HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ

LJUBE VELEVSKI APPELLANT

AND

THE QUEEN RESPONDENT

Velevski v The Queen
[2002] HCA 4
14 February 2002
S197/2000

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

S J Odgers SC with A C Haesler for the appellant (instructed by Murphy's Lawyers Inc)

A M Blackmore with M C Marien for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

CATCHWORDS

Velevski v The Queen

Criminal law – Evidence – Expert evidence – Whether certain wounds to deceased were self-inflicted – Whether capable of being the subject of expert opinion – Evidence given by experts on matters of common knowledge of human behaviour – No objection by accused – Whether admissible – Whether conflicting opinion of experts incapable of resolution beyond reasonable doubt by jury because of difficulty and sophistication of purely scientific or medical evidence.

Criminal law – Practice and procedure – Duties of prosecution – Whether prosecution obliged to call other expert witnesses whose evidence might have been favourable to the accused.

Criminal law – Evidence – Confessions and admissions – Lie as evidence of consciousness of guilt – Whether jury could rely upon alleged lie only if satisfied of it beyond reasonable doubt.

Evidence Act 1995 (NSW), ss 79, 80.

1 GLEESON CJ AND HAYNE J. At some time between 9.00 pm on Sunday, 19 June 1994 and 5.00 am on Monday, 20 June 1994 in a three bedroom suburban house in Berkeley, Wollongong, New South Wales, twin babies aged about three months, and their sister, Zaklina, aged six years, were murdered. All three children were murdered in the bedroom in which their parents and the twins ordinarily slept. Each child's throat was cut. The wounds were very great. The mother of the children, Snezana Velevska, died of similar wounds. The three children, and their mother, all suffered their wounds in the narrow space between the edge of the parents' bed and a cot in which the twins had slept.

2 There were three other people in the house when the children were murdered and their mother died: the appellant, and his mother and father, who were all then living at the house. The appellant, father of the children and husband of Snezana, was later to tell police that, on the Sunday morning, 19 June 1994, he and his wife had had an argument about the refusal of her mother, the appellant's mother-in-law, to care for the children while they went shopping. Zaklina had been staying with her mother's parents and the appellant went straight over to their house to collect Zaklina and bring her home. On his return, there was a further exchange of words in which Mrs Velevska said that "[b]ecause you have taken our daughter from my mother place I don't like your family too so you have to get rid of your parents". This, the appellant said, he agreed to do. During this conversation (to which the appellant's mother was said to be a party) Mrs Velevska was said by the appellant to have proposed that she could "go and find a place and rent it out" (for herself). He said that Mrs Velevska then, at about 11.00 am, had gone into the main bedroom with the twins. She had slammed and locked the door behind her. He said Zaklina was then in the lounge room with his parents. He, so he said, had spoken to his parents, who lived with them, and then, at about 1.00 pm, he had gone into Zaklina's bedroom next to the main bedroom. In Zaklina's bedroom he lay down and fell asleep, not waking until 6.00 am, 17 hours later. He heard nothing untoward in the intervening time.

3 The bedroom used by the appellant's parents was not adjacent to the main bedroom, in which the murders occurred, or to Zaklina's bedroom in which the appellant said he spent so much time. This third bedroom was separated from the two other bedrooms by a corridor. The appellant's parents were later to tell police that they, too, had heard nothing untoward.

4 The appellant was charged with the murder of his wife and his children. He was convicted and appealed unsuccessfully to the Court of Criminal Appeal of New South Wales (Grove, James and Kirby JJ). Kirby J would have allowed the appeal, the jury's verdict, in his Honour's opinion, being unreasonable. His Honour was also of the view that there was a miscarriage of justice because of what he characterised as an "imbalance" in the medical evidence.

5 The appellant now appeals to this Court. In the oral argument of the appeal it became apparent that the central question in this Court is whether it was open to the jury to conclude, as it did, that the prosecution had proved beyond reasonable doubt that the appellant had murdered his wife and children or was there a reasonable possibility that Mrs Velevska had killed her children and then herself? The appellant gave three other grounds of appeal: that the trial judge should have excluded some evidence given at the trial by pathologists called by the prosecution despite trial counsel for the appellant not objecting to it, and in some cases eliciting it from the witnesses; that the prosecution should have called some expert witnesses in addition to those it did call; and that the trial judge erred in his directions to the jury about lies allegedly told by the appellant. Finally, leave was sought to add, as an additional ground, that the Court of Criminal Appeal should have held that there was a miscarriage of justice caused by there being insufficient directions given about conflicting expert evidence.

6 It is necessary to say something further about the facts and about the course that the trial took. It is convenient to pick up the narrative at the point at which the appellant emerged from Zaklina's bedroom, next door to the room in which the deaths occurred, and to do so largely by reference to what he told police when interviewed.

7 The evidence given at trial about the time of death of the deceased was that all four had died before the time the appellant said he got up and came out of Zaklina's bedroom. On his account, he had stayed in Zaklina's bedroom for 17 hours, sleeping for most of that time and not moving from it to eat, to drink or even to empty his bladder. At about 6.00 am he got up and, as he left Zaklina's room, he encountered his father. He and his father tried to open the door of the main bedroom but could not, because it was locked. They knocked at the door but there was no reply.

8 The appellant said that soon after he woke up, he asked his parents to leave the house and go to his sister's house to stay for a time. Despite the early hour, and despite having to waken his mother who had suffered a stroke some years earlier, and was infirm, he set about moving his parents at once. Moving his parents required two trips to his sister's house but it seems his parents accompanied him on both. At about 8.30 am, the appellant finally dropped his parents at his sister's house which was about half an hour away from his house. After dropping his parents at his sister's house the appellant returned to his house.

9 At about 10.30 am or 10.45 am, he went to the Macedonian welfare centre to seek advice. During that visit he told a social worker that he had "family problems, marriage problems" and that he thought it was "because we live with my parents and she doesn't like it". In addition, he said that his mother-in-law "gets very much involved in our marriage". The appellant told the social worker several times that he could not get "inside the house" but later made reference to

some indoor "latches". The social worker asked whether he had checked if Zaklina was at school or had checked Mrs Velevska's whereabouts with his mother-in-law. He said he had not and that he did not have a telephone number for his parents-in-law.

10 It later emerged that very soon after visiting the welfare centre and despite having seen Zaklina's school bag in the house, he went to the school Zaklina attended, and asked there where she was. He gave to Zaklina's teacher two envelopes, in one of which there was a note about Zaklina's absence from school on the previous Friday. There was nothing in the other envelope. He told the teacher that he had found the envelopes in Zaklina's bag. He said he returned to the house after visiting the welfare centre and that he stayed there for about three hours. He did not try to speak to his wife during this time.

11 At about 3.30 pm, he spoke to neighbours, one of whom called police. Police came to the house soon after 4.00 pm. The door to the principal bedroom was locked. One officer bent down and looked under the door. The police broke into the room. There they found the four bodies in the space between the edge of the double bed and the cot. Snezana Velevska's body lay roughly parallel to the bed and cot, on top of the bodies of the children. An ambulance was called. One ambulance officer climbed on to the double bed to check for signs of life. There were none. A pathologist, Dr Bradhurst, and a forensic scientist, Ms Beilby, later examined the scene in great detail. A kitchen knife was found under Mrs Velevska's body.

12 The appellant was interviewed by police six times but he was not arrested or charged until January 1995. For a little over a fortnight in June and July 1994, pursuant to warrant, police monitored conversations in the house between the appellant and his parents. Nothing was said in those conversations that was alleged to be incriminating.

13 At trial, the central thrust of the defence was that the prosecution had not excluded, beyond reasonable doubt, the possibility that Snezana Velevska had killed the children and then herself. Not surprisingly, the defence went so far as to suggest that the evidence revealed that this was what had happened. As a result, some of the evidence at trial, and some of the argument both at trial and on the hearing of the present appeal, was cast in terms that suggested that there was a choice to be made between what was called the "murder-suicide theory" and the "murder-murder theory". It is right to say that no other explanation of events was reasonably open. It is important, however, to bear steadily in mind that the question for the jury was *not* which theory was the more plausible. The question was whether the murder-suicide theory was excluded as a reasonable hypothesis.

14 The pathologists who gave evidence expressed different opinions about some aspects of the matter. Most importantly, they differed about whether Mrs Velevska had committed suicide or been murdered. It is as well, however, to begin by noticing some important matters about which there was no dispute. Those matters relate to three subjects:

(a) Mrs Velevska's wounds;

(b) The blood stains;

(c) The position of the bodies.

Mrs Velevska's wounds

15 Mrs Velevska suffered a major transverse wound to the throat which had been caused by two cuts. The cervical spine showed two deep cuts at different places. One of those cuts had damaged the spinal cord. Mrs Velevska would have been unable to move after the spinal cord was cut and, therefore, she could not have inflicted any further wound to herself, or inflicted a wound on another, once she had sustained the wound which damaged her spinal cord. Mrs Velevska's internal jugular vein and the common carotid artery on each side of her throat was cut. Either of the cuts that penetrated to the cervical spine was sufficient to cut all these major vessels but the evidence was consistent with only some of the vessels having been cut by the first wound and the others by a second wound. Although cutting any of the large vessels would ordinarily lead to rapid and large loss of blood, there was evidence before the jury that a person suffering a wound which cut only some of them could continue to move and inflict harm on others for several minutes.

16 In addition to the major wound to Mrs Velevska's throat, there were superficial parallel cuts along the edge of that main wound. Those cuts were mainly in two clusters, with four or five wounds in each cluster. Similar marks were seen on Zaklina, albeit to a lesser extent.

17 Mrs Velevska had a gouge type wound on the pad of the palm of her right hand, at the base of her thumb (the thenar eminence). There was a difference of opinion between the experts who gave evidence at the trial about whether this was a defence wound. She had no other injuries or wounds typical of the kind sustained by a person defending against attack. By contrast, Zaklina did have defence injuries to her right hand.

The blood stains

18 All four victims suffered wounds which produced great loss of blood. No blood stains were found anywhere in the house except in the area immediately

under and surrounding the bodies. There were blood stains on a bedside table which formed part of a single headboard and sidetable unit for the double bed; there were blood stains on the wall and on the skirting board closest to the heads of the victims. Almost all of the blood was below the height of the double bed. There were no blood stains on the door handles or light switches and nothing suggested that they had been wiped clean.

19 Mrs Velevska died wearing a nightie, bed jacket and underwear. She was also wearing some jewellery: two neckchains, four bracelets and eight rings. Zaklina was wearing a tracksuit. Each of the twins was wearing sleeved nightwear enclosed at the foot in the fashion of a sleeping bag. Mrs Velevska's body was found face down on top of the other bodies, yet there was a lot of blood on the back of her bed jacket. That included blood identified as her own blood and blood from Zaklina and blood from one or both of the twins. There was little blood staining on the backs of the babies, despite both Zaklina and Mrs Velevska both being found in a position where the head and neck area of each was on top of the babies' backs.

20 The legs and feet of Mrs Velevska had almost no blood on them except for three linear blood marks on her outer calf which an expert in blood stain patterns (Mr Raymond) thought to be suggestive of finger marks. In Mr Raymond's opinion "the entire scene appeared to have been played out near the ground and close to the large stained area on the carpet". There was blood from Mrs Velevska on the bedside table and wall. Some of that appeared to have been projected directly on to the wall when the bed was not in its usual position, hard against the skirting board, but was some centimetres away from it.

The position of the bodies

21 There was evidence from which it was open to the jury to conclude that the bodies had been moved to some extent at some time. First, some of the blood stains on the twins were not deposited on their bodies in the position in which they were found. Secondly, one of the twins came to rest in her final position only after a significant volume of Mrs Velevska's blood had been deposited on the carpet and both projected and splashed on to the bedside unit. Thirdly, Mrs Velevska had a linear blood mark on her left forearm typical of a mark that would be left if her forearm had been pressed into a bloody carpet. Her body was not found with that arm in that position. Fourthly, there was a smear on the front of the bedside unit in blood that was from Mrs Velevska that was consistent with it having been wiped, when wet, with the sleeping bag of one of the twins. Fifthly, there was the limited blood staining on the heads of the twins despite Mrs Velevska's body being on top of them. Sixthly, Zaklina's body was found with her leg in a position, fixed in rigor mortis, which, in the opinion of some of the expert witnesses, was not consistent with her having come to rest after death in the place in which she was found. Finally, there was evidence from which the

jury could conclude that the bed had been moved back into its normal position against the wall *after* Mrs Velevska had suffered a wound which saw her blood deposited on the wall behind the bed.

22 There was a great deal of other evidence given by the several expert witnesses who testified at the trial. There was evidence from a locksmith that the door to the bedroom could be unlocked from outside the room and the door closed from the outside in such a way as to leave the door locked. Apart from a forensic scientist (Ms Beilby) who gave evidence about sampling and grouping of blood found at the scene and Mr Raymond, the blood pattern expert, the prosecution called five pathologists: Dr Bradhurst, Dr Cooke, Dr Collins, Dr Oettle and Professor Mason. The appellant called still further expert evidence from Dr Zillman, a pathologist. All six pathologists expressed opinions which differed in some respects from opinions expressed by the others. It will be necessary to mention some, but not all, of those differences.

23 Dr Bradhurst, a forensic pathologist who was, at the time of giving evidence, and since 1986 had been, working at the New South Wales Institute of Forensic Medicine, attended the house at Berkeley at about 7.40 pm on Monday, 20 June 1994. He inspected the scene before the bodies were moved. It was Dr Bradhurst who gave evidence that Mrs Velevska died some time between 9.00 pm on Sunday, 19 June and 5.00 am on Monday, 20 June. Dr Bradhurst conducted post-mortem examinations of Mrs Velevska and the three children.

24 The other pathologists who gave evidence had not attended the scene and had not observed the post-mortems, although Dr Cooke had examined the bodies after the post-mortem examinations. Each of the pathologists other than Dr Cooke, therefore, gave evidence of opinions formed by reference to photographs taken at the scene and on post-mortem, and by reference to findings made and recorded by others. Each of Dr Cooke, Dr Collins, Dr Oettle and Professor Mason was very experienced. Dr Zillman had somewhat less experience than the other witnesses. Dr Cooke was Chief Forensic Pathologist of Western Australia; Dr Collins was a private consultant who from time to time performed work for the Institute of Forensic Medicine in Victoria; Dr Oettle, before his retirement in 1991, had been Director of Forensic Medicine at what was then the Division of Forensic Medicine in New South Wales; Professor Mason was Professor Emeritus of Forensic Medicine at the University of Edinburgh. Dr Zillman had worked as a government forensic pathologist in Queensland between 1992 and 1994 and thereafter had undertaken private practice as a consultant pathologist specialising in forensic pathology.

25 Each pathologist was asked, without objection, to express an opinion about whether particular features of the scene, the wounds or other matters, were consistent with Mrs Velevska having died at her own hand or at the hand of another. Dr Bradhurst and Dr Zillman each gave evidence that, in his opinion, it

was probable that Mrs Velevska had committed suicide. Each of the other doctors was of the contrary view. Not surprisingly, there were some differences, particularly differences of emphasis, in the evidence given by the pathologists. Argument in this Court proceeded by reference to the evidence of Dr Bradhurst rather than that of Dr Zillman. It is convenient to do so because Dr Bradhurst's evidence may be seen as the expert evidence most favourable to the appellant.

