

COMP6445

Required = paras 42, 45 and 55-56

Rest of case in optional (and interesting to see how these are transcribed)

## **Court of Criminal Appeal**

### **New South Wales**

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Case Title: Tiwary v R

Medium Neutral Citation: [2012] NSWCCA 193

Hearing Date(s): 20, 24 July 2012

Decision Date: 10 September 2012

Jurisdiction:

Before: Bathurst CJ at [1]  
Allsop P at [1]  
Fullerton J at [1]

Decision:

Orders made on 26 July 2012. Reasons delivered on 10 September 2012.

1. Extend the time for filing the notice of appeal up to and including the day on which it was filed.
2. Appeal upheld.
3. Conviction of the murder of Chow Lyang Tay quashed.
4. Conviction of the murder of Poh Chuan Tan quashed.
5. In lieu thereof verdicts of acquittal be entered on each count.

Catchwords:

CRIMINAL LAW - murder - appellant convicted of killing two flatmates with baseball bat - forensic and other evidence sufficient to support rational hypotheses consistent with innocence - reasonable doubt as to guilt notwithstanding inconsistencies and implausibilities in appellant's account - verdict unreasonable or insupportable having regard to the evidence - convictions quashed - no retrial ordered

Legislation Cited:

Criminal Appeal Act 1912 (NSW), s 6(1)  
Evidence Act 1995 (NSW), s 137

Cases Cited: Kurdi v R [2011] NSWCCA 179  
M v R [1994] HCA 63; 181 CLR 487  
SKA v R [2011] HCA 13; 243 CLR 400  
Tiwary v R [2008] NSWCCA 319

Texts Cited:

Category: Principal judgment

Parties: Ram Puneet Tiwary (Appellant)  
The Crown (Respondent)

Representation

- Counsel: Mr D Dalton SC (Appellant)  
Mr P Ingram SC (Respondent)

- Solicitors: John B Hajje & Associates (Appellant)  
Solicitor for Public Prosecutions  
(Respondent)

File number(s): 2005/3786

Decision Under Appeal

- Court / Tribunal:

- Before: Johnson J

- Date of Decision: 17 December 2009

- Citation: R v Tiwary [2009] NSWSC 1415

- Court File Number(s) SC 2005/3786

Publication Restriction:

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## JUDGMENT

- 1 **THE COURT:** On 26 July 2012, the Court made orders extending time for filing the notice of appeal, allowing the appeal, quashing the convictions of the appellant for the murders of Chow Lyang Tay and Poh Chuan Tan and

ordering the entry of verdicts of acquittal on the counts of murder of Mr Tay and Mr Tan. Leave to appeal (the matter not being a question of law only) was granted at the beginning of the hearing. These are the reasons of the Court for those orders.

- 2 There were two grounds to the appeal. The first (which we would reject) asserted an error in the learned primary judge (Johnson J) failing to exclude certain expert evidence, pursuant to the *Evidence Act 1995* (NSW), s 137. The second (which we would allow) asserted that the jury verdicts (which were by majority) were unreasonable and cannot be supported having regard to the evidence, for the purposes and within the meaning of the *Criminal Appeal Act 1912* (NSW), s 6(1).
- 3 It is convenient to deal with the first ground after we have considered the evidence and the issues that arise on the evidence for the purposes of determining the second ground of appeal.

### **The task for this Court**

- 4 The principles upon which this Court should act under the *Criminal Appeal Act*, s 6(1), are authoritatively stated in *SKA v R* [2011] HCA 13; 243 CLR 400 at 405-406 [11]-[14], *M v R* [1994] HCA 63; 181 CLR 487 at 492-493 and 494-495, and *Kurdi v R* [2011] NSWCCA 179 at [3]-[18].  
Notwithstanding that there may as a matter of law be evidence to sustain a guilty verdict, a court of criminal appeal must ask itself on the whole of the evidence as a question of fact whether there is a reasonable doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that a court which experiences such a doubt may conclude that no miscarriage of justice occurred.
- 5 The appellant had previously been tried and convicted of both murders in 2006. Those convictions were overturned on appeal: *Tiwary v R* [2008]

NSWCCA 319. Neither of the flaws in the first trial which led to the quashing of the verdicts affected the second trial.

### **The facts**

- 6 Sometime between about 12.15 pm and 2.15 pm on Monday, 15 September 2003, two university students, Mr Tay and Mr Tan, were murdered in premises in Kensington which they had occupied as co-tenants with the appellant. Their bodies with their heads brutally bludgeoned were located by police after they responded to a 000 call placed by the appellant at 2.20 or 2.21 pm.
- 7 The premises comprised the upper floor of a duplex which fronted on to Barker Street, Kensington, within easy walking distance of the University of New South Wales campus. The lower level of the duplex was occupied by the owners, Mr and Mrs Lichaa. The upstairs unit was accessed from Barker Street by a set of stairs partially enclosed by the brick façade of the building leading to the front door at the top of the stairs. From the rear it was accessed via a set of external stairs onto a balcony extending the width of the building to a backdoor. A driveway extending from Barker Street along the eastern side of the building provided access to the rear concrete yard, garages and the rear external stairs through wrought iron side gates. Upon entering the front door a hallway extended into an open lounge room from which a rear door opened on to the external balcony. From the front door, Mr Tan's bedroom was the first room on the left followed by the bathroom, the appellant's bedroom and the kitchen. Mr Tay's bedroom was the second room on the right after an unoccupied bedroom immediately adjacent to the front door.
- 8 Mr Tay was found lying on his back behind a settee in the lounge room in a large area of pooled blood. There were deposits of his clotted blood on a computer located on a nearby desk. There were extensive areas of blood staining (both wiped and spattered) on the surrounding walls.



- 9 Mr Tan was found slumped with his back against the wall beside the closed front door. There were extensive areas of blood staining in that area.
- 10 Mr Tay was apparently bludgeoned in the north eastern part of the living room, adjacent to his computer. Mr Tan was first attacked in the living room, where his broken spectacles and pieces of teeth were found; he was apparently chased up the hall to the front door, where he was repeatedly bludgeoned and then stabbed.
- 11 In each case the cause of death was blunt force injury to the head with consequent brain injury consistent with both deceased being struck multiple times on the top of the head (Tan) and back of the head (Tay) under considerable force with a baseball bat. These injuries would have produced an immediate state of deep unconsciousness in each of the deceased ultimately leading to death. Mr Tan also suffered multiple injuries to his face, including a broken nose and broken teeth.
- 12 In the view of Dr Duflou, the forensic pathologist who performed the autopsy, the combined appearance of Mr Tan's head injuries suggested that at least five or up to 10 blows were delivered to his head and a number of blows to the front of his face. Mr Tan also sustained five penetrating stab wounds to the right-hand side of his neck which, because of the presence of inhaled blood in his lungs, and frothy blood within the nose and mouth, justified them being included in the cause of death. One of the stab wounds passed into the voice box and one into the base of the tongue and back of the oesophagus. Mr Tan also had defensive stab wounds to the backs of both hands.
- 13 Dr Duflou gave evidence that the wounds to the neck were likely to have been inflicted after Mr Tan suffered the head injuries, likely while he was

unconscious, and that he would not have survived for any significant period after the wounds to the neck were inflicted.

- 14 Mr Tay also sustained a single stab wound to the neck. In Dr Duflou's view the lack of bleeding into his lungs suggested that the stab wound was inflicted either at or about the time of death or shortly after. For this reason it was not included as a cause of death. In Dr Duflou's opinion, a minimum of two extremely forceful blows were delivered to the back of Mr Tay's head. He also had a defensive injury to his left-hand index finger and a superficial stab wound to his forehead. The combined effect of the evidence collected at autopsy, including the views of Dr Rodriguez, a consultant neuropathologist, indicated that Mr Tay survived in a state of deep unconsciousness for about two hours after sustaining the head injuries, before he was stabbed in the neck.
- 15 On this analysis, the stab wounds to the neck of both deceased were likely to have been inflicted at about the same time, and at or about the same time that Mr Tan's head injuries were inflicted, that is, some time after 2.00 pm and before 2.20pm
- 16 The fact that Tan and Tay were fatally assaulted (and, subject to the remarks below about the possibility of a second baseball bat, very likely by the use of the same or similar weapons) at different times over a period of about two hours was consistent with other evidence relied upon by the Crown at trial, in particular the proven movements of Mr Tan shortly after midday to 2.00 pm when he was either en route to university, at university or returning from university. It was the appellant's case that he was in the unit at the time of the murder of Mr Tay but asleep, though waking momentarily at the sound of a fall, and that later he was awakened in the course of Mr Tan being fatally assaulted, but that he did not emerge from his bedroom (through fear) and therefore did not identify the assailant or assailants.
- 17 A bloodied knife and baseball bat were located by police in the unit. The knife was found under Mr Tan's right leg. (It was likely that police moved Mr Tan's body to some extent as they forced entry through the front door

and that the knife or the body were forced into closer alignment for that reason.) The baseball bat was located leaning against the wall inside the appellant's bedroom. Mr Tan's blood was identified on both items. There was none of Mr Tay's blood detected on either item. Mr Tan's blood was identified in discrete locations on the appellant's feet, hands and shorts. None of Mr Tay's blood or DNA was detected on the appellant or his clothing. There were faint stains on his long sleeved sweater, which tested positive to a presumptive blood test.

18 It was the Crown case that the appellant assaulted Mr Tay with the baseball bat after Mr Tan left the unit shortly after midday and then assaulted Mr Tan with the same weapon within a short time of him returning to the unit at around 2.00 pm, after which he then stabbed both of the deceased in the neck before ringing 000 to report the murders which he attributed to an unknown assailant or assailants. The murders were alleged by the Crown on the appeal to be premeditated and that the appellant executed his plan alone with care and precision over the course of two hours, taking appropriate measures to ensure that there was little or no blood on him or his clothing which would implicate him as the murderer before he alerted the authorities and falsely claimed that he came across the bodies of his flatmates on emerging from his bedroom.

