidence we now turn to consider.

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20 Ibid Australian Archives ACT: WW1 Records Series B2455: Personnel Dossiers for 1st Australian Imperial Forces Ex-service Members; ex-service member no. 14163/65464: Sydney John Harding.

The Hair Evidence

59 Evidence was given at the trial that, on 3 January 1922, a Constable Portingale went to the house where Alma Tirtschke's body was lying prior to burial and, using scissors, he cut a lock of hair from the left side of her head just over her ear "and about six inches from her head."

60 Subsequently, on 12 January, when the police investigators Piggott and Brophy went to the Footscray home of Mr Ross to arrest him, they located, at his direction, two folded blankets on a sofa in the vestibule of the house. According to the police these were said by Mr Ross to have been from the wine bar. Upon opening up a brown blanket, Senior Constable Piggott observed what appeared to be strands of hair. The blankets were delivered to the Government Analyst, Charles Price, on 13 January. The evidence discloses that "the reddish-brown blanket" was placed over a wooden screen and 22 hairs were removed from it in the presence of Mr Price. Mr Price himself took five hairs from the other blanket described as "the grey blanket."

61 According to the evidence of Mr Price, he took 10 or 12 hairs from an envelope containing Alma Tirtschke's hair (it had an average length of 6½ inches with the longest being 9 inches). The 22 hairs also averaged 6½ inches in length but with the longest 15, 12, 10 and 9 inches and the shortest 2½ inches. These hairs were not identical in colour to the hairs in the envelope. They were light auburn colour and were not cut but had fallen out or been taken from the scalp somehow or other. One had a bulb root. Mr Price came to the conclusion that they were hairs "cast off in the ordinary process of nature." Mr Price was asked whether there would be any distinction in their colour as compared with hair that was actually growing. He said he could not say that directly but the conclusion he formed, as regards the hairs he found on the blanket, was that they did not come from the frontal portion; that they had not been exposed much to the light; that they came from the back portion of the head; and that that is the reason why the colour was not as deep as those on the front portion. Microscopically they agreed, because there was a kind of coarseness about them, and when treated with caustic soda it tended to bring out the pith portion of the hair, "and that pith was identical with the hairs on the blanket." The five hairs from

the grey blanket, Mr Price said, were "similar in colour" to the hairs on the reddish-brown blanket, but that was all he had to say about them.

62 In cross-examination, Mr Price admitted that it was "several years" since he had last made an examination of hairs from any woman's head. "It does not often come under my notice", he added. He had made very few such examinations in his life. Not only did the hairs from the child's head and the hairs from the blankets differ in colour, he said, but they differed in diameter, and it was possible, but not probable, that the hairs on the blankets may have come from another head. He had examined many hairs since he had conducted this particular examination, and he had, in the course of his examination, found some hairs that were as like Alma Tirtschke's as the hairs on the blankets.[21]

63 When re-examined, he said that his reason for thinking the front and back of the hair would differ was that in one head of hair he had tested "the frontal portion was quite red, and the hair from the back of the head quite dark."

64 The defence case was that the reddish-brown blanket seized at the Footscray house had never been in the wine saloon. This assertion was supported by Mr Ross' mother. According to Mr Ross, both blankets at the wine saloon were grey and had been transferred to the Footscray house rolled around some pictures after the expiry of the wine saloon lease. [He identified a grey blanket produced by his counsel at the trial as the other grey blanket from the wine saloon.] Indeed, Ivy Matthews who, as previously indicated, had worked at the wine saloon as a barmaid, stated that the reddish-brown blanket had not been there in her time and she identified the grey blanket produced by the Crown as one of the two matching military blankets that had been on the couch.

65 Apart from that challenge to the Crown case, there was evidence from the defence witness Gladys Wain, that she had sat on the couch on the afternoon of 30 December. She had blonde hair with an auburn tinge. A sample of her hair had been provided to

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21 See *"The Gun Alley Tragedy"* ibid pp 47-48.

the Crown. Additionally, Caroline Ross (wife of Colin Ross' brother Thomas) and her sister Alice Valentine, gave evidence of visiting the wine saloon on 28 December. Both had sat on the couch in the cubicle and later combed their hair utilising a mirror which was located above the couch. The former claimed to have light auburn hair and the latter reddish hair.

