

IN THE COURT OF APPEAL

[1993] QCA 480

SUPREME COURT OF QUEENSLAND

C.A. No. 221 of 1993

Brisbane

[R. v. Kina]

T H E Q U E E N

v.

ROBYN BELLA KINA

(Appellant)

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THE PRESIDENT  
DAVIES J.A.  
MCPHERSON J.A.

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Judgment delivered 29/11/1993

REASONS FOR JUDGMENT BY THE PRESIDENT AND DAVIES J.A. JOINTLY.  
MCPHERSON J.A. SEPARATELY. ALL AGREEING IN THE ORDER TO BE MADE.

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**APPEAL ALLOWED. SET ASIDE THE CONVICTION AND THE VERDICT. ORDER  
A NEW TRIAL.**

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CATCHWORDS: CRIMINAL LAW - petition for pardon - reference of whole of case to Court of Appeal by Attorney-General pursuant to s. 672A Criminal Code - fresh evidence - appellant did not give or call evidence at trial - evidence of history of abuse by husband and of threat to anally rape appellant's niece not revealed at trial - whether miscarriage of justice

Counsel: M. Byrne for the Crown  
J. Jerrard Q.C. with him P. Feeney for the Appellant

Solicitors: Director of Prosecutions for the Crown  
Boe & Company for the Appellant

Date(s) of Hearing: 22 November 1993

IN THE COURT OF APPEAL

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C.A. No. 221 of 1993

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Before     The President  
           Mr Justice Davies  
           Mr Justice McPherson

[R. v. Kina]

T H E Q U E E N

v.

ROBYN BELLA KINA

(Appellant)

**REASONS FOR JUDGMENT - THE PRESIDENT AND DAVIES J.A.**

**Judgement delivered 29/11/1993**

On 5 September 1988, after a trial which lasted less than a day, Robyn Bella Kina ("the appellant") was convicted in the Supreme Court of Queensland of murdering one Anthony David Black, and was sentenced to imprisonment with hard labour for life. The appellant did not give or call evidence at her trial, and her chance of acquittal depended solely on the possibility that the jury might not be satisfied from the prosecution evidence that she intended to cause death or grievous bodily harm.

The prosecution case was that, at about 9 o'clock in the morning of 20 January 1988, the appellant and the deceased had an argument in the room which they shared at a house in West End, the appellant ran from the room to the kitchen of the house, obtained a knife, and returned to the bedroom where the deceased

had remained. The appellant then knocked a chair which the deceased had picked up out of his hand and stabbed him with the knife, causing the injuries of which he died.

The trial judge ruled that there was insufficient evidence to justify leaving provocation for the consideration of the jury. That decision was subsequently upheld in the Court of Criminal Appeal, which dismissed an appeal by the appellant against her conviction on 23 November 1988.

Kelly SPJ, with whom Matthews and Macrossan JJ. agreed, said:

"The evidence indicated that the appellant and the deceased were in the deceased's room in a house and they had had a close relationship, a de facto relationship, and while they normally got along well, when the deceased was drunk he was occasionally aggressive towards the appellant and occasioned her injury in the past. The evidence showed that there were about ten minutes of loud bumping and screaming and the appellant ran out of the room and into the kitchen, and back into the room in which the deceased was, pushing the door open with her shoulder in order to do so. There was evidence that when she went into the room she said, 'I am going to stab you, you bastard', and that she stabbed him in the left hand side of his stomach.

...

The situation simply is that there is no evidence of what occurred in the room prior to the stabbing and, that being so, there was just no evidentiary basis on which a conclusion could be drawn as to the existence of provocation."

On 24 May 1993, a petition for a pardon was delivered to the Governor on behalf of the appellant following which, pursuant to section 672A of the Criminal Code, the Attorney-General has

referred "the whole case with respect to the conviction of ... Robyn Bella Kina on the charge of murder to the Court of Appeal to be heard and determined by the said Court as in the case of an appeal by the said Robin Bella Kina".

The appellant has given the following three grounds of appeal:

- "1. I did not receive a fair trial and a miscarriage of justice was occasioned thereby by reason of:
  - (i) problems, difficulties, misunderstandings and mishaps occurring in the communication of my instructions to the Lawyers who prepared my case and represented me upon my trial; and
  - (ii) which lead to errors so fundamental as to vitiate entirely the decisions of myself and those Lawyers that I would neither give nor call evidence upon my trial.
2. Further, or in the alternative, there is now available to myself evidence which should be accepted as fresh evidence and which is of such a nature that, had it been placed before the jury who decided my case, there is a significant possibility that that jury, acting reasonably, would have acquitted me entirely or, alternatively, would have acquitted me of the offence of murder.
3. Further, or in the alternative, whether or not that evidence be fresh evidence, it is of such a nature that a refusal by this Court to receive it would lead to a miscarriage of justice, in that its receipt would demonstrate that it is unsafe in the administration of justice to allow my conviction for murder to stand."

There is a considerable body of evidence to explain the conduct of the appellant's trial and appeal on her behalf, including evidence with respect to her statements to her lawyers and others, prior to trial, concerning her relationship with the

deceased and the events which occurred prior to his death, both on and before the day when he was stabbed. It is convenient to pass over the explanations as to why the trial and appeal were conducted as they were, and to move immediately to the evidence which the appellant could now adduce to raise issues of provocation, self-defence and lack of the necessary intent. The latter point was argued before the jury, but without evidence from the appellant or her witnesses. Without that evidence, the prosecution case on intent was strong and neither provocation nor self defence had any prospect of success.

The appellant's life, from childhood, has been filled with abuse, trauma and hardship.

She is only thirty-four years of age, and already more than half of her siblings are dead: there were fourteen children in the family, including the appellant, and seven have died, four in infancy.

Her father was violent towards her mother and the children, whom he used to regularly flog.

When she was seven or eight years of age, she was sexually molested by an uncle, and these incidents continued regularly for about three years.

The appellant began to engage in sexual intercourse when still very young, and when she was almost twelve she began to use contraceptive pills.

Shortly afterwards, her mother left her father and the children. The appellant was only twelve. She said in her

affidavit:

"8. .... I was in school at Caboolture and my father took me out of school at the age of twelve to look after my three surviving younger brothers and sisters.

I always felt very insecure and frightened. I was frightened of my father but was also frightened of the Welfare Authorities taking the younger children away because my father used to drink most of his money and kept beating the children.

9. It was at this time that I started prostituting myself to get some money together to run the household. I also started drinking at this time and on looking back I think I was an alcoholic even at the age of twelve. I was definitely an alcoholic by the age of fourteen."

Some years later, the appellant's mother returned and took the appellant and her younger brothers and sisters to Mt. Isa, where the appellant returned to school. However, "... because I had been away from school for so much I found it very difficult. By the age of sixteen I was uncontrollable and I was detained at the Wilston Youth Hospital for a period of six months. When I was released, I continued to drink alcohol and take pills and I started getting into trouble with the police."

Following a brawl in a hotel on Stradbroke Island in October 1978 when the appellant was nineteen years old, she was convicted of unlawful wounding and assault occasioning bodily harm and sent to prison. When she was released, she went back to live with her mother "and my lifestyle of drinking and drugging continued."

In 1983, she tried to stop drinking alcohol but, later that year, her mother died. The appellant was very upset because she loved her mother very much. "When she died I resolved not to love anyone else and in November 1984 I started working as a

prostitute."

The appellant suffers from diabetes, high blood pressure and depression and contracted syphilis late in 1984 when working as a prostitute. This was later cured. She often did not take the medication provided for her diabetes but regularly took serapax for her depression. Late in 1984, she took a serapax overdose after which she was hospitalised for several days.

The appellant met the deceased in February 1985. He frequently drank at a hotel in the locality where she worked as a prostitute. He paid her for their first sexual encounter. They met again a few days later and again had sexual intercourse but the appellant did not ask the deceased for payment. "He asked me to stop working on the streets and I started living with him in a flat at Petrie Terrace. He worked and supported me and I had no need to work on the streets at that time."

Initially, although they often had arguments, they were happy and the appellant loved the deceased. "He is the only man I have ever loved and the only person I let get close to me after my mother's death."

Although she had been without alcohol for about two years, the appellant started drinking again at this time and the deceased also drank a lot. He also gambled and frequently lost, often blaming the appellant. When he had lost, he would ask the appellant for her money and, when she refused to hand it over, he would hit her. "Tony displayed violence towards me during all of our relationship." She also stated that "sometimes" she provoked

him.

A summary of the appellant's life with the deceased would not be as eloquent as her own sworn statements. The following extract is taken from her affidavit.

"18. Most often our fights concerned Tony's demands for anal sex. He started making these demands in about April or May 1985 when we moved to Petrie Terrace. Throughout our relationship I had problems with my periods such that they lasted often up to three weeks. During these times we were unable to have sex in the normal way and Tony insisted upon having anal sex. I did not want to do this. It made me feel dirty. But he insisted. He regularly forced me down, punched me and had anal sex with me without my consent.