19 The Crown submissions on appeal differed, importantly, from the Crown case at the trial. There, it seemed to be the Crown case that while there was a dispute simmering between Mr Tay and the appellant over money, the killing of Mr Tay occurred fortuitously, he not having attended his morning lectures, and that Mr Tan was killed when he arrived home from university because he discovered Tay's dead body and knew the appellant had killed him. Further, at the trial, such blood as there was on the appellant was said to have been medium velocity spattering that occurred during the battering of Mr Tan. On the appeal, it was effectively conceded that unless the appellant had washed immediately after killing Mr Tan (of which there was literally no evidence) and immediately prior to the 000 emergency call, there were three available explanations for the (not

extensive) blood of Mr Tan on the appellant: spattering from the Tan murder, expired blood coughed by Mr Tan onto the appellant who was near him as he was dying, and both spattered and expired blood. The difficulty for the Crown case in those circumstances was that, on one available explanation, the (not extensive) blood on the appellant came from Mr Tan coughing as the appellant claimed and that despite having bashed Mr Tan in the face and around the head with the bat in the living room, chased him up the corridor where he repeatedly bludgeoned his head, and stabbed him in the neck, the appellant had little blood on him either at all or until the blood coughed by Mr Tan.

- 20 The Crown submitted at trial that the absence of any of Mr Tay's blood on the appellant was explained by the opportunity he had to wash himself in the interval before Mr Tan returned to the unit (and that he disposed of any blood stained clothing or towels in this same time frame) or because there may not have been back spatter given that the staining around Tay's body appeared to be directional.
- 21 The absence of any of Mr Tay's blood on the baseball bat and the knife was said by the Crown to be explained either because the appellant cleaned them before using them on Tan or that Tan's blood masked the residue of Tay's blood on both weapons.
- 22 The Crown case theory was in direct conflict with the appellant's account given first to the 000 operator and then to police on emerging from the unit and thereafter in the course of extensive formal questioning. In summary, he said he was disturbed from sleep by the sound of something falling in the flat beyond his closed door on one occasion during the morning, but went back to sleep without checking to see what the source of the noise might be; and later he was disturbed from sleep a second time by a loud noise, after which he heard the sound of someone calling for help. When he emerged from his bedroom after barricading himself in until the noise ceased, he saw Mr Tan slumped at the front door. He told police that he found Mr Tay deceased in the lounge room while he was checking the unit for intruders, after which he telephoned 000. He said that while he was on the phone to 000, but while the operator had him on hold while she was



making contact with the ambulance and police, he checked Mr Tan for a carotid pulse, at which time Tan coughed and expired blood on him.

23 At the trial the Crown conceded that the persistence of conflict between the experts allowed for the reasonable possibility that Mr Tan's blood on the appellant's feet and ankles was expired blood emitted by an involuntary cough reflex when a body reacts to blood in the airways, even in a state of deep unconsciousness, at any time up to brain stem death. At the first trial there was a considerable conflict between experts for the Crown and the appellant on this issue. Whilst there remained an area of dispute between two opposing experts at the retrial, the Crown effectively conceded that the blood staining on the appellant may have been expired blood, but maintained the submission that Mr Tan was so deeply unconscious by reason of his massive head injuries that he could not achieve a cough reflex and that medium velocity impact spatter deposited in the course of the assault was the more probable explanation for Tan's blood on the appellant's feet and ankles.

24 Whilst the reasonable possibility that the blood droplets were expired blood was not a complete answer to the Crown case at trial, on the appeal the Crown conceded that the reasonable possibility that the blood was expired was consistent with the appellant's account to police that Tan "spasmed" and coughed blood as he was checking him for signs of life after the murder and that the relatively small amount of blood on his feet and ankles was inconsistent with the nature and extent of Tan's injuries revealed at post mortem and the spread of blood at the crime scene. This makes it unnecessary to explore in detail the respective evidence of Dr Fulde and Dr Matheson. It suffices for present purposes, given the approach of the Crown on appeal, to say that we find Dr Matheson's views persuasive for at least three related reasons. First, Dr Fulde's evidence was a generalisation from what he had not seen in his experience: coughing of unconscious persons. Secondly, Dr Fulde accepted that with respect to serious head injuries, his staff at the trauma unit at St Vincent's

Hospital would call upon the expertise of neurosurgeons. Thirdly, Dr Matheson, an experienced neurosurgeon, not only had a sound medical and theoretical foundation for his view that an unconscious patient near death from brain injury could cough expired blood, but also he had personally witnessed it. Further, this conjecture as to whether this was expired blood could have been resolved by analysing the blood spots for the presence of saliva. This test was not conducted. In the light of this material, the Crown on appeal was plainly correct in accepting the reasonable possibility that the blood on the appellant was either wholly or in some significant part expired from a cough of Mr Tan.

- 25 On the appeal, the Crown recognised that it had to explain in a rational way consistent only with the guilt of the appellant what happened to the blood that must inevitably have been transferred to the appellant during the bludgeoning of Mr Tan. On appeal, the Crown squarely and fairly confronted the difficulties for its case by reason of the dearth of forensic evidence linking the appellant to the murders. First, there was no blood or DNA of Mr Tay on the appellant. Although he had had two hours to wash, on the Crown case, shortly before calling 000 he had thrust a knife into the neck of the dead or near dead Mr Tay without any blood being transferred in the process. Perhaps more importantly, the Crown accepted that one would reasonably have expected more blood on the appellant had he carried out the sustained and brutal attack on Mr Tan. Whilst such blood as was on him might have been only from the attack, in circumstances where no saliva test was done on the blood said to be expired, where blood was spotted in discrete areas on the lower parts of the legs and feet and none on the face, hair, shoulders or upper body, a real and significant doubt was raised as to whether the appellant bludgeoned and stabbed Mr Tan. In squarely confronting this difficulty, the Crown recognised that the relative dearth of Mr Tan's blood on the appellant was only inconsistent with guilt if the Crown resisted (as it had at the trial) the argument that the blood on the appellant might have been expired blood. If the hypothesis of expired blood was resisted, the dearth of blood on the appellant,

though still possible if he had killed Mr Tan, threw up a significant doubt as to that essential fact. Thus, on appeal, the Crown embraced what had been largely resisted below, that the blood on the appellant **was** expired from the cough by Mr Tan while he was dying. The embracing of this fact also emphasised what the Crown submitted was a carefully arranged and premeditated plan to kill both men. The dearth of Mr Tan's blood on the appellant and the complete absence of any blood of Mr Tay could be explained by the careful washing of himself after Mr Tan's murder and just before placing the 000 call. Given the absence of blood on any clothes found, he must have killed (at least Mr Tan) naked. Then, having cleaned himself, and put on his shorts, while he was on the phone speaking to the ambulance operator, Mr Tan coughed blood on him. It was then too late to wash again.

- 26 Some discussion took place on appeal as to whether this version of events was put to the jury. It was submitted that it was embedded as an alternative hypothesis. For the reasons that we later give, this way of hypothesising events does not remove the existence of what we perceive as a reasonable doubt as to the appellant being the actor who murdered Mr Tan (and Mr Tay).

### **The relationship between the appellant and the deceased**

- 27 At this point it is helpful to give some background to the three young men concerned. All three, Tay, Tan and the appellant, were Singaporean nationals in their twenties studying engineering at the University of New South Wales (Tay and Tan electrical, and the appellant mechanical engineering) under student visas. They had not known each other prior to coming to Sydney. There was no evidence of any overt animosity between them. They occasionally went out for dinner together and watched films together at home. There was evidence that there had been some domestic disagreements about washing-up and cooking and that this had led to their cooking separately, without any suggestion of this being the source of

serious tension or argument. There was no evidence of any illegal activity such as drug use or supply.

- 28 Both Mr Tan and Mr Tay were due to graduate at the end of the 2003 academic year and to return to Singapore. They were both good students attending classes regularly. The academic progress of the appellant was fractured by periods when he was not studying at all, and in other periods when he was repeating subjects that he had failed.
- 29 Mr Tay was described as quiet and reserved and as keeping to himself, though of friendly disposition. He did not interact with others at university to any great extent and did not go out and socialise often. He was described as living a quiet life. Mr Tay was married, his wife being resident in Singapore. His study at university was privately funded.
- 30 Mr Tan (also known as Tony) was relatively outgoing as compared to Mr Tay, having for example gone to the casino with the appellant on one or two occasions, but also led a generally quiet life. He was (like the appellant) studying on a scholarship from the Singapore Armed Forces. Unlike the appellant, however, he was described as an excellent and committed student. On 24 February 2003, he had married a Singaporean national who was resident in Singapore. She had visited Mr Tan in Sydney in March 2003 and he had returned to Singapore for a visit in June 2003.
- 31 The appellant was described as very outgoing. He had a lot of friends and socialised frequently. He occasionally visited the casino and was described as generous with money. He studied late into the night and his habit was to sleep through the day. His friend Kay Meng Lee, his girlfriend Elvira Metiljevic and his brother gave evidence that he would often sleep until late in the morning and into the afternoon, or get up for a morning lecture and then go back to bed. He supplemented his scholarship from the Singaporean Armed Forces by working part time as a security guard.



### **The importance of the appellant's poor academic record**

- 32 It was common ground that the appellant had falsified his academic record with a view to concealing his poor performance. The appellant's academic transcript and student debt records were tendered in evidence. The appellant's academic transcript disclosed that he had failed a number of subjects since he began his studies in 2000. The appellant falsely reported to the Singapore Army that he had passed all five of his subjects in semester two of 2001 when the true position was that he had failed four of five subjects in semester one of 2001 and three of five subjects in semester two of that year. On another occasion, he also sent his girlfriend's transcript to his parents, representing that it was his own.
- 33 His academic performance did not improve in 2002. In semester one of 2002 he failed four of seven subjects, and in semester two, four of his six subjects. He did not re-enrol in semester one of 2003. In semester two of that year he successfully completed two of five subjects and was given special consideration in relation to the other three, due to the death of his flatmates. The appellant was blocked from re-enrolment in March 2004, because of outstanding student fees of \$5650, which had been due by 16 July 2003.
- 34 The Crown submitted that one aspect of the appellant's motive for killing Mr Tay and Mr Tan was to conceal his academic failures from the Singapore Armed Forces. It was said that Mr Tan, who was also on a scholarship from the Singapore Armed Forces, might disclose the appellant's poor academic results upon his return to Singapore. Pursuant to the scholarship, a failure to maintain a satisfactory academic performance might end his entitlements and require his sureties (his brother and cousin) to repay what had been expended.