66 Following this evidence, and at the request of the Crown, the trial judge (Justice Schutt) permitted Charles Price to be recalled. He gave evidence that the hair of Gladys Wain, which he had inspected, was 4½ to 5½ inches in length; it was golden blonde hair of a very fine structure and bore no similarity to the hair found on the blanket [presumably the reddish-brown blanket.]

67 According to The Argus reports, the hair evidence was, as would be expected, the subject of final addresses. The defence counsel is quoted as telling the jury:

> For corroboration of the evidence of the women Maddox and Matthews that the child was in the café the Crown relies on the presence of hair on two of the blankets which it alleges were in the cubicle at the time the girl was murdered. This is very, very slender evidence indeed. That is the mistake the public makes. When it hears there are facts like the finding of the hair, it instantly jumps to the conclusion that a man is guilty. You and I have to go further. Mr Price says, "In my opinion the hair on the two blankets came from the same head." The evidence is that the brown blanket was never in the café. Even Ivy Matthews says, "That brown blanket was never there in my time." You have seen Mrs Thomas Ross and Alice Valentine. I am told that Ms Valentine's hair is very similar to that of the murdered girl.[22]

68 The Crown submission on this issue was as follows:

> How come that Ross tells Ivy Matthews that he wrapped the body in the blanket, and that hairs are found on blankets corresponding with the hair of Alma Tirtschke.

And later:

> Gentlemen, the blankets are all-powerful. If Mr Price, the analyst, had wanted to "put in the boot" to the prisoner he would have said, "that is Alma Tirtschke's hair". He says it is similar. …
>
> That women Gladys had her hair compared with the hairs found and with Alma Tirtschke's hair, and the analyst said it was nothing like. Why was not a

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22 The Argus, 25 February 1922, p.21.

> sample of Alice Valentine's hair taken? It might have been as easily distinguished from the dead girl's as Gladys Linderman's was.

69 In his charge, the trial judge referred specifically to the evidence of the hair on the blankets.[23] He stated that one of the classes of evidence was "evidence regarding hair on blankets alleged to have been in the wine saloon, said to be identical with or to resemble that of Alma Tirtschke."

70 One of the arguments advanced in the High Court appeal (noted in the joint judgment of Knox CJ, Gavan Duffy and Starke JJ) was that the trial judge had "failed to point out the weaknesses of the evidence which went to identify the hair of the dead child with that found on certain blankets, and the evidence identifying certain serge found on the Footscray Road with that of the dress worn by the child on the day of her death."[24] The majority response was:

> Again, as to the evidence relating to hair on the blankets and the serge found on the Footscray Road, the presiding Judge in his charge stated in detail the salient point of the evidence and left it to the jury to attach to it such weight as they might think proper. No error in law can be assigned arising out of this treatment of the evidence.

71 In his dissenting judgment, Isaacs J agreed with the majority on this aspect of the trial judge's charge.[25] But it was also the view of Justice Isaacs that "... apart from the three confessions relied upon by the Crown, the case was practically unsustainable."[26]

72 Because of the vital importance of the confessional material (despite the apparent contradictions between the versions given by the various witnesses) anything which corroborated such evidence was necessarily of great significance. As we have previously stated the hair evidence fell into the corroborative category. Moreover, the acceptance by the jury of the evidence of the hair placed Alma Tirtschke in the wine saloon and had the capacity to characterise Colin Ross and his brother Stanley and Gladys Wain as untruthful witnesses.

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23 The Argus, 25 February 1922, p.22.

24 Ibid, p.254.

25 The basis of the dissent of Isaacs J was that the alleged confession of the accused Ross to Sydney Harding squarely raised the issue of manslaughter insofar as the killing may have taken place at a time subsequent to the sexual act.

26 Ibid, p.265.

73 We also note the dispute in the trial as to the source of the reddish-brown blanket. If the jury accepted the hair evidence adduced by the Crown, the defence evidence as to it never having been at the wine saloon would necessarily have been regarded as tainted. This in turn could have adversely affected the jury view of the credibility of Mr Ross and his mother generally. Of course, if the blanket had in fact come from elsewhere - such as the Ross house - the hairs on it could not have come from Alma Tirtschke.

74 As can be seen from the material we have set out in some detail, the hair evidence played a prominent role in the trial. It constituted an extremely powerful piece of circumstantial evidence.