26 Dr Bradhurst was the first pathologist to give evidence. He was led, in chief, to agree that in his opinion:

> "on [the] medical evidence the scene and autopsy findings [were] consistent with Snezana Velevska's cut throat being self-inflicted rather than being inflicted by the hand of another".

The reasons which Dr Bradhurst gave for that opinion were elicited from him and explored in examination-in-chief as well as in cross-examination.

27 Chief among those reasons was the significance he attached to superficial cuts accompanying the main wound which, although they "may be seen in a homicide" were, in his opinion, characteristic of a suicide or self-inflicted wound. His evidence also examined a number of other matters including the angle and depth of Mrs Velevska's wounds, compared with the wounds sustained by the children. There was discussion of the causes of petechial haemorrhages[1] found on Mrs Velevska's face and eyes and, in particular, whether they suggested that there had been some compression of her neck before death. His opinion was sought and given about whether the presence of some damage to Mrs Velevska's neck chain was consistent with suicide (in which, usually, the part to be cut is exposed) or with homicide. There was discussion about the significance of there being no evidence of struggle and the scene appearing, as it did, to be a "quiet scene".

28 There was also reference to the fact that there were buttons missing from Mrs Velevska's nightie and that her hairclip was not in the position in which it would ordinarily be expected to be. Reference was made to bruises that were found on her body. In the end, however, it may be doubted that any of these last-mentioned matters (the buttons, hairclip or bruises) was of real significance.

29 Of more significance, however, was the evidence which Dr Bradhurst gave about how the blood which was found at the scene might have been deposited where it was. It is as well to set out some of his evidence about this.

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1 The haemorrhage of very small blood vessels in the skin, sometimes referred to as dot-like haemorrhages.

Having accepted that Mrs Velevska was found face down, the examination continued:

> "Q. Can you offer any explanation as to how there is some of her blood on the back of her night jacket?
> A. Yes.
>
> Q. If she has committed suicide in that way?
> A. If she did commit suicide – one scenario I suggest for that would be that, if in fact she did kill the babies and then commit suicide, that she had, in the process of committing her death, *she was at first lying with her back on the floor and she had had some attempts at cutting her throat and with bleeding going on the floor* and also at that time perhaps cutting her – into the wind pipe or her – below her thyroid cartilage into her airway and *blood would have run down on to the floor and may well have got on to the back of her clothing in that way*. I am suggesting she is taking some time to die, to go through the process of death or causing death.
>
> Q. After she bleeds in that way, she stands up and falls forwards on to where the children were?
> A. Yes, well she hadn't managed to kill herself at first although there is considerable bleeding having occurred and also some spray from her cut vessel going on the furniture as it was seen and also her coughing blood from her airways and that projected cough blood going there but, more important, more blood going on the floor from the cut vessels, but then after a period of time finding that she still hadn't died, *[she] places the children in the position they were found and doing the final cuts on top of them in the way that she was found*.
>
> Q. Would she have the strength to get up and do that if she previously cut her throat and suffered a blood loss such as appeared on the back of her night jacket?
> A. I believe that *she would have been able to have the strength to do that* because of recorded cases previously of witnessed suicide in this way, that there seems to be an extra reserve of strength that they have that they were able to do what to, I am sure, to you and to myself would seem amazing acts or feats.
>
> Q. You have already agreed that *the injury to Snezana's throat occurred very low to the ground*, is that correct?
> A. Yes.

> Q. And that she had lost a significant amount of blood on to that carpet area on the ground?
> A. Yes.
>
> Q. *When she's lost that amount of blood on to that carpet area and on the chest of drawers on the ground, would you agree that the children are not there on the floor?*
> A. *They are not in the position where they were found. They may have been on the floor*." (emphasis added)

30 Several features of this passage of evidence are notable. It was accepted at trial, and on appeal, that if Mrs Velevska committed suicide, she had, by then, murdered her children. The second answer quoted assumes that Mrs Velevska lies on the floor either having cut her throat or in order to do so. Where are the children's bodies then? Dr Bradhurst's next answer has her placing the bodies of the *three* children in the position they were found and doing so after she has suffered "considerable bleeding". As the last of his quoted answers acknowledges, when Mrs Velevska suffers a wound which, as he later acknowledged, severed an artery, the children's bodies are *not* where they were later found, but where were they? *All* the blood is found in a *very* confined area, so confined as to be only a little larger than the area occupied by the body of Mrs Velevska on top of her children and consistent only with the wounds being inflicted on the victims very close to the floor. The difficulties presented by these considerations were explored further by the prosecution in the examination of Dr Bradhurst but it was entirely open to the jury to regard the answers he gave as not explaining how she could have done this when the blood stains were as they were.

31 Next, there was the question of how blood from one or other of the twins came to be on the back of Mrs Velevska's bed jacket. This, Dr Bradhurst suggested, could have been as a result of Mrs Velevska cutting the throat of one, if not both, of them while holding the child, either at the time of cutting, or immediately after, sufficiently high up, over the top of her shoulder, for the blood to flow down over her back. Again, it was well open to the jury to reject this explanation.

32 It is important to notice that the explanations offered by Dr Bradhurst were not dependent only upon his expertise. The opinion expressed by Dr Bradhurst (in his answer to the fourth question quoted) that a person suffering wounds of a particular kind *could* perform the physical manoeuvres he suggested may have been undertaken, or that a person *could* have inflicted wounds on one or both of the three month old twins in the position he suggested, did depend on his expertise, but it answered only one of the questions the jury had to consider. If they accepted Dr Bradhurst's evidence on these matters they then had to consider whether the possibility that Mrs Velevska had in fact done these things

had been excluded beyond reasonable doubt. That was a question which required consideration of human behaviour, not scientific analysis. It depended upon much more than what Dr Bradhurst said in evidence. It was a question to be assessed on the whole of the evidence against the appellant. Perhaps most importantly, it was a question which could properly be affected by the jury's assessment of the evidence which the appellant gave, and the explanation he offered of his conduct during and after the time his children had undoubtedly been murdered.

33 Dr Cooke, Dr Collins, Dr Oettle and Professor Mason all gave evidence that, in their opinion, the several features to which reference has already been made were consistent with homicide not suicide. Dr Zillman was of a contrary view. Some of the experts called by the prosecution expressed more definite opinions than others, that particular features were consistent with homicide. What is important for present purposes is that the differences in opinion between the experts can, in the end, be seen as turning upon two matters. The first was whether Mrs Velevska not only could have, but may have, moved the bodies of her children after she had suffered one substantial wound to her throat. The second was how she came to have her own blood, and blood of the children, on her back. Other differences of opinion between the experts, if resolved in the way for which the prosecution contended, may have reinforced a conclusion that the appellant was guilty of murder. Resolving them in the opposite way would not have done more than remove reinforcement for the prosecution contention. The central questions would still have remained.

34 It is apparent, then, that the two questions we have identified as central did not turn *only* upon matters requiring expertise. The jury's acceptance of the evidence which did require expertise by no means compelled a verdict of acquittal. In particular, accepting that a person *could* effect the various manoeuvres that Mrs Velevska would have had to undertake if she had murdered the children did not require the jury to conclude that this was a reasonably possible explanation of what had happened.

35 It is convenient to deal, at this point, with the application to supplement the grounds of appeal in this Court by adding a ground that the Court of Criminal Appeal erred in failing to hold that there was a miscarriage of justice caused by the directions given about conflicting expert evidence. In order to do that, it is desirable to consider the argument which the appellant sought to advance. The appellant submitted in this Court that the differences of opinion between the experts included matters "at a level of difficulty and sophistication above that at

which a juror, or a judge, might by reasoning from general scientific knowledge subject the opinions to wholly effective critical evaluation"[2].

36 The trial judge told the jury that, in assessing the expert evidence, it was proper for them to bear in mind that they lacked the scientific knowledge and experience of the experts and that insofar as their opinion depended on scientific medical or psychological knowledge (as opposed to common experience or common sense) "it would not be proper to find an issue against the accused by accepting one body of expert evidence and rejecting another *unless there was good reason for doing so*" (emphasis added). The trial judge gave examples of such reasons; and then pointed out that other evidence in the case might help to resolve any conflict – particularly what the prosecution alleged to be its circumstantial case. His Honour concluded by reminding the jury that they *must* have regard to the differing opinions of the pathologists.

37 The appellant submitted that, because the differences of opinion between experts could not be properly evaluated by the jury, the trial judge should have directed the jury that it would be dangerous to accept the body of expert evidence adverse to the appellant by reasoning from general scientific knowledge. As these reasons have sought to demonstrate, the premise of the argument is flawed. The critical differences between the experts did not depend upon matters that required difficult or sophisticated scientific analysis. The critical differences turned upon whether there was a reasonable possibility that Mrs Velevska had acted as Dr Bradhurst suggested in his evidence, not upon whether a person was physically *able* to have acted in that way. That issue may be contrasted with the issues in *Chamberlain v The Queen [No 2]*[3]. In *Chamberlain*, the critical question was whether some stains were stains of foetal blood. Experts expressed different opinions about the question which was a wholly scientific question. Here the critical question turned on whether Mrs Velevska may have killed one or both of the twins in the way described by Dr Bradhurst, may have then lain supine on the floor while bleeding profusely, before turning over, moving her children's bodies (and the bed) to the positions in which they were found, and only then inflicting a further savage wound to herself.

38 We need not decide whether there may be cases in which a direction of the kind put forward by the appellant should be given or, if it should, what it should contain. The absence of a direction of this kind in this case has led to no

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2 *Chamberlain v The Queen* (1983) 72 FLR 1 at 82 per Jenkinson J; 46 ALR 493 at 574 cited in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 558 per Gibbs CJ and Mason J.

3 (1984) 153 CLR 521.

miscarriage. We would, therefore, refuse leave to amend the notice of appeal in the manner sought. We turn then to consider other evidence the jury could take into account in deciding whether suicide had been excluded.

The alleged lie

39 At trial, the prosecution emphasised what the appellant said he had done, and not done, in the period between his bringing Zaklina home from her maternal grandparents' house and the police discovering the bodies. In particular, the prosecution alleged that his assertion, that he had spent 17 hours in Zaklina's bedroom and had slept for most of that time, was a lie told because he was conscious of his guilt. The prosecution sought to argue that two other statements of the appellant were lies evidencing consciousness of guilt but the trial judge directed the jury that they could not take them into account. The trial judge gave the jury instructions, along conventional lines[4], about how they might use the alleged lie and how they might not. No complaint was made in this Court about those directions. Rather, it was submitted that "the Court of Criminal Appeal erred in regarding it as open to the trial judge to leave the alleged lie to the jury in the way he did". This contention was put in two ways.

40 First, it was submitted that the critical time to be considered was the time of death. Thus, so the argument proceeded, the question was whether the appellant was shown to have lied about the period given in evidence as the period during which the victims died. That, however, is altogether too narrow a way of considering the matter. It seeks to divert attention from what the appellant *did* say to some other, narrower, claim that he might have made, and ask whether a statement that he remained in Zaklina's room between 9.00 pm and 5.00 am was inherently improbable. That is not what he said. It was well open to the jury to conclude that what the appellant did say was a lie.

41 The second branch of the appellant's argument about this statement was that it was not reasonably open to the jury to be satisfied that it was a deliberate lie or that it arose from a consciousness of guilt. It is enough to say that both conclusions were well open. The appellant asserted that he had done something that, judged against his own previous conduct, or against the ordinary conduct of any person, could be described only as extraordinary. It was, therefore, not a matter about which it could easily be said that he might be mistaken and it was inherently implausible. There was expert evidence that it was unlikely that he had slept as long as he suggested he had. In addition, there was evidence that his father had told police that he had seen the appellant go out of the bedroom on Sunday evening. This last matter, however, may not be of great significance.

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4 *Edwards v The Queen* (1993) 178 CLR 193.

The appellant's father was called to give evidence by the prosecution but leave was granted by the trial judge to cross-examine Mr Velevski senior about statements he had made to police about his son's movements that were statements inconsistent with the evidence that he gave in court. It was open to the jury to consider him to be an unreliable witness.

42 If, as the appellant suggested was the case, his wife had killed first her children and then herself and, in the course of doing so had inflicted defence wounds on Zaklina, for him to say, as he did, that he had been in Zaklina's bedroom, asleep, offered some answer to the many questions that would inevitably be provoked by the suggestion that Mrs Velevska had murdered the children. Why did he not check on the welfare of his wife and children during the Sunday afternoon? Was it to be assumed that they were in the bedroom for this whole period without any food or drink (except, perhaps, a bottle for the twins)? Unless all four died silently, (which, given Zaklina's defence wounds was unlikely) why did he do nothing to investigate what was happening in the room? Whether his statement was properly characterised, as it was in the Court of Criminal Appeal, as a type of alibi is not to the point. It may not be an alibi or, if it is, it may not be a very good one. That, however, should not be permitted to distract attention from its significance. It was a statement which, if not true, could be understood by the jury as put forward because he could not account innocently for his movements. That is, it was open to the jury to conclude that he was lying about where he was and what he was doing during this period because he was conscious that "if he tells the truth, the truth will convict him"[5].

43 It was next submitted that, even if it was permissible to leave the alleged lie to the jury in the way it was, it was necessary, in the circumstances, to give the jury a direction that they could rely upon an intermediate fact as a link in a chain of reasoning only if satisfied beyond reasonable doubt of that intermediate fact[6]. Stated in that form the proposition is legally accurate but its recitation to the jury would be of no assistance unless its application to this case were explained. How that could have been done in this case was not made clear. It was submitted that the jury *may* (but need not) have concluded that the telling of the lie settled any reasonable doubt that consideration of the other evidence tendered at trial allowed. *If* the jury followed this path, it would, so it was said, make the telling of the lie an indispensable intermediate fact. It was the *possibility* that the jury might reason in this way that called, so it was submitted, for judicial instruction about how it should be undertaken.

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5 *R v Tripodi* [1961] VR 186 at 193; *Edwards* (1993) 178 CLR 193 at 209.

6 *Shepherd v The Queen* (1990) 170 CLR 573 at 579 per Dawson J; *Edwards* (1993) 178 CLR 193 at 210.

44 The argument should be rejected. It proceeds from a premise about the way in which the jury might approach the task which is wrong. It assumes that the jury will consider the evidence in separate and isolated compartments. That assumption is not made because the evidence relates to different steps in a chain of reasoning, but solely because it suits the appellant's immediate forensic purposes to isolate one of the pieces of evidence as the critical element that will conclude the issue of guilt. Once it is accepted, as it was, that the telling of the lie was not necessarily an intermediate indispensable fact in this case, it becomes apparent that the jury had to consider the evidence as a whole. The lie was not a separate fact which, together with other facts, would form links in a chain of reasoning.

45 As has already been mentioned, some of the evidence adduced from the pathologists was evidence of matters of human behaviour rather than matters about which they drew on their specialist or other medical expertise. There was no objection to this evidence and there was no discrete ground of appeal to the Court of Criminal Appeal seeking to agitate the question. That trial counsel did not object to the evidence is not surprising. The trial was fought as a contest between the murder-suicide explanation of what happened and the murder-murder explanation. It was clearly to the forensic advantage of the appellant at trial to have Dr Bradhurst, the first pathologist to give evidence to the jury and the pathologist who had attended the scene and performed the post-mortem examinations, express the opinions he did. Once that had been done, the die was cast. It was inevitable that the other pathologists would be asked similar questions to those asked of Dr Bradhurst. The trial having been conducted in this way, there has been no "wrong decision of any question of law, or … on any other ground … a miscarriage of justice"[7].