19. When he hit me, he often knocked me to the floor. When I was on the floor he often kicked me in the stomach or the back. These fights mostly happened after Tony had come home from work and he was still wearing his work clothes, including his steel capped boots. I can recall Tony kicking me with his steel capped boots on many occasions and at various places we were staying, including Highgate Hill, Petrie Terrace, Toowong and Cleveland. I used my clothes to hide the injuries I got when he kicked me.

20. Although I was living with Tony I was also sleeping with other men. There was one in particular, a taxi driver, that I slept with. And around September, 1985 Tony came home unexpectedly one day and found me in bed with this man. He beat me up and gave me a swollen face and two black eyes.

21. I was always afraid of Tony, not only because of what he did to me but also because of what he threatened to do to me. He threatened to bash me and put me in hospital, and he threatened to take me out to the bush and flog me when no one was around. He made these threats virtually every time we had a fight, which was many times a week.

22. Once in 1986 we were at the place of a friend of his whose name was Steve. We were in the bedroom and Tony wanted anal sex. I did not want to do it. Tony threatened that he would throw me off the balcony if I did not give in. The balcony was several storeys high and I knew that if he threw me over the balcony I

would probably not survive. I managed to get away from him on that occasion.

23. On another occasion in July 1985 at Petrie Terrace at about 8 o'clock one night Tony again wanted anal sex, and when I refused he threatened to throw me out the window. On that side of the house, there was a big drop and I knew I would be killed or seriously injured if he threw me out the window. I believed he would carry out his threat and I could not get away from him. So I gave in to him and let him have anal sex.

24. Tony worked on the construction of the Toowong Shopping Centre, working different shifts. Once prior to Christmas 1985 when he worked the shift from midnight to six in the morning, I went out on the town without telling him. He came home before me and found out that I had been out all night. From that time he made sure that I could not get away from him when he worked the midnight shift.

25. Sometimes he took me to work with him at midnight and kept me there until he finished work at six in the morning. He took me up to the higher levels by going up some ladders. I was afraid of heights and was too scared to climb back down. Tony knew this.

26. On one occasion in August 1986 while I was on the construction site, Tony came to me and said he wanted to have sex. There was a group of his work mates with him. I did not want to do it, but Tony took my clothes off and he pushed me onto the bare concrete outside a little shed. The others were watching and they were all joking about what he was doing to me. He had sex with me. I did not think I could resist, especially as there was a group of them. When Tony finished, he got up off me, turned to his mates and said: "Who wants to go next?. All of the others then had sex with me, one after another. I do not know how many there were. This went on for about two hours while I lay on the concrete, cold and naked on a night in August.

27. He also forced me to have sex with him and his work mates on one other occasion at the construction site, although I cannot recall exactly when that was. The second occasion is not as vivid in my memory as the first time he did it.

22. Although he took me to his work sometimes, he tied me up on all the other nights when he worked the

midnight shift. Sometimes he tied me face up; sometimes he tied me face down. He always tied my hands and my feet. Sometimes he tied my hands to the top of the bed, with one hand tied to each corner of the bed. Sometimes he tied my hands together in front or behind my back. Sometimes he tied one foot to one corner of the bed and the other foot to the other corner. Sometimes he tied my legs together and then tied them to the end of the bed. He often tied me up naked, although he allowed me to have a blanket. Even if I was wearing a nightie, he made me take my pants off. I stayed tied up this way all night until he came home about seven o'clock in the morning. I could not go to the toilet during the night.

29. When he came home in the morning, he nearly always had sex with me before untying me. If my feet were tied together he untied them. Sometimes he had sex in the usual manner; sometimes he had anal sex. I could not resist. After having sex, often he would still not untie me. He went and had breakfast and a beer while I lay tied up. Then he came back about half an hour later and had sex with me again. Only then did he untie me. I hated it. He tied me up this way whenever he was on the midnight shift, unless he took me to work with him. Tony worked on the midnight shift every night a week for one week a month for four or five months.

30. He tied me up fairly tightly because one time prior to Christmas 1985, I managed to escape and did not come home for a couple of days. I had to come back because I had nowhere to go. I knew if I had gone to my sister's place he would have come and got me. When I returned that time, he flogged me. I got two black eyes and my face was all swollen.

31. I often went to see my sister Agnes to get away from Tony and talk about the problems I was having. Towards the end of 1985 Tony and I moved into a flat at Toowong but because of our fights after Christmas in 1985 I left Tony and went to stay with my brother Clifford at Cleveland. Tony spent each weekend with me at Clifford's place. In early 1986 I went to a flat at Highgate Hill and although Tony was not living with me at that time he would come there most nights. We still had our fights and these were regularly because he wanted to have anal intercourse with me.

32. I was still drinking at this time and in June, 1986 whilst drunk I got into an argument with my sister Agnes, and I stabbed her with a knife. When I

was arrested I was drunk and my memory of the events at this time is not good. I was denied bail at first and sent to Boggo Road on remand.

33. At about that time I realised that I had to do something about my drinking problem. I dried out while I was in prison awaiting the court case and I decided that I had to stay off alcohol. When I was released on bail in September 1986, I stayed at Jodaro which is an alcohol rehabilitation centre at Newmarket and I did not drink. I have not drunk alcohol since that time.

34. Prior to this time my memory of events is a lot more uncertain than it is after this time when I became sober. Sometimes I may have recalled dates incorrectly or have placed events in the wrong order, but the substance of what happened is accurate to the best of my recollection.

35. In October, 1986 I was sentenced to six months imprisonment plus three years probation for unlawful wounding. I was released from prison on 13 February 1987 and spent the first several months after this time at Jodaro.

36. When I left Jodaro I went back to stay with my sister Agnes at Nundah for a short time and then I stayed with my brother Clifford and his girlfriend Jan Baker at Cleveland. During this time Tony was working at Eumundi and he came down and saw me on the weekend on a regular basis. Jan had a son called Simon who was about eighteen or nineteen years old. Tony thought that I was going to strike up a relationship with Simon. I thought this was ridiculous. Simon was like a nephew to me and I told Tony this but he did not believe me. When Tony visited, he locked me in my room while Simon was in the house. I was locked up most of the day on Saturday on a fairly regular basis. If I wanted to go to the toilet, sometimes Tony came with me. Otherwise I had to urinate in an empty ice cream container which I emptied in the toilet when Tony let me out of the room.

37. On one occasion on a Friday or Saturday night in the middle of 1987, I was at home alone with Tony. We started fighting and he started punching me. I then heard Jan's daughter Rosalind come home. I told Tony to stop it or Rosalind would hear him. He then threatened me by saying he would give Rosalind a flogging. A short time later Clifford came home and

told Tony to leave the house. A few days later I left and went to stay with him at Eumundi.

38. In October, 1987 I was at the Eumundi Hotel with Tony. He had been drinking heavily although I was sober. I had forgotten my purse and I went back to the lounge to fetch it. Tony was angry with me and I was afraid that I would get a flogging from him once we were outside so I pushed him down some steps at the hotel. Tony fractured his heel. Although it was not placed in plaster, it stopped him from working. When this happened Tony threatened that he would really hurt me when his heel got better.

39. After Tony broke his heel he returned to Brisbane and stayed at Nundah with me for a few days before he went to his parent's home in Toowoomba. I then stayed with my sister Agnes until November, 1987 when I went into the Mater Hospital for a laparoscopy. I always wanted to have children but I never fell pregnant. I don't know why. Sometimes Tony would ask me when I was going to have his child. After the operation I visited the Fertility Clinic at the Mater Hospital supervised by Dr. Devenish-Mears. I got a five day course of tablets which I took. When I took these tablets I felt very depressed. I continued to be depressed. Some times I was more depressed than at other times. Every time I got my periods I felt more depressed.

...

46. In December, 1987 I moved to 70 Thomas Street, West End where I shared a house with a number of people. Tony came down on the weekend to visit me from Toowoomba. Tony was more angry than usual because of his ankle and because he was unable to work. He was drinking very heavily. When he came down for seven days around Christmas 1987 he drank seven cartons of beer.

47. At that time my niece, Enid Morris was having problems at home. Her mother was Agnes Morris who was my sister. I had agreed to take Enid with me for a year until she decided whether she would go back home with her mother or not. Enid came to stay with me in January 1988.

The days before 20 January 1988

48. On Friday 15 January, Tony was staying with me. I went to the Mater Hospital for another appointment at the Fertility Clinic. I was given a

prescription of clomid tablets. There were five tablets one for each day. I felt depressed when I took these tablets. Tony was with me when I went to the Clinic and afterwards we went to the Castle Hotel at Mater Hill. We had an argument there because I did not want to sit in the pub all day. I also had my periods and I was bleeding fairly heavily and did not feel well. Tony was very angry with me when we left at 2.00 in the afternoon. He insisted that we walk home. I prepared dinner that evening and stayed out of his way. After dinner I went for a walk on my own because I was upset. I was away for sometime and when I came back it was late. An argument started and then Tony jumped up off the bed and punched me in the mouth and grabbed me by the hair and pulled me onto the bed. He just kept punching me about the face and the stomach. Then he raped me. He held me by the back of my neck and pushed my face down on the pillow. I went to the bathroom to have a shower and Tony came in as well. He whacked me across the face in the bathroom. I then went back to bed with him. He apologised and cuddled me and I fell asleep.