75 We also draw attention to the efforts of the defence to have the blanket hairs analysed prior to the trial. On 30 January 1922, the solicitor for Mr Ross, a Mr N.H. Sonenberg, wrote to Detective Piggott in these terms:

> It is intended to have an independent test of the hair alleged to have been found by you and the Government Analyst on a blanket or blankets taken from the home where the accused and his relations lived, as [sic] also of the hair supposed to have been obtained from the hair of the head of the dead girl Alma. Will you kindly let me know when and where each of these exhibits can be inspected and tested. An early answer will oblige.

76 The response of the Crown Solicitor, dated 1 February 1922, was as follows:

> Your letter herein of 30 ult. to Detective Piggott with reference to tests you desire to have made of certain hairs which have been exhibited herein has been handed to me for reply.
>
> I have to state that it is of the first importance that such exhibits when produced on the trial should be in the same condition precisely as when the witness gave evidence respecting them in the Court below.
>
> I can not therefore agree to any tests being made at this stage. Perhaps the Court, after they have been exhibited on the trial, would on application grant your request. Inspection may be had here at any time agreed upon, you being represented.

This matter does not appear to have been pursued any further.

77 As is clear from the trial evidence, the defence submitted a sample of the hair of Gladys Wain for analysis which was found to bear no similarity to the hair located on the blanket.

78 On this issue, the relevant portion of the Petition of Mercy is in these terms:

> 21. Your petitioners humbly submit that in August 1995 researcher Kevin Morgan[27] discovered the original exhibits of hair on which the verdict of the jury depended in the trial of Colin Campbell Ross. The exhibits were found by Morgan in the prosecution's Trial Brief file retrieved from the Public Record Office Victoria and inspected by Morgan at the Office of Public Prosecutions, Melbourne, in the said State of Victoria.
>
> 22. The prosecution's Trial Brief for the trial of Colin Campbell Ross was a file closed to public access under s.9 of the *Public Records Act (Victoria)* 1973. This section of the Act refers to records which may be declared private or personal and which may be withheld from public inspection for 75 years from the file's creation. However, after making application on exceptional grounds, Morgan was granted access to the file under special provisions of the Act.
>
> 23. Normally all exhibits are destroyed after a trial and only the documentary evidence is forwarded to the Public Record Office. In this instance, because they were enclosed in an envelope, the hair exhibits were apparently overlooked. The reason they had not been discovered previously was because the file had been closed to public scrutiny for 75 years.
>
> 24. The authenticity of the exhibits is confirmed by the following features:
>
> (i) The exhibits were located in the Crown's official Criminal Trial Brief file, a closed file stored under secure protection at Public Record Office Victoria on behalf of the Office of Public Prosecutions Melbourne.
>
> (ii) Within the file the exhibits were contained in an envelope clearly labelled to identify its contents and initialled for verification by the chief investigating detective.
>
> (iii) The exhibits accord with contemporary descriptions of their appearance.
>
> (iv) Section 22(1) of the *Public Records Act (Victoria)* 1973 states: "A public record produced from the Public Record Office shall have the same evidentiary value as if it had been produced from the public office from which it was transferred."
>
> 25. Because the prosecution Trial Brief file's closure period would expire in 1998 and the file would then be openly accessible at the Public Record Office, Morgan was concerned that the exhibits might be subject to

27 Author of *"Gun Alley (Murder, Lies and Failure of Justice)"* (2005) Simon & Schuster.

inadvertent damage, loss or destruction by the public. He was also interested to have the hairs examined and scientifically documented as he had reservations about the opinion given on them at Ross' trial. For these reasons he was concerned that the specimens should be preserved for future legal and scientific reference.

26. In 1998 the Office of Public Prosecutions (Victoria) permitted a strand from each of the exhibits to be released from the prosecution's Trial Brief file to the Victorian Institute of Forensic Medicine for mitochondrial DNA (mt DNA) testing.

The mt DNA test proved inconclusive due to lack of sufficient retrievable mt DNA in the acquired sample. A further test in March 2004 revealed the presence of contaminant DNA - presumably from persons who had handled the exhibit during the preceding 82 years. [The Victorian Institute of Forensic Medicine - the only appropriately accredited mt DNA analysis laboratory in Australia - has indicated that it does not have the resources to apply other than its "standard procedures" for removing contaminant DNA and neither does it have the resources to develop a forensically accredited test to a level of expertise equal to that which US laboratories - for example the US Armed Forces DNA Identification Laboratory (AFDIL) and the US Federal Bureau of Investigations (FBI) laboratory - presently offer for decontaminating and extracting mt DNA from ancient hair.]