46 Nor was there any miscarriage of justice occasioned (as the appellant submitted) by the failure of the prosecution to call as witnesses other pathologists who, a police officer testified, had "agreed with" Dr Bradhurst's opinion that Mrs Velevska had probably committed suicide. No statement or report was obtained from the pathologists mentioned in the police officer's evidence and no statement was obtained from a Dr Botterill who assisted Dr Bradhurst at the post-mortem examinations. Yet it was contended that the prosecution had been duty bound to call them to give evidence. Indeed Kirby J, who dissented in the Court of Criminal Appeal, concluded that a miscarriage of justice had been caused by the "imbalance" in the medical evidence tendered in the prosecution case.

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7 *Criminal Appeal Act* 1912 (NSW), s 6.

47 The argument proceeds from an assumption about what the evidence of these persons might have been. The most that could be said to have been revealed by the evidence was the general tenor of their views. It may be doubted whether an assumption that their evidence would have supported the particular views formed by Dr Bradhurst is well founded, in the absence of any statement or report which revealed what evidence each may have given about the various matters of which Dr Bradhurst gave evidence. Even assuming, however, that one or more of them, when qualified, would have given evidence which supported the opinions of Dr Bradhurst, there has been no miscarriage of justice. First, the notion of "balance" in this context is seductive, but misleading. On its face it suggests that, in every case where expert evidence is to be led, the prosecution must seek out and adduce evidence of competing or contradictory opinions. Why that should be so in an adversarial system is not revealed. What is required is that the prosecutor is bound to ensure that the prosecution case is presented with fairness to the accused[8]. Fairness does not require some head count of experts holding differing opinions. Secondly, it is to be recalled that the evidence now in issue is *expert* evidence of *opinion*. It is not evidence of facts. *R v Apostilides*[9], and like cases about the obligations of the prosecution, are primarily concerned with evidence about the facts of the case. Other considerations intrude in relation to expert evidence, not least being the consideration that such a witness can give evidence only by reference to facts which will have to be established otherwise. In a case such as the present, where several experts were to be called to give evidence, the prosecution, not already being in possession of evidence from other expert witnesses, was not bound to seek it out by having the witness qualify himself or herself to form an opinion and then to call the witness to give evidence of the opinion that was formed.

48 The appeal should be dismissed.

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8 *Richardson v The Queen* (1974) 131 CLR 116.

9 (1984) 154 CLR 563 at 575.

49 GAUDRON J. Following a trial in the Supreme Court of New South Wales, the appellant was convicted of the murder of his wife, Snezana, and his three daughters, Zaklina (aged 6) and twins, Daniela and Dijana (aged 3 months). An appeal to the Court of Criminal Appeal was dismissed by majority (Grove and James JJ, David Kirby J dissenting).

50 The appellant now appeals from the decision of the Court of Criminal Appeal to this Court. Amongst other grounds, it is argued that the verdicts are unreasonable. In this regard, it is put that the jury could not exclude, as a reasonable hypothesis, the possibility that the appellant's wife murdered their three children and then committed suicide.

The facts

51 The bodies of the appellant's wife and children were found in the main bedroom of their and the appellant's home at Berkeley, a suburb of Wollongong, on Monday, 20 June 1994. The door of the bedroom was locked from the inside and police gained entry by smashing a hole in the door and reaching through to unlock it from the inside. There was no light on in the room.

52 All four bodies were found in a confined area in the main bedroom between a bed and a cot. All had their throats cut. In the case of Snezana, there were two severe cuts into the cervical spine, one of which cut into the spinal cord[10]. The bodies were found on top of one another, with the twins face down on the floor, Zaklina face down on top of the twins and their mother face down on top of her. A knife was found directly under the mother's body, at head height. The room, itself, bore no sign of a struggle or of forced entry.

53 Dr Bradhurst, who examined the bodies before they were removed from the bedroom and later conducted post-mortem examinations, placed the time of the deaths between 9.00 pm on the night of Sunday, 19 June and 5.00 am on Monday, 20 June 1994.

54 There was a very considerable quantity of blood in the area where the bodies lay. There was also blood on the side of the cot, on the lower part of a bedside cabinet adjacent to the bed, on the wall and skirting board behind the bed, underneath the bed and on part of the bed linen which was overhanging the bed near the floor. The absence of blood in other parts of the bedroom led Dr Bradhurst to conclude that the injuries had been inflicted in the area in which

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10 One cut penetrated the intervertebral disc between the 5th and 6th cervical vertebrae by at least 5 millimetres, and the other penetrated the intervertebral disc between the 4th and 5th cervical vertebrae by at least 20 millimetres. The deeper cut penetrated the spinal cord.

the bodies were found, a view which was not challenged in the trial. Moreover, Dr Bradhurst's unchallenged opinion was that Snezana's head must have been close to the floor when some, if not all, of her injuries were inflicted[11].

55 Apart from the appellant and his wife and children, the only other occupants of the house at the relevant time were the appellant's aged parents. Investigations revealed no blood or blood stains on their clothing or on that of the appellant. Extensive tests were also conducted throughout the house for traces of blood, including with polylight equipment which can detect minute traces. Apart from the area of the main bedroom where the bodies were found, no blood was located in any other part of the house or in the drainage system. Nor was any trace of blood found on any of the light switches in the main bedroom. Moreover, testing of the steering wheel of the appellant's car revealed no trace of blood. Importantly, there was also no evidence that any attempt had been made to conceal or remove any blood staining.

Conflicting expert evidence

56 The argument that the verdicts are unreasonable falls to be considered in a context in which conflicting opinions were expressed by various experts who gave evidence at the trial. Their evidence was summarised by the trial judge as follows:

> "Dr Bradhurst's opinion was that the evidence, the pathological evidence, was consistent with Snezana's wounds being self-inflicted but he was not able to exclude the possibility of homicide. Dr Cooke said that a firm conclusion cannot be made and he was unable to exclude the possibility of either suicide or homicide. Dr Byron Collins said it was probably not self-inflicted and was most unlikely to have been suicidal but suicide cannot be excluded. Dr Oettle said it was homicidal, not suicidal. Professor Mason said that on the balance of probabilities it was homicide and Dr Zillman said the hypothesis of murder/suicide is more likely than that of murder/murder."

Subject to three matters which were raised earlier by the trial judge in his summing up, that is an accurate summary of the expert evidence in the case.

57 The first matter to which reference should be made in relation to the above summary is that Dr Bradhurst was of the view that Snezana probably suicided. The second is that Dr Oettle also expressed his opinion in terms of probability, saying that "the sum of the probabilities leads me to conclude that Snezana was

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11 Dr Bradhurst considered that Snezana may have been standing when she inflicted the final wound to herself.

murdered rather than that she committed suicide". The third is that there was evidence that other pathologists[12], who were not called as witnesses in the trial, agreed with the opinion expressed by Dr Bradhurst.

The nature of the expert evidence

58 A number of important points should be made with respect to the expert evidence. The first and most important is that, standing alone, that evidence cannot support a finding beyond reasonable doubt of murder. If the verdicts are to stand, it can only be on the basis that, when the other evidence is considered in conjunction with the evidence of those experts who considered that, in the case of Snezana, homicide was more probable than suicide, the evidence, as a whole, is capable of excluding suicide as a reasonable hypothesis.

59 The second matter to be noted is that no expert witness based his opinion solely on the injuries inflicted on the appellant's wife and children. Rather, each relied on that evidence in combination with other aspects of the forensic evidence. The third matter is that the nature and cause of some of the injuries, on which some of the experts relied for the formation of their opinion that Snezana was murdered, were matters about which different experts expressed different opinions.

60 Finally, it should be noted that, apart from Drs Bradhurst, Cooke and Oettle, the experts who were called as witnesses in the trial based their opinions, in large part, on what they observed in photographs of the bodies and of the bedroom in which the bodies were found. Dr Oettle viewed the body of Snezana from a distance on the Friday following her death. Dr Cooke inspected the bodies some five days after their removal from the main bedroom and, on the same day, inspected the bedroom. Dr Bradhurst, on the other hand, viewed the bodies in the bedroom where they were found and, later, conducted post-mortem examinations upon them.

The post-mortem examinations

61 Save for the fact that the post-mortem examination of Zaklina's body revealed that she sustained defensive type wounds, nothing turns on the injuries inflicted on the children. It is, thus, necessary to recount only Dr Bradhurst's findings with respect to Snezana.

62 Dr Bradhurst noted that, on Snezana's body, there was "a large gaping 150 x 40 millimetres deep cut throat across the front of the neck". Measured from the middle of the neck, the wound extended upwards for 6 centimetres towards the

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12 Professor Hilton and Drs Botterill, Lawrence and Duflou.

left ear and upwards for 9 centimetres towards the right ear. The wound was irregular and there was a series of superficial parallel cuts along the upper and lower margins.

63 In addition to the superficial cuts in the vicinity of the wound, Dr Bradhurst's examination revealed mild bruising below the cut and an abrasion on the right side of the neck with indefinite parallel cuts. There was also a scalp abrasion above the left ear and a superficial wound to the right hand on the pad of the palm at the base of the thumb.

64 Dr Bradhurst also noted some marks on the right side of the face and on the back of Snezana's body which he identified as "residual lividity". There were also marks on the eyelids, between the lips and the gums and on the front of the right shoulder which he identified as petechial haemorrhages. In his subsequent evidence, Dr Bradhurst expressed the opinion that the petechial haemorrhages occurred after Snezana's death as a result of the positioning of her body. Additionally, Dr Bradhurst noted a periosteal haemorrhage on the skull bone which, he considered, might have been an old haemorrhage.

65 As well as the above findings with respect to Snezana's body, Dr Bradhurst made a number of negative findings as follows:

- there was no evidence of any bruising about the lips or gums;
- there was no evidence of any bruising about the face;
- although there was a mild degree of patchy bruising on the front of the neck below the cut throat, there was no evidence of any ligature mark or skin bruising on the back or sides of the neck;
- there was no evidence of any typical defence type injuries on the hands, forearms or upper arms;
- there was no evidence of any bruising elsewhere about the body.

66 So far as the absence of bruising is concerned, subsequent examination by Drs Bradhurst and Cooke did reveal bruising to Snezana's wrists.

The competing hypotheses

67 It should be noted at the outset that, notwithstanding the serious nature of Snezana's wound, the expert witnesses were all agreed that it could have been self-inflicted[13]. Their different opinions reflected different aspects or different

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13 Dr Bradhurst was of the view that the severity of the wounds did not rule out self-infliction. Dr Cooke said that: "suicidal cut throat injury may extend deeply into

(Footnote continues on next page)

interpretations of the other evidence. Before turning to the detail of those differences, it is convenient to note one other important difference.

68 Because blood from her children was found on the back of Snezana's nightdress and matinee jacket, Dr Bradhurst, who favoured the hypothesis that she committed suicide, postulated that, before inflicting her own fatal injuries, Snezana held the twins and Zaklina over her left shoulder, either when she cut their throats or shortly afterwards. Alternatively, Dr Bradhurst considered, as did Dr Zillman, that Snezana may have lain on her back in the childrens' blood before inflicting the fatal cut to herself. On either hypothesis, Snezana's throat was cut in two distinct movements, with some time – perhaps three minutes – between the first cut and the second cut, the latter of which cut into the spinal cord and resulted in her immediate paralysis and, then, death. During this time according to Drs Bradhurst and Zillman, Snezana could have placed the children where their bodies were found and either stood above, or placed herself on top of them before inflicting her own fatal wound.

69 On the other hand, the presence of the children's blood on the back of Snezana's night attire was accounted for by some of the experts[14] who favoured the view that Snezana was murdered by postulating that, after her murder, the throats of the children were cut across her back. On this theory, Snezana was attacked while lying face down across the bed, forced onto the floor between the bed and the cot and had her throat cut from left to right with death occurring immediately[15]. And after the fatal injuries were inflicted, the bodies were placed on top of each other by the person responsible for their deaths in the positions in which they were later found.

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the neck, on occasion with multiple cuts to the vertebral column. Extension through the vertical column, the spinal cord however, must be particularly unusual with suicidal cut throat injury." Dr Collins considered that the totality, variety and depth of wounds to Snezana's neck were "quite unusual" for self-infliction, but concluded that "the fatal wound … when considered in isolation, could be interpreted as having been self-inflicted". Dr Oettle agreed that "as regards severity, suicides are capable of inflicting the most astonishing wounds, through all structures down to the vertebral column and even through an intervertebral disc into the spinal canal or they may … produce other extraordinary conditions". Professor Mason, although of the view that the severity of the wounds indicated murder, had "no doubt that this can occur in suicide". And Dr Zillman believed that the severity of the wounds was equally consistent with suicide or murder.

14 Dr Collins rejected Dr Bradhurst's theory, but did not expressly suggest that the children were killed over Snezana's back.

15 In cross examination of the accused, the prosecution suggested that Snezana was forced onto the floor and her throat then cut.

The expert opinions: their different bases

70 Dr Bradhurst, who favoured the hypothesis that Snezana murdered her children and then committed suicide, based his opinion on:

- the absence of evidence of any struggle;
- the superficial parallel cuts along the edges of the main wound which, he said, were "consistent with [it] being self-inflicted rather than with being carried out by someone else"; and
- "the absence of typical defence type injuries."

71 Dr Zillman, who also favoured the theory that Snezana murdered her children and then committed suicide, based his opinion on:

- the presence of arterial blood spurts on the bedside cabinet and the wall behind the bed; and
- the absence of blood stains of the kind and in the position that would be expected if Snezana had sustained all of her throat injuries at the same time, as postulated by those who favoured homicide.

72 The presence of blood spurts, according to Dr Zillman, indicated that Snezana was alive whilst lying on top of the children and that she died in that position. The blood spurts upon which Dr Zillman relied for this opinion were, according to his evidence, laid down over blood that had already dried. The blood spurts and the dried blood in question had come from Snezana, as was established by the uncontradicted evidence of Ms Beilby, a forensic scientist.

73 As already indicated, Dr Cooke was of the view that it was impossible to exclude either suicide or homicide. The factors which, in his view, favoured suicide were the "undisturbed quiet appearance" of the bedroom and the fact that the knife was "appropriately placed for [Snezana's] collapse with the weapon in her right hand". As against those considerations, Dr Cooke thought that the petechial haemorrhages and ill defined marks to the skin of the neck "raise[d] the possibility of the neck compression prior to death". Other matters raising the possibility of murder were the presence of blood on the rear of Snezana's left leg, which might have been fingermarks, the fact that Snezana wore several necklaces, which is uncommon in self-inflicted cut throat injuries, and the fact that two buttons were missing from her nightdress.