49. The next morning Saturday, 16 January, I felt sore and hurt and I wanted to sleep all day to avoid him. I took a number of tofranil tablets. It could have been ten; it could have been thirty. On this day I felt particularly depressed because of how Tony had treated me the night before, about my periods, and as a result of the tablets I had been taking from the Fertility Clinic. I just wanted to forget everything at the time when I took the tablets. It knocked me out for a couple of hours. When I awoke it was about 2.30 in the afternoon. I then went down to the Melbourne Hotel where Tony was. When I arrived he said that he had a few bets and had won. He then bet on the next race and lost. He then blamed me for ending his winning streak. He was angry with me.

50. We left the Hotel about 5.30p.m. and walked home. I got dinner ready and stayed away from him until I went to bed at about 11.00 o'clock. When he came to bed I told him not to touch me and he punched me in the mouth and the head. I started to cry. He told me to take my clothes off. He said he was going to the toilet and he wanted my clothes off by the time he came back. When he left the room I shut the door. It is the sort of door which locks when you close it. There is no knob on the outside. He knocked on the door but I would not open it. After a while he stopped trying to come in and I thought he had gone into the lounge room. When I opened the door at that time, he

pushed me into the room and slammed the door shut. He punched me in the face and on the body. He made me take all my clothes off except my underpants. He hit me in the stomach. I was crying and asked him if I could sleep in the other room. He said that he would fix me so that I could not sneak out away from him whilst he was sleeping. He had a piece of rope and he tied me to the bed by my wrists, my feet and my body.

51. On Sunday morning 17 January 1988 he untied me. When he went to the toilet I again shut the door and would not let him in for some time. Finally when I did open it he pushed me back, grabbed me by the hair and dragged me onto the bed. He raped me and belted me up. After this happened I can not recall much of what else happened that day. I spent the rest of the day in bed whilst he watched cricket on the T.V.

52. Monday 18 January 1988 was uneventful. We did nothing much, just watching T.V. virtually all day.

53. On Tuesday 19 January 1988 Tony and I had sexual intercourse (not anal intercourse) in the morning. Tony and I went with some others from the house to the Medical Centre at Woolloongabba and from there to the Woolloongabba Hotel where we stayed until a bit after 5.00p.m.. When we arrived home I fixed dinner for everybody. Tony was drinking heavily that day and that evening he and Colin who is a friend were drinking a cask of wine. He was very drunk however we went to bed without any violence that night.

#### The events of 20 January 1988

54. The twentieth of January was the last day of the course of tablets which I got from the Fertility Clinic. I felt depressed. I was still having my periods. I had to see my probation officer at 10.00 o'clock that day. I had a black eye from when he beat me on Saturday night but it had gone down a bit and it was not very noticeable. I did not want to go and see my probation officer looking like I had just been beaten up.

55. We were lying in bed in the morning and we started kissing and cuddling. He then wanted to have anal intercourse with me. I did not want him to do that. When I refused he punched me in the face and the stomach. We started arguing. He said to me that if I could not have sex in that way he bet that my niece Enid would. I was extremely upset. I would not let any man touch my little niece. I had promised my sister that I would look after her. I was like her

mother. I immediately got up and left the room and he slammed the door behind me. I had my bag with me and I was going to have a shower. I saw the kitten in the kitchen and walked in there to give him some milk. Then I saw the knife and something snapped. I am not sure where the knife was whether it was on the bench or whether it was in its stay sharp container but I picked it up. When I picked up the knife, I was thinking of what he said about my niece Enid. I feared that he was capable of carrying out his threat to hurt my niece. I went back to the room. The door was closed but I shouldered it open.

56. When I went into the room with the knife, I did not intend to stab him. I just wanted to threaten him with it so he would not go near Enid. When he saw me come back into the room, he jumped off the bed and grabbed a chair and came towards me. He kept coming until he was very close to me. I thought he was going to hit me with the chair, and I knew that once he started hitting me with the chair he would not stop. Then he said to me: "You won't use that you gutless cunt". I just reached out and stabbed him once in the body. I did not mean to kill him. I did not mean to injure him seriously. I was not aiming for his heart. When I saw that I had stabbed him, I threw the knife away. He staggered and fell to the ground. I was extremely upset. I said to him that I was sorry and that I loved him and also said: "Please don't die". I held him in my arms. I asked my niece Enid to go and get an ambulance.

57. Later on the ambulance came and the police interviewed me. I was told that he had died and I felt terrible."

In a subsequent affidavit, the appellant said:

"33. In relation to the circumstances in which I had anal intercourse with Tony as disclosed in my several statements, the circumstances surrounding these times were as follows:-

- (a) Sometimes he forced me down and held me and forced anal sex: and
- (b) On other occasions I lay down and allowed him to do it because I knew the consequences of any refusal would include violence.

34. I hated it. I wanted a baby not that."

Further, she gave brief oral evidence to the effect that, at the time of the stabbing, she thought that:

(a) if she had not got the knife to confront Tony, the following would have occurred:-

"(i) I would have been forced to have had anal sex;  
(ii) Tony would have attempted to be very nice to me;  
(iii) He would have patched up my face; and  
(iv) I probably would have been able to go to the Probation Officer."

(b) if Tony had got the knife from her "he would have stabbed me with the knife. I say this because he was very angry when I had left the room and angrier still when he saw me with the knife. In my several statements I made reference to Tony's threat to go back to Toowoomba. He would not have done this because he had no money and in fact, was demanding some from me for the day. He had made threats like this to me before which he did not fulfil. If he ever made a threat to leave, he would simply go the Hotel and drink and come back later in the day. I cannot recall him ever having left for any time over night, and I believed one reason for his not leaving was that I was always running around after him."

A number of witnesses provided affidavits which corroborated the appellant's account of her relationship with the deceased. There is an overwhelming impression that she was repeatedly

violently assaulted by the deceased followed by denials by the appellant that the deceased was responsible for her injuries.

It is unnecessary to refer to the detail of this evidence, but a passage from the affidavit of Enid Louise Morris should be quoted. Ms. Morris was the appellant's niece about whom the deceased made a threat to the appellant on the morning on which he was killed. Ms. Morris was born on 25 December 1973 and was fourteen when the deceased was killed.

Ms. Morris has stated:

"12. On 20 January 1988 I was woken up by the sound of a fight. I could hear Tony and Aunty Robyn both yelling. The walls were banging. I was so scared I hid in a basket in my room. I heard a door slam. I seemed to be in the basket for ages but it probably was not all that long. Then the sounds changed and I came out. I saw Tony lying on the floor and Aunty Robyn crying."

Completely independent evidence to confirm aspects of the appellant's account of her relationship with the deceased is also available.

Following her arrest, the appellant was examined at the Brisbane Watch-house on 20 January 1988 by Dr. David Alvin Orth, a medical practitioner who was, at the time, working for the Aboriginal and Islander Community Health Service Brisbane Ltd. It seems that no report was requested from Dr. Orth by the appellant's lawyers until some months after the dismissal of her appeal from her conviction. It is instructive to refer to the contents of that report. Dr. Orth wrote:

"Ms. Kina was last seen by myself in the Brisbane City watches on the 20th January 1988. ... . She told me

that on the morning of the 20.1.88 between the hours of 08.30 and 09.00 she had a fight with Tony Black. She said that he had been drinking the night before and began to make sexual advances towards her in the morning. She said that they began fighting because she didn't want him to touch her and he wouldn't take no for an answer. She said that during this fight he punched her in the head, the back of the head and neck, as well as in the face, forehead, upper abdomen and in the thighs of both legs.

On examination she was tender around the base of her neck though there was no visible bruising or swelling.

She was tender over the left loin and left buttock though there was no visible bruising or swelling. She was tender anteriorly in both thighs though there was no visible bruising or swelling. She was tender in the upper part of her abdomen though there was no visible bruising or swelling. She had a graze across the middle of her upper back that was 4cm long. ...

...

In summary, Robyn had a number of medical problems including a number that could have affected her mind at the time of Tony Black's death. She had uncontrolled diabetes. She had suffered from depressive illness over the years. Alcohol abuse, the inability to fall pregnant, obesity, poor social circumstances, heavy painful periods would all have tended to worsen her tendency towards depression and therefore cloud her judgement."

In his affidavit exhibiting his report, Dr. Orth referred to a photograph taken of the appellant at the Watch-house that day and said:

"The photo shows bruising to the right eye which appears to be about seven to ten days old. The photo shows reddening of the left eye which indicates a very recent injury perhaps sustained on the same day. ...

5. In the clinical notes I made at the time, I refer to the bruising around the right eye as coming 'from previous fight around Christmas'. This was the explanation given to me by the patient. The findings on examination were not consistent with this explanation. The injury was a lot more recent."