However, the microscopic examination conducted by the Victorian Institute of Forensic Medicine gave rise to the opinion that the Crown's crucial hair evidence was flawed. The Institute advised that an opinion be obtained from a leading scientist in the field of forensic hair comparisons: Dr James Robertson, Director of Forensic Services, Australian Federal Police, Canberra.

Following negotiations liaised by Morgan, the Office of Public Prosecutions (Victoria) agreed to permit the exhibits to be released from the prosecution's Trial Brief file to the Victorian Institute of Forensic Medicine and from thence to Dr James Robertson in Canberra.

27. Because of the importance of preserving the evidentiary status of the exhibits under s.22(1) of the *Public Records Act (Victoria)* 1973, the Victorian Institute of Forensic Medicine, under the supervision of officers from the Office of Public Prosecutions, enclosed the exhibits in evidence bags fastened with the security seals of the Victorian Institute of Forensic Medicine prior to secure transfer of the exhibits from the Office of Public Prosecutions to the Victorian Institute of Forensic Medicine.

In order to ensure continuity of the legal integrity of the hair samples as court exhibits, Dr Robertson conferred Australian Federal Police evidentiary status on the exhibits for their transmission to him in Canberra. The hairs were then examined by Dr Robertson.

28. In his report of the examination of the hair exhibits (original of which is attached to this petition), Dr Robertson stated: "The hairs from all three sources, Tirtschke, Wain and the blanket, were all easily differentiated

at the stereo microscopic level based on colouring. This was confirmed at a more detailed microscopic level where there were very clear differences in colour, pigmentation and other features. In my opinion, the hairs recovered from the brown-grey blanket could not have come from the deceased Tirtschke, or from Wain."

29. It is humbly submitted that by reason of the following matters Colin Campbell Ross has suffered a miscarriage of justice in being convicted for the murder of Nell Alma Tirtschke:

    (i) The conclusion reached by the chemist Price - in declaring the blanket hairs and the victim's hairs "derived from the scalp of one and the same person" - was invalid, as the statistical data for this kind of comparison is not available in 2005, let alone in the 1920s.

    (ii) Dr James Robertson, Director of Forensic Services, Australian Federal Police, an expert of world standing in forensic hair comparisons, can demonstrate that the hairs in the Ross trial exhibits are not similar but in fact showed distinct differences and in his opinion the two exhibits cannot be from the same source.

30. The evidence of the hair is evidence of a static and objective kind; it is not dependent on the witness' claims of alleged concessions. The evidence of the hair was crucial to the jury's verdict in that the evidence of the hair cannot lie. It independently and objectively confirmed for the jury that Nell Alma Tirtschke had been in the presence of Colin Campbell Ross.

31. None of this evidence in relation to the hair referred to in this Petition was available to Colin Campbell Ross at his trial. Neither was it available at his appeal to the Full Court of the Supreme Court of Victoria nor at his appeal to the High Court of Australia.

    It is respectively submitted that had this evidence in relation to the hair been available at the trial, it is not merely far from certain that the jury would have returned the verdict which it did return, but it is probable that it would not have done so.

32. In the circumstances, Your Petitioners humbly pray that Her Majesty may be graciously pleased to exercise Her Royal Prerogative of Mercy in their favour and grant that the verdict in the trial of Colin Campbell Ross be overturned and annulled.

79 We should say at once that there is nothing to suggest that the hair samples located in the Trial Brief file are other than authentic.

80 The significance of Dr Robertson's report is such that it should be set out in full.

REPORT OF EXAMINATION OF HAIR SAMPLES IN
THE CASE OF R. v. ROSS, 1922

BACKGROUND:

The central technique used in the forensic analysis of hairs is examination using microscopes. This will usually start with examination at quite low magnification (up to x30 or x40) and usually with overhead light or epi illumination. At this magnification and with reflected light the overall shape of the hair, its colour, condition and appearance of the root and tip ends can be assessed.