### **The financial issues and rent**

- 35 The unit at Barker Street was tenanted by Mr Tay and the appellant from 2002 with a third person. When that person moved out in early 2003, Mr Tan moved in. Around this time a fourth person also lived in the unit. He moved out in approximately July 2003 leaving the fourth bedroom vacant. Tay and Tan and the appellant were covering the rent until a replacement flatmate could be found. The rent for the unit was \$2172.60, due on the 13th of each month. Mr Tay had authorised a direct debit from his account to cover the total monthly rent and he would then be reimbursed by Mr Tan and the appellant for their respective shares. Up to and including August 2003, the rent was paid on time, except for one occasion in October 2002.
- 36 A document apparently prepared by Mr Tay and recovered during a search of the unit suggested that in August 2003 the appellant owed him \$5054.00 for bills, rent for August 2003 of \$543 and further accumulated debt, the origin of which was not explained. A forensic accountant gave evidence in the Crown case that the accumulated debt likely represented eight months of unpaid rent. He also gave evidence that on the basis of the appellant's bank statements from Australian bank accounts, it seemed that he had not been reimbursing Tay for his share of the rent since March 2003.
- 37 Mr Chaw gave evidence that while he was staying in the empty room in the unit for a short time in July 2003, the appellant told him that a friend was supposed to move into the room and that while he did not know whether the appellant told him the name of the person, he knew the person was called Andrew and that he was an Australian from Bathurst.
- 38 When questioned by the police the appellant denied knowing anyone called Andrew. He stated that he had met someone who initially said he "wouldn't mind moving in, but then he moved in with his sister", and that he had mentioned this person to Mr Tan and Mr Tay. He could not recall this person's name, but remembered that he studied aerospace engineering and said he would recognise him on sight. He gave the police the name of

a friend, Zodin, whom he thought would recall this person's name. There does not appear, from the transcript of the trial, to have been any follow up with Zodin, who, it appears, was a member of the appellant's group of friends. The appellant's girlfriend, his friend and his brother also gave evidence they had never heard the appellant mention a friend by the name of Andrew. In a statement, Mr Tan's wife also stated she had never heard of any mention of an Andrew moving into the house. The Crown submission was that the appellant had made up Andrew, in order that Mr Tay begin billing "Andrew" for a quarter of the rent monthly, thereby alleviating some of the debt mounting on him.

39 Mr Tay had told friends that when he and Mr Tan returned to Singapore at the end of the academic year, the appellant would assume responsibility for paying the total rent. Two emails of Mr Tay (one of 14 July 2003 to the appellant and the other of 19 July 2003 to Mr Tan) refer to a friend of the appellant moving in and a person named 'Andrew'.

40 The appellant had one Australian bank account, and access to a Diner's Club Account card. According to the forensic accountant the appellant's account was opened on 14 August 2002, with an opening balance of \$11.32 and a deposit of \$15,835.58 was received from Hohitashwa Tiwary (the appellant's father), part of which was used for university fees. The account was dormant from December 2002 to March 2003. In April 2003, \$7,300 was credited to the account, which was used to pay university fees. On 17th April a further \$2106.52 was credited to the account. This was the final credit until two salary payments from Integrated Security of \$204 and \$931.50 were made on 28 August 2003 and 10 September 2003 respectively. During the period between April and September 2003, the appellant's bank account gradually declined with his Westpac Account balance being \$7.26 on 5 September 2003. Cash withdrawals were also made from the appellant's Diner's Club Account card. As at 10th September 2003 the appellant had \$738.76 in his bank

account and available credit of approximately A\$1200 on his Diners Club card.

- 41 There was evidence, however, from the appellant's brother that the appellant had ready access to money provided by their father through a Singaporean bank account.
- 42 It is unnecessary to describe in detail all the evidence concerning the financial records found on Mr Tay's computer, including what appeared to be indebtedness of the appellant and a projected inflow from "Andrew". The appellant in his interview with the police said he was up to date with his rent.
- 43 There was also evidence from Mr Chaw of a conversation between the appellant and Mr Tay in the days or weeks before the murders in which Mr Tay asked the appellant whether he had paid the rent, to which the appellant responded that he had, but that he had had an argument with the real estate agent. Mr Chaw described Mr Tay as "quite stingy" and unlikely to lend large amounts of money.
- 44 The Crown relied upon this financial analysis to support the submission that the appellant was in financial difficulties and that this set the scene for a dispute with Mr Tay which erupted on the morning of the murders because Mr Tay did not go to university that day. The Crown submitted that the dispute got out of hand and that the appellant killed Tay. The Crown then submitted that having killed Tay, the appellant killed Tan when he returned home to cover the murder and because Mr Tan would have been in a position to inform the authorities of the events precipitating the dispute between the two men. On appeal, there was asserted to be a significantly greater degree of pre-mediation to events as, and for the reasons, described earlier.



## **Mr Tay's marriage and incipient relationship with Ms Jasmine Tan in Singapore**

- 45 Mr Tay was married. Records were produced and tendered of online discussions between him and a young woman in Singapore, Ms Jasmine Tan (no relation to the deceased Mr Tan). She was a former university friend of Mr Tay, and engaged to be married. The records revealed that they spoke every few days from mid June to early July 2003. They sometimes spoke for minutes and sometimes hours, discussing their daily lives, travel plans and desires to visit each other. The conversations involved terms of endearment, were sometimes flirtatious and occasionally sexual. On occasions Mr Tay makes clear his emotional and sexual attraction to Ms Tan. The contents implied that Tay had not had intimate sexual contact with Ms Tan. Records of conversations after 3 July were not produced at the trial; but a text message was sent by Ms Tan to Mr Tay's phone on 16 September that suggested they had remained in contact. The message was: "*Dear, pls reply if u r okay. U r makg mi very worried. Please!*" In a statement at the trial, Ms Tan explained that she sent the message after having seen the news on television that two Singaporean students had been killed in Sydney.
- 46 There was a suggestion by defence counsel at the trial and on appeal that the incipient relationship may have been the source of an unknown assailant's motive to kill Mr Tay. The Crown tendered immigration records to show that neither Ms Tan nor her future husband were in Australia at the time of the murders. Both Ms Tan and Mrs Tay (who was aware of Mr Tay's friendship with Ms Tan) denied any affair. In a statement, Mr Tan's wife noted that Mr Tay was not wearing his wedding ring when she visited, but he was wearing it when his wife visited.

## **The baseball bat**

- 47 On the afternoon of Saturday 13 September 2003 the appellant purchased a black softball or baseball bat from a sports store in the city. This was the bat recovered at the scene by the police with the blood of Mr Tan (but not Mr Tay) found on it.
- 48 The first ground of appeal (the asserted wrongful failure to reject evidence) concerned an aspect of the murder scene connected with the bat. Samples of black paint were obtained from the western wall of the unit, one from the eastern wall and a third from the bat itself. The places from which the samples were recovered on the walls were consistent with marks that may have been made during the attacks on both Mr Tay and Mr Tan. Ms Dusting gave evidence that all three samples were indistinguishable in some test results from each other having regard to colour, fluorescence, infrared spectroscopy and mass spectrometry. She said, however, that further tests of the two samples were inconclusive because those last results could not be replicated. She provided an opinion that the results "slightly supported" the contention that the black paint on the two walls came from the bat. The tests did not reveal any paint from the walls on the bat. In [6] and [9]-[10] of his reasons for judgment admitting Ms Dusting's evidence, the trial judge summarised the issue and its significance:

"[6]The issue flowing from the inconclusive micro-XRF test is that Ms Dusting was not able to demonstrate what could be described as a two-way transfer, namely, transfer of paint on the wall to the bat. She explained in evidence (T882.34) that there could be a number of reasons why a two-way transfer did not occur. She expressed the opinion that the evidence of a one-way transfer slightly supported the proposition that the black paint on the eastern and western walls could have come from the black paint on the softball bat. The opinion '*slightly supports*' was expressed in a range of opinions, with '*slightly supports*' being above '*inconclusive*' but below '*supports*', '*strongly supports*' and '*very strongly supports*'.

...

[9]There is a significant fact in issue in the proceedings as to whether the softball bat was used as a murder weapon on Tay as well as Tan. The present state of the evidence is that no blood of Tay was located on the softball bat.

[10]The juxtaposition of the black marks on the eastern and western walls next to blood stains from Tay and Tan respectively is capable of shedding light upon that question. The evidence of Ms Dusting, it seems to me, is probative of that fact. It is not merely a question, as the Accused submits, of some broad submission that there is some similarity between the paint on the bat and the paint on the walls. Ms Dusting is able to take it a step further as a result of her testing. It is probative in my view."

- 49 There was evidence from a student colleague of Mr Tan (a Mr Teo) that, about two to three weeks before the murders, Mr Tan had said to Mr Teo that he had bought a baseball bat for protection. No second bat was found on the premises.
- 50 The appellant told police that he purchased the bat for recreational purposes.

#### **Aspects of the events and circumstances of 15 September**

- 51 Mr Tay was bludgeoned shortly after midday; Mr Tan sometime around or shortly after 2.00 pm. Some aspects of the day about which there is no dispute should be noted. Their significance can be seen in the hypotheses advanced at the trial and on appeal, by the Crown and the defence, and in any other rational hypothesis consistent with innocence.
- 52 The appellant's girlfriend, Ms Metiljevic, telephoned him at 6.30 am. They spoke for half an hour, arranging to meet at 2.00 pm after an exam she was sitting. After 2.00 pm, he not having turned up or answered her texts, she sent him a text saying, "I guess you're still sleeping, bye."
- 53 There was evidence from Ms Metiljevic and others that the appellant often slept late in the day and into the afternoon. The appellant had worked as a security guard on Saturday night until midnight and all Sunday.

- 54 The appellant told the police that he got up after speaking with Ms Metiljevic, had some breakfast, washed up and went back to his room and went to sleep again.
- 55 Mr Tay's laptop computer was last used at 10.16 am and Mr Tan's at 12.02 pm.
- 56 Both Mr Tay and Mr Tan had a lecture that day. Unusually, Mr Tay did not attend it. The evidence was that he always attended class. Mr Tan attended his midday lecture but arrived at least 15 minutes late. The walk from the unit (where his computer had been used at 12.02 pm) and the university was short. Student colleagues gave evidence that Mr Tan appeared somewhat dishevelled, distracted and tired.
- 57 The previous Thursday, Mr Tay and Mr Tan had arranged with Mr Teo (the fellow student) to meet after the Monday noon lecture to organise a seminar for ethics in engineering. After the lecture, in the lecture hall, Mr Tan said he wanted to cancel the meeting. No reason was given. Mr Teo took it that this was being done on behalf of Mr Tay also. Mr Teo gave the time for this conversation as "just after 2.00 pm".
- 58 Other students saw Mr Tan that day after the lecture. Mr Kheng Chai said that the lecture finished about 1.50 pm or 1.55 pm, after which he spoke to Mr Tan who "appeared to be uneasy". Mr Chai said, "He was shaking from side to side. Alan [another student] said something like 'what's going on?' Tony then said 'I have to go to the toilet urgently'." He did not return. Mr Jeff Lum spoke to Mr Tan briefly after the lecture ended, which he said was "around 1.45 to 2.00 pm". He said he "seemed normal". Stephen Tay said Mr Tan looked very tired, but otherwise normal; Mr Tan told him that he was going home to sleep. Mr Choon Poh was at the lecture. He said it finished at 1.55 pm. He said that Mr Tan said at the end of the class that he needed to go to the toilet.