Ms. Marie Celia Moore knew the appellant when she was a welfare worker at the Aboriginal and Islander Community Health Service Brisbane Ltd.. Ms. Moore has sworn an affidavit in which she has stated:

- "3. Robyn was a client of the Health Service and I observed her when she came regularly to seek treatment from the medical staff. She was really badly battered over and over again. I formed the opinion that she was the victim of domestic violence, although I did not witness this. I only saw the repeated bruises and injuries she carried when she came to the Health Service.
4. When Robyn was charged with murder ... I wrote a letter ... and sent it to Mr. Brian Devereaux at the Public Defenders Officer ... .
5. I received no reply to the letter and no one from the Public Defenders Office (or elsewhere) contacted me in relation to the letter."

The letter, which is dated July 11 1988, said:

"Despite her cheerful disposition I believe that Robyn had suffered continuous domestic violence during the time she lived with Tony Black. I am not aware that Robyn or Tony made any attempt to seek professional help for this violence, however it is my belief that Aboriginal women accept 'their lot' and put up with these situations.  
If I can be of any more assistance, please do not hesitate to contact me at the above address or phone number."

Mr Devereaux, who is referred to in Ms. Moore's affidavit, is one of a number of lawyers who assisted or represented the appellant.

When she was first charged, the appellant was represented by Ms. Theresa Hamilton, the Principal solicitor employed by the Aboriginal Legal Service.

Neither Ms. Hamilton nor any of the other lawyers who acted for the appellant received any training or instructions

concerning how to communicate or deal with Aborigines or Islanders.

Ms. Hamilton took a statement from the appellant on or about 24 February 1988, and subsequently acted for the appellant at committal proceedings in respect of the subject charge in March 1988. A copy of the statement taken by Ms. Hamilton was included in a brief to Mr T.D. Martin of Counsel who appeared for the appellant at committal. That statement deals with a number of the matters now deposed to by the appellant.

In her affidavit, Ms. Hamilton gives the following account of obtaining the appellant's statement:

"20. I took the statement by a process of question and answer, from which I took handwritten notes which were subsequently type written into the form in which the statement now appears. It took approximately one and a half hours to obtain the statement, and I observed during the interview process that the Appellant was very reluctant to make any negative comments about the deceased. Although she outlined during the taking of the statements several instances where the deceased had assaulted her, or treated her badly in some other way, she never outlined any such incident without adding words to the effect 'But, I probably deserved that', or 'I probably caused him to do that by my behaviour'. I did not include all of these observations in her statement, as I considered that many of her observations about her own behaviour were unfair, and caused by her extreme guilt over the death of Mr Black."

It is appropriate also to mention some aspects of Ms. Hamilton's general experience while the Principal Solicitor to the Aboriginal Legal Service (referred to by her as the "ALS").

"17. During my years with the ALS, I found that Aboriginal clients were often extremely difficult to interview. They usually presented as reticent and uncommunicative, and would not volunteer information

unless questioned in detail. In my experience, an important matter could be overlooked in that situation, because it was not volunteered by the client, and not asked about by the solicitor. I expected to experience some of these problems with the Appellant, but even so found her to be one of the most difficult clients for whom I acted at the ALS.

18. The Appellant presented to me when I visited her at the prison as a woman in a state of deep depression. She was extremely reticent when discussing the circumstances which led to the murder charge against her. She volunteered no information without being asked, and appeared passive and uninterested in the entire process of the preparation of her defence. I formed the opinion, based upon my contact with her during the preparation of her defence on this charge, that the Appellant had loved the deceased, Mr Black, and was still in a state of deep mourning during the periods when I saw her prior to the committal proceedings at the trial.

...

"21. .... . During the years that I worked with Aboriginal clients, I found it to be very common that clients were reluctant to discuss sexual matters. Clients who would freely admit to serious acts of violence or dishonesty would refuse to discuss or deny even very minor allegations of sexual misconduct against them. In relation to the allegation that the deceased threatened the Appellant's niece, I was never given any instructions in relation to this matter. In general terms, I found during my work with Aborigines that their kinship system is very strong, and on many occasions I have appeared for clients who were charged as a result of offences committed in defence of a relative, or even because of a perceived insult to a relative."

After the appellant was committed for trial, the Aboriginal Legal Service applied for Public Defence funding for her and also requested that the matter be briefed back to the Aboriginal Legal Service to represent the appellant at her trial. Ms. Hamilton believed that it was highly desirable that the Aboriginal Legal Service represent the appellant at her trial, especially in view of the communication difficulties which she anticipated would

occur. The appellant also wanted to be represented by the Aboriginal Legal Service, but initially that was not approved although the appellant was granted Public Defence funding. Accordingly, the appellant's defence was prepared for trial by the Public Defender's Office.

Initially, the appellant's case was handled within the office of the Public Defender by a clerk, Gavin Townsing, but it seems that there were serious communication difficulties and Mr Townsing was replaced by Mr. Devereaux, who has since been admitted to practice as a barrister, but was employed by the Public Defender as an Interviewing Clerk or Officer. As such, he was not permitted to provide legal advice to clients, but his duties were to attend on clients to obtain statements of fact, personal statements of antecedents and comments on police briefs and depositions.

Mr Devereaux took statements, a "Statement of Fact" and a "Personal Statement", from the appellant at the Brisbane Womens' Prison in July 1988 and these statements were typed and signed by the appellant. He had access to the appellant's hand written diary notes and a letter, referred to below, to the Public Defender, from a social worker, Mr Berry. However, he was not aware that the appellant had not been represented by the Public Defender at committal, and did not see a copy of the appellant's statement taken by Ms. Hamilton. It seems that he did not realize that there were important lines of inquiry to be pursued.

Mr. Devereaux does not "... recall receiving any guidelines

or instructions as to the specific needs of clients of Aboriginal descent in relation to how I should seek to communicate with such clients given their special needs." He has sworn an affidavit in this proceeding, in which he stated:

"24. I recall the following matters in relation to my attendances on the Appellant:-

- (a) The Appellant was extremely difficult to communicate with. For example, even reading her diary notes which contained reference to an argument about sexual intercourse being 'my way not yours' did not alert me to the fact that anal intercourse was the subject of the argument. The Appellant never actually told me that the rape she complained of in her diary notes was anal rape. Prior to the trial, I had not adverted to the reference to anal intercourse in Mr. Berry's report of 7 June 1988. I left the Public Defender's Office on the last Friday in July 1988 and I left a memorandum with instructions as to what further needed to be done in the matter ... I see from that memorandum that I did not suggest attempting to examine the Appellant any further upon what had happened at the time of the incident or upon Mr. Berry's report. I recall seeing the 4 Corners program which included an interview with the Appellant and thinking that I had not been aware before that she had said Tony (the deceased) had wanted anal intercourse. When I heard this it did seem to help explain her reticence in her communications with me.
- (b) It was apparent that the Appellant either could or would not talk to me about what had happened to her in her relationship with the deceased or on the day of his death in any detail;
- (c) With the benefit of hindsight, it was probably not a good idea to send a young white male to obtain such instructions as to the circumstances given the necessary references to their sex life, sexual abuse and related matters.
- (d) I employed a question/answer dialogue in interviewing her.
- (e) Despite my difficulties in communicating with her I thought that at the time I had

- developed a good rapport with her.
- (f) I recall that during the course of my attendance on the Appellant that there were long silences.
  - (g) It struck me that she had great difficulty in talking to me about what had happened to her."

An affidavit has also been provided by Mr. Michael John Shanahan, a barrister who is now the Assistant Director, Public Defender of the Legal Aid Office (Queensland). Mr Shanahan, who also has never received any formal education or training in relating to the special needs of Aboriginal clients, appeared at the appellant's trial. His first "involvement in relation to the Appellant was my receipt of the trial brief", which "had been prepared by the Preparation Section of the Public Defender's Office". His first contact with the appellant was on 11 August 1988, when he attended upon her at the Brisbane Women's Correctional Centre.

In his affidavit, Mr Shanahan has stated:

"8. Prior to my attendance I had been informed by employees of the Public Defenders Office who had, to that time, been dealing with her and believed that the Appellant was a difficult client and there had been considerable difficulty in obtaining necessary instructions for her representation. I was further informed that the appellant would not speak to one of the employees, Mr. Townsing, who had been assigned the matter.

...

10. As a result of the communication difficulties the appellant was apparently suffering, after conferring with the then Public Defender, Mr Newton, it was decided that it might be appropriate to retain the Aboriginal Legal Service to take instructions from the Appellant. I was aware that the Aboriginal Legal Service had represented her at her committal hearing.

11. I recall my attendance on the Appellant on 11 August 1988. The only matters canvassed with the Appellant were her difficulties in communication with staff of the Public Defender's Office and the suggestion that she be represented by the Aboriginal Legal Service. The Appellant agreed and those instructions were reduced into writing. I further recall that the appellant was extremely reticent in her communication with me and I quickly ascertained that she either did not wish to or could not talk in detail concerning the case to her lawyers.