Hairs consist of three anatomical parts, the outer scales and cuticle, the body of the hair called the cortex and a central canal called the medulla. The latter is not always present in human scalp hair. The medulla can be seen at low magnification if hairs are placed in a suitable mountant (a liquid chosen for its optical properties) on glass microscope slides.

The visual colour of hair results from a visual perception but at a microscopic level the presence of pigment in the cortex is the main determination of colour. The detail of the pigment particles or granules and their arrangement into groups can only be seen using transmitted light at higher magnification of up to x400 total magnification. At this level other detailed features can also be seen in the cortex. The presence or absence of these features is used along with the previously mentioned features, to differentiate (tell apart) hairs from different people.

This is the basis of the forensic examination of hairs and it relies on the variation in these microscopic features being less in the hairs from one person than hairs from different people.

In fact, the examination process relies on the scientist looking for differences. Only when no significant differences exist can an inclusionary opinion be considered.

The final step in the examination process involves direct comparison of two hairs using a comparison microscope. This consists of two transmitted light microscopes linked with an optical bridge, which allows the examiner to compare the two hairs side by side.

The basics of the above process have changed little this century and much of what is known about the microscope features of hairs was known in the early decades of the 1900's.

Today it is possible to conduct DNA testing on some hairs. Where this is not possible or not successful the fundamental examination process is the same today as 100 years ago.

Finally, as the differentiation of hairs from say two persons is based on there being greater recognisable differences (variations) between the hairs of individuals than within the hairs of each individual an <u>essential</u> [underlining in original] prerequisite for a meaningful examination is to have enough hairs from each individual to reveal the range of variation within and between individuals. It is generally considered for a meaningful examination, a sample from an identified (known) source should consist of from 40 – 100 complete

hairs. These would usually be pulled or combed to ensure the roots were present.

THE ROSS CASE

The sample relating to the 1922 Ross case consists of three pieces of cardboard onto which are attached three separate samples of hair.

From information supplied to me along with the samples I understand that Colin Campbell Ross was convicted of the 1921 murder of a 12 year old girl, Alma Tirtschke, and that evidence was presented at trial in 1922 that a number of hairs, recovered from a brown-grey coloured blanket from the lodgings or house of Ross, were said to have come from the deceased. The precise nature of the latter evidence is not the subject of this report. I further understand that a Mrs Wain, a female friend of Ross, was excluded as the source of the hairs on the blanket. Ross was convicted of the murder and hanged.

RE-EXAMINATION OF HAIR SAMPLES

I received three items as follows:

1. A piece of brown card which was labelled "Hair from head of deceased Alma Tirtschke."

On this card was a group of visually reddish brown hair in the rough shape of a figure 8. The hairs were held by a glass slide and tape. I removed ten hairs from this sample and placed them on individual glass microscope slides in a semi-permanent mounting medium (Hystomount) for further examination.

The hairs ranged in length from about 4 to 17cm. None had a root present and most had been cut at both ends and hence were segments of hair shafts. All had a distinctive reddish/orange brown colour. The central medulla was visible in some of the hairs.

I also recorded the detailed microscopic features of five hairs.

2. A brown piece of card which was labelled "Hair Mrs Wain."

On this card was a circular group of hairs held on the card by a broken glass slide. I removed ten hairs from this sample and prepared them as for the hairs from Tirtschke. The hairs ranged from about 7 to 13cm.

Three had roots present. The remainder had cut or broken ends. All had a light yellow brown hue. Detailed microscopic examination revealed the hairs to be relatively featureless.

3. A brown piece of card which was labelled "Hair from Brown-Grey Blanket."

On this card was a tightly configured group of hairs in the shape of a figure eight. The hairs were held on the card by a piece of (browning) clear adhesive tape. I removed eight hairs from this group due to the smaller number present and the desire to maintain the integrity of the appearance of the group. These hairs ranged in length from 7 to 20cm and only two had roots present the remainder having cut ends. One hair had a so-called club root, which is

normally associated with hairs which have been naturally lost. The second had what appeared to be a so-called ribbon shaped root which would normally require some force for removal, such as combing. I examined all hairs in detail and recorded their microscopic features. These hairs had more visible features than hairs from the two known samples 1 and 2. Furthermore, the microscopic features would support a conclusion that the hairs in this sample were from a single source.