- 59 Jonathan Choy and Sean Murray met Mr Tan on the stairs adjacent to the exit from the university. Mr Choy said Mr Tan looked pre-occupied with something; Mr Choy said that Mr Tan did not, as he usually would, answer and smile. Mr Choy saw Mr Tan get into a four door white car with three people in it. The car was parked facing the wrong way in a one way street. He thought the three occupants were Asian. He did not recognise them. Mr Choy's timing said this was at about 1.45 to 1.50 pm. Mr Murray also saw Mr Tan get in the car and, as he approached it, take his backpack off. Mr Murray recalled the car as dark colour. He said the occupants were Asian.
- 60 From this evidence it can be inferred that Mr Tan, who was somewhat preoccupied and not his usual self, met three unidentified people in a car by some pre-arrangement at about 1.55 to 2.00 pm, possibly slightly before or after that timeframe. He was then driven what was a short walk of only hundreds of metres to his flat. There, within the next ten to fifteen minutes, he was murdered. On the Crown case these people must have dropped Mr Tan at home and driven off. No one from the car came forward, despite a degree of publicity about the murders. A number of students who knew the deceased came forward to assist the police. There was evidence of news coverage of the murders in newspapers and the electronic media in Australia and Singapore. The police sent out media releases seeking information concerning the car Mr Tan got into.
- 61 Although the timing and sequence is not precise, it would appear from the above evidence that Mr Tan probably got home just before or just after 2.00 pm, perhaps as late as somewhat after 2.05 pm if Mr Teo's recollection was accurate.
- 62 Upon getting into the unit, the evidence permits the conclusion that Mr Tan began to cook a meal. One of the two police officers who first entered the premises upon responding to the 000 call, Sergeant Newton, entered the kitchen and found a saucepan with a number of chicken wings in it. The element was on high and the bottom of the chicken was burnt. Sergeant

Newton observed that "it did appear that the chicken had only been cooking for a short time." The photographs in evidence show six to eight pieces of chicken. Given the observation of Sergeant Newton and the fact that the heat was on high and some burning had occurred, it is unlikely that Mr Tay was responsible for cooking the chicken in light of the unchallenged evidence that he was bludgeoned shortly after midday. If Mr Tan did so, as is probable, it would have taken some further time after he arrived home, presumably not having seen the near dead Mr Tay at the other end of the unit. Also, whilst he may have been very hungry or cooking to keep some food for later, the quantity of food is consistent with preparing food for himself and another person or other persons. It is to be recalled that one disagreement that the flatmates had was over washing up and they did not cook for each other. It is also unlikely that if Mr Tiwary was the murderer of Mr Tay, and was lying in wait to despatch Mr Tan upon his return from his noon lecture that he would put on food at about the time of Mr Tan's expected return.

- 63 By now the time must have been some time after 2.00 pm, perhaps 2.10 pm if Mr Teo's recollection was accurate.
- 64 By 2.20 or 2.21 pm Mr Tan was dead, the call to 000 being made at that time.
- 65 The appellant was in the unit. The question for this Court is whether upon the whole of the evidence it was open to the jury to be satisfied, beyond reasonable doubt, that he murdered Mr Tan having some two hours earlier bludgeoned Mr Tay near to death?

### **The plausibility of the Crown case**

- 66 The Crown case was plausible. The appellant was in the unit at all relevant times on the day of the murders. The attack on Mr Tan was two hours after that on Mr Tay.

- 67 The Crown relied upon the appellant having a motive to kill Mr Tay because of impecuniosity and unfulfilled financial obligations; to kill Mr Tan to conceal the earlier murder of Tay; to kill both to conceal his university failures and to prevent disclosure of his fabricated academic record, which would have obligated him to reimburse a large sum of money to the Singapore Army.
- 68 The appellant had the means to kill both deceased. He had purchased the bat. The knife was readily available. He had trained as a commando.
- 69 The appellant had knowledge of the movements and lecture times of his colleagues.
- 70 Mr Tay had remained at the unit, missing class (unusually) to confront the appellant over the unpaid rent and to deal with the taking over of the lease.
- 71 The injuries to the back of the head of Mr Tay indicated a surprise attack.
- 72 The chair at the end of the settee, behind which the battered body of Mr Tay was found, was placed to hide the presence of the body from Mr Tan upon his return later in the day.
- 73 There was no evidence of forced entry. The owners had the side gates locked until their return at about 1.45 pm.
- 74 There was no evidence of robbery.
- 75 Upon Mr Tan's return, after he had begun to cook the chicken, he was attacked in the living room.
- 76 There was a positive presumptive test for blood and the DNA of all three in the bathroom basin waste.

- 77 One of the owners downstairs who saw the appellant leave along the side of the building on arrival of the police (the appellant having left via the back stairs) did not notice anyone else leaving the building from where he was at the rear of the downstairs unit. The position of Mr Tan almost immediately adjacent to the front door (making it difficult for Sergeant Newton to get in without pushing the body) made it highly unlikely that anyone could have left via the front door.
- 78 While the appellant was (according to his version) in his room either asleep or barricaded in, in fear, the keys to his room were in the lock on the hall side of the door, visible to the assailant or assailants who (on his version) committed the murders. They thus killed his flatmates without apparently despatching him as a potential witness.
- 79 The absence of any significant amount of spattered blood on the appellant was consistent with cleaning after Tay's murder (for which there was time) and after Tan's murder (for which there was a short time, before he made the 000 call).

### **The appellant's account**

- 80 The appellant did not give evidence at either trial. There was, however, ample evidence of his account to emergency services and police of various degrees of contemporaneity.
- 81 The appellant stated the following in his initial 000 call to the Telstra operator before being transferred to the ambulance service:

"Good morning, I need the police and an ambulance

...

There's been a murder, two".



82 Then, after giving his location, the Telstra operator said "connecting ambulance". The telephone then began to ring as if the call was being transferred. At this, the appellant appears to become distraught, even hysterical, saying loudly:

"What the fuck, what the fuck, what, why are you fucking transferring me?! What the fuck. Ahh."

83 The ambulance emergency operator then came on the line. The appellant said amongst other things:

"I, I need the ambulance and the police. There's been a murder ... My, my two friends are lying dead outside ... There's blood all over the place."

He was asked:

""What I want to know is exactly what has happened there."

He said:

"I have no idea. I was asleep and I heard this screaming, and I, when I turned my two friends are dead."

The exchange continued (V1 being the ambulance operator and V2 the appellant):

""V1When you say they're dead, are they definitely unconscious?

V2There's blood all over, I can't even tell now.

V1OK. Does it look like they've been shot? Have they been stabbed?

V2No, there's, there's a baseball bat and a knife there.

V1And a knife?

V2They're bashed in complete, yes, there's a knife lying on the ground as well.

V1OK. Listen, what I want you to do, is this phone you're on, it's a mobile, is it?

V2It's a mobile, yes.

V1Is it safe for you to go back outside and just check if they are breathing?

V2I'm not going back outside till somebody gets here. I'm not fucking going back outside.

V1No worries.

V2You want to break down the door, fucking go ahead, I'm not fucking going back outside.

V1That's OK, that's all right. They're out there, are they?

V2.....

V1Is the person -

V2No, no, no.

V1- is the person who did this out there?

V2No, there's nobody outside, so I, the back door was opened. I closed the back door and I grabbed the bat, and I came back into my room and called you.

V1OK. So the person who did this is not there. All right.

V2.....

V1And there's definitely been weapons, there's definitely serious bleeding?

V2Oh, yes.

V1OK. Could you see where the blood was coming from or you just looked and ran outside?

V2There's blood all over the place. I can .....

V1OK. So you don't know at this point if they're still breathing or not?

V2I get, I come, I should've checked, I didn't check, no, I didn't.

V1OK. All right, that's OK. When do you think this happened?

V2It was just, I, I woke up when there was, like, screaming outside and I went outside and, and I waited for a while 'cause I thought the, 'cause I could hear -

V1OK. Listen, that's OK. We've got the ambulance on the way now, OK.

V2Thank you ...

V1Now listen -

V2.... are you going, are you gunna, are you gunna hang up now?

V1Pardon?

V2Are you gunna hang up or are you gunna stay on?

V1Do you want me to stay on with you?

V2Could you please till somebody gets here, please?

V1Are you worried that somebody is still there?

V2I, I closed the door, so I know, oh, unless he's in one of the other rooms - I don't know, but I've got the bat with me, but there's nothing else, I just pushed my -

V1OK. But you're, listen, let me just get this straight. You're inside the house -

V2I'm inside the house.

V1- and the two people that have been attacked, they're outside the house. Is that correct?

V2Yeah, no, no, they're inside the house too.

V1But you have locked -

V2Yes, they're down the corridor.

V1OK.

V2I, I've myself and I've locked my door, got my cabinet in front of the  
-

V1You've locked yourself in the room?

V2Yes, I have -

V1And you didn't -

V2- and I grabbed the bat.

V1OK. And you didn't see who was there?

V2What?

V1You didn't see the person who did this?

V2No, I didn't.

V1OK.

V2I should've gone outside earlier, but -

V1OK. I'm going to stay on the phone with you.

V2But shit, oh, fuck.

V1How old are these people, your friends?

V2Um, about 25.

V1Males or females?

V2Both are males. (3 sec pause and moment of silence)

V1OK. So let me just get this straight. You're in the bed, the room of  
the house, you've locked yourself in.



V2Yes.

V1You were asleep. You woke up and heard them screaming-

V2Screaming, yes.

V1- and you've gone out, and seen them both lying there -

V2Yes.

V1- with a knife and a baseball bat. Is that correct?

V2Yes, and I, I took the baseball bat with me, it's with me right now.

V1OK. OK. (*moment of silence*) I'm going to stay on the phone with you, OK.

V2Yeah. Why are they taking so long? There's a hospital just down the road.

V1Listen, I know, I understand that, but it's going to depend where the ambulance is, and listen, the ambulance is not going to come in there until the police get there, OK.