...

13. Upon return from the prison, I again consulted with the Public Defender and confirmed the difficulty in communication. The decision of the Public Defender was that I was to remain briefed as trial Counsel with the Aboriginal Legal Service engaged specifically to address the communication difficulties.

14. Arrangements were then made for a photocopy of my brief to be provided to Ms. Theresa Hamilton, Solicitor of the Aboriginal Legal Service to instruct me at trial."

In her affidavit, Ms. Hamilton has stated:

"On or about 16 August 1988, I was informed by the Public Defender's Office that, although the appellant's matter would not be briefed back to the ALS, in view of the fact that there were some communication difficulties between the appellant and those in the Public Defender's Office preparing her trial, the ALS would be permitted to instruct Counsel within the Public Defender's Office who was to appear for the Appellant on her trial. I subsequently appeared at Ms. Kina's trial to instruct Mr Michael Shanahan, a barrister employed by the Public Defender's Office.

15. I recall that subsequent to this advice that the ALS would instruct on the trial, a copy of the brief which had been prepared by staff of the Public Defender's Office was delivered to me at the ALS.

16. ... although I was to appear as instructing solicitor, I had no real input into the preparation of the brief, or the preparation for trial, other than to attempt to facilitate communication between Mr Shanahan and the appellant. I read the brief which had been prepared for Mr Shanahan, but did not consider that it was appropriate for me to seek any further

instructions from the appellant without a request to do so from Mr Shanahan. Accordingly, I did not do so."

Ms. Hamilton has further stated that she did not notice that the statement taken by her from the Appellant prior to the committal hearing was not included in the trial brief that had been prepared by the Public Defender, and that she "... assumed that Mr Shanahan had sufficient instructions as no request was made of me to seek any more instructions from the Appellant."

In his affidavit, Mr Shanahan has stated:

"17. ... documents in the category of instructions or information of the appellant's recollections were limited to:

- (a) her handwritten diary notes;
- (b) her statement as taken by Mr Devereaux;
- (c) a report from Mr David Berry, Social Worker.

18. I had no communication with Mr Berry prior to the trial."

In the week before the commencement of the trial, Mr Shanahan and Ms. Hamilton attended on the appellant at the Brisbane Women's Correctional Centre. Ms. Hamilton has only a vague recollection of that conference. However, she has stated:

"39. .... . The Appellant continued to present as an uncommunicative person and did not contribute to any significant degree to the legal and factual issues raised with her.

40. I believe that the impression given to her by the advice from Mr Shanahan and me was to the effect that it may have been undesirable for her to give evidence, but it was made clear to her that it was up to her to make a decision in that respect.

41. In my experience, Aboriginal clients were generally very reluctant to give evidence, unless they were given considerable support and encouragement to do so. I recall that the appellant would have needed considerable positive encouragement to make a decision that she wished to give evidence in this matter. I did not provide any such encouragement.

42. I did not think that the appellant should give evidence. One of my main concerns about the appellant giving evidence was the fact that, at that time, she was still in a depressed and remorseful state, and seemed to blame herself, rightly or wrongly, for everything which had occurred."

In his affidavit, Mr Shanahan also has given evidence concerning that conference. He has said:

"20. I recall that there was no discernible change in the demeanour of the Appellant and she remained most uncommunicative. I was not able to discuss with the appellant, in any detail, the contents of her several instructions as listed in paragraph 17 above or to expand on those in any manner.

21. I recall that the following matters were discussed at this conference with the appellant:

- (a) The trial procedure;
- (b) The Crown evidence against her;
- (c) The options as to whether or not she wished to give or call evidence;
- (d) The differences in the sentences that can be imposed by the Court on convictions of murder or manslaughter.

22. As stated above, the appellant was extremely difficult to communicate with and I was not then and cannot now be certain as to the degree in which she understood the matters I discussed with her.

23. The appellant was of the view that she did not wish to give evidence. At no stage did she indicate to me that she wished any witnesses to be called.

24. I did not see how the appellant could possibly be called to give evidence as I did not know how I could ascertain what evidence she could possibly give. I formed the view that I should proceed to trial without being able to obtain any instructions from her beyond those which were already contained in the actual brief.

25. Given the lack of communication that I had encountered on my conference with the appellant I did not attempt to dissuade the Appellant from her desire not to give evidence. I was of the view that she should not give evidence.

26. The instructions, in my view, did not provide sufficient evidence to allow the defence of provocation to be raised, as there were insufficient circumstances to argue that there was sudden provocation. The trial was conducted on whether the Crown could satisfy its onus as to the requisite

intent. This way of running a trial was explained to the Appellant."

Mr. Shanahan and Ms. Hamilton had a further conference with the Appellant on the morning of 5 September 1988, the day of the trial. The Appellant there gave written instructions that she did not wish to give or call evidence. In her affidavit, Ms. Hamilton has said:

"45. I do not recall seeking any further instructions from the Appellant during the course of the trial."

In his affidavit, Mr. Shanahan has said:

"28. After obtaining these instructions I did not consult the appellant any further during the course of the trial except to speak to her during the morning adjournment as to how the trial was proceeding."

Reference has been made above to Mr. Berry, a Social Worker.

Mr. Berry's evidence is important, and it is desirable to quote from his affidavit. In it, he has stated:

"...

2. I first saw Robyn Kina on 18 April 1988 after I received a letter dated 4 April 1988 from her asking me to visit her in prison. In my first meeting with her she was very shy, quiet and withdrawn, and it was difficult communicating with her. I spent one and a half hours with her and slowly learned of her predicament. She said that she wanted to talk things out because of the great confusion she felt since she had decided to fight the charge of murder which had been brought against her arising out of the death of her de facto Tony Black. At first she told her legal representatives nothing, simply that she wanted to plead guilty to murder. Then a letter from her family convinced her that they loved her and gave her some courage to fight the case.

3. In our first meeting, Robyn made it clear to me that she was having problems communicating with the people from the Public Defender's office who were

preparing her case. She said she had not been able to talk about her personal details with her solicitor, Gavin Townsing. One of the things I agreed to do for Robyn was to ensure that the Public Defender's office was fully informed of her situation.

4. On 21 April 1988, three days after my first visit to Robyn, I telephoned the Public Defender's office and left a message for the person handling the matter to telephone me. I received no response to this message. I again telephoned the Public Defender's office on several occasions over the next few weeks without success. Finally, I spoke to Gavin Townsing and informed him that I had been asked by Robyn to obtain personal details and relevant information about the offence and supply this to him in written form. He asked about some matter (I forget what) concerning Robyn's story. I said to him that I would prefer to get it all down in writing and supply it to him in complete detail at the one time. This was what Robyn wanted.

5. At our first meeting, I asked Robyn what happened when Tony died. Slowly and gradually she told me part of her story, including that Tony had continually beaten her up, that he had forced her to have anal sex with him and that he tied her up. At that time she said that she did not want these personal details to come out in court. I went back to see her again on several occasions and gradually I learned more of her story. I visited her for 45 minutes on 26 April, for 2¼ hours on 5 May, and 1¾ hours on 16 May 1988. I then wrote a report dated 7 June 1988 addressed to Gavin Townsing at the Public Defender's office setting out what Robyn had told me. ... On 9 June 1988, I went to the Public Defender's office, delivered the original report at the reception counter, and advised that I would be available to discuss the report or for joint interviews with Robyn if requested."

After delivering his report to the Public Defender, Mr. Berry continued to visit the appellant and obtain information from her which he then sent on to the Public Defender's Office. However, except for one telephone conversation with an officer employed there - who was not handling the appellant's case - Mr. Berry was unable to contact her lawyers. Instead, he received information from the appellant that her legal representatives

wished that he "would not interfere with proceedings."

A copy of Mr. Berry's report is exhibited to his affidavit. It dealt with a number of the matters now deposed to by the appellant. So did other material on the Public Defence brief. So did the statement taken from the appellant by Ms. Hamilton, although it was omitted from the brief. No explanation is given by any of the lawyers involved at that time as to why they did not follow up inquiries with the appellant and other potential witness. Nor do they explain what, if any, attention was given to the information available to them in advising the appellant not to give evidence. Because of perceived difficulties in obtaining information from the appellant and anticipated problems in her giving evidence, the appellant's legal representatives formed the opinion that she should not give evidence and advised her accordingly. Her decision not to call or give evidence was founded on that advice.

Mr. Berry's affidavit also included the following paragraphs:

"19. .... I continued to see Robyn but my role changed after the trial. Before the trial we discussed what had happened leading up to the death of Tony Black and what was necessary for the defence of her case. After the trial I saw Robyn in a counselling capacity. We talked about her self esteem, aspects of her personality and her behaviour patterns. We looked at how she got into the relationship with Tony and how she should approach future possible relationships. But we never went back to discuss the events leading to the death of Tony Black.