CONCLUSION:

The hairs from all three sources, Tirtschke, Wain and the blanket, were all easily differentiated at the stereo microscopic level based on colouring. This was confirmed at a more detailed microscopic level where there were very clear differences in colour, pigmentation and other features.

In my opinion, the hairs recovered from the brown-grey blanket could not have come from the deceased, Tirtschke or from Mrs Wain.

This conclusion has to be tempered by the following:

(a) as the hair sample from Tirtschke was cut it was not possible to examine the microscopic features at the root end of the hairs.

(b) as all of the hair samples are over seventy years old there may have been changes in colour.

Despite the above potential limitations the extent of the differences and the very distinct colour of the Tirtschke hair are such that I consider it very unlikely the hairs on the blanket could have come from Tirtschke.

No hairs were received from Ross and hence no conclusion can be reached as to whether or not the hairs could have been his own. In the absence of hairs from Ross any inclusionary conclusion would have been unsafe, regardless of any findings or conclusion resulting from examination of other hairs sample.

James Robertson
Director, Forensic Services
Australian Federal Police

30, November 1999.

81 We note that Dr Robertson is an acknowledged expert in the field of hair and fibres and has published widely. He was, for example, the editor of "*The Forensic Examination of Hair*", CBC Press 1999.

82 Dr Robertson's opinion is, in effect, the reverse of the opinion expressed at the trial by Charles Price, who described himself as a Government Medico Legal Analyst, (and who was apparently a chemist).

Conclusion

83 At the time of his trial, Colin Ross was deprived of the opportunity of having a comparison of the blanket hairs and those taken from the head of Alma Tirtschke examined by an independent expert. Furthermore, whatever view may be taken of the expertise of Mr Price (and there is no specific record of his qualifications available to us) it is difficult, if not impossible, to reconcile his conclusions with his observations. In any event, if the jury had had before it a forensic opinion of the type advanced by Dr Robertson, a very different view may have been taken, not only of the reliability or veracity of the confessional evidence, but also of the evidence of Olive Maddox and Ivy Matthews of having observed Alma Tirtschke in the wine saloon.

84 Of course, insofar as the veracity of Sydney Harding's evidence of the jail yard confession is concerned, the new forensic evidence could also have been viewed by a jury in conjunction with the additional material about Mr Harding's previous false swearing.

85 The evidence of Dr Robertson is credible and constitutes fresh evidence. Moreover, it was not evidence of a type which the defence could have obtained at the time of the trial given the refusal of the Crown to make any of the hair samples available.

86 The test to be applied by an appellate court in determining whether the miscarriage of justice has occurred is set out in the case of *Gallagher v The Queen*[28] namely, that an appellate court will conclude that the unavailability of fresh evidence at the time of the trial involved the miscarriage of justice only if it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the accused of the charge if that evidence had been before it.

87 We are not considering this matter as an appellate court. Nonetheless, given the importance of the hair evidence, not only to the acceptance of the confessional evidence which was vital to the Crown case, but also to the rejection of what may otherwise have been the exculpatory evidence of key defence witnesses, we are driven

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28 (1986) 160 CLR 392.

to the conclusion that there has been a miscarriage of justice as that concept is applied by the appellate courts.

88 Although it is not within our remit to determine whether the proviso in s.568(1) of the Act (as interpreted in *Weiss v The Queen*[29]) is enlivened upon a consideration of the whole of the evidence, we venture the view that it is not.

89 It needs to be understood, however, that a finding that there has been a miscarriage of justice does not automatically result in an acquittal. Rather, in a case such as the present one, it would, in our opinion, result in the quashing of the conviction and the ordering of a new trial. Of course, in this case, no new trial is possible, but that would not prevent a Court of Appeal, seized of the matter by way of a reference pursuant to s.584(a) of the Act, from quashing the conviction of Colin Ross.

90 The Attorney-General also has the option of granting a pardon independently of this statutory regime. Such a pardon is not, however, the equivalent of an acquittal, and the conviction itself would remain formally unreversed.[30] Nonetheless, it could constitute a recognition or acknowledgement that the culpability of Mr Ross cannot now be conclusively determined.

91 And we so advise.

TEAGUE J CUMMINS J COLDREY J

20 DECEMBER 2007

29 (2005) 224 CLR 300.

30 See *Sentencing*, 2nd ed. 1999 Fox and Freiberg, p.22-23.