V2Yeah. How long are the police gonna take? (*5 sec pause*)

...

V1Are you there?

V2I'm outside now. They're definitely not breathing.

V1OK. Listen, the ambulance is there in your street, OK.

V2It's on my street, where?

V1The ambulances are there, but they are not coming in till the police get there.

V2Can I go outside?

...

V1All right. So we're waiting on the police. Now, do you want me to let you go now?

V2Did you find out how long the police are gunna take?

V1It shouldn't be too long. We've explained the urgency of the situation, OK.

V2OK, ah, OK, get um -

V1Listen, you're there with your friends right now. Do you think they are beyond any help or do you want to try and do some first aid?

V2I know -

V1I know it's really hard, but I can give you some advice on what to do.

V2I, I know, I know CPR as well, but there's blood, there's this like, like, there's blood all over his, his, his nose, so I don't even know if I can give him CPR and -

V1OK

V2Um, I'm, I'm, I'm gunna, I'm gunna go outside now.

V1OK. All right. I'll let you go. I'll let you go.

V2OK. OK."

At the time the appellant says he has gone outside his room, the television can be heard in the background.

84 The appellant was spoken to by ambulance officers and police at the scene and gave a brief account of his movements during the day leading to what he claimed to be the discovery of the bodies of his flatmates.

85 Upon leaving the flat by the back door, and going down the stairs and along the side of the house, the appellant met ambulance officers. He

appeared to be upset, distressed and bewildered, agitated and breathing heavily. He told one ambulance officer that one of his flatmates was lying on the ground covered in blood frothing at the mouth. He told another in answer to a question as to what he had seen:

"I don't know. I was asleep. I heard a noise. I woke up. I saw lots of blood ... I think I saw a knife."

- 86 The police arrived. After some short accounts to some of the police, the appellant gave this account to Sergeant Woodward that was recorded in his notebook:

"Sleeping in room. My girlfriend called morning, but went back to sleep. Woke up to the sound of things falling. Thought somebody dropped something, but went back to sleep. Heard somebody run past. The bedroom door was locked from inside. Person who ran past, I think Tony, yelled 'help'. I didn't go out. I should have, but didn't. My room has a damaged fly screen. After heard sound somebody being hit I should have opened door but didn't. The sound lasted 5 minutes. It was all quiet. Some time after, I opened the door. I noticed the door was slightly ajar. I saw to my right my friend Tony was lying next to the front door. His back was against the wall. I saw baseball bat and knife near him. I picked up the bat and went towards the back entrance and saw my other friend lying there, Tay. Closed back door, locked it and took the bat to my bedroom and went in and locked the door. I called 000 on my mobile and they told me to stay in the room and wait. The lady asked me if I knew CPR. I know, but didn't try. She said the ambulance people were outside, but they are not coming in until police arrive. I said I don't see anyone outside, so I went outside with the bat.

...

I saw Tony had froth coming from his mouth and was bleeding from his head. I still had the bat with me. I touched Tony on the neck to see if he was bleeding.

There was blood all over the floor. I put my hands near his nose and felt. He was not breathing. I did not want to do anything else. I went to Tony and touched his neck to see if he was breathing and feel a pulse. He wasn't, so I left the house by the back door. I went outside on the street and saw the ambulance, told them what happened. I waited with the ambulance and spoke to the police".

- 87 Importantly, the sequence that the appellant gave Sergeant Woodward accorded with what he told the 000 operator: that he had seen both Tan and Tay before telephoning.
- 88 The appellant voluntarily accompanied police to Maroubra Police Station from the unit and participated in a recorded interview, which extended over some hours. He was also photographed and consented to supplying a buccal swab for DNA testing.
- 89 Relevant parts of the interview in which the appellant explained what had happened were as follows:

"A 65: ... I actually woke up about 6:00 something, my girlfriend called me ... I had a shower and everything and then I went back to bed. [The second time] I, I don't know when exactly this was but I heard, I heard, like the TV was on loud outside and I, I heard, I thought I heard like something drop, I thought it was nothing because nothing, I didn't hear anything after that, and so I went back to bed, I didn't even open my door.

...

A 66: ... I woke up like for the third, third time I guess today when I heard what I thought was the sound of some sort of commotion, I was half asleep and the TV was on as well so I had no idea what actually was goin' on, and just about getting out of bed when I heard somebody rush past my door, bump along the thing and, and, and I, I think it was Tony, I think he was, I think he screamed help but I'm not exactly sure. A couple of moments, a while later I, I hear what the, the sound of something metal being hit against something and that went, went on for quite, for, for some time and after that it was just quite [sic]. At that point I, I would, I, I chose not to go out, I chose not to go out, and I locked my room door from the inside and I pulled my old cabinet and barricaded myself inside. When I could find my phone I, for some reason I couldn't find my phone, I found my phone, I called, called triple 0, and the lady, they, she was asking me questions ... there was no more sound from outside, I thought OK, OK, now might be a good time, a good time -

...

A 67: - to have a look. I pushed the cabinet thing aside, unlocked my door, had a quick outside [sic], closed the door again, there was, I saw Tony, my friend, laying on the right



hand side from my room near the door and there was blood around him .... I went outside, I, the baseball bat and knife were there so I grabbed the baseball bat and, and just put it in front of me and went down to the, to the living room, there was nobody there either.

...

A 68: At that point I hadn't seen my friend Tay 'cause there's, there's like a couch in the living room, the TV was still on and it was real loud, and the couch was there and I saw that the, I saw that the back door was open so I, I thought there might be somebody there so I, so I took the, took, I had the baseball bat, I went, I went back and grabbed the knife and, you know, holding them both I went towards the back, it was, that's when I saw Tay, he was lying behind the couch and was covered in, covered in blood too. And nobody outside near the back so I locked the door ... and went back to my room and the lady on, the emergency operator she, she said, yeah, should like check, check to see if, if they're breathing you know, like try to give them CPR and I went back outside and saw Tony was like, like froth and all this his mouth and, and I checked for his pulse and I tried to shake, shake him, and like there was no response at all. And I went to Tay and did the same thing, there was no response either, he didn't have a pulse. I did not perform CPR or anything. I went back inside, the lady told me to wait till the police were there, she said the ambulance guys were already outside but there [sic] weren't gunna come in until the police were there so after a while she told me, yeah, the police car's there so I, I, I still had the baseball bat with me, I don't know where I left it, I just was carrying it with me just, just in case. And well, yeah, when she said the ambulance guys were there I decided like, yeah, I had to leave the house. I left the house and guys were near the junction of Barker and that street just before the hill."

It is to be noted that this sequence was at odds with what he had told the ambulance officer on the phone and Sergeant Woodward earlier in the day. Then, he had said (to both) that he saw the two bodies before calling 000. Also, he now refers to picking up the knife, as well as the bat.

- 90 He said he last saw Tay and Tan the evening before at 9.30 or 10.00 pm. He then gave answers to detailed questioning about the day in question: waking up at "about 6.00, 6.20" upon the call of his girlfriend (A 316, 317); making arrangements to meet her that afternoon (A 334); having a shower and breakfast, and going back to bed (A 379, 380, 383, 399); being up for about an hour (A 424); later, after sleeping, hearing the sound of the television and something falling, waking him up, but going back to sleep

almost immediately (A 438, 444-450); this being, he estimated, at about 8.00 am (A 451, 452).

91 This last mentioned occasion of being woken up would, if the appellant were telling the truth, in all likelihood be Mr Tay falling upon being hit. He continued to answer questions about the day: waking up a "third time". The questioning included the following, which we will set out verbatim because of the importance of the inconsistencies.

"Q453 And then you, you say woke up a third time you heard a sound.

...

Q454 Tell me about that.

AOK. Lying in bed and I heard this really loud, a real loud, something, like something big had fallen down. I thought what the hell is this? And I heard some metal thing, I thought someone was picking something up, I thought I may as well go and look just in case somebody smashed the TV, but the TV was still on, so I thought OK. I got out of bed, I was just, just putting away my stuff, 'cause all my clothes were on my bed as usual, but after a while hear somebody run past my room, at that point I was just by my wardrobe putting in my contact lenses, and I hear somebody run past my room and I think it was Tony, I think, I think I, I'm pretty sure he shouted for help. I know it's, people ran towards the front entrance end and I heard, I heard the metal sound like a couple of times, I knew something was wrong.

Q455 What metal sound was that?

A I think it's been the baseball bat which I found.

Q456 A baseball bat. Now I'll just take you back, you woke up and you heard what somebody run past your door.

A. Mmm Mmm.

Q457 Was it loud steps or -

A Yes, somebody was running past my door and -

Q458 Then -

A- somebody screamed as he run past my door.

Q459 Were they running slow or were they -

A He was running, I, it sounded like a guy's streaking past my door.

A460 And where did the sound come from, did it sound it's coming from across the house or where did it --

A It started from here, the person's ran towards the front entrance.

Q461 So you're indicating towards the back of the house?

A I dunno where it started, I'd just say it would be somewhere in the living room, I dunno which end. But it started from there and the person apparently bumped into my door or tried maybe to knock on my door as they ran past, and ran over here. And then I hear the metal sound then.

Q462 Metal sound. And you thought, you said it was a baseball bat?

A Base, baseball bat.

Q463 What makes you think it was a baseball bat?

A Because it's aluminium and it was lying right beside where I found Tony."

92 He continued with his recounting of what happened:

"Q496 So you woke up a third time, you heard what sounded like, you said it was Tony, he was screaming for help. When you say that what, what do you mean by scream, was it loud, soft, long, short scream, what was it?

A No, it was just one, what it'd sound like, it was just like a sort of scream, like 'Ahhh' and 'help', and then he bumped or knocked against my door and went running on that side.

Q497 Towards the front of the house?

...

Q500- exactly what you can remember. Did, when I say did you hear something, did you hear another person in the unit?

AWell, I heard the thumping of the somebody running along the ground, I don't know, I just don't know how to tell if there was one person or ten, well ten people I would tell but -

Q501Yes.

A- if there two people or three people, I couldn't tell at the point.

Q502Did you hear any argument or anything like that?

ANot beside the thing falling over earlier, I don't think anything else.

Q503OK. And what did you hear then, after you heard Tony run past the door?

AOK.

Q504Or you say you thought it was Tony. What did you hear then?

AWell, I was standing right here and I heard this metal thing going, a couple of times it hit, I think it might have hit the door frame, and when, like, there's a metal, metal thing.