20. Robyn has developed enormously over the period since I started seeing her in 1988. Her self esteem had risen enormously. She has lost a lot of her shyness and she is now able to talk with other people about things which she previously would not be able to

talk about."

The appellant also is conscious of these changes in herself.

In one of her affidavits, she has said:

"67. After my conviction I continued to receive counselling from David Berry. He helped me see myself in a different light. I started to like myself. He encouraged me to do self improvement courses. I completed basic computer courses and computer graphics. I did art classes and progressed to tutoring other prisoners in art. I contributed to major presentations of art. I undertook literary studies and became a convenor of activities geared towards helping homeless youth. I visited an Aboriginal school to assist with art work. I became an organiser of a successful sportsmen's dinner which raised funds for homeless youth."

Later, she has spoken of the occasion, in October 1991, when she first became "able to speak about Tony's threat to have anal intercourse with my fourteen year old niece."

It is necessary to record something of the appellant's statements concerning her communication difficulties and then to notice the experts' explanations for these problems.

"59. The Aboriginal Legal Service acted for me when I was charged. They saw me at the prison and took a statement from me, however, there were some things which were too painful to talk about. .... .

60. I had trouble talking to the men from the Public Defender's Office who came to see me. At that time I was very insecure. A friend of mine in the prison had a social worker called David Berry who used to see her. I wrote to David Berry and asked him to see me. He spent a lot of time with me and I felt I could trust him. I opened up to him some of the things that happened. I explained a lot of my personal background but I could not bring myself to talk about the threat to my niece. I still felt that I did not want a lot of this stuff told in Court.

61. I had several meetings with the men from the Public Defender's Office. They advised me not to give evidence . . . ."

- "7. I am aware that Psychiatrists who have filed reports in these proceedings had made reference to why I did not refer to the threat to Enid by Tony. The reason why I did not talk about it at the time is simply that I just blocked it out for a year or two. I used to do that when I was young. Things that went bad I used to try and block out.
- ...
15. Shortly before the trial I was told that Ms. Hamilton would be my solicitor at the trial. I was happy to hear this. I had found it easier to talk to her than the men from the Public Defender's Office.
16. After I was told that Ms. Hamilton was to be my solicitor I remember a conference with her though I do not recall the presence of Mr. Shanahan. I do not challenge his recollection that he was there. It was in the week before the trial. I recall that the issue of whether or not I would give evidence was raised. I was asked whether or not I wanted to give evidence. Part of me did and part of me did not.
- ...
19. Each of the legal representatives knew what I could say and it appeared that what I had said and written would not help me at the trial. I perceived that Ms. Hamilton did not want me to give evidence. I was invited to "think about it".
20. My own reasons for not wanting to give evidence were that I was scared, shy and embarrassed. I found it hard to talk and I was unable to speak out about the threat to Enid and what I had said seemed to be irrelevant to my legal representatives so I just did what they suggested.
- ...
22. After this conference I recall Ms. Hamilton coming to the jail again on the Friday before the trial and saying to me words to the effect that, "The trial is going to be on Monday and don't worry. It is only going to go for a few days." It still seemed Ms. Hamilton did not want me to give evidence. She kept reassuring me that I did not have to think about the matter over the course of the weekend or be concerned with the question of whether or not I should give evidence.
23. On Monday, 5 September 1988 Mr Shanahan and Ms. Hamilton came and spoke to me in the cells of the Supreme Court. They asked me to sign two (2) documents about my admitting the cause of death

to Tony and secondly, that I did not wish to give or call evidence. By this date it was clear that that was what they wanted me to do.

24. I signed the paper because Theresa Hamilton and Michael Shanahan made it clear that they did not want me to give evidence and said something like, "because it would go against me if I went on the stand."

It is not proposed to refer to the expert evidence in any detail, since it is not necessary to do so.

Dr. Diana Eades is a sociolinguist with particular expertise in communications by Aboriginal people. Dr. Eades' conclusion, which was not challenged by the prosecution, was that "the manner in which information has emerged in Robyn's story is totally consistent with her Aboriginality ... even though this may seem extraordinary to a non-aboriginal person." According to Dr. Eades, given her limited "bicultural competence" at the time of the killing and her trial, the appellant would have been unlikely to reveal sensitive or significant information unless a person communicated with her in the aboriginal way, which does not involve direct questions. Further, the extent of the information which she would have been willing to provide would have been affected by the degree of trust which she felt in the person with whom she was speaking: her sense of family responsibility would have obstructed her ability or willingness to involve her niece and "shame" her sister, the child's mother. Throughout her time in prison, the appellant would have gained in bicultural competence, assisting her to communicate in a non-aboriginal way, and the passage of time would have allowed her to prepare to

reveal the sensitive details of the deceased's threat to her niece, with its family significance.

Dr. Eades also explained why the appellant accepted her lawyers' advice not to give evidence at her trial: simply put, she did not have a close relationship with them and her "Aboriginal way of dealing with 'white business' such as the Court, would guide her not to oppose her lawyers."

Two psychiatrists and a social worker also gave affidavits with respect to the appellant's relationship with the deceased and the development of her account of events over a period of time. None was cross-examined, although the prosecution objected to the Court receiving the social worker's affidavit on the basis that she was not appropriately qualified; according to the prosecution, the necessary expertise lies in psychology, not social work.

Professor Brent Waters, a Consulting Psychiatrist, gave evidence that the deceased's "threat to anally sexually assault Enid ... evoked a range of powerful emotions, including shame, guilt, humiliation, anger, frustration and a strong desire to protect Enid, who at the time stood in the position of her daughter."

Further, he said:

"Before the trial, she was barely able to talk about the sexual abuse she had suffered from Mr Black, and even then only in a counselling context with her social worker, Mr David Berry. But she was not yet able to talk to him of Mr Black's threat to sexually abuse Enid.

In my opinion, this crucial fact remained concealed as a result of a psychological mechanism known as

repression whereby extremely anxiety provoking thoughts, feelings and ideas are kept out of the conscious mind until their ability to cause extreme anxiety is reduced, usually by counselling or support and the passage of time. In Ms. Kina's case it is clear that repression was operating, and its source was her deep sense of shame over being anally raped and not being strong enough to defend herself, and her guilt that she exposed Enid to the same risk. She was unable to talk about these matters because such a disclosure would have been extremely anxiety provoking and distressing at the time. Their revelation was only possible when the guilt and shame was countered by greatly improved self confidence and self esteem, which came about over a period of years as she worked on her further self improvement through counselling with Mr. Berry."

Another psychiatrist, Dr. H.D. Eastwell, said that the appellant had "an understandably strong reaction" to the deceased's threat to sodomise her niece, and to his preference for anal sex, about which she felt "bad" and "dirty". In his opinion, the appellant did not disclose the deceased's acts and her reactions to them until October 1991 because she was affected by the psychological mechanisms of repression, and perhaps, denial. He explained repression as a "'mechanism' whereby thoughts and ideas which are unacceptable or offensive to the person are kept out of their conscious mind. Denial is an extreme form of repression."

It is unnecessary to rule on the admissibility of the affidavit of Ms. C.A. Miller, a social worker at the Domestic Violence Resource Centre, and undesirable to do so because there was no real investigation of her qualifications and much of her evidence need not be relied on for the appellant's present purposes; it is not for this Court on this occasion to express an

opinion on the elements and characteristics of what has been termed the "battered woman syndrome" or to decide what consequences follow if the appellant was a victim of that syndrome when she killed the deceased: cf R. v. Runjanjic and Kontinnen (1991) 56 SASR 114, & Burt - "The Battered Woman Syndrome and the Plea of Self-Defence (1993) 27 University of British Columbia Law Review 93.

Neither the appellant nor any of the other deponents was cross-examined, but counsel for the respondent submitted that the appellant's evidence should not be accepted because there are significant differences in the various accounts which she has given which "become more favourable to her cause as time progresses". In particular, it was submitted that self-defence had now emerged as a possible ground of exculpation but was not raised by the material available to the appellant's legal advisers at the time of trial. Conversely, it was contended that, while the circumstances known to the appellant's legal representatives at the time of trial were sufficient, if given in evidence, to require that provocation be left to the jury, the present material does not raise provocation as an issue "because she never had an intention to stab the deceased until she was forced to in order to defend herself ...". However, it was accepted that, on any of the appellant's accounts, "there'd have been a good arguable case of ... lack of necessary intent." Further, it was accepted by the respondent that there is nothing to indicate that the appellant's lawyers at the time of her trial

adverted to the significance of what she then said as a basis for raising provocation for the jury. With his customary candour, Mr Michael Byrne for the respondent acknowledged that "There is no doubt that the system did miscarry in so far as her preparation for trial was concerned."

The force of the respondent's argument based on the changes in the appellant's account of events is diminished if regard is had to the cultural, psychological and personal obstacles to full and frank disclosure by the appellant which have been eliminated or reduced by the passage of time, counselling and an increasing understanding of aboriginal communication difficulties and the "battered woman syndrome" and the problems which are presented in these matters. It is perhaps sufficient to observe that there is no basis upon which, in the circumstances, this Court could hold that the appellant's evidence must or should be rejected. Each of the experts, for different reasons, expressed opinions favouring the acceptance of her evidence.