74 Two other matters should be noted with respect to Dr Cooke's evidence. The first is that Dr Cooke was of the view that the distribution of blood on the wall behind the bed "suggest[ed] that the bed may have been displaced further

away from the bedside cabinet than indicated in the ... photographs and video at the time the mother's injury was suffered." The second matter is that, according to Dr Cooke, the photographs indicated that Zaklina's left knee was partly bent and her foot unsupported. In his view, this indicated that rigor mortis was present when her body was placed in the position in which it was found. Further, it was not placed in the position in which it was found "for the first several hours after death."

75 Of the expert witnesses who favoured the view that Snezana was the victim of homicide, it is convenient to first deal with the opinion of Dr Oettle. His opinion was based on a combination of matters relating to the scene in the bedroom and the nature of the injuries sustained by Snezana. So far as the scene in the bedroom is concerned, Dr Oettle referred to:

- the displacement of Snezana's nightdress over the front of the abdomen relative to its position over the back of the trunk;
- blood smears on Snezana's left leg consistent with her body having been dragged prior to its being found;
- blood smears on her nightdress which were consistent with their having been made by a manufactured article (such as a knife) and were unlikely to have been made by Snezana;
- the presence of the children's blood on the back of Snezana's clothes;
- the absence of Snezana's blood stains on the bodies and clothing of the children;
- the presence of blood stains on the wall behind the bed, indicating that the bed was moved after Snezana's throat was cut;
- the presence of rigor mortis in Zaklina's left lower leg indicating that death did not occur where her body was found;
- missing buttons from Snezana's nightdress which suggested a struggle.

76 So far as concerns the injuries sustained by Snezana, Dr Oettle relied on:

- the angle of the wounds, which, in his view, was more consistent with homicide than with self-infliction by a right handed person;
- the petechial haemorrhages which were consistent with their being asphyxial in origin;

. bruising on Snezana's face shown in photographs but not described by Dr Bradhurst, which was inconsistent with self-infliction but consistent with assault;

. the abrasion on Snezana's forehead and bruising over the right parietal region which were consistent with assault;

. the wound to Snezana's right hand which was consistent with its being a defensive wound;

. bruises to Snezana's wrists which were consistent with an assault;

. the periosteal haemorrhage which had the appearance of being recent and which was consistent with force against a flat surface or a blunt force such as a fist;

. the improbability of Snezana remaining conscious after her left carotid artery was cut.

77 A number of the matters on which Dr Oettle relied for the formation of his opinion were also relied upon by Dr Collins and by Professor Mason. Dr Collins based his opinion on:

. the totality and variety of Snezana's wounds which, in his opinion, were "unusual for self-infliction";

. the abrasion to the right side of the neck which was not typical in suicidal deaths and which he did not believe could have been caused by the jewellery that Snezana was wearing;

. the curved brown abrasion to the lower anterior neck was unlikely to have resulted from the action of cutting one's own throat;

. the petechial haemorrhages were more likely to be asphyxial than post-mortem gravitational;

. the bruising to the scalp, and, possibly, to the lower lip and gums which are "not common in a straightforward suicidal death";

. the injury to Snezana's right hand which was unlikely to have been accidental;

. the distribution of Snezana's blood on the bedside table, floor and wall which was, in Dr Collins' view, inconsistent with the position of the bodies as found;

. the absence of the children's blood on the cuffs of Snezana's nightdress;

. the paucity of blood on the knife;

. the presence of rigor mortis affecting Zaklina's left lower leg;

. the incongruity of the tranquillity of the scene;

. the cut into the spinal cord was such that subsequent activity would be unlikely if not impossible.

In his evidence in chief, Dr Collins acknowledged that there were competing explanations for each of the matters upon which he relied for his opinion that Snezana's death was probably not suicidal.

78 Professor Mason rested his opinion that, on the balance of probabilities, Snezana's death was homicidal on the following:

. the scene looked "almost too peaceful";

. the position of Snezana's body was anomalous and it was unlikely that she got into that position by collapsing on top of the other bodies;

. the position of Snezana's nightdress was compatible with her body having been pushed or pulled into the position in which it was found;

. the distribution of Snezana's blood stains indicated that her body and the bed were moved after her throat was cut;

. the position of Zaklina's leg was most likely due to persistent rigor mortis, indicating that she was moved after her death;

. the equal severity of Snezana's two deep wounds pointed to the probability of homicide;

. the wound to Snezana's right hand was probably a defence wound;

. the likelihood that petechial haemorrhages occurred before death;

. the marks to Snezana's lips were bruise marks and not the result of lividity.

Expert evidence generally

79 So far as is presently relevant, the admissibility of expert opinion evidence in New South Wales is governed by ss 76, 79 and 80 of the *Evidence Act* 1995 (NSW) ("the Evidence Act"). By s 79, opinion evidence is admissible if it is

"wholly or substantially based on [specialised] knowledge"[16]. Section 80 provides:

> " Evidence of an opinion is not inadmissible only because it is about:
>
> (a) a fact in issue or an ultimate issue, or
>
> (b) a matter of common knowledge."

80 In this Court it was contended that some aspects of the expert evidence were not based on specialised knowledge. Certainly some parts were not based on specialised medical knowledge but on knowledge derived from experience in the field of forensic pathology, which may well constitute "specialised knowledge" for the purposes of s 79 of the Evidence Act.

81 It was also contended on behalf of the appellant that some of the matters about which the expert witnesses gave evidence, including the displacement of Snezana's nightdress, its missing buttons and a displaced hairclip, which Dr Oettle said were suggestive of a struggle, were not "specialised knowledge" for the purposes of s 79 of the Evidence Act.

82 The concept of "specialised knowledge" imports knowledge of matters which are outside the knowledge or experience of ordinary persons[17] and which "is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience"[18]. So to say, however, is not to say that an expert

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16 Section 76(1) of the Evidence Act provides that evidence "of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed." Section 79 creates an exception to that rule in the following terms:

> "**Exception: opinions based on specialised knowledge**
>
> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

17 See *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Murphy v The Queen* (1989) 167 CLR 94 at 111 per Mason CJ and Toohey J, 130 per Dawson J; *Farrell v The Queen* (1998) 194 CLR 286 at 292-293 [10] per Gaudron J, 300 [28]-[29] per Kirby J; *R v Turner* [1975] QB 834 at 841 per Lawton LJ delivering the judgment of the Court.

18 See *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ, cited with approval in *HG v The Queen* (1999) 197 CLR 414 at 432 [58] per Gaudron J, and adopted in *R v Makoare* [2001] 1 NZLR 318 at 324 [23] per Blanchard J on behalf of the New Zealand Court of Appeal. See also *Osland v The Queen* (1998) 197 CLR 316 at 336 [53] per Gaudron and Gummow JJ.

witness cannot have regard to matters that are within the knowledge of ordinary persons in formulating his or her opinion. So much is expressly acknowledged by s 80(b) of the Evidence Act.

83 As will later appear, it is unnecessary to determine the admissibility of those aspects of the expert evidence with respect to which argument was addressed in this Court. However, once it is accepted that an expert witness may have regard to matters of common knowledge, much of the argument must be rejected. This notwithstanding, one aspect of the argument should be accepted. That aspect concerns the evidence of Professor Mason that "the main stumbling block to [the suicide theory] ... lies in what seems to be incontrovertible evidence of movement of the bodies and furniture after the mother's death." The question whether that evidence was or was not "incontrovertible" was not a matter for expert evidence. Rather, it was a matter for jury determination.

84 Before turning to the evidence with respect to the possible movement of the bodies and the furniture, it is necessary to consider one other feature which pertains to expert evidence generally. As already indicated, expert evidence is evidence with respect to matters outside ordinary experience or knowledge. Where conflicting evidence is given with respect to such matters, the conflict will ordinarily be capable of resolution by a jury only if the evidence is based on matters of common knowledge or experience or on assumptions with respect to matters about which the jury can reach its own conclusions.

85 If the conflicting evidence of experts is not based on matters or assumptions with respect to matters upon which the jury can reach its own conclusions but, instead, is evidence of "opinion on matters of science within disciplines of which each [is] a master, and at a level of difficulty and sophistication above that at which a juror ... might by reasoning from general scientific knowledge subject the opinions to wholly effective critical evaluation", a jury cannot, by reference solely to that evidence, resolve that conflict in a manner "which would eliminate reasonable doubt"[19].

Matters incapable of resolution

86 For present purposes, it should be noted that there were clearly three matters about which the only evidence was conflicting expert evidence on purely scientific matters and which, therefore, could not be resolved by the jury beyond reasonable doubt. The first concerns the origin of the petechial haemorrhages which, in Dr Bradhurst's opinion, were the result of the position of Snezana's

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19 *Chamberlain v The Queen* (1983) 72 FLR 1 at 82; 46 ALR 493 at 574, cited with approval in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 558 per Gibbs CJ and Mason J.

body but, which, in the opinion of Dr Collins, with which Drs Cooke and Oettle and Professor Mason agreed with varying emphasis, were more likely to have been asphyxial in origin and, thus, indicative of an assault upon Snezana shortly prior to her death.

87 The second matter which could not be resolved by the jury by reference to the expert evidence was the question whether the marks on Snezana's face were bruises as Dr Oettle thought or post-mortem lividity as opined by Dr Bradhurst. The final matter which the jury could not resolve by reference to the expert evidence was whether the periosteal haemorrhage observed by Dr Bradhurst during his post-mortem examination was an old haemorrhage, as he suggested in his evidence, or was a recent haemorrhage, as suggested by Dr Oettle.

88 Apart from the above matters of expert opinion about which the jury could not reasonably have reached a conclusion, a number of other matters upon which the experts based their conflicting opinions were matters about which there were competing explanations. Importantly, there was evidence that the bruises and abrasions noted on Snezana's body could have been the result of a struggle with Zaklina whose body had defensive type wounds. So too, it must be assumed, could Snezana's displaced hairclip. Further, Dr Bradhurst allowed in his evidence that Snezana's clothing was probably disturbed by him whilst taking vaginal swabs in the bedroom.

89 When regard is had to the above matters and also to the inability of the jury to resolve the conflict with respect to the purely scientific matters, it must be concluded that the jury could not have excluded Snezana's suicide as a reasonable possibility unless satisfied either that the bed was moved after her death but before the bodies were found or that her body, or the bodies of one or more of her children were moved after her death.

Movement of the bodies and bed

90 It was not in issue at the trial that, by reason of the location of the blood stains found on the children and their night attire, there had been, in the words of Mr Raymond[20] "some movement of the bodies in relation to one another after the deposition of at least some [of Snezana's blood]". So, too, it was not in issue that the bed was moved at some stage after Snezana's throat was cut. That was because the blood stains on the wall and skirting board behind the bed could only have been laid down if, when Snezana's throat was cut, the bed was "some centimetres" further away from the bodies than it was when the police photographs were taken.

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20 Mr Raymond, a blood stain pattern analyst, gave evidence as to the location of blood stains.

91 Those experts who favoured the view that the bed and or the bodies of the children were moved after Snezana's did so by reference to matters which, upon proper analysis, were also purely scientific or medical matters and about which there was conflicting evidence. The first of those disputed matters was whether Snezana's throat was cut in a single movement, resulting in her immediate paralysis. In the face of the conflicting evidence of Dr Bradhurst that, in his opinion, Snezana's wound was the result of two distinct cuts, the jury could not conclude beyond reasonable doubt that it had been cut in a single movement, as Dr Oettle thought likely. Nor could the jury conclude that Snezana's death occurred immediately in the face of the expert evidence of Dr Zillman that, by reason of the presence of blood spurts on blood that had already dried, Snezana must have taken some time to die. Thus, the expert evidence necessarily left open the reasonable possibility that Snezana's throat was cut in two movements and that she was alive for some time after the first cut, even if less than three minutes, before the second cut which resulted in immediate paralysis.

92 On the basis that it was a reasonable hypothesis that Snezana's throat was cut in two movements and that she lived for a few minutes – perhaps three minutes – before sustaining the second cut which led quickly to her death, the question for the jury was whether it was or was not a reasonable possibility that, having made the first cut to her own throat, she moved the bed "some centimetres" and placed the bodies of the children in the positions in which they were found (or vice versa) before placing herself on top of the children and inflicting a further cut which led quickly to her death. And that question also involved matters of scientific or medical knowledge about which there was conflicting evidence.

93 As to the possibility of movement, Drs Bradhurst and Zillman were of the view that the injuries from the first wound to Snezana's throat would not prevent her moving the bed and the bodies of her children and that the movements in question were physically possible. Dr Collins said that although it was "an unusual scenario" her capacity to carry out the movements would "depend ... on what structures were damaged" and accepted that it was not known "what structures were damaged."

94 Dr Oettle's opinion that Snezana could not have moved the bed and the bodies of her children was first postulated on the "bilateral severance of the carotid arteries and the major jugular veins, internal jugular veins, the right vertebral artery, the right side of the spinal cord". In other words, his opinion was first based on the total injuries sustained and did not take account of the possibility that some time elapsed between a cut to the left side of the throat and a subsequent cut to the right side. It was only in agreeing with a proposition put by the trial judge that Dr Oettle expressed the view that, because of the amount of blood near the bedside cabinet shown in the photographs, Snezana would not have been able to move to the spot where she was found "irrespective of whether

she had at that stage received the cut that cut into the spinal column". The question whether, on the hypothesis that her throat was cut in two movements, Snezana could have moved the bed and bodies of her children was not directly put either to Professor Mason or to Dr Cooke.

95 Nor is the reasonable possibility that Snezana moved the bed and the children's bodies after cutting the left side of her throat and before inflicting a second cut to the right side capable of being negatived by the evidence relating to Zaklina's left leg. Those witnesses who expressed the opinion that rigor mortis had set in before her body was placed in the position in which it was found did so on the basis that photographs taken in the bedroom indicated that her foot and lower left leg were unsupported.

96 Dr Bradhurst, who viewed the bodies in the bedroom, expressed the opinion that "the body [then] appeared to be ... suitably arranged against the body of her mother and in relation to the twins" and that "it may have been in that position at the time of her death, there being sufficient friction and position against each other to keep it in that position". Similarly, Dr Zillman expressed the opinion that if rigor mortis had set in before Zaklina's body was placed over the bodies of the twins, then one "would expect that the rest of [her body] would be unusual for its location and it [was] not". Instead, according to Dr Zillman, "[t]he rest of her posture [was] fixed in rigor mortis just as the legs [were] and the rest of her posture exactly matche[d] the position in which she was found."

The appellant's conduct

97 It follows from the foregoing analysis of the expert evidence that the question whether the jury could have concluded that it was not a reasonable possibility that Snezana murdered her children and then committed suicide depended on the other evidence led at trial. That evidence consisted, chiefly, of evidence relating to the conduct of the appellant immediately before and subsequent to the deaths of his wife and children. The prosecution relied on that conduct as evidence of consciousness of guilt.

98 As appears from the appellant's record of interview and his sworn evidence at trial Snezana was in a highly distressed and irritable state on the morning of Sunday, 19 June 1994. Following a telephone conversation with her mother, Snezana indicated to the appellant and his parents that she and the children were going to move into a flat. Although the appellant denied it in his evidence at the trial and in one of his interviews with the police, there was evidence that he had told Detective Sgt McGrath, on the day after the bodies were found that Snezana had also told him that she was not happy with his parents living with them.