...

Q508All right. And how many times did you hear what sounded like a metal thing hit the door?

A I don't now if it hit the door but I, the door frame ... maybe it hit the door.

Q509The door frame, sorry, you said the door frame.

A No, I, I don't know exactly what it hit but I, maybe it hit, I dunno, maybe he hit, hit the door knob or something like that.

Q510Which door do you, do you say you think it was hitting? Just -

A It would either be Tony's or the front entrance.

Q511OK. But you're not sure?



A I'm not sure.

Q512 OK. How long did you hear the hitting sound?

A The hitting sounds.

Q513 You said earlier that it went on for a while, and when I spoke to you at Barker Street you said it could have been 5 minutes. Would that be right?

A 5 minutes. That's a long time to be hitting. 5 minutes .... I've really no of time at this point.

SENIOR CONSTABLE FREARSON

Q514 Try and remember it, try. Take your time if you need to but try and remember it and, and hear it again. Try and relive it to a degree and see, try, just try and think about it, how long did it go for roughly, how many times can you hear it, that you hear this noise?

A 'Cause it wasn't continuous, it's not like it was just metal ... it was like it would hit something and stop, hit something and stop, I'm standin' right out, right inside on this side of my door and I'm, at this point there's something wrong, 'cause I heard a yell for help and I didn't go outside.

SENIOR CONSTABLE WOODWARD

Q515 Was your door locked still?

A My door is always locked.

...

Q517 OK. Did you hear anybody come to your door?

A To my door, no.

Q518 So when you say the banging, it was banging and then it stopped?

A No, it was, I don't know how long exactly it was going for but I must have heard it, the bat go down about 10 times, hit, but I don't know if it, but that, it sounded like it was metal but if he was hitting somebody .... So I, I don't, I heard it about 10 times.

...

Q521 And so you chose not to go out and you locked the room ... you said at one stage there it went quiet, how long had it been quiet before you unlocked your door to have a look outside?

A The first thing I did was when I heard him do that and I heard the metal sounds, what I did, ... I grabbed my table and the cabinets underneath and I put it against my door.

...

Q526 What were you thinking, what were you thinking -

A I was trying to get me, trying to remember where my phone was to call Triple 0 but for some reason I couldn't find my phone. I, I knew it was on my bed somewhere but, but all my clothes were on this side and I think it just slipped in there after I called my girlfriend, just put it in there. And I didn't want to move away from the door so I just hold, just holding the door.

Q527 So how long do you think it passed until you decided to open the door?

A Well, it was quiet for at least 5 minutes before.

Q528 And what happened then, Ram?

A Well, I took the cabinet away, pushed it away from the door, I opened the door, like had a quick peek outside and closed it again, didn't hear any footsteps or anything like that.

...

Q541 O.K. And that was when you looked to your right, you saw Tony then. What happened then, what did you do then?

A Well, first thing that confirmed my worst fears and I locked the door back again. I put, put, I think I put, I think I put the cabinet back, it's, and I went to go on the bed and started looking for my phone. And I found my phone and that's when I called Triple 0.

...

Q587 So, I've just get this, make sure I'm correct. Earlier you told me that you saw the baseball bat and knife near him, picked up the bat and went towards the back entrance. Is that -

A That was after.

Q588 That's after you were -

AAfter, after, because, I, when I first saw it I went right back inside but then the lady told me to go and check for their like -

Q589Right.

A- just to see if I can perform CPR and stuff like that. And I went, so I went outside, that's when I took the bat, and then I -

Q590No, that's OK. I've just got written what you told me, you picked up the bat and went towards the back entrance and you saw my other friend lying there, Tony.

A.No, Tay.

Q591Tay.

ATay was lying there.

Q592You, you closed the back door, locked it, and took the bat back to my bedroom went in and locked the door. I called Triple 0 on my mobile. But -

ANo, I didn't, I called Triple 0 first, she asked me to leave, she asked me to check on them.

Q593So you didn't go down to the back of the room?

ANo, I didn't go down until she asked me to.

Q594OK.

ASorry.

Q595So you've picked up, you've looked at the bat -

AYeah.

Q596- you've gone back inside, locked the door and then you've Triple 0. What's happened then?

AThe lady says that, she asked me like my particulars and stuff like that, my address and all, and she says, she says, do you know if, if they're still, they're still breathing? And I said, she said, if you want to perform CPR I can teach you how to do it. I said, I know how to perform CPR but I, there might still be somebody outside so I don't

want to go out yet. She said, OK, you stay in your room. And she said they're getting the police and the ambulance people .... After I spoke to her and I realised everything was quiet outside I took another look, went straight for this and grabbed the knife and the baseball bat ... and, and I just made sure nobody was here and then went back and I locked the door, was locking the door and that's when I found Tay on this side.

...

Q59820 minutes before everybody arrived. You didn't have the bat at that stage when you called Triple 0?

A.No, I didn't.

Q599OK. So when you've called Triple 0 and she said, do you know CPR? So you went out to check on Tony?

A.I, I actually made sure nobody was inside, nobody's still in there so, I didn't want to go back here without anything so I grabbed -".

93 This sequence was contrary to what he told the ambulance officer and Sergeant Woodward earlier in the day, as to when he saw Mr Tay and when he picked up the baseball bat.

94 The questioning continued:

"Q632Did you notice anything else about the living room?

AThat's when I, I closed the door and I, with the ball and, baseball bat and the knife I went back towards the front entrance and the lady, the lady to see if like they had CPR, if I could perform CPR but I went up to Tay and went up to Tony and when, when I got, when I got to him like went down on my knees and I, I was just like, I think I put the knife down that I had, like the baseball bat's still in my hands, and like I didn't want to face him entirely so I was like sitting this way so I could look down the corridor as well, and I had the baseball bat still in my hands.

Q633Yes.

AAnd like I, I, I wanted to check to see if there was a pulse so I put my hand like on his neck to check for his carotid pulse and when I -

Q634When you say you put his hand on his neck, can you just show just for the camera what exactly, which fingers and that did you use?  
A.I think I've gone like that."



- 95 Although the transcript of this interview does not contain a reference to Mr Tan expiring blood by coughing, there is a point in the interview shortly after the last exchange that was broken by an interruption in the recording by a change of tape (Q660 and following) where it appears that the appellant may have been about to explain the expiration, but was cut off. The following exchange is recorded:

"Q660 Yes. How, how, how do you think you got all that blood on you there?

A. 'Cause I tried to put his head back, 'cause he was, he was ---

Q661 That's O.K., put your jumper on and ---

A. He ...

Q662 Take a seat.

A. I ---

Q663 How did you, yes, continue how you were ---

A. When I went up to him and I'm, I'm looking that way so that I can (TAPE BEEPING) see anybody who comes down."

- 96 The interviewer (Sergeant Woodward) did not return to the topic. Sergeant Woodward recognised in his evidence that he could or should have gone back to this topic. This can be seen as important for at least two reasons. First, it lessens the impact of the proposition of the Crown at the trial that the version of the coughing was made up as a recent invention to account innocently for Mr Tan's blood on his feet and ankles. Secondly, it casts the Crown's submissions on appeal into some relief. By the Crown embracing the expired blood as the product of a reflex cough after washing off Tan's blood transferred during the assault, implicitly it was far more likely that the appellant would refer to this fact earlier in his accounts to police, rather than later. Indeed, it would likely be one of the first things the appellant

would have said were he to have planned the killing and then washed off Mr Tan's blood so carefully, only to leave expired blood photographed by police. It would have been of prime importance to explain how this blood came to be on him.

- 97 On 18 September 2003 the appellant voluntarily participated in a further video recorded interview at the unit where he "walked through" the events of 15 September under questioning by police. That evidence was summarised by McClellan CJ at CL in the earlier appeal judgment at [32] and [114]-[116] as follows:

"[32] A walkthrough was also conducted with the appellant during which the following exchange occurred:

'Q: OK. That's fine. OK You've picked up the bat and the knife. Now, you're on the phone?A: That's right.

Q: Which hand are you holding the phone in?A: I think it was the same hand as the knife.

Q: OK. So you've got the phone in your hand with the knife. OK. You were still talking on the phone?A: There was times I was talking and there was times I wasn't ... And this, this, like I said, I thought I'd missed out certain things the other day when I speaking to ..., like, when I was, I was right beside [Tony] ... Like, a spurt of blood came out of his nose and mouth ... And he's spasmed.

...

A: But I was actually leaning down beside him ... That's when I saw the blood sort of spasm ... And blood came out the front.

...

Q: Now, just to clarify, you said that blood came out of his nose. Now, was -

A: It was just, like, it was like froth ... And, and he sort of spasmed ... And that made me take a step back.'

....

[114] ... During the walkthrough on 18 September 2003 the appellant raised the possibility of Tan expiring blood when he said 'like, when I was, I was right beside him... like, a spurt of blood came out of his nose and mouth ... and he spasmed.' The appellant described how he was leaning down beside Tan's body and said 'that's when I saw the blood, saw the spasm ... and blood came out from the front ... and

that's when I, like, took a step back and all the time I was, just looking up this way, just in case somebody's surprised me.'

[115] Later when asked by the police to clarify what he said about blood coming out of Tan's nose the appellant said 'it was just, like, it was like froth ... and he sort of spasmed ... and that made me take a step back ... just, no, I didn't expect that it would spurt ...'

[116] At this point the appellant (who apparently appeared reluctant to approach the site of where Tan's body had been located) at the request of the police endeavoured to direct Sgt Davis to assume a position where he (the appellant) was at the time of the spasm or spurt. The demonstration led to Sgt Davis squatting beside the assumed location of Tan's body with his left foot closest to the body. The photographic evidence showed more blood on the appellant's left foot than on his right."

98 During significant parts of the walkthrough video, the appellant appeared hesitant and unable to give coherent, clear answers under questioning. At times he expressed a difficulty recalling the precise sequence of events. This was important because at both the interview at the police station on the evening of 15 September and during the discussion in the "walkthrough" of 18 September, the appellant said that he did not see Mr Tay dead until **after** he had made the 000 call. That is, he said, he went out of his room after the noise ceased, saw Mr Tan, picked up the bat and knife, returned to his room and called 000. Of course, his call to 000 revealed that he knew of two deaths not one. Thus, the question was whether he was honestly confused about sequence (which he said he was on a number of occasions) in connection with the discovery of shocking and traumatic murders or carelessly dishonest in the telling of falsehoods.