The question for this Court is whether there has or might have been a miscarriage of justice. The test is sometimes put as whether the evidence as a whole is such as to give rise to a significant possibility of a different verdict: Mickelberg v. R. (1989) 167 CLR 259; R. v. Condren; ex parte Attorney-General (1991) 1 Qd.R. 574. While that may provide a satisfactory test in most circumstances, and the question whether a miscarriage of justice has occurred should usually be assessed in light of the way the criminal justice system operates so that, as a general

rule, an accused person is bound by his or her counsel's conduct of the case (Birks (1990) 48 A. Crim. R. 385, 392), the concept of a miscarriage of justice is broad and flexible and should not be curtailed by judicial exegesis.

There is little reason for an inquiry as to what the appellant's lawyers at her trial should have done on the material which they had which, it should be noted, was different from and much less than the material now available. It might be that, even on what they had, the appellant's lawyers should have acted differently, at least to the point of pursuing additional investigations. With the benefit of hindsight, they should have taken steps to better deal with the appellant's difficulties in giving instructions and her potential difficulty in giving evidence; other than in exceptional circumstances, it surely can not be a proper basis for detriment to an accused person that, for reasons not associated with the offence charged, that person is substantially deterred from communicating effectively in preparing for or participating in his or her trial.

However, the present task is not to second guess the appellant's lawyers at her trial or to attribute blame for what was done, or not done, in what were, on any view, unusual and difficult circumstances.

It is unnecessary to conduct such an exercise to conclude that the appellant's trial miscarried. That conclusion is inescapable. The legal system for the most part works well, but we must not shut our minds to the reality that sometimes matters

go awry and produce a miscarriage of justice. Nor, when that occurs, should we shrink from a frank acceptance of what has occurred and an equal openness and readiness to put it right.

In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

- (i) her aboriginality;
- (ii) the battered woman syndrome; and
- (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.

In the exceptional events which occurred, the appellant's trial involved a miscarriage of justice.

Accordingly, the appeal should be allowed.

Since it is impossible for this Court to conclude that the appellant must be acquitted or could safely be convicted only of manslaughter, the proper course is to order a new trial. Of course, it is a matter within the discretion of the Director of Prosecutions whether a further indictment is presented.

THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Brisbane

Before      The President  
              Mr Justice McPherson  
              Mr Justice Davies

[R. v. Kina]

IN RE: ROBYN BELLA KINA

REFERENCE BY ATTORNEY-GENERAL  
UNDER S.672A OF THE CRIMINAL CODE

**REASONS FOR JUDGMENT - MCPHERSON J.A.**

Judgment delivered the Twenty Ninth day of November 1993

At her trial on 5 September 1988 the petitioner Robyn Kina was found guilty of the murder on 20 January 1988 of Anthony David Black. For this she received the sentence of imprisonment for life that is made mandatory by s.305 of the Criminal Code. Her appeal against conviction was dismissed by the Court of Criminal Appeal on 23 November 1988. Since then matters have come to light which led the petitioner to apply to the Governor in Council for the exercise in her favour of the royal prerogative of mercy. Section 672A of the Code expressly preserves the pardoning power of the Governor, while adding in para. (a) that the Crown Law Officer may refer the whole case to the Court of Appeal, to be heard and determined as in the case of an appeal by a person convicted. It was under this provision that the Attorney-General on 24 May 1993 referred to the Court "the whole case with respect to the conviction of ... Robyn Bella Kina on the charge of murder

..." of Anthony David Black.

It has been held that the Court sits judicially in hearing a reference under s.672A. To restrict its function, as s.672A(a) apparently does, to hearing and determining the case "as in the case of an appeal by a person convicted" might be thought to allow little scope for the procedure to operate at all, the more so if an appeal by that person has already been heard and disposed of by the Court. It is, however, plain from what is said in decisions of authority, including Ratten v. The Queen (1974) 131 C.L.R. 510, 516, that the procedure on a reference under s.672A is available to correct a miscarriage of justice; and that, at least in some circumstances, new evidence that does not necessarily satisfy all the tests for making it strictly admissible as "fresh" evidence on an appeal may be received on a reference of this kind.

In considering such a reference in Ratten v. The Queen, Barwick C.J., with whose reasons McTiernan, Stephen and Jacobs JJ. agreed, said that one instance of a miscarriage of justice is where the petitioner or appellant has not had a fair trial (131 C.L.R. 510, 516). After discussing various forms in which this might appear, his Honour went on:

"There is lastly the situation where the miscarriage is that the jury did not have before it evidence not available to the appellant at the time of his trial which, if believed by the jury, was likely to lead to an acquittal, the jury not being satisfied beyond reasonable doubt of guilt. This may be regarded as an instance in which the accused has not had a fair trial."

His Honour went on to expand what was meant in speaking in criminal trials of evidence being or not being available, and of a

miscarriage of justice resulting from it. He said (at 517):

"there will be no miscarriage simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted. The accused, nevertheless, will have had a fair trial ... Of course, if by reason of new evidence accepted by it though it may not be fresh evidence, the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the fact that the trial itself has been fair will not prevent the court upon that evidence from quashing the conviction."

It was essentially on this proposition that Mr Jerrard Q.C. for the petitioner in this matter based his submissions to us. Later decisions which are assembled and considered in the reasons for judgment of Thomas J. in R. v. Condren, ex parte Attorney-General [1991] 1 Qd.R. 575, 578-579, do not seem to me to add very much of relevance here to what was said in Ratten's case, except that the requirement that it be "likely" that a different verdict would be reached on the additional evidence has since been varied or qualified. The test now is whether there is "a significant possibility that the jury, acting reasonably, would have acquitted the appellant" if the evidence had been before it : see Gallagher v. The Queen (1986) 160 C.L.R. 392, 399, 402, 421.

The only issue raised at trial of the petitioner was whether she caused Black's death with the requisite intention; that is, with intent to kill, or to do him some grievous bodily harm. In that context the prosecution evidence against her would certainly have appeared to the jury to be cogent and strong. The first witness in the case was Perry Webber, who was one of those living

in the house with the petitioner and Black. Shortly before the fatal event, he heard sounds of thumping and screaming coming from their room. It lasted for about 10 minutes and then he saw the petitioner came running out of her room (which was at the back of the house) and into the kitchen, where she grabbed a "Staysharp" knife. She ran back to the bedroom, using her shoulder to open the door, which in the meantime Black had closed. As the petitioner rushed into the room, Webber heard her say "I am going to stab you, you bastard". By then he was following close behind her, and he saw her stab Black in the left-hand side of his stomach. He said that when she ran back into the room with the knife, Black grabbed a chair and tried to hit the knife out of her hand. She knocked the chair out of his hand and stabbed him. When Webber was asked about Black's movements thereafter, he said that Black had just "stumbled around" the room because he had a broken ankle.

Webber was cross-examined to some extent, from which it emerged that when Black had the chair in his hand, he was telling the petitioner to "get away, get away"; also that after she stabbed him, and he fell to the floor, she started hugging him and telling him she hadn't meant it. Webber's recollection was that what she said was "Don't die; don't die. I didn't mean it. I'm sorry". This was confirmed by another resident of the house, Colin Te Rare, who however did not hear anything of the preceding events because he occupied a room at the front of the house. Jennifer Doctor, who also lived there, said little more in her

evidence than that some time before the incident she had heard someone crying, and that, while under the house feeding the dog, she had heard banging and thumping above. The first she knew of the stabbing was when she heard the petitioner say "I'm sorry, Tony," and saw her with her arms around him as he lay collapsed on the floor.

In view of the state of the evidence before them, it is scarcely surprising that the jury returned a verdict of guilty of murder. The petitioner's statement after stabbing Black that she "didn't mean to" might readily be viewed as an expression of remorse for what she had done, without seriously detracting from her conduct in sallying out to the kitchen for the knife and returning with it to the bedroom exclaiming "I am going to stab you". Both her conduct and the accompanying words were expressive of the intention that the Crown carried the onus of proving. The petitioner herself did not give evidence at the trial, and there was therefore nothing but the testimony of Webber to account for what had happened. It is true that counsel for the petitioner at trial suggested that a defence of provocation should be allowed to go to the jury. Evidence had been elicited from Te Rare that Black was "argumentative" and that he had previously used violence against the petitioner. Te Rare had more than once seen her with a black eye, and also bruises to the arm and neck. On the other hand, he also described the couple's relationship as being "very much that I think most people have ... sort of up and down".

To raise under s.304 of the Criminal Code a case of

provocation for the jury to consider, it would have been necessary to show that there was something to suggest, at the very least, that the stabbing causing the death was done "in the heat of passion caused by sudden provocation, and before there is time for the passion to cool". Measured by this test, there was nothing in the evidence at trial capable of activating s.304. Webber said he could not tell whether the "thumping" he had heard before the event was blows being struck; it was more like furniture being thrown around. Plainly the trial judge was correct in ruling as he did that there was no evidence fit to go to the jury that suggested provocation whether by words or conduct; or loss of self-control; or proportionality of retaliation. Indeed, having regard to what the other witnesses said, it is difficult to see how an issue of provocation could have been presented at the trial without the petitioner herself giving the necessary evidence.