99 According to the appellant's record of interview and sworn evidence, his wife then took the twins into the main bedroom and locked the door. This

occurred at approximately 11.00 am. The appellant, on his account, stayed with his parents for some little time and went into Zaklina's room at approximately 1.00 pm. He said that he remained there until early the next morning without leaving the room even to go to the bathroom. He said in his record of interview and in his evidence at the trial that he did not see his wife or the twins after Snezana went into the bedroom. The following day, he told Detective Sgt McGrath that he had seen Snezana prepare Zaklina's lunch for school and the evidence of his father was that that occurred in the kitchen about 8.30 pm. Further, the appellant's father told police on 20 June that he had eaten dinner with his wife, Zaklina and the appellant on 19 June. The appellant and his father denied this at trial.

100 Upon rising on Monday morning at 6.00 am, according to the appellant, he knocked on the door of the main bedroom and received no response. Shortly after this the appellant drove his parents to his sister's home. He returned home to collect various things for his parents and then drove back to his sister's place. He said he took his parents to his sister's house because he wanted to speak with his wife in their absence so that he could find out what was troubling her. According to his evidence, he did not knock on the door of the main bedroom, call out to his wife, or attempt to open the door during the period in which he returned home to collect his parents' belongings.

101 When the appellant returned to his sister's home, she advised him to contact the Macedonian Welfare Association and suggested that Snezana may have gone to her parents' house. The appellant did not then or at any subsequent time attempt to contact Snezana's parents. However, he did go to the Macedonian Welfare Association, arriving there at approximately 11.00 am, and spoke to a social worker, Mrs Nikolovska.

102 At the Macedonian Welfare Association, the appellant asked Mrs Nikolovska if his wife had been there. He was told that she had not. After some further conversation, Mrs Nikolovska advised the appellant to contact Snezana's parents and to check at Zaklina's school. During the course of the day the appellant told various persons to whom he spoke that Mrs Nikolovska had told him that he could not contact the police as to Snezana's whereabouts for 24 hours. The appellant maintained this account of his conversation with Mrs Nikolovska in his record of interview and at the trial notwithstanding her evidence that she said that he should wait until 3.00 pm before contacting the police. In fact, he did contact the police, through his neighbours, at 3.25 pm, which, on his account, was a little more than 24 hours since he had last seen his wife.

103 After leaving the Macedonian Welfare Association, the appellant, according to his evidence, went home and collected two notes explaining Zaklina's absence from school the previous Friday. The notes, he said, were in

the kitchen. The appellant then went to Zaklina's school and asked if she was there. According to his account, he then returned home.

104 At approximately 1.00 pm, the appellant phoned Snezana's aunt, telling her that he was looking for his wife and children. In his evidence, he said he tried to persuade her to phone Snezana's parents. According to the aunt, the appellant told her that he and Snezana had been arguing and that Snezana had left and taken the children with her. On the aunt's account, she told the appellant to phone Snezana's parents and he informed her, as he had earlier informed the social worker and later his neighbour, that he did not know the telephone number.

105 At about 3.00 pm, the appellant approached his neighbour, Mr Jorge, to inquire if he had seen his wife. It was at that stage that the neighbour rang the police for the appellant. Mr Jorge interrupted his conversation with the police to ask the appellant when he last saw his wife. Mr Jorge informed the police that the appellant's English was poor but said that "he said since 2 o'clock this morning that door has been locked".

106 At this stage, it is convenient to note that although, in his evidence, the appellant said he did not know for how long he was simply lying down and how long he was sleeping while in Zaklina's room, he gave investigating police slightly different accounts at different times. In an interview with Snr Constable Stefanjuk on 20 June he said "I slept a little. I just laid there for periods because I was depressed." On 22 June he said he had gone to sleep at 1.00 pm. In an interview on 5 July, he likened his sleep to "the dead". And on 18 July, in another interview, he said "I have never slept for that long what I did on that day, for 17 hours." Later, on 20 July, when asked why he had slept for 17 hours, he replied "I don't know. I can't – I can't imagine how – why I slept so long 'cause this has never happened to me before in my life." Evidence was called as to the improbability of the appellant having slept from 1.00 pm to 6.00 am the following day without waking. It should be noted however, that whenever the appellant was asked directly whether he had slept for the entire period in which he was in Zaklina's room, he said that he had not done so.

107 Additionally, there was evidence that the safety catch on the main bedroom door could easily be released from the outside by the insertion of a screwdriver or small stick into a slot on the outside door handle. In cross-examination the appellant denied that he knew how to open the door from the outside and there was no evidence to the contrary. Although the slot on the outside door handle was said in evidence, by a qualified locksmith, Ms Arundell, to be "pretty obvious", the first police officers to arrive at the scene on 20 June asked the appellant for a hammer with which to bash a hole through the door rather than utilising the inbuilt mechanism.

108 Standing alone, the evidence of the appellant's conduct – in particular, his failure to knock on the main bedroom door or otherwise check the bedroom and his failure to contact his wife's parents – was capable of sustaining an inference that he was not, as he claimed, trying to locate his wife and children and, thus, that he knew that their dead bodies were in the bedroom. So, too, his account of his remaining in Zaklina's bedroom from 1.00 pm to 6.00 am the following day, if rejected by the jury, could, in isolation, provide a foundation for the conclusion that he was attempting to conceal his knowledge of what had happened to his wife and children in the main bedroom and, also, when it had happened.

The other evidence

109 As already indicated, the evidence as to the appellant's conduct and the rejection of his account of having stayed in Zaklina's room from 1.00 pm on Sunday until 6.00 am on Monday was, if viewed in isolation from the other evidence, capable of constituting evidence as to his consciousness of guilt. However, that evidence did not stand alone. Importantly, there was evidence as to two other matters which should now be noted.

110 The undisputed evidence was that the door to the main bedroom was locked from the inside. There was evidence that the safety lock could be manipulated from the outside to give the appearance that it had been locked from the inside. The evidence was that this could be achieved by applying pressure to the knob in particular ways when closing the door. There was no evidence that the appellant knew how to manipulate the lock in any of these ways. Nor was any question put to him in the trial to suggest that he, in fact, had such knowledge.

111 The second matter to which attention should be drawn is that there was uncontested evidence that, if Snezana and the children had been murdered, their assailant would almost certainly have had a considerable amount of blood on his or her hands, clothing and shoes and that it would be likely that blood would have dripped onto other parts of the carpet. As noted above, apart from the area in which the bodies of Snezana and the children were found, the evidence was that there was no trace of blood in any other part of the main bedroom or the house or on any of the appellant's clothing or, even, in the drainage system. Moreover, the evidence was that there was no sign of any attempt to remove any blood stains.

Unreasonable verdict

112 Having regard to the inconclusive nature of the expert evidence and the evidence negating the presence of blood or traces of blood on any of the appellant's clothing or in any part of the house other than in the area where the bodies were found, the evidence was not capable, in my view, of excluding, as a reasonable hypothesis, the possibility that Snezana murdered her children and

then committed suicide. And that is so even if regard is taken of the appellant's conduct on the day before and the day subsequent to their deaths and his account of staying in Zaklina's room is rejected.

113 Although the evidence of the appellant's conduct is, as already noted, capable of supporting an inference that he was not really looking for his wife and children, it is equally consistent with his being depressed because his wife had said she was going to live in a flat and anxious not to cause her further upset. Further, rejection of the appellant's account of staying in Zaklina's room was not, of itself, evidence which placed him in the main bedroom when his wife and children met their deaths. And, when considered in the light of the evidence negating blood or traces of blood other than in the area in which the deaths occurred, that evidence could not place him in the main bedroom at the time in question.

114 It follows, in my view, that the evidence did not permit the jury to exclude, as a reasonable hypothesis, the possibility that Snezana murdered her children and then committed suicide. That being so, the jury should have entertained a reasonable doubt as to the appellant's guilt[21]. Accordingly, the appellant is entitled to have the guilty verdicts quashed and verdicts of not guilty entered.

115 Because I am of the view that the jury's verdicts were unreasonable, it is not strictly necessary for me to consider other grounds of appeal relied on by the appellant in this Court. This notwithstanding, I should indicate that, were I of the view that the jury could properly have arrived at the verdicts of guilty, I would be of the further view that there were two defects in the trial which require the verdicts to be quashed and a new trial ordered.

Failure of the prosecution to call other expert witnesses

116 The first defect in the trial, which was the subject of amended ground of appeal 2(a) and which, in my view, would otherwise require a new trial, relates to

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21 See *Peacock v The King* (1911) 13 CLR 619 at 634 per Griffith CJ; *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; *Thomas v The Queen* (1960) 102 CLR 584 at 605-606 per Windeyer J; *Plomp v The Queen* (1963) 110 CLR 234 at 252 per Menzies J; *Barca v The Queen* (1975) 133 CLR 82 at 104 per Gibbs, Stephen and Mason JJ; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 536 per Gibbs CJ and Mason J, 570, 576-577 per Murphy J, 599 per Brennan J; *Hodge's Case* (1838) 2 Lewin 227 at 228 per Alderson B [168 ER 1136 at 1137]; *R v Horry* [1952] NZLR 111 at 122 per Gresson J delivering the judgment of the Court; *R v Onufrejczyk* [1955] 1 QB 388 at 394 per Lord Goddard CJ.

the failure of the prosecution to call as witnesses those forensic pathologists who, to the knowledge of the prosecutor, had formed opinions coinciding with that expressed by Dr Bradhurst. The prosecution neither obtained statements from these persons nor called them as witnesses.

117 The ordinary rule is that:

> "all witnesses whose testimony is necessary for the presentation of the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interests of justice would be prejudiced rather than served by the calling of an unduly large number of witnesses to establish a particular point."[22]

Of course, a failure by the prosecution to call witnesses is not a defect which will result in a new trial unless it is established that that failure resulted in a miscarriage of justice, in the sense of depriving the accused of a chance of acquittal that was fairly open[23].

118 It would, I think, be going too far to say that, where there is a conflict in the evidence of expert witnesses, the interests of justice require the prosecution to call all experts who are known to have expressed opinions on the matter in issue. However, two particular matters rendered it necessary in this case for the prosecution to call those forensic pathologists who were known to have expressed opinions coinciding with those of Dr Bradhurst.

119 It will be recalled that Dr Bradhurst was of the view that certain marks on Snezana's face and shoulder were the result of post-mortem lividity and that petechial haemorrhages observed on her eyelids, lips and gums occurred post-

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22 *Whitehorn v The Queen* (1983) 152 CLR 657 at 664 per Deane J. See also at 674-675 per Dawson J (with whom Gibbs CJ and Brennan J agreed on this point at 660). See also *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 292-294 per Fullagar J; *Richardson v The Queen* (1974) 131 CLR 116 at 120-122 per Barwick CJ, McTiernan and Mason JJ; *Ram Ranjan Roy v The King* (1915) AIR Calcutta 545; *R v Harris* [1927] 2 KB 587 at 590 per Lord Hewart CJ; *Seneviratne v The King* [1936] 3 All ER 36 at 49 per Lord Roche. Cf the earlier view that correct prosecutorial practice merely required the Crown to make all witnesses available for the defence to call: *R v Woodhead* (1847) 2 Car & K 520 per Alderson B [175 ER 216]; *R v Cassidy* (1858) 1 F & F 79 per Parke B [175 ER 634].

23 *R v Apostilides* (1984) 154 CLR 563 at 577-578.

mortem. Dr Oettle and, to a lesser extent other experts who gave evidence that, in their opinion, Snezana's death was probably homicidal, considered that the marks were bruise marks and that the petechial haemorrhages may have been the result of neck compression while she was alive. It was not disputed in this Court that Dr Botterill assisted Dr Bradhurst with the post-mortem examinations. It is to be assumed that he would have been in a better position to form an opinion about the nature of the marks on Snezana's body and, perhaps, the petechial haemorrhages than those experts who based their opinions mainly, or, in some cases, wholly on photographs.

120 The second matter that should be noted with respect to the failure of the prosecution to obtain statements from those persons who supported Dr Bradhurst's opinion and to call them as witnesses is that, in his summing up, the trial judge instructed the jury that it was for them "to give such weight to the opinions of [the] expert witnesses as [they thought appropriate], having regard to the qualifications of the witness, the honesty of the witness, the partiality or otherwise of the witness and the extent, if any, to which the witness' opinion accords with such other facts as you find proved to your satisfaction." A little later, his Honour instructed the jury that "in assessing the evidence of those experts whom you find to be credible and impartial ... it would not be proper to find an issue against the accused by accepting one body of expert evidence and rejecting another unless there was good reason for doing so."

121 It will later be necessary to consider the adequacy of the trial judge's directions with respect to the conflicting expert evidence. For the moment, it is necessary to observe only that, in the context of the direction set out above, the case was left to the jury on the basis that they might reject the evidence of particular experts. What is important to note is that the jury could only have found the appellant guilty by rejecting the evidence of Drs Bradhurst and Zillman. As their opinions did not depend entirely or, even, mainly, on facts that the jury might or might not find proved to their satisfaction, it must be taken that their evidence was rejected, at least in significant part, on the basis of their honesty, credibility or partiality, unless, in the case of Dr Zillman, his evidence was also rejected on the basis of his comparative lack of experience in the field of forensic pathology. Their evidence might well not have been rejected on any of those bases if those persons who agreed with the opinion of Dr Bradhurst had been called as witnesses in the trial. Accordingly, in my view, the failure of the prosecution to obtain statements and call them as witnesses resulted in a miscarriage of justice.

Directions to the jury

122 The grounds of appeal with respect to the trial judge's directions to the jury related to the use which the jury might make of lies, if any, told by the appellant (amended ground of appeal 2(c)) and the failure of the trial judge to adequately instruct the jury with respect to the conflicting expert evidence

(amended ground of appeal 2(e)). It is convenient to deal first with the directions concerning conflicting expert evidence.

123 With respect to the conflicting expert witnesses, the trial judge directed the jury that "insofar as their opinions depend on scientific, medical or physiological knowledge, as opposed to the common experience of people in general such as yourselves or on commonsense, it would not be proper to find an issue against the accused by accepting one body of expert evidence and rejecting another unless there was good reason for doing so." That direction was explained in these terms:

> " You would need to consider, for example, whether the expert based his or her evidence on some view of the facts which is different to the facts as you find them to be; whether he or she placed weight on facts which appear to you to be established by the evidence or not established by the evidence; did others express a different view taking into account matters of which the particular expert was unaware or which he or she appeared to overlook. Did he or she appear to place too much weight on some aspect of the case which some of the other experts thought less important."

124 To the extent that the expert witnesses took account of matters which were not purely matters of science or medicine – for example, the appearance of the scene, Snezana's wearing of a necklace and the buttons missing from her nightdress – that direction was both necessary and adequate. However, as earlier indicated there were conflicting opinions as to matters of pure science or medicine.

125 The conflicting opinions on matters of pure medicine or science concerned the nature of the marks on Snezana's face and shoulder, the origin of the petechial haemorrhages, the age of the periosteal haemorrhage and the question whether the wound to her throat could have been inflicted in one or two movements, and whether, if in two movements, she would have been capable of moving her children's bodies and the bed. These matters should have been identified as matters which did not depend on facts which the jury might or might not find proved to their satisfaction, but were matters of pure science or medicine which could not be resolved simply by preferring one body of expert evidence to another.