99 There were a number of parts of the appellant's account and the manner in which it was told in the "walkthrough" which the jury could well have thought either implausible or reflecting badly on his version of events, such as the description of holding the knife while checking for Mr Tay's pulse, the long pauses sometimes made in evident difficulty in fixing sequence and the inconsistencies in sequence. We have taken into account that a jury could have taken that view as part of seeing and hearing all the evidence in context. Notwithstanding that, and taking it into account, we are still left with a doubt as to the verdicts. We have not ourselves taken

our own impressions of the appellant's attitude and demeanour in the walkthrough into account. In respect of this evidence, we note the caution referred to by French CJ, Gummow and Kiefel JJ in *SKA v R* [2011] HCA 13; 243 CLR 400 at 410-411 [29]-[31] in an appeal court viewing a video recording of a complainant's evidence. Similar caution is appropriate here about drawing any adverse inference from the impression created by the video recording of the "walkthrough". The need for caution is reinforced because we cannot say that we all had the same impression of the "walkthrough".

- 100 At this point, an observation should be made that is important to our ultimate view as to the existence of a reasonable doubt as to guilt. The trial, and, to a degree, most of the submissions on appeal, can be seen to have been conducted in almost a binary fashion. The Crown case theory included: a motive (perhaps weak for such horrific crimes), opportunity, the purchase of the murder weapon, and the appellant's account being in some respects implausible and recounted with inconsistencies. The defence case, which accepted that the appellant was present when the deceased were killed, relied upon his version of sleeping through the first murder, being awakened by the second but fearful to go out, and then finding his flatmates murdered by unknown assailants being reasonably possible.
- 101 There may be a tendency, in such circumstances, if there are aspects of the appellant's account that are implausible or difficult to accept, to fall back on the Crown case theory as the balance of the (binary) universe of discourse. On appeal, the Crown, perfectly correctly, accepted that inconsistencies in the version relied upon by the appellant or difficulty in accepting his account as truthful in all respects did not by default permit a finding of guilt beyond reasonable doubt. It was still necessary for the Crown to negative beyond reasonable doubt any rational hypothesis consistent with innocence said to be open on the evidence.



- 102 The appellant participated voluntarily in a further recorded interview on 28 May 2004 at the conclusion of which he was charged with the murder of Mr Tay and Mr Tan.

### **The crime scene**

- 103 A detailed plan and a comprehensive set of crime scene photographs was tendered at trial showing the configuration of the rooms in the unit and the location of the bodies of the deceased. On the appeal, that plan was colour coded to highlight the deposits of the blood of Tan and Tay and the location of five fingerprints not able to be identified from the database and one not suitable for identification purposes. Other fingerprints were identified as those of the appellant and the deceased and people known to be associated with them. The baseball bat and the knife were examined but no prints with sufficient detail for identification purposes were able to be recovered.
- 104 A helpful summary of the evidence of the crime scene and the likely methods of the attacks is found in [21]-[26] of the judgment of McClellan CJ at CL:

"[21] A bloodstain was detected on the lower eastern wall and there was evidence of Tay's head having been in contact with the wall. There was blood staining around a computer located on a desk which included clotted blood and what was determined to be medium velocity blood impact spatter. This led Detective Elliott, a crime scene examiner, to conclude that there had been an initial assault near the lower eastern wall, then after a short while there was some movement and a secondary assault took place near the computer.

[22] On and in front of the lounge were bloodstains, small pieces of glass, glasses frames, and shattered teeth. From the trail of blood staining associated with Tan's body Detective Elliott concluded that the initial assault on Tan was in the lounge room where he was struck in the face, then moved into the hallway where a further assault took place. Tan was lying on his back with his head beside the front door and facing left towards it. The front door was closed but unlocked. There was a black handled kitchen knife under Tan's left knee. There was evidence of medium velocity blood staining radiating from Tan's head and also medium velocity blood staining on the floor around his body, on his clothing and upper feet. Detective Elliott concluded that

this blood staining was a result of the impact on Tan's head from the weapon used. There were three knife wounds to Tan's neck.

[23] Detective Elliott inspected the kitchen sink and the bathroom. He found no signs that they had been used in an attempt to wash or remove blood from the appellant or his clothing. He conducted a presumptive test for blood in the bathroom, obtaining a weak positive on the hot water tap and a strong positive on the hand basin. However, Detective Elliott explained that these tests did not confirm the presence of blood. The substances identified may have been rust or some other material.

[24] Detective Elliott examined the clothing the appellant had been wearing when he exited the flat. There were faint stains which tested positive to a presumptive blood test on the front, rear, inside front, and inside right cuff of the appellant's long sleeved top. These stains were consistent with transfer stains, which could have come from the appellant's bare skin. There was no blood staining on the top that the detective could relate to the assault. He observed that it is the nature of using a weapon such as a baseball bat with a wide end that it allows blood to be projected in areas away from the bat and the assailant could be somewhat protected due to the shape of the bat. However, he said he would have expected some blood stain spatter on the assailant.

[25] Detective Elliott also examined the shorts which the appellant had been wearing. He found a number of stains, three of which were later confirmed to be human blood, and which he said were consistent with medium velocity blood spatter.

[26] Blood smears were detected on the appellant's hands together with blood spots on his feet and ankles. The blood spots ranged in diameter from 1 to 3 mm."

**The reasons why we concluded that there was a reasonable doubt not resolved by any advantage of the jury**

- 105 We examined the whole of the evidence available to the jury. We considered counsel's submissions written and oral. We discussed at length all aspects of the evidence.
- 106 Our individual views about aspects of the evidence varied in emphasis; but we all reached the clear view that there was a reasonable doubt about the appellant being the murderer of Mr Tay and Mr Tan.

- 107 Whilst Mr Tay and Mr Tan were fatally assaulted some two hours apart, it was no part of the trial that their killings were unrelated. Indeed, it was the Crown case supported by medical evidence that the appellant stabbed Mr Tay in the neck at or about the time he killed Mr Tan to ensure that he was dead.
- 108 Aspects of the appellant's account to police were difficult to accept. First, sleeping through Mr Tay's murder by the unknown assailant or assailants beyond waking up at a fall and going back to sleep strikes at least one of us as implausible. Yet, people can and do sleep through noise. Secondly, the response of the appellant to the sound of Mr Tan being attacked is problematic. While on his account he is unaware of the assault, his friend does call for help and he does hear sounds of hitting. It is difficult to understand why he would not at least investigate if he had no inkling of the ferocity of the horrific attack that was occurring. Thirdly, there are the inconsistencies in his accounts to 000 and the police as to when he came out of his room and found Tan and Tay brutally bashed and bloodied. Such inconsistencies may, however, be explicable by the shock of being exposed to the battered corpses of his friends. Fourthly, the inconsistencies as to when he picked up the bat and the knife and the implausibility of his claim to have examined Tay to see whether he was alive with both weapons in his hand (and not having any of Tay's blood transferred to him in the process). Fifthly, his hesitancy in recounting events as he assisted police in the walkthrough. Again, however, this may be explicable by reliving, and striving for precision in the recall of, an horrific experience. Sixthly, the fact that his keys were in the door of his room, on the hallway side, easily visible to the assailants.
- 109 Why then did (and do) we have a doubt about his guilt? One hypothesis that in our view is available on the facts is the murder of both Tay and Tan by others, for reasons that are unknown but about which the appellant may have had some knowledge. On that hypothesis he was not liable for their murder as the person who physically did the acts causing death, though

questions of complicity or misprision may arise. This might give rise to his fear and hysteria, both at the time and later (and in that way explain why he barricaded himself in his bedroom), about brutal killers able to deal with him as they dealt with Tay and Tan. The commission of the murders by others of whom the appellant had knowledge may explain both the inconsistencies in his accounts on material matters and the difficulty he had in communicating clearly the sequence of events in the walkthrough. It would also explain the level of intense emotion and hysteria in his voice in the 000 call and the evident distress during the walkthrough.

110 The evidence supporting this hypothesis is as follows. Both Mr Tay and Mr Tan behave unusually on the day they were murdered. Mr Tay misses a lecture-something he never does. The Crown says he remains at the unit to confront the appellant over the debt. The question that immediately presents is why he would interrupt his lectures when he could see and talk to the appellant at any time and in the presence of Mr Tan, his ally on the issue? One reasonable competing hypothesis is that he was expecting someone.

111 Mr Tan goes to class, but he is unusually late. He seems pre-occupied and not himself; he has just left Mr Tay in the unit. He is not so distracted that he does not attend class, so it can be comfortably inferred that he has not witnessed the brutal bludgeoning of Mr Tay. Something, however, appears to pre-occupy him. Further, both Mr Tay and Mr Tan have something to do or someone to meet after the lecture. This can be reasonably inferred from Mr Tan's late cancellation of the preparation for the ethics seminar with Mr Teo that he and Mr Tay were to share that afternoon. After his lecture, Mr Tan met three people who were waiting in a car for him at the exit from the university and left with them. His home was only a few hundred metres away. These people undoubtedly drove him to his unit. Once inside he begins to cook a meal that is consistent with food for a number of people.



- 112 The above hypothesis, based on facts that are tolerably certain, raises the real possibility that another or others who could have been the killer or killers of Mr Tay returned to the unit with Mr Tan intent on killing him.
- 113 There was evidence that Mr Tan some weeks before had bought a baseball bat "for protection". A second bat was not found at the crime scene. It was common ground that the murder weapon that was found in the flat was purchased by the appellant. Accepting that Mr Tan's blood may have masked the blood of Tay on the knife and bat, and that Ms Disting's evidence supported the conclusion (albeit weakly) that the same bat was used to bludgeon both men, nevertheless there was some evidence of a second bat, that may have been used on Mr Tay and removed.
- 114 The people in the car did not come forward to assist police. There was evidence of media coverage of the murders and of police wishing to speak to the people in the car. They were, on the Crown case, the last people (other than the appellant as killer) to see Mr Tan alive. They had waited to pick him up by apparent pre-arrangement to drive him a few hundred metres. In all the circumstances, including the unusual behaviour of both Tay and Tan, there is a reasonable possibility that these people (or one or more of them) had a connection with the re-arrangements of the usual pattern of Tay's and Tan's day and had organised to meet Tan after his lecture when, unbeknownst to him, they had killed Tay and were driving Tan to the unit where he would also be killed.
- 115 The evidence does not reveal why one or more of these people would want Tay or Tan killed. This does not appear to have been random violence. At the trial and on appeal, counsel for the appellant posited the incipient affair between Mr Tay and Jasmine Tan as a possible motive. That is possible, but it is not compelling. Accordingly, the reason for the brutal, ruthless and cold-blooded murder of two diligent and quiet-mannered students is unexplained. On this hypothesis the killings were

effected by persons capable of exciting the greatest of fear in an individual who had any knowledge of the occurrence of the act and of their identity.