She, as I have said, did not testify at her trial. It is easy after an event which turns out badly to be critical of the efforts of others. Nevertheless, it is difficult to understand why she was not advised to give evidence on her own behalf. Speaking only from my impression as a trial judge, juries nowadays generally expect to see the accused testify. By doing so here, she might possibly have made her case better, but could scarcely have made it worse. True, she had a record of previous convictions including two for unlawful wounding, of which one had been committed less than two years before this incident; but it was as certain as anything can be that no occasion would have

arisen for permissible cross-examination about her previous record. The only person on whose character her evidence might possibly have cast imputations was dead by her own hand. There was no reason for any apprehension that the discretion conferred by s.15(2)(c) of the Evidence Act 1977 might be enlivened.

The reason for not calling her as a witness or recommending that she testify is said to have been that she was uncommunicative or (what is not necessarily the same thing) not a good communicator. That is by no means unusual among individuals who come to give evidence in court, and, in the case of one like the petitioner, might conceivably have been no bad thing. To be seen by the jury as a person who could not find words to explain or defend her actions might have aroused rather than dispelled sympathy. Taciturnity in a witness tends to present no less of a problem for the cross-examiner. But to consider the matter in this way is really to attempt to assess the possible outcome of trying different tactics from those adopted at the trial. That is not a function of proceedings like these.

The real reason why the petitioner should have been called to give evidence at her trial was that there were things she could have said that might have provided evidence of provocation, or of self-defence, or both; or which, in combination, might have gone some way to undermine the impression that she had killed with the necessary intent. There was, according to the material presented to us, an extensive history of conduct on Black's part amounting to cruel and inhuman mistreatment of the petitioner during the

period of their association, which went back to at least 1985.

If it is said that she was uncommunicative, there were nevertheless several individuals to whom she had in fact confided her account of events. Ms. Theresa Hamilton, then employed by Paul Richards and Associates, solicitors who originally acted for the petitioner, took a statement which was signed by her in March 1988 after it had been typed up. It is ex. TJH1 in these proceedings. In it the petitioner recounts that shortly before the killing took place on the morning of 20 January 1988, there had been an argument between her and the deceased in the course of which he had hit her; when she went out to the kitchen he slammed the door (which was difficult to open from outside) behind her. There were, her statement to Ms. Hamilton went on:

"a lot of things going through my mind. I don't know why it was I snapped at that particular time. I guess I was sick of being punched up all the time and I know that one thing that influenced me to take the knife to the bedroom was that I knew if I went in without any weapon, with the mood that he was in he would definitely punch me. I had never seen him as angry as he was after our fight in the morning. The door could not be opened from the outside without the handle so I just pushed my shoulder against it until it opened. He was sitting down and when he saw I had a knife he stood up. He picked up a chair and held it in front of him as though to defend himself and I remember he said 'You won't use that you gutless cunt.' I just reached out then and slashed at him and then pulled the knife out and threw it out the window. He put the chair down then held himself and staggered out of the bedroom, he said something like 'You stabbed me'."

In addition to ex. TJH1, there is a daily diary of events prepared by the petitioner at the request of Mr David Berry, a social worker and consultant, who in about June and July 1988 was taking a close interest in her. The diary contains an account in

chronological sequence of events that took place from 15 January through to 20 January 1988 when the killing occurred. It gives details of the deceased's mistreatment of the petitioner including beating her and tying her to the bed at times during those five days. What is more important it tells of a demand by him to have anal intercourse against her wish on the morning of 20 January. According to the diary, it was her opposition to doing this that provoked the argument overheard by Webber. The petitioner says that in the course of it the deceased punched her in the face and stomach; "slammed" her against the wall; and pulled her hair. It was after these assaults on her that she went to the kitchen and took the knife with which Black was stabbed.

Mr Berry also wrote a report ex. DJB1 which is dated 7 June 1988. It refers again to several of these details, including the demand for anal intercourse on 20 January; the slamming of the bedroom door after her; her "snapping" and grabbing the knife; and her stabbing the deceased "once down low, deliberately avoiding his heart and chest area". The report ex. DJB1 in the record before us is in the form of a letter addressed to someone in the Public Defender's Office with whom Mr Berry had previously spoken by telephone. It was delivered to the reception counter of the Public Defender's Office by Mr Berry personally on 9 June 1988. He followed it up with another personal call there and a further letter dated 29 June 1988 (ex. DJB2); but his efforts to elicit a useful response to his communications on behalf of the petitioner were, it is fair to say, rebuffed by the Office. He eventually

received an intimation that he should not interfere in the proceedings.

Meanwhile, Mr Brian Devereaux, then an interviewing clerk and officer with the Public Defender who was involved in taking instructions from the petitioner, prepared a statement dated 27 July 1988 (ex. RBK5) based on notes of interviews he had previously had with her. This, too, contains an account of the stabbing and of what happened in the bedroom immediately before it took place. It contains the following statement by her:

"Tony [Black] yelled out to Colin, 'She's got a knife'. Tony kept coming towards me until he was so close that I stabbed him. He had not hit me with the chair before I stabbed him but I believe that had I not stabbed him when I did he would have hit me with the chair."

It bears in one particular a close resemblance to a statement she had made to Mr Berry, which is recorded in his letter of 29 June 1988 (ex. DJB2).

"If I didn't stab him he would have whacked me with that chair and he would not have let up. If I wanted to kill him I would have aimed at his heart."

It is therefore evident that in various statements from the petitioner taken before the trial there were accounts of the incident that were capable of raising not only a possible question of provocation but also self-defence, as well as bearing on the question of intent. It is true that her statements are not all completely consistent, neither are they inconsistent. Before us they were not made the subject of cross-examination, and we are therefore bound to accept them at least where they are not contradicted by evidence from other persons.

What is difficult to understand is that none of this material, or evidence to the effect of it, was presented at the trial. All except one of the documents mentioned here were included in the brief to counsel at trial; that is to say, he was briefed with the diary of events; the report by Mr Berry dated 7 June 1988 (ex.DJB1); and the statement dated 27 July 1988 taken by Mr Brian Devereaux (ex. RBK5). The exception was the statement (ex. TJH1) given to Ms. Hamilton, which had been included in the brief to another counsel to appear at the committal proceedings, but was not included in the brief on trial. It seems that after the committal and before trial, the Public Defender took over conduct of the petitioner's defence. Mr Jerrard Q.C. informed us that at the time in question there may have been no system in force for the Public Defender's office to obtain the committal brief or file in such circumstances. I must say I think that an extraordinary state of affairs.

Even without ex.TJH1 there was in counsel's brief on trial more than enough information to warrant recommending to the petitioner that she give evidence. The case is, in my respectful view, not one in which it can be said that difficulties of communication prevented her instructions from being known to counsel or her other legal advisers. She adequately communicated them to Ms. Hamilton, Mr Berry, and Mr Devereaux. Her instructions with respect to the facts and events leading up to the killing were obtained from her and incorporated in the statements and other documents briefed to counsel at trial. As

the client, it was for the petitioner to say what had happened. This she did in the written statements to which I have referred. It was the function of her legal representatives to examine what she said and to advise her whether it was capable of raising relevant matters of defence or grounds of exculpation at law.

Counsel who appeared for her at the trial has deposed that he did not know how he could ascertain what evidence the petitioner could possibly give. The statements in the trial brief provide the solution to that problem. He also says he formed the view that he should "proceed to trial without being able to obtain any instructions beyond those which were already contained in the actual brief". It is difficult to see why more were needed; but in any event his conclusion was that those "instructions did not provide sufficient evidence to allow the defence of provocation to be raised, as there were insufficient circumstances to argue that there was sudden provocation". For that reason, he says, the trial was conducted on whether the Crown should satisfy its onus as to the requisite intent. "This way of running of [? the] trial", he adds, "was explained to the Appellant". It could scarcely have been any more difficult to explain provocation and self-defence to her than to expound the conception of intention to kill or do grievous bodily harm.

In the end, I am persuaded that there has in this case been a miscarriage of justice arising from the fact that in the material now before the Court there is evidence which if presented at the trial would have raised a significant possibility that a verdict

of guilty of murder would not have been returned. The prospect would have been good that she would have been found guilty only of manslaughter. The matter is one in which it must be conceded the evidence was available at the trial, and in that sense the evidence was not "fresh". It is nevertheless one of those exceptional instances mentioned in Ratten v. The Queen (1974) 131 C.L.R. 510, 517, in which the conviction should be quashed and the verdict set aside because of a serious doubt about whether the petitioner was guilty of the offence of which she was convicted.

I would therefore allow the appeal, set aside the conviction and verdict, and order a new trial.