126 With respect to the appellant's contention that the trial judge's directions on the use which the jury might make of lies was inadequate, the trial judge identified only one matter which the jury might find to be a lie, namely, the appellant's statement that he was in Zaklina's room from 1.00 pm until 6.00 am the next day and that he slept from 3.00 or 4.00 pm until 6.00 am. Further, the trial judge gave general directions as to what must be established before a lie can be used as evidence of consciousness of guilt and further instructed the jury that

lies were only "relevant ... if they amount to circumstances which, along with other circumstances, satisfy you beyond reasonable doubt that there is no other rational conclusion but that the accused is guilty." So far as the directions concerning lies are concerned, they were, in my view, appropriate and adequate in their particular context.

True alternatives

127 Although it was not the subject of any ground of appeal, there is one final matter to which I should refer. The case against the appellant was entirely circumstantial, but it differed from most circumstantial cases in that it was presented as a case of true alternatives – either Snezana killed her children and then committed suicide or the appellant killed his wife and children. In the case of true alternatives, the exclusion of one necessarily proves the other. In a context in which the expert evidence was presented in terms of probabilities, there was a real danger that the jury might have rejected the defence case as improbable or, even, highly improbable and then reasoned that, that being so, the appellant must be guilty.

128 Early in his directions to the jury, the trial judge instructed the jury that they could only convict the appellant if satisfied beyond reasonable doubt that he was guilty. Additionally, his Honour instructed the jury that, if satisfied only that the appellant "could have killed his wife and children, or might have killed his wife and children, or probably killed them", they must acquit. A little later, his Honour instructed the jury that, to convict, they "must be satisfied beyond reasonable doubt that the killer could not have been Snezana".

129 The above direction is not of itself inadequate. However, the trial judge had earlier told the jury that the words "beyond reasonable doubt" needed no explanation. Ordinarily that will be so. But because the case, as presented, was postulated on true alternatives, the full implication of the direction that the jury could not convict the appellant unless "satisfied beyond reasonable doubt that the killer could not have been Snezana" may not have been entirely clear. It would have been preferable for the jury to be instructed that, if there was any reasonable possibility that Snezana killed her children and then committed suicide, they should acquit and, conversely, they could only convict if that was not a reasonable possibility.

Conclusion

130 The appeal should be allowed, the order of the Court of Criminal Appeal set aside and, in lieu of that order, the appeal to that Court should be allowed, the convictions quashed and verdicts of not guilty entered.

GUMMOW AND CALLINAN JJ.

The facts

131 At about 4 pm on 20 June 1994, police officers found in the main bedroom of the appellant's residence at Berkeley, Wollongong, the corpses of four persons: on the floor the appellant's twin babies, lying on them his six year old daughter Zaklina, and above her, face down, her head almost severed from her torso, the children's mother and his wife, Snezana. Their throats had been cut. There was a knife on top of the twins' bodies close to Zaklina's face and Snezana's right hand. Their deaths almost certainly occurred between 9 pm on 19 June and 5 am on 20 June. Throughout that period, there were three other persons in the house: the appellant, his father Petre, and his mother Tasa.

132 On their arrival at the residence, the appellant told the police officers this:

> "I think my wife lock herself in bedroom with children. I no see since last night. She took children in room and lock door. I sleep out here."

133 The appellant claimed that he did not have a key to the locked door.

134 The appellant was interviewed at Port Kembla police station at about 6 pm on 20 June 1994 by a police officer fluent in Slavic languages. During that interview, this was recorded:

> "'Can you tell me what happened?' The appellant replied 'There was a disagreement between Snezana and her mother when Snezana asked her mother for help in looking after the children. I went into the daughter's bedroom at 1 o'clock and didn't come out until 6 this morning'. Senior Constable Stefanjuk asked the appellant 'Did you sleep the entire time?' The appellant replied 'I slept a little. I just laid there for periods because I was depressed'. Senior Constable Stefanjuk asked 'Did anything else happen that day?' The appellant replied 'Snezana told me that my parents had to move out of the house'."

135 The clothes that the appellant said that he wore on the night of 19 June 1994 were examined and showed no signs of blood stains. Nor were there any traces of blood found on the light switch in the bedroom or anywhere else in the house. There was no indication that any external doors or windows of the appellant's house had been forced. The appellant told police that he had not seen his wife and children since the previous night; that his wife had taken the children into the bedroom and locked the door. The lock was engaged when a button on the inside knob of the door was pressed. The door could however relatively easily be opened from the outside by the insertion of a flat projector

into a rectangular slot on the outer door handle. A screwdriver, a "paddlepop" confectionery stick or a similar, flat, firm object could be used to turn the lock. The appellant denied any knowledge of any means of unlocking the door without a key.

The trial

136 The appellant was charged with the murder of his wife and their three children. He was tried in July 1997 in the Supreme Court of New South Wales by Dunford J with a jury and was convicted on all counts.

137 The appellant, assisted by an interpreter, gave evidence at his trial. He denied killing his wife Snezana and the three children. He said that he was in great shock when he discovered that they had been killed. His wife, he said, had returned to work after the birth of Zaklina. The appellant said that during that time she looked all right but was a "little bit nervous". The appellant claimed that her nervousness manifested itself after Snezana spoke with her mother. After the twins were born there were occasions when Snezana would shut herself in her room. When the appellant was home Snezana would do this about once a week. She was not a talkative person and did not speak about matters that upset her. The appellant said that his wife could not cope with the work of caring for the children and his parents. An arrangement had been made for the appellant and Snezana to go shopping together on Sunday 19 June. Snezana telephoned her mother to arrange for the children to be minded by her for a time on Sunday. When she returned from the telephone she was in tears and said: "It looks like we won't be able to go out today". The appellant described the events that followed:

> "I was looking after the twins in the same room where they found the bodies ... At that moment she stayed in the room but she told me to go and pick up the girl from her parents and during the time that I went to pick up the child from her parents, when I returned she came out of the room at that time … Her face again showed signs that she was upset and that she started uttering very bad words to all of us. First of all she said she was going to leave, that she did not care, she did not care at all who was going to stay and remain living in the house and then on our question of 'Where are you going to go', she said 'It's not important where I am going to go' and she then used the words 'I am not going to go to my mother and father anymore. I am not looking for a husband or father for my children, wherever I go I will go and take the children with me'. We were very upset by these words … We did attempt to speak to her but she became more and more irritable but she flared up again and began to shout at us even more. I said 'Why do you want to leave home'. She said 'It is not important for you to know'. I asked her, 'Where are you going to go'. She said 'I am going to live in a flat, in some flat' and she did not say which

> one or where, she just said in a flat … For some time she sat in the television room, about ten to fifteen minutes, and she was crying by herself. We weren't bothering her during that time, not upsetting her, she was just crying. About five to 11 or 11 o'clock, as she was going from the television room into the room where the twins were, you could see her stomping with her feet, going stomping, very upset, a very upset condition, and then as she was going into the room, she slammed the door forcefully. The whole house shook from that … From that moment I did not see her anymore … For about two hours my father and my mother and I sat in the television room together, discussing why she became so upset after the conversation that she [had] with her mother and we just did not know what she was going to do afterwards, whether she was going to respond. We did not know what was going to happen … Two hours later, 1 o'clock I went into Zaklina's room at 1, I was very upset and disturbed by what I had seen, her that way, wondering what she was going to do, whether she was going to leave home, whether she was going to take the children with her, she was not looking for another father for them; I had to then go into the room to rest, to relax ... I did lie down but I cannot say how long I was lying there and when I fell asleep, I remained there until 6 o'clock the following morning ... During the time that I was in the room, I did not hear any person walking in and out or walking about the house. There was no noise like that. I did not hear the children crying, at feeding time or anything like that, I did not hear anything. I did not hear anything ... When I got up from my room at the same time my father was emerging from his room. I talked to my father ... first of all I asked him, 'Do you know who closed my door?' Because when I went to lie down at 1 o'clock my door was open and he said he did not know − and I did not know how it came to be closed; and then I went to knock on the door to get a response from my wife, whether I should go to work or not. There was no response, no sign from her or from the girls, and then immediately I decided that, we had a discussion with my father, that I should take them to my sister's place."

138 The appellant said that he suggested to his parents that they might have to find somewhere else to live. When asked why this was raised with them on the Monday morning, the appellant said:

> "Well because on the Sunday she was saying she was going to leave and she would not tell us where she was going to go and because she hadn't emerged from her room at all and I was asleep in the other room and I felt something must be wrong, and then I thought that I should take, ask them to go so I would remain on my own with her to find out what was the matter."

139 When pressed as to why he did not hear any noise coming from the bedroom on the morning of the discovery of the bodies the appellant said this:

> "Yes I couldn't sort of think something like that because we were there altogether before. The fact that there was no response from her, I had no idea why there wasn't any response, what was in her mind, why she wasn't responding − I had no idea."

140 The appellant said that in the morning he had called at the Macedonian Welfare Association Services before the bodies were discovered. There he had spoken to Olga Nikolovska and Nada Petrevska. Later he telephoned his sister. The appellant next went to the Berkeley Primary School to convey "some letters" to Zaklina's teacher explaining an earlier absence of the child from school. The appellant said that he was informed by her teacher that Zaklina was not present at school that day. The appellant returned home and telephoned Snezana's aunt. Following that conversation he spoke to his neighbours and asked them to contact the police. The appellant denied that he had been in the bedroom occupied by Snezana since he woke at 6 am. Nor, he said, had he seen either of his parents enter the room.

141 The appellant offered this explanation:

> "First of all I didn't want to break the door down and also that if I broke the door down knowing that my family was inside, I thought that I would upset them inside and the builder, my builder had told me − actually my builder had not told me how to open the door in a correct manner without having to break it down."

142 The appellant said that in a conversation with his wife earlier in the week, she had said to him that " … she felt incapable of looking after so many people, including the children and if my parents would go out of the house, to leave the house." The appellant concluded his evidence in chief by denying that he had any reason to kill his wife and children and could not conceive of circumstances that would make him do so.

143 The appellant's case has always been that his wife killed the three children and then cut her own throat.

144 The appellant's father was called to give evidence at the trial by the respondent. However, in view of some contradictory statements he had earlier made to police officers the respondent was permitted to cross-examine him. Although the father's evidence generally confirmed that of the appellant, he did contradict the appellant and himself, particularly as to times and his last sighting of Snezana.

145 The prosecution case was a circumstantial one. Reliance was placed by both sides on evidence from pathologists.

146 The Crown pointed out that the appellant's presence in the house obviously afforded him the opportunity of killing his family. It was inherently unlikely that he would have spent 17 hours in the one room, Zaklina's bedroom, as he claimed, without leaving it, whether to obtain food or drink, or even to visit the lavatory. Additionally, the prosecution attached significance to the appellant's claim to believe that, although Snezana was in the bedroom with the children throughout those 17 hours, the appellant did not knock on the door, did not call out, did not look under the door (as the police later did), and did not attempt, with or without the assistance of others, to obtain access to the room. The prosecution submitted, both at the trial and during the appeals, first to the Court of Criminal Appeal of New South Wales and to this Court that this conduct was inexplicable, except on the basis that the appellant must have known what had happened to Snezana and the children in the bedroom.

147 Other circumstances pointing to guilt and relied on by the Crown were these. In the early morning of 20 June 1994 the appellant caused his parents to leave the house, hurriedly and without any earlier notice to them. They had only migrated to this country in July 1989 and had subsequently lived with the appellant and Snezana, except for a brief period when they had voluntarily spent a short time elsewhere.

148 Another inculpatory circumstance upon which the Crown relied was the appellant's visit to Zaklina's school (which had however been suggested by Ms Nikolovska of the Macedonian Welfare Association Services) and inquiries there of her teacher Ms Dimitrovska whether Zaklina was at school; yet the appellant handed at that time two notes to Ms Dimitrovska, saying as he did so that he had found them in Zaklina's school bag at home. It was open to the jury to conclude therefore, the Crown submitted, that the appellant's inquiry of Ms Dimitrovska was not a genuine inquiry. If the school bag was at home, the Crown rhetorically asked, how could the appellant genuinely possibly believe that its owner was at school? The appellant made no attempt to ascertain whether his wife was at her parents' place, despite that the appellant's sister Ratka suggested to the appellant that Snezana might have gone there. A social worker from the Macedonian Welfare Association Services, Ms Nikolovska, had made a similar suggestion. The appellant gave the unlikely explanation for his failure to contact his wife's parents, that he did not have their telephone number.

149 The arrangement of the room and the bodies in it, and especially the presence of blood behind the bedhead, matters fully discussed by Gleeson CJ and Hayne J in their joint judgment and which we need not repeat, argued against murder and suicide by the appellant's wife. Another relevant circumstance was that when the police officers entered the room the lights in it were not turned on.

There was no evidence whether curtains or blinds were installed on the windows and if they were, whether they were open or shut on entry of the police. Nor was there any evidence as to what could or could not be seen and done in the room at night. The Crown, not surprisingly, argued that it was unlikely that the appellant's wife could have killed herself and the children in darkness.

150 Some other significant factual matters should be mentioned. There were some fingerprint markings (unidentifiable) on the handle of the knife which had been used to effect the killings. They had not, as might perhaps have been expected of a murderer, been wiped or cleaned away. Against that however, was the evidence that Snezana's hands were covered in blood, yet no significant quantity of blood had been transferred to the handle of the knife. There was no suggestion that the appellant was other than, to all appearances, a good father.

151 We turn now to the evidence of the pathologists which Grove J in the Court of Criminal Appeal summarised in a manner that we are for present purposes content to adopt:

> "The possibility of suicide by Snezana [after killing the children] was canvassed by the six forensic pathologists who testified − Dr Bradhurst, Dr Cooke, Dr Oettle, Dr Collins, Professor Mason and Dr Zillman. Dr Bradhurst had been called to the scene by police. He performed post mortems on the following day and a second post mortem examination later in the company of Dr Cooke. Dr Bradhurst considered that the probabilities favoured murder/suicide and Dr Zillman expressed the same view. The others favoured murder/murder except Dr Cooke who effectively adopted a non-preferential stance. It will be necessary to conduct some examination of the views of the pathologists and the bases for them. At present it suffices to observe that there was credible evidence available to the jury upon which they could find that all four deceased were the victims of murder. It is recorded that Detective Whyte testified that he had been informed by Dr Bradhurst that others of his professional colleagues were in support of his view. Professor Hilton, Dr Duflou and Dr Botterill were named but no statement of their concordant views was obtained by police and they were not called."

The appeal to the Court of Criminal Appeal

152 The appellant's appeal to the Court of Criminal Appeal (Grove and James JJ; David Kirby J dissenting) was dismissed. The majority were satisfied that the verdict was open on the evidence, that no errors had been made at the trial giving rise to a miscarriage of justice, and that the verdicts had not been shown to be unreasonable.

The appeal to this Court
Is there a field of expertise as to the self-infliction or otherwise of wounds?

153 The first submission of the appellant in this Court was that the Court of Criminal Appeal erred in failing to hold that a miscarriage of justice was caused by the admission of inadmissible evidence from the medical witnesses called by the prosecution. The substance of that submission is that evidence given by pathologists that murder, rather than suicide, of the appellant's wife was the more likely hypothesis, was not expert evidence and should not have been admitted.

154 The appellant contended that it was not established that there is a reliable body of knowledge and experience, based on the observation of wounds, which would enable a person to express an expert opinion whether particular wounds were self-inflicted. The appellant accepted that in *Mason*[24] the English Court of Criminal Appeal had held that an expert could give evidence whether wounds were self-inflicted, but submitted that the Court's reasoning was questionable in that it assumed that "there is no difference in principle" between an opinion that wounds were self-inflicted and an "opinion whether the deceased died in consequence of his wounds, or from natural causes".

155 The existence of such a field of expertise was doubted but ultimately accepted in *R v Anderson*[25] in which Winneke P said this[26]:

> "Counsel was prepared to accept, and asked the court to accept, that there is an organised body of knowledge and experience, based on the observation of wounds alone, which will entitle a person, skilled in the knowledge, to express an expert opinion upon the question of whether particular wounds observed are self-inflicted[27]. I must confess to some difficulty in comprehending how a person, medically qualified or not, by merely observing wounds, can express an opinion that they have been 'self-inflicted'. However, I am prepared to accept that such a body of knowledge exists. The evidence of Wells and Collins tends to lend some support to its existence. What is clear, however, is that such body of knowledge does not derive from recognised principles of medical science,

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24 (1911) 7 Cr App R 67 at 69, citing *Archbold's Criminal Pleadings* 24th ed (1910) at 452.

25 (2000) 1 VR 1.

26 (2000) 1 VR 1 at 22-23 [55].

27 cf *Clark v Ryan* (1960) 103 CLR 486 at 490-491 per Dixon CJ, 501-502 per Menzies J; *R v Bonython* (1984) 38 SASR 45 at 46-47 per King CJ.

> but rather from the study of characteristics and patterns of wounds from which one may infer, by comparison with recognised standards, that the wounds being studied are themselves self-inflicted. Such an expertise would not necessarily be limited to medical practitioners although, by dint of their practice, they would be the more likely possessors of it. In a real sense, as I understand it, the claimed expertise is derived from empirical data in much the same way as those who claim an expertise in analysing and interpreting blood stains to determine their source of origin, whence they emanate and the force of impact required to produce them. However the field of expertise, which we are asked to assume in this case, would seem to me to be necessarily an imprecise one simply by reason of the infinite variety of circumstances in which wounds are produced and can be suffered. In general terms, the law's own experience suggests that expressions of opinions that a wound or wounds are self-inflicted are those expressed with full knowledge of surrounding circumstances; for example the history given by the victim or the knowledge that the victim was found in circumstances suggesting self-harm, etc. It is, perhaps, instructive that counsel have not been able to cite to the court any case where opinion evidence of this type, given in circumstances where the accused denies self-infliction and asserts infliction by a third party, has been recognised or received in evidence."

156 Whether wounds may have been suicidally self-inflicted is capable, in our opinion, of being the subject of expert evidence, if a suitable foundation as to the witnesses' training, study or experience has been laid.

157 We do not take Winneke P to be expressing any contrary view, but simply to be offering a caution, which, with respect, we think appropriate, regarding the occasional imprecision of such evidence and the need to scrutinize it with great care.

158 Nothing in s 79[28] of the *Evidence Act* 1995 (NSW) ("the Act"), stands in the way of the reception of expert evidence of this kind. "Training, study or experience", the words used in the section, necessarily include, as they must in all areas of expertise, observations and knowledge of everyday affairs and events, and departures from them. It will frequently be impossible to divorce entirely these observations and that knowledge from the body of purely specialised

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28 "Exception: opinions based on specialised knowledge

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

knowledge upon which an expert's opinion depends. It is the added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give his or her opinion. Section 80(b)[29] of the Act is to no different an effect.

159 There is, in fact, in any event, as resort to texts (to which Winneke P was not apparently referred) shows, an established body of expertise and specialised knowledge on the topic of self-inflicted wounds. In Freckelton and Selby's *Expert Evidence*, in that part of the publication which deals with forensic pathology, Dr Cordner writes this[30]:

> "There are four categories of self-inflicted injuries, which have different patterns: suicidal; self-mutilation (these may be either by psychiatrically disturbed individuals, or to precipitate medical treatment as in the case of some prisoners); self-inflicted injuries mimicking an assault; and scarification (of decorative or totemic significance, and in Australian Aborigines as signs of remorse). As a general rule, lacerations and bruises are rarely self-inflicted.
>
> *Suicidal injuries*
>
> Suicidal injuries usually occur in what are called 'sites of election'. Sites involving incised wounds from sharpened implements such as razors include the wrists, front of elbows and forearms, *front and sides of neck* and occasionally the groin. *Wounds may be single but are often multiple and grouped together*, and there may be a regularity or symmetry to the pattern. For example, the wounds are often parallel to each other, and often of similar severity, although there may be a number of 'tentative' marks adjacent to the more significant wounds. The injured site, by definition, must be accessible. The clothing is usually spared.
>
> *It is not usually difficult to distinguish a suicidal and homicidal 'cut' throat. The former often has the characteristic tentative or hesitant*

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29 "Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about:

…

(b) a matter of common knowledge."

30 Cordner, "Forensic Pathology", in Freckelton and Selby's *Expert Evidence* (1993), vol 1 at [33.460]-[33.470].

> *relatively superficial incisions, usually at the lateral end of the deeper wounds*. The presence of other suicidal injuries, the absence of injuries associated with an assault together with circumstances indicating a suicide, including the location of the weapon, will assist with resolving the issue. Suicidal stab wounds may be accompanied by 'tentative' marks.
>
> Vanezis and West (1983) reported on 21 fatal cases of self-stabbing. In fifteen cases, tentative or hesitation injuries were present. In a further two cases, such marks were evident in the clothes but not on the body, emphasising the importance of examining the clothing. Often the clothing is completely spared. The common sites of election are the chest and abdomen, the exact location sometimes depending on the victim's knowledge of anatomy." (emphasis added)

160 Medical doctors, and pathologists in particular, are well capable therefore of processing specialised knowledge enabling them to offer informed opinions as to the infliction, self or otherwise, of injuries. Their experiential knowledge of the pathology of blood, tissue, bone, and additionally, of the way in which vulnerable parts of the body may be reached with weapons would, on that basis as well, qualify them to express an opinion on this matter.

Did the experts trespass beyond their expertise?

161 It is true however, that in this case the experts may, despite s 80(b) of the Act, in some respects have gone beyond their field of expertise. The appellant submitted that several of the experts relied upon phenomena which required no expertise for its assessment. Dr Oettle gave evidence that "the position and the direction" of blood smears on Snezana's leg were such that he thought it "most unlikely" that they were made by her. Defence counsel objected to the expression of this opinion. A criticism was also made of Dr Oettle's reliance on the fact that Snezana's nightgown was "displaced"; that the absence of two buttons was "very suggestive of a struggle"; and that a hairclip on Snezana's head had been dislodged, having first made assumptions as to how securely the hair clip had been fastened. Dr Collins in his evidence, referred, as part of his expert opinion to the "incongruity of scene tranquillity". He had, he said, a "feeling" that "the scene might have been cleaned up", and referred to "commonsense on how the child is held against a shoulder and what parts are exposed". These matters were relevant, he said, to the hypothesis of the defence that Snezana had held her children to her shoulder after cutting their throats. Professor Mason said that the scene "looked almost too peaceful". Defence counsel objected to this opinion also, submitting that it was "not a scientific opinion, nor a pathological opinion". Professor Mason stated that: "The main stumbling block to [the suicide theory] ... lies in what seems to be incontrovertible evidence of movement of the bodies and furniture after the mother's death."

162 The appellant pointed out that the experts themselves conceded that they had relied upon matters which did not require medical or scientific knowledge. Dr Collins acknowledged that some matters that he relied upon might not have a basis in medical judgment and that he was "not better qualified than anyone else in relation to the judgments that have no medical basis necessarily for their support". Dr Oettle disagreed with the view that "the medical evidence alone is not conclusive" but concluded that the difference between homicide and suicide "lies mainly in the history and the circumstance of the crime scene and to some extent the characteristics of the injuries". Professor Mason agreed that he had considered "all the available evidence", including "a number of matters which don't depend upon the pathological findings … that is, scientific, medical views". In cross-examination he responded to the suggestion that some of his statements were "entirely conjectural" and "speculative" by stating that: "Most of the statements ... are based on some logical thinking rather than just plucking them out of the air … There's always got to be speculation if you don't know the answer". Dr Zillman, the defence expert, noted that "one of the attributes of a pathologist is a creative imagination".

163 That the experts made these concessions does not of itself however avail the appellant in the context of this trial. The concessions provided a platform for an attack on the experts' opinions adverse to the appellant: to that extent those opinions would have been diminished in importance and cogency. The concessions, as well as the asserted opinions were before the jury and it was for the jury to assess the latter in the light of the former.

164 We would accept the submission that the experts in giving the evidence to which we have referred to above went beyond their expertise. Instead of just stating what they had observed and using only those parts of ordinary knowledge and experience which it was necessary for them to use in reaching their expert opinions, they gave weight, and attached significance to other matters, of which the security of a woman's hair clip when fastened is a clear example. For reasons which we will state later however, reception of that evidence did not mean that the trial necessarily miscarried.

165 The appellant argues that he should not be prejudiced in this appeal because a global objection was not taken to the experts' evidence or to some aspects of it which, in part at least, as we have already said, should not have been received. In support of this argument, the appellant relied on another passage from the judgment of Winneke P in *Anderson*[31]:

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31 (2000) 1 VR 1 at 25 [59].

> "The trial judge has a continuing responsibility, particularly in a criminal trial where a witness has been allowed to express an opinion on a critical issue, to ensure that such opinion is not left for the jury's consideration where it has become clear that the person who has expressed it has no qualification to do so, or has provided no factual or scientific foundation for the opinion expressed[32]. Although it is, of course, true that it is for the judge to decide whether an expert's opinion is admissible, and for the jury to decide whether the opinion is credible and what weight it should be given, it is also true that an opinion is only as good as the factual or scientific basis upon which it is expressed; and if no such basis is given or, if given, can be seen to be speculative or irrelevant to the opinion expressed, then the opinion will be worthless[33]."

166 One difficulty for the appellant is that it was in his interests, strongly and inevitably so, not to object globally, to the admission of expert evidence of the kind given and to some particular aspects of it. Absent a claim of suicide and some supporting evidence of it, preferably pathological, and therefore invested with an aura of independent professionalism, there was only one conclusion sensibly open to the jury and that was of murder. This is no doubt why, very early in the trial, the prosecutor was allowed, without objection, to invite Dr Bradhurst to read from a report that he had made, the following:

> "In my opinion the cut throat wound had features typical of self-infliction. It was accompanied by a series of parallel superficial tentative cuts, leading to the margin of the main wound. The wound extended higher and penetrated more deeply on one side, that is the right side of the neck, than the other and passed across the front of the neck. It cut through the median cricoid thyroid ligament at the lower margin of the thyroid cartilage, which although not as frequent as an incised wound cutting through the thyroid hyoid ligament, is nevertheless quite consistent with self-infliction. The fact of two deep cuts into the cervical spine with one extending more deeply to damage the cord is again quite consistent with self-infliction."

167 The doctor went on to give precisely the kind of evidence that the appellant submitted, incorrectly in our view, cannot be founded upon a body of specialised knowledge:

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32 See *Bugg v Day* (1949) 79 CLR 442 at 456-457 per Latham CJ; *Inch* (1989) 91 Cr App R 51 at 54; *R v Marquard* (1993) 85 CCC (3d) 193 at 225.

33 *R v Turner* [1975] QB 834 at 840 per Lawton LJ.

"Q Is there any observation that you have made there that is not equally consistent with homicide?

A Just that the series of superficial tentative cuts are characteristically seen in a suicide from time to time. They may be seen in a homicide, but the characteristic appearance is seen in a suicide or a self-inflicted wound. And also the typical appearance of the wound, the fact of the wound going higher on one side of the neck and then passing down across the front of the neck is a characteristic generally of a self-inflicted wound, although it can be seen also in a homicidal wound.

Q In fact the direction of a wound across the neck might also depend upon the position of the victim, is that correct?

A Yes, it just depends on the position and how the knife was held.

Q In relation to the observations that you have just given in that paragraph that you have read out, would you be able to exclude the cut as being homicide?

A I wouldn't be able to exclude it being a homicide, but I would consider it more likely to be self-inflicted because of the features, but I couldn't entirely exclude the homicide.

Q So you do place some considerable emphasis on the features which you say are the superficial tentative cuts which are consistent with self-infliction?

A Yes, there were − yes, that's right, the series of parallel superficial tentative cuts; that, together with other aspects of the findings."

168 The appellant criticises the reception of the evidence of Dr Collins as to the incongruity of the scene of tranquillity. But the appellant's counsel made no objection to the introduction of this topic in the expert, Dr Bradhurst's, evidence in chief and developed it in cross-examination. The appellant's counsel questioned, and was answered as follows:

"Q You noticed, and expressed the view in your report, that the place was very tidy?

A That was − yes, to me it was quite an amazing house, it was so tidy, very neat.

Q It wouldn't be unfair to describe it as appearing to be obsessively tidy, would it?

A I would think so, yes, I would think that would be a good term to use, because just my experience having had children and having children at the moment, young children, that I don't know how she was able to do it.

Q The same comment of tidiness could be used to describe the relative positions of the bodies in the place where they were found, that is, the two twins lying in parallel on the bottom, then the elder child lying on top of that and then the mother finally lying on top of the elder child?

A Yes, that would be a good description, very tidy."

169 Thereafter, the battle lines having been drawn, each side sought to draw from the expert pathologists who gave evidence, such opinions on matters calling for expertise and otherwise, as would advance their respective cases. Two examples will suffice. Perhaps in anticipatory refutation of evidence that he expected Dr Oettle to give, the appellant's counsel also adduced in cross-examination of Dr Bradhurst, evidence about the buttons on Zaklina's nightgown, and the hairclip in her hair. A little later, he cross-examined about the movement of furniture at the death scene, a matter on which expert opinion could arguably, but not necessarily be given as a matter of expertise, because questions of the strength and capacity of a mortally wounded woman were involved. These were the questions and answers:

"Q The position of the blood on the wall indicates to you that it looked as though the bed had been pulled away from the wall when that blood was deposited?

A Yes.

Q And that involves it being replaced before Mrs Velevska fell forward finally and died?

A And died, yes.

Q You're familiar with most of the forensic pathologists in Australia, are you not?

A Yes, I know the names of many of them. I have met quite a number.

Q You are familiar with Dr Michael Zillman?

A No, I'm not.

Q He's not a New South Wales practitioner. Let me put some matter to you for your consideration. In a quadruple cut throat murder, one of the victims being a healthy adult and one a healthy child of six years of age, you would expect there to be a significant amount of noise initially?

A Yes, yes.

Q Were you informed of whether any noise was heard by anyone in the house or anyone external to the house on the evening of the 20th?

A I understand that there were no noises heard.

Q Although the bed position was changed during the incident, there were no breakages in respect of the bed evidence or any other thing?

A Yes.

Q There was nothing to suggest from what you observed that a deliberate comprehensive alteration to the scene had occurred?

A That is so.

Q And the undisturbed nature of the scene is one of the matters which you take into account in favouring the conclusion that this was a murder suicide?

A Yes."

170 It follows, in our opinion, that although some evidence was given by experts which they were not entitled to give as expert witnesses, the trial did not miscarry on that account. It was in the appellant's interests with respect to some matters for such evidence to be given. In some instances, either no objection was taken, in all probability for forensic reasons, and in others, when it was taken and overruled, the reception of the evidence was not such as to cause any miscarriage of justice, a matter which we will discuss in more detail later.

Expert witnesses not called

171 The appellant next argued that the Court of Criminal Appeal erred in holding that no miscarriage of justice was caused by the failure of the Crown to call as witnesses Professor Hilton and Drs Botterill, Lawrence and Duflou.

172 The point arises in this way. The police officer who had the conduct of the investigation, Det Sgt Whyte, gave evidence that he understood, during the course of it, that Dr Bradhurst's opinion that the appellant's wife probably committed suicide had been "agreed with" by some of his professional colleagues, including Professor Hilton and Drs Lawrence and Duflou. He did not obtain statements from those persons because he "took the view that Dr Bradhurst's report certainly covered the views held by those doctors. I did not see the point of getting any further reports from them". No statement was obtained from Dr Botterill, who assisted Dr Bradhurst to carry out the autopsies

(and who presumably agreed with Dr Bradhurst). After receiving Dr Bradhurst's report, Det Sgt Whyte sought opinions from Drs Cooke, Oettle, and Collins and Professor Mason and they were called as witnesses for the prosecution (along with Dr Bradhurst). Professor Hilton, and Drs Botterill, Lawrence and Duflou were not called as witnesses. Dr Zillman was called by the defence.

173 Senior counsel for the appellant at the trial addressed the jury on the basis that the failure by the Crown to call the pathologists who had expressed agreement with Dr Bradhurst was improper and unfair. The trial judge did, however, give a clear and helpful direction about this matter. His Honour said:

> "Reference has been made by defence counsel to the failure of the Crown to call particular persons as witnesses, eg Professor Hilton, Dr Duflou, Dr Botterill and also I think, the father and brother of Snezana Velevska.
>
> It is desirable that I give you a direction in this regard; where it appears that there is a witness who could be expected to be able to give relevant evidence but that witness has not been called, you are not entitled to speculate upon what he or she might have said if he or she had been called; but where that witness is a person who in the ordinary course you would expect eg the Crown to call, and the Crown offers no satisfactory explanation as to its failure to call that witness, you are entitled to draw the inference that his or her evidence would not have assisted the Crown case.
>
> Here however, in relation to the pathologists at least, there is no reason to speculate on what they might have said. There is evidence both from Dr Bradhurst and from Det Sgt Whyte, that they agreed with Dr Bradhurst's opinion. The Crown did say that their agreement may have only been in passing and on limited information, as did Dr Oettle initially.
>
> You will remember that Dr Oettle changed his mind when he got a more complete picture but there is no evidence that their concurrence with Dr Bradhurst was on this limited basis; and if they had expressed an agreement on incomplete information and/or later changed their minds, it would have been open to the Crown to call them to say so.
>
> Similarly, of course, and this is a response to the question you sent me yesterday. Similarly, it would have been open for the Defence to call them in the Defence case but the consequence of that would have been that the Crown would have been able to cross-examine them, and the Crown may not have been able to cross-examine them if they had been called in the Crown case. The fact of the matter is they have not been called, and the only evidence about their opinions ie the pathologists, is that they have expressed agreement with Dr Bradhurst."

174 The obligations of the Crown to call material witnesses are stated in these terms by Dawson J in *Whitehorn v The Queen*[34]:

> "All witnesses whose names are on the indictment, presentment or information should nevertheless be made available by the prosecution in order that they may be called by the defence and should, if practicable, be present at court."

175 In *R v Apostilides*[35], this Court held that a decision of the prosecutor not to call a particular witness would constitute a ground for setting aside the conviction if, when viewed against the conduct of the trial taken as a whole, it could be seen to give rise to a miscarriage of justice.

176 Even if, notwithstanding that the appellant was fully apprised of the opinions of the experts who were not called, the respondent should have called those witnesses as we are inclined to think he should, the trial judge's direction following the appellant's counsel's strong criticism of the respondent in his address, would have operated to cure disadvantage to the appellant (if any) that might otherwise have occurred.

The trial judge's role in relation to expert evidence

177 The next ground argued by the appellant was that the Court of Criminal Appeal erred in failing to hold that a miscarriage of justice was caused by the directions to the jury in respect of the conflicting expert evidence.

178 In support of this ground the appellant referred to the approval by Gibbs CJ and Mason J in *Chamberlain v The Queen [No.2]*[36] of a passage in the judgment of Jenkinson J, one of the judges in the intermediate court of appeal, the Full Court of the Federal Court. The passage of Jenkinson J with which their Honours agreed is as follows[37]:

> "Those means of evaluating evidence which the jury enjoys by hearing and watching witnesses, and which are denied an appellate tribunal, could not in my opinion have enabled the jury reasonably to have

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34 (1983) 152 CLR 657 at 674.

35 (1984) 154 CLR 563 at 578 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

36 (1984) 153 CLR 521.

37 (1984) 153 CLR 521 at 558, citing (1983) 72 FLR 1 at 81-82; 46 ALR 493 at 573-574.

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

179 It may be noted that Bowen CJ and Foster J in the Full Court of the Federal Court took a different view from Jenkinson J. They said[38]:

> "Had we seen and heard all the evidence on this topic being given, we might have concluded otherwise, but situated as we are, we have no doubt that the jury was entitled to prefer the evidence of one group of experts to that of the other group."

180 No other member of this Court in *Chamberlain* appears to have, expressly or by implication, approved the passage from the judgment of Jenkinson J. With respect, the position stated by Bowen CJ and Foster J, that juries are entitled to prefer one group of experts over another is, as a matter of general principle, clearly established. We would take the opinion of Jenkinson J and its adoption by Gibbs CJ and Mason J to have been expressed with particular reference to the circumstances of *Chamberlain*, a case which has excited and continues to excite controversy[39].

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38 (1984) 153 CLR 521 at 558 citing (1983) 72 FLR 1 at 30; 46 ALR 493 at 520.

39 The *Peden* case which is the subject of a book "Who Killed Hannah Jane" (1981), by Tom Molomby excited similar controversy. It was a case in which pathologists gave conflicting evidence about whether a woman could have killed herself by

(Footnote continues on next page)

181 The correct position is, in our opinion, that conflicting expert evidence will always call for careful evaluation. So too, because expert evidence by definition deals with generally unfamiliar and technical matters, it will always need careful, and usually more elaborate treatment by the trial judge in directing a jury about it.

182 Juries are frequently called upon to resolve conflicts between experts. They have done so from the inception of jury trials. Expert evidence does not, as a matter of law, fall into two categories: difficult and sophisticated expert evidence giving rise to conflicts which a jury may not and should not be allowed to resolve; and simple and unsophisticated expert evidence which they can. Nor is it the law, that simply because there is a conflict in respect of difficult and sophisticated expert evidence, even with respect to an important, indeed critical matter, its resolution should for that reason alone be regarded by an appellate court as having been beyond the capacity of the jury to resolve.

No miscarriage of justice

183 In the Court of Criminal Appeal David Kirby J in dissent was impressed by six matters in particular which he regarded as sufficient to require that the verdict be quashed.

184 The first of these was the apparent absence of motive. His Honour acknowledged, correctly, that its presence was not essential[40] but that its absence might be significant. Its absence here however could well have been counterbalanced in the minds of the jury by the differences which had developed between the appellant's wife and her in-laws, and between the appellant and his wife causing her on the morning before her death to withdraw into the bedroom.

185 The second matter to which David Kirby J referred was the absence of blood traces elsewhere in the house or on clothing in it, or on the steering wheel

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inflicting such a massive wound to her neck by a razor that her head was almost severed from her body (p 2). The victim's husband was convicted of the murder. Ultimately, an appeal in which it was sought to adduce fresh evidence was rejected by this Court (Knox CJ, Gavan Duffy and Rich JJ). The Court suggested however that it might be appropriate for the Executive to consider the fresh evidence which was a pathologist's opinion that the wound may well have been self-inflicted. A subsequent Royal Commission found that the fresh evidence was capable of raising a reasonable doubt in the minds of a properly instructed jury (pp 119-120). It was a case however that depended on its own facts.

40 *Plomp v The Queen* (1963) 110 CLR 234.

of the appellant's car. This absence was confirmed by the use of high intensity light, a polylight, capable of detecting minute traces of blood invisible to the naked eye. This was a matter clearly brought out in cross-examination. It was for the jury to evaluate it in the light of the other evidence, including the time which elapsed between the death of the appellant's wife and the alerting of the police.

186 The third matter was, his Honour said, the consistency of the appellant's accounts to the investigating police officers and in evidence. This matter has to be weighed, as it no doubt was by the jury, with the appellant's assertion that he stayed alone in his daughter's room for 17 hours and heard and saw nothing untoward, and that his accounts amounted in substance to no more than consistent denials of any role in the death of his family. Even so there were inconsistencies in fact to which his Honour later referred, particularly with respect to whether and for how long the appellant slept and when he last saw his wife alive.

187 A fourth matter of concern to his Honour was that the appellant had made some statements not long after the deaths of his wife and children which his Honour described as "odd" statements for him to make if the appellant had murdered his family. The statements were that he did not believe that his wife could "…do that to the kids because she very deep cut"; and, "Even yesterday I never thought that my wife would do something like that to my children, we both loved our children."

188 These statements were before the jury for evaluation in the light of the rest of the evidence. The jury must not have been impressed by them. Nor, with respect, are we. The second of them is by no means necessarily exculpatory, and the other is also well capable of an equivocal interpretation.

189 David Kirby J next referred to the fact that covertly recorded conversations between the appellant and his parents did not hint of any involvement by the appellant in Snezana's and the children's deaths and there was nothing to suggest that the appellant had coached his father about what he should say to the police or in evidence. We are unable to accept that this factor necessarily gives rise to a reasonable doubt. The father might not have needed any coaching. He himself might simply not have known what happened. He may have chosen not to know. In any event it is not difficult to imagine why the appellant would not wish to raise the matter of the murder of his immediate family with his father.

190 David Kirby J next speculated that Snezana may have been psychiatrically disturbed. His basis for this is that her mother had been treated for depression and her brother four years before had suffered a breakdown. But the evidence for any

like condition in Snezana's case was very slight. His Honour summarised it in this way:

> "The medical evidence relating to Snezana was spare. She had difficult pregnancies with both Zaklina and the twins. She suffered from acute vomiting, requiring admissions to hospital during the course of each pregnancy. She was under the care of Dr Walton, gynaecologist. A social worker, who saw Snezana while she was pregnant with Zaklina, wrote a report suggesting she was not communicating, and that there were difficulties establishing rapport. She suggested a psychiatric consultation, which was then undertaken by Dr Peter O'Brien, the psychiatric registrar. Dr Walton interpreted the hospital notes. He described Dr O'Brien as having been 'reasonably happy although he said he would have wanted to see her later'. Dr Walton added that, for his part, he had no difficulty communicating with Snezana."

Later his Honour said:

> "Dr Wilcox [psychiatrist] thought that Snezana may have developed a depressive illness. He said this:
>
> > 'She was certainly under more stress having to care for twins and elderly relatives and this level of stress in someone with a vulnerability to develop depression, being related to a family history, may have led to her becoming depressed. If she had developed depression she may have perceived that her situation was hopeless and could have possibly had feelings of guilt and may have experienced difficulty in seeing a future for herself.'
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> Dealing with the day before her death, Dr Wilcox gave the following evidence:
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> > 'After Mrs Velevska spoke to her mother on the day prior to her death she was very upset and her speech was reported as not making sense. She sounded confused as if she had lost contact with reality. If this was the situation she may have been becoming psychotic as confusion, perplexity and lability of mood are recognised as symptoms of a psychosis that occurs in the post-partum period.'"

His Honour noted that:

> "After the birth of the twins on 3 March 1994, Dr Walton saw Snezana on 29 April 1994 (approximately 7 weeks before her death on 20 June 1994). At that time he saw no signs of post-natal depression. He said this:

'No, almost exactly the opposite. This girl was very jovial and chirpy, she was essentially skiting about how she was managing and how things had gone well during the pregnancy and after.'

Dr Rao, the family doctor, saw Snezana on 6 May 1994. He spent twenty to thirty minutes with her. She appeared extremely happy."

191 Against the fact of her apparent happiness was some evidence that post-natal depression can be delayed, and from the appellant and his father, that Snezana had hinted at suicide and had threatened to leave. Such a threat might just as much provide a motive for the appellant's behaviour as it might be suggestive of any psychiatric condition. In the end, as his Honour said, the position was no more than that he was left with the impression that Snezana genetically may have been psychiatrically predisposed towards depression and may have been seriously disturbed. The jury, however, must have thought, and there was a proper basis for their so thinking, that the deceased's state of mind did not lead her to kill her children and herself.

192 The matters which led David Kirby J to entertain a reasonable doubt are, in our opinion, matters upon which minds can differ. They were all points that were made to the jury. Some of them were little more than speculation. They were all however answerable by other evidence which was led here, and was well capable of demolishing any hypotheses of innocence to which, standing alone, they might have given rise. The most troubling of all of the matters is the absence of blood elsewhere in the house. To prove murder however, the prosecution was not obliged to prove beyond a reasonable doubt that there were traces of blood in places other than the main bedroom. The case might have been more compelling if it had. But it would be a mistake to think that with respect to every crime there will be no loose ends as to detail at the end of the trial. Why there were no external traces of blood, whether, and how or if, they were removed, or whether by some means they were never deposited by the appellant beyond the room will probably never be known. Ignorance of these matters does not deprive the case of the requisite cogency on the ultimate issue, of guilt or otherwise.

193 We do not therefore consider that, despite that one ground of appeal has some validity, any miscarriage of justice has occurred or that this is a case in which it was not open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty. This was a very strong circumstantial case. In significant respects the appellant's conduct and explanations are not credible: his claim that he remained closeted in a bedroom for 17 hours, in one version sleeping the sleep of "the dead", in another version, saying that he saw Snezana when she came out at 5 o'clock in the afternoon to warm up milk for the children; the delivery of the notes taken from his dead daughter's school bag at home to her school; his sudden removal of his parents from his home in the early morning;

his delay in seeking help; and, least credible of all, his failure to effect an entry, forcible if necessary, to the bedroom to which his whole immediate family had retired for so long. When these matters are weighed with the likelihood of rearrangement of the room after the slayings, the strength required to carry them out; the existence of family discord immediately before the slayings; and, the other less obvious, but still significant features of the case to which we have earlier referred, a very strong case, upon which the jury were fully entitled to reach a verdict of guilty, emerged. We do not regard the inadmissible evidence given by the experts as being of significance in the context of the whole case. If we did, for the appellant to succeed, we would still need to be satisfied, which we are not, that like evidence was not introduced and used by the appellant for the appellant's own forensic purposes, and was not objected to for the same reason. And we do not consider the fact that some of the expert evidence may have been (which on balance we do not in any event think it was) especially difficult and sophisticated, would require that the appeal be upheld. Juries are entitled to and are able to evaluate conflicting, sophisticated, difficult expert evidence.

194 We would therefore dismiss the appeal.