116 Thus, the reasonable hypothesis of the presence of others is real. The hypothesis that the appellant was not the murderer of Tay and Tan is strengthened by the dearth of forensic evidence to link him to either killing.

117 None of the blood found on the appellant or his clothes was that of Mr Tay. True it is that he had two hours to clean himself of any blood from Mr Tay's bashing; but the evidence did reveal that the killer stabbed Mr Tay in the neck around the time of (presumably before) the bludgeoning of Mr Tan.

118 More importantly, there is the dearth of blood of Mr Tan. This was of critical importance in evaluating the reasonableness of the alternative hypothesis. We have already described how the controversy about this was played out at trial and how the Crown dealt with the matter on appeal. For ease of comprehension it is necessary to restate parts of what we have already said. We would say, at the outset, however, that the approach of the Crown on appeal to holding the verdicts was both robustly realistic and powerfully argued. In significant part because of the clarity of the distillation of the issues by the Crown on appeal, we were able to concentrate on the evidence that was essential to the existence or not of a reasonable doubt about the appellant's guilt. That did not detract from the need for a careful and thorough examination of all of the evidence, but it enabled the Court to focus its enquiry, for which the Court was, and is, grateful.

119 There was little blood on the appellant who, on the Crown case, had just bludgeoned Mr Tan repeatedly adjacent to the front door, having begun his attack in the living room and having chased him up the hallway. The distribution of blood was neither limited nor uni-directional. Sergeant Elliott reasoned that it was possible that notwithstanding the ferocity and violence of the attack, the relatively small amount of blood on the appellant was the

result of chance. The Crown accepted, however, that whilst that was possible, one would have expected to see more of Tan's blood on the appellant had he wielded the bat in the ferocious attack reflected in the range of the blood spatter and distribution of his head injuries. Then, of course, there was the appellant's account that Tan had expired blood by a reflex cough as he leant or crouched down to check his pulse. We have referred to the conflict in the expert evidence about this, from which we accept that such a reflex cough from a dying man is possible. At the trial the Crown strenuously resisted it as the explanation for the blood on the appellant. There was said to be a late invention of it at the walkthrough on 18 September. But, as we have already said, the appellant may have been coming to it at one point in the first interview on the evening of 15 September. There is a reasonable possibility that some or a good proportion of the blood on the appellant was expired blood from a cough by Mr Tan. In these circumstances there was even less blood spattered on him from the ferocious attack. It was the dearth of forensic evidence and the reasonable possibility that Mr Tan coughed or expired blood on to the appellant that on appeal the Crown had squarely to confront. It did so by embracing what had been substantially resisted below - by accepting that Mr Tan coughed over the appellant while he was speaking to the ambulance operator and that the reason that there was so little other blood on him was that he had washed himself before calling 000. This would require (in order for there to be no blood-spattered clothes) that the murder of Mr Tan was undertaken naked. Having washed and dried himself, he rang 000 and, while going through the charade of checking for a carotid pulse, Tan coughed and expired blood on him. It was too late to wash again; he had already called for police and ambulance.

- 120 This hypothesis is possible. There are, however, difficulties with it. First, the bathroom where this washing must have taken place was inspected by 4.00 pm on the day. Sergeant Elliott, the experienced crime scene investigator who got to the scene at about 3.35 pm, examined the bathroom "*closely ... as an obvious place where someone may have*

*attempted ... to wash or remove blood from their person or clothing"* (T 905). He inspected the tiles, the wall tiles, the grouting on the floor. There was nothing visible to suggest that the bathroom had been used for that purpose (T 905). He saw no evidence of someone seeking to clean him- or herself of blood in the bathroom. Nevertheless, he still took a number of swabs of various places and sent them for further testing. No inculpatory evidence was tendered from swabs from the bath, bathroom walls or floor.

- 121 Secondly, if, contrary to the view contemporaneously formed by Sergeant Elliott, the bathroom had been used by the appellant to wash himself, he would have had carefully to dry the bathroom surfaces and himself. This would have required clothing or a towel which would have been wet. No such wet clothes or towel were or was placed into evidence.
- 122 Thirdly, though there was a positive result for blood in the bathroom sink, it was presumptive only. Ms Friedman, a forensic biologist, tested the swab from the basin. The positive presumptive did not prove that the sample was blood. Other substances give a positive result. The screening test for blood that would have proved whether it was or was not blood was not undertaken because of the smallness of the sample. Further, the stain from which the swab was taken was "greyish" rather than a red-brown stain. She accepted that the swab might not be blood, but a combination of DNA from a source other than blood. There was no reliable evidence of blood in the basin. The DNA of all three in the waste of the basin was consistent with the three men living there.
- 123 Fourthly, there is the timing of this cleaning. Having just bludgeoned and stabbed Mr Tan in a violent and ferocious attack, this careful and cold-blooded murderer must carefully and thoroughly wash and dry not only himself, but also the bathroom. Sloppy or careless work will see him undone. The killing was in all likelihood done sometime after 2.05 pm, possibly after 2.10 pm. By 2.20 or 2.21 pm he has called 000. Not only is this barely enough time to undertake the task of despatching Mr Tan,



washing and drying himself and washing and drying the bathroom, but it raises the question why he would place himself under such time pressure. There was no need to call 000 at 2.20 or 2.21 pm. The importance of the cleaning task for exculpation would logically have dictated (to such a careful planner, on this hypothesis) some further delay of the call.

124 Fifthly, there is the circumstance of when the appellant raised the fact of the coughing or expiration of the blood by Mr Tan. At the trial this was resisted. His version of it was said to be late invention. Now embraced by the Crown, the expiration of blood poses another difficulty. If the appellant had methodically planned and effected the killing, including the thorough washing and drying of himself and the bathroom in such quick time, he would have been partially foiled by the inconvenience of the near dead Mr Tan coughing blood over him while he held the phone faking concern over whether his victim had a pulse. One would have thought, in these circumstances, that the explanation of the expiration of the blood would have been given very early in his explanations, in all likelihood to Sergeant Woodward in the afternoon outside the unit, or clearly at the interview that evening (even if he was interrupted).

125 Sixthly, there are aspects to the 000 call that tell in favour of innocence. Whilst emotion can be faked, of course, the tone, verging on hysteria, of the appellant when he was transferred resonated with fear. Further, he asked to remain on the line with the ambulance officer until the ambulance or police arrived, in a tone of residual fear and distress. This would not appear to be the action of someone who has methodically planned and effected the execution of both Tay and Tan.

126 There is considerable suspicion about the events of 15 September 2003, and about the appellant's version of events, both as to its content and tone and manner of expression, especially in the walkthrough. There are matters unexplained.

- 127 Nevertheless, the two bodies of evidence - concerning the existence of the three people in the car picking up Mr Tan and the dearth of connecting forensic material linking the appellant to the death of either, especially Mr Tan, raise in all our minds a reasonable doubt.
- 128 That doubt was, and is, not one which could be resolved by any advantage the jury had in seeing and hearing the evidence at trial.
- 129 The hypothesis upon which the doubt is founded also goes some way to explain and ameliorate some of the problems with the appellant's accounts. He may not have been entirely accurate or complete in his explanations. He may have had a greater degree of knowledge than his explanations revealed, or even some complicity in the murders. If, however, as is a reasonable hypothesis, others known to him murdered Tay and Tan, his circumstances and attitude and ability to recount matters would be partly driven by fear of consequences to him. This was not his version of events, but in our view the confluence of the likely presence of other persons and the dearth of forensic evidence connecting him to the murders gives rise to a reasonable doubt as to him being the murderer.

### Ground 1

- 130 The above conclusions make it strictly unnecessary to deal with this ground. The above assumes that Ms Dusting's evidence was admissible.
- 131 The trial judge summarised counsel's argument as to s 137 at [7]-[8] of his reasons, as follows:

"[7]Senior Counsel for the Accused submits that the evidence does not really extend beyond a similarity in black paint as between the three surfaces in question, that the Crown can advance a submission to the jury without this evidence and that the jury could conclude from their own observations a similarity in the three surfaces, namely the bat and the two points on the wall. It is submitted that unfair prejudice would flow to the Accused because, if this evidence is given through Ms Dusting as expert evidence, it would elevate the significance of the evidence.

[8]The forensic and scientific evidence already before the jury has demonstrated, at various points, degrees of inconclusiveness, uncertainty and certainty with respect to forensic testing. The jury will have a range of evidence before them which would leave them in the position where a number of issues cannot be demonstrated to a level of scientific certainty, one way or the other."

- 132 The trial judge's reasons were set out at [11]-[14] of his reasons, as follows:

"[11]The unfair prejudice to the Accused which is claimed, in my view, is not sustained. It is capable of being prejudicial to the Accused, of course, in the sense that all evidence tendered in a criminal trial which may tend to implicate an Accused is prejudicial. The question is whether it is unfairly prejudicial.

[12]There are qualifications on the evidence of Ms Dusting which appear to flow essentially from her inability to obtain a two-way transfer. No doubt the issues raised by Ms Dusting's evidence may be explored in evidence-in-chief and in cross-examination.

[13]I am not persuaded that this evidence gives rise to any unfair prejudice to the Accused. I am satisfied that it is probative. I am not persuaded that the fact that the evidence is adduced through an expert witness constitutes a form of unfair prejudice. The evidence is relevant to a fact in issue in the trial. It is probative, and its limitations may be explored before the jury in a way which will leave the jury with this evidence, to be taken into account with the totality of the other evidence, for the purposes of their deliberations as to whether this Accused is guilty of the murder of Tan and Tay.

[14]I propose to allow the evidence."

- 133 It is to be recognised that there was no complaint about how the trial judge directed the jury in the use of this evidence.
- 134 The evidence was not weighty or probative to a high degree, but in a circumstantial case it was some evidence which could be viewed and weighed with all the other evidence. Any misuse of it beyond the terms of Ms Dusting's evidence was open to be prevented by proper directions, which were given.

135 Not only do we perceive no error in approach of the trial judge, we agree with his evaluation of the considerations attending the ruling. In these circumstances it is unnecessary for us to add to the jurisprudence on the proper test for appellate evaluation of rulings under s 137.

136 These were and are our reasons for the orders made on 26 July 2012